Case Number: 2500913/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Miss E Watson	**AND**	**Matalan Retail Limited**

JUDGMENT ON PUBLIC PRELIMINARY HEARING

Heard at: **North Shields** **On: 27 November 2017**

Before: **Employment Judge A M Buchanan**

Appearances

For the Claimant: **In person**
For the Respondent: **Mr A Mugliston of Counsel**

JUDGMENT

It is the Judgment of the Tribunal that:

1. The claim form includes a claim of harassment of a sexual nature or in the alternative harassment related to sex and an application to amend is not required. If that conclusion is wrong, the application to amend the claim form to include such claims of harassment is granted.

2. The application to strike out the claims of harassment and/or unfair dismissal on the grounds of such claims having no reasonable prospect of success and/or for failure to comply with the orders of the Tribunal is refused.

3. The application for a deposit order in relation to the claims of harassment and/or unfair dismissal on the ground of such claims having only little reasonable prospect of success is refused.

REASONS

1 This matter comes before me this morning on a public preliminary hearing to consider various applications. First to consider whether the claimant needs to amend her claim form to include an allegation of harassment related to sex or harassment of a sexual nature pursuant to section 26 of the Equality Act 2010 and, if she does, whether permission to amend should be granted. Secondly, to consider whether any claim of harassment and/or unfair dismissal should be struck out on the basis that it has no reasonable prospect of success. Thirdly, to consider whether the claims of harassment should be struck out for failure to comply with the orders of this Tribunal. Fourthly, to consider whether either or both of the claims of harassment and/or unfair dismissal should be the subject of a deposit order on the basis that they have only little reasonable prospect of success.

2 I have first considered the question of amendment and I have given careful consideration to the contents of the ET1 filed by the claimant and the ET3 filed by the respondent. In the ET1 the claimant did not tick the box indicating she wished to bring a claim of sex discrimination but she did refer in section 8.2 of that document to an ongoing course of conduct by a person described as Tommy ("TD") in respect of the unwanted touching of her shoulders in April 2015 and ongoing allegations of him calling her his girlfriend and standing too close to her and of general bullying. In its ET3 response, the respondent concentrated understandably only on the question of unfair dismissal and made out a defence to that claim by setting out comments ascribed to the claimant at a meeting on 16 March 2017 and which it is said led to her dismissal. It is said that if the dismissal is for any reason unfair that the claimant has contributed to that dismissal by her culpable and blameworthy conduct.

3 A private preliminary hearing came before me on 10 October 2017 when I ordered the claimant to set out full particulars of the allegations of harassment and she did that in a document filed on 17 October 2017 and I have given careful consideration to that document this morning. The claimant alleges an ongoing course of conduct by TD from April 2015 through to March 2017 and in addition allegations that in 2017 TD showed the claimant a photograph on his mobile telephone of a girl clad only in a bikini and that he had stood too close to her on many occasions and had grabbed her arm more than once and told her to slow down and had referred to her as his girlfriend and a further allegation this morning that he had told her that he never sleeps in pyjamas. That further information asserts that the unwanted conduct referred to was of a sexual nature or in the alternative related to the claimant's sex. The document does not fully comply with my orders of 10 October 2017 in respect of the time and place of the alleged acts and full details of witnesses to the alleged acts but the claimant in fact filed the further information on the same day as the 10 October 2017 Orders were sent out to the parties by email and therefore before she was able to see the detail of the Orders in writing. I have considered the question of amendment and I have considered the well known authority of **Selkent Bus Company v Moore [1996] ICR 836** and the guidance of Lord Justice Mummery in that case to the effect that in considering an application to amend, I must consider the nature of the amendment, the applicable time limits and

the questions of hardship and prejudice to the parties including the timing and manner of the application to amend.

4 I have come to the conclusion that there is included in the claim form as originally filed and notwithstanding the absence of a tick in the box marked sex discrimination, a claim of sex discrimination by harassment and that what the claimant has done pursuant to my orders of 10 October 2017 is to give further particulars of that existing claim and I therefore conclude that an application to amend is not in fact required.

5 However, if I am wrong in that then I have considered whether permission to amend should be allowed and I am satisfied that it should. The matters set out by the claimant are now particularised in a way which allows the respondent to understand the allegations it has to meet. If I do not grant permission to amend, the claimant will be without a remedy in respect of allegations of harassment which allegedly lasted over a period of two years. The claimant complained to her line manager on 10 March 2017 in writing and at length and the matters were gone into at a meeting on 16 March 2017 which in turn led to disciplinary action against the claimant arising out of her conduct at that meeting. The respondent is clearly able to respond to the allegations and in considering the questions of hardship and prejudice I conclude that the balance lies in favour of granting permission to amend. The claimant raised the subject matter of these claims in her claim form and gave further particulars at the first opportunity in October 2017.The allegations point to a campaign of harassment over a two year period which on the claimant's case led her to react angrily at the meeting on 10 March 2017 when the respondent brought her to a meeting with TD and that in turn has led to her dismissal. If, contrary to my conclusion at paragraph 4 above, leave to amend in required then taking all relevant factors into account, I conclude that the claimant should be granted leave to amend her claim form to enable the allegations of harassment to be advanced.

6 So far as the merits of these claims are concerned I have given careful consideration to the claims advanced. It seems to me that there is an arguable case on what the claimant says that what happened to her over a period of two years amounted to harassment of a sexual nature or was related to her sex. The matters alleged will very much depend on an assessment of witness evidence and it seems to me that the very high test which is to be passed before a claim of discrimination can be struck out has not been met by the respondent in this case. I have reminded myself of the guidance from Lady Smith in **Balls v Downham Market High School & College [2011] IRLR 217** that the test for strike out is not whether the claim is likely to fail nor is it a matter of asking whether it is possible the claim will fail. It is not a test that can be satisfied simply by considering what is put forward by the respondent in the ET3 or in submissions and in deciding whether oral and written assertions regarding disputed matters are likely to be established as to facts. It is a high test and I should have regard not only to material relied on by the parties but to everything contained in the Tribunal file. Having done that I am not satisfied that the claim should be struck out on the basis that it has no reasonable prospect of success. I take the claimant's case at its highest and, if it is supported by the

evidence, then there is more than an arguable case that she has been the victim of sexual harassment or harassment related to her sex. On that basis I refuse the application to strike out the claim.

7 There was an alternative matter before me of strike out on the basis of an alleged failure to comply with orders of the Tribunal and in particular my orders of 10 October 2017. In essence this related only to the claim of harassment as there was no requirement on the claimant's part to comply with any orders in respect of the claim of unfair dismissal contained on the orders of 10 October 2017 save order 4 in respect of the schedule of loss. It was argued that the claimant had not fully complied with order 2 made on 10 October 2017 in respect of the further information of the harassment claim and order 4 in respect of a schedule of loss. I take account of the fact that the claimant did provide further information on 17 October 2017 on time and before she had seen the 10 October 2017 orders in writing and she apologised this morning for her failure to provide a schedule of loss which she had overlooked. I addressed the additional information required in respect of the harassment claim in case management and supplemental orders are issued separately. I considered the matter and in particular whether a fair trial was still possible. I am satisfied that it is. I refuse the application to strike out either claim of the basis of failure to comply with the orders of 10 October 2017.

8 I have considered whether I should order a deposit as a condition of the claimant being able to continue to advance any particular allegation or argument. The allegations of harassment depend on witness evidence and if the claimant's case is supported by the evidence then there is more than a little reasonable chance that the claim will succeed. It is not appropriate in those circumstances to order a deposit. The application for a deposit in respect of the claim of harassment is refused.

9 I have turned to the question of the claim for unfair dismissal. On the face of it Mr Mugliston made a very compelling submission to me this morning that the claim of unfair dismissal is not one which will not succeed. I remind myself that in assessing a claim of unfair dismissal a Tribunal does not substitute what it thinks should have happened. It effectively judges the respondent and asks itself whether what the respondent did fell within the band of a reasonable response in terms of procedure and penalty. On the face of what the respondent says in the ET3, there is a strong case for saying that what it did in moving to dismiss the claimant fell within the band of a reasonable response. The claimant challenges the decision to dismiss on the basis that there was no investigation at all by the respondent into the conduct of TD towards her – let alone a reasonable investigation - and that a reasonable employer would have investigated her allegations in order to properly understand what led her to act as she did at the meeting she was required to attend on 16 March 2017 with TD and others after she had made serious allegations against TD. The claimant also asserts that in light of that failure to investigate the penalty of summary dismissal imposed on her fell outside the band of a reasonable response.

10 I was referred to three documents by Mr Mugliston which are said to have been sent by the claimant to the respondent after her dismissal in which she sets out her wish to apologise for her conduct towards TD on 16 March 2017. I have looked at those documents with care. In parts they do not help the claimant's case but in other parts they do. Clearly the rationale of the respondent in organising a meeting on 16 March 2017 at which the claimant was to confront the person against whom she had made serious allegations will be considered by the Tribunal as will the details of exactly what happened at that meeting and the way the respondent then went about moving to dismiss the claimant for her conduct at that meeting.

11 Taking all those factors into account, I am not satisfied that it can be said that the claim of unfair dismissal has no or even only little reasonable prospect of success. The claim will turn on the evidence and the Tribunal will have to consider that evidence and make findings of fact. Accordingly the application to strike out the claim of unfair dismissal is refused as is the linked application that such claim should be made the subject of a deposit order.

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Employment Judge A M Buchanan

Date: 1 December 2017