EMPLOYMENT TRIBUNALS

Claimant: Mrs J Stark

Respondent: Crosslane Investments Limited

HELD AT: Manchester **ON:** 10 January 2018

BEFORE: Employment Judge Trayler

REPRESENTATION:

Claimant: Mr C Breen, Counsel
Respondent: Miss J Shepherd, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claim is not struck out, neither is any part of it struck out, on the grounds that it has no reasonable prospect of success.

2. No deposit is ordered to be paid by the claimant as a condition of proceeding with any allegation or argument on the ground that it has little reasonable prospect of success.

REASONS

1. The purpose of the preliminary hearing is firstly to consider whether the claim or any part of it should be struck out on the basis that it has no reasonable prospect of success. Secondly to consider whether any allegation or argument by the claimant has little reasonable prospect of success, and if so whether she should be ordered to pay a deposit as a condition of proceeding with that allegation or argument.

2. The relevant law is within schedule 1 rules 37 and 39 Employment Tribunals Rules of Procedure 2013. By rule 37:

> "At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds". T subparagraph (a) is the ground that "it is scandalous or vexatious or that it has no reasonable prospect of success."

3. By rule 39:

> "Where at a preliminary hearing the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

4. The respondent applies for an order striking out the claim or that a deposit be paid by the claimant. No evidence was called by either party. The parties have not agreed any facts in relation to the claim.

5. The parties referred me to a number of documents within the bundle which I read at the outset of the hearing. Each party had made written submissions which I read. In addition, counsel for each party made oral representations. A claim or any part of it should only be struck out on the basis that there is no reasonable prospect of success in the most obvious and plain case in which there is no factual dispute, and in which the applicant can clearly cross the high threshold of showing there is no reasonable prospect of success. Applications which involve prolonger or extensive study of documents and the assessment of disputed evidence that may depend on the credibility of witnesses should not be brought. This was reiterated in **Kwele-Siakam v Cooperative Group Limited UKEAT/0039/17**. It is clear that striking out is a draconian measure which should only be taken in the clearest of cases. By that judgment the EAT held that by reference to **Ezsias v North Glamorgan NHS Trust [2007] 603 IRLR CA** and **Madarassy v. Nomura Internationa plc [2007] IRLR 246CA** that striking out is a draconian measure which should only be taken in the clearest cases. There is no rule of law that discrimination cases cannot be struck out but extreme hesitation should be exercised in doing so. In **Ezsias** it was held that where there is a crucial core of disputed facts that was not susceptible to determination otherwise than by a hearing and evaluating the evidence, there should not be a strike out. Whilst there may be cases which embrace disputed fact but which nevertheless may justify striking out, what is important is the particular nature and scope of the factual dispute in question, see paragraph 7 of the judgment of Lord Justice Maurice Kay.

6. The claimant complains of indirect sex discrimination. The claims have been articulated within the claim form by the claimant with the assistance of solicitors. The claimant has made a detailed identification of the provisions, criteria and practices she relies upon. As the claimant complains of indirect discrimination the claimant will need to show that the respondent had applied a provision, criterion or practice at a relevant time. For these purposes the relevant time in my view will be between the first request by the claimant for flexible working and the termination of the claimant's employment by resignation, namely from 6 February 2017 to 21 April 2017.

7. In order for a complaint of indirect discrimination to succeed as the respondent says the claimant must be able to meet all four conditions within section 19 Equality Act 2010. In this there must be a provision, criterion or practice ("PCP") that the respondent applied or would apply equally to men and women employees. Secondly, the PCP must put women at a particular disadvantage when compared with men. Thirdly, the claimant herself must have experienced that particular disadvantage. Fourthly, the respondent must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

8. The fourth part of that requirement is clearly not relevant at a preliminary hearing stage. There has been no evidence and no finding as to what needs to be justified, if anything.

9. In **Essop and Others v Home Office (UK) Border Agency, Naeem v Secretary of State for Justice [2017] UKSC 27** the five salient features of a complaint of indirect discrimination are explained. Firstly, it is not necessary for a claimant to prove an explanation as to why a PCP puts one group at a disadvantage compared to others. Secondly, a causal link will need to be proved between the PCP and disadvantage suffered by the group and by the claimant. Thirdly, the reason for the disadvantage need not be unlawful or indeed under the control of the respondent, the PCP and the reason for the disadvantage are "but for" causes of the disadvantage and removing one or the other would solve the problem. Fourthly, it is not necessary to prove that the PCP puts every member of the group sharing a protected characteristic at a disadvantage. Fifthly, a particular disadvantage can be proved by statistical evidence which may show a co-relation between variables and outcomes. A co-relation is not necessarily the same as a causal link. The sixth salient feature relates to justification.

10. The respondent says that the claimant will not be able to show a PCP which enables her to complain of indirect discrimination. Using the numbering used by the parties, there are nine of these. I list them as follows:

(1) and (2) A policy of reducing, or practice of discouraging, home working.

(3) A practice of limiting the number of home workers and/or the number of hours or days they were allowed to work from home.

(4) A policy of requiring its internal service functions i.e. Head Office staff, to be office based.

(5) A policy of not allowing Head Office employees to work from home for two days a week.

(6) and (7) A practice of not granting new home working requests (from Head Office employees or any other employees) for two days a week from at least February 2017 until April 2017.

(8) A policy of not allowing its legal department to work from home for two days a week.

(9) A requirement that the claimant work in the office from 9.20am to 5.00pm on Mondays, Tuesdays and Thursdays, in the office from 9.20am to 3.00pm on Fridays allowing her to work from home only on Wednesdays and the remainder of Friday afternoon.

11. As Mr Breen says, there are a number of facts which are in dispute between the parties, none of which have been resolved by agreement. From what I have seen within the documents I have read, there is nothing to expressly contradict the claimant's assertions save for the evidence of the respondent. That, in my view, is in essence the reason why it would be inappropriate to order that the claim or any part

of it is struck out. The same applies in relation to a deposit order when there remain substantial findings of fact to be made by the Tribunal.

12. The respondent says that the arguments are unsustainable. The claimant says that it is not possible to make that determination at this stage of the proceedings when no evidence has been heard.

13. There is a schedule within the bundle which the respondent says sets out its approach to flexible working. However, as Mr Breen says, this is not an agreed schedule of facts and is capable of challenge and that the claimant should be given the opportunity of challenging it by cross examination of the respondent's witnesses. In addition, he says that whatever the respondent had agreed at different times the situation may (as the claimant will assert) be different when she makes her flexible working requests starting in February 2017.

14. The claimant also relies upon a number of disputed comments she alleges were made by and on behalf of the respondent as to its attitude towards flexible working. These include that the respondent was saddened at her request for flexible working, that flexible working and working from home was viewed unfavourably by senior officers at the respondent, that those working from home were able to "take the mickey" and that the claimant working from home should be "kept below the radar", the claimant asserting that this is because working from home was considered unfavourably. The claimant also asserts that the respondent had stated that it was, at least within its finance department, withdrawing from previously held positions concerning home working.

15. This at the very least raises the question as to what the respondent's attitude towards flexible working was at the time the claimant made her requests. More specifically, the claimant sought flexibility in the hours that she worked and also the location so that she could work at home. Again, the claimant will assert that the respondent was trying to remove opportunities for flexible working. I believe that these are material facts. They are facts which are in dispute and I am in no position to resolve that dispute, nor would I seek to do so at this preliminary hearing stage. There is a potential for the Tribunal hearing the case, after hearing the claimant's evidence and the respondent's evidence, including cross examination, to find what provisions, criteria and practices were applied by the respondent at the relevant times. What had happened previously may be irrelevant as this may have changed by the time of the claimant's request.

16. The factual disputes the Tribunal will have to determine are set out more fully in the claimant's skeleton argument. I agree with the claimant's submission that it would be incorrect to seek to assess those at this stage. As the claimant submits, it is possible for a one-off provision, criterion or practice to apply as in **British Airways PLC v Starmer [2005] IRLR 862 EAT.**

17. There are, in my judgment, disputed facts which are a crucial core as they are relevant to the issues of the provisions, criteria or practices applied by the respondent, and these should be given the opportunity to be tested at the full hearing for the reasons I have stated.

18. The respondent refers in its arguments to each PCP relied upon by the claimant and asks that either all or some of these be struck out or that in the

alternative the claimant should be ordered to pay a deposit as a condition of pursuing a complaint of indirect discrimination.

19. Using the numbering adopted by the parties in relation to PCP 4.1 and 4.2 the respondent says that the claimant's own case shows that a PCP cannot be proved. This is argued on the bases that the respondent had agreed a trial home working arrangement and secondly that four employees had home working arrangements. That may prove to be the case but in my view facts need to be proved before such a conclusion could be reached. There is a core of disputed fact as to what the respondent's true PCP was at the time of the claimant's various applications for flexible working. History may show what the respondent's PCP was or it may not. The respondent's PCP may have changed for example because of its experience of home working. The schedule setting out the history of home working applications is not agreed and is capable of dispute. I am unable to find that the complaint has little or no reasonable prospect of success. As the claimant submits, there are significant fact disputes which are set out within Mr Breen's skeleton argument paragraphs 1 to 23 which I shall not recite in full here. However, what is persuasive is that the core fact for the Tribunal to find is what the respondent's PCP was at the relevant time. I cannot make the finding that the claimant has no or little reasonable prospect of success in proving that the respondent had a policy of reducing or discouraging home working. It is a question of evidence.

20. In PCP 4.3 the respondent by reference to the history of the way it dealt with home working applications no such PCP applied. For the same reasons as above, I consider it a question of core fact as at February to April 2017. The Tribunal will need to find fact and consider what inferences can be raised from those facts as appropriate. It cannot be said the clamant has no or little reasonable prospect of success.

21. In respect of PCP 4.4, the respondent accepts that it had a preference for office- based working. The Tribunal will need to determine whether it was a preference or a policy which indirectly discriminates against the claimant. Again, this is a question of core evidence and it is not possible to say it has no or little prospect of success. The respondent says it has a business need for office-based working which may show a policy against it or may be relied upon to justify indirect discrimination. Again, it is a question of evidence and evaluation.

22. In respect of PCP 4.5 the respondent says that no such policy existed by referring to two employees working from home. This may show what the respondent did in February to April or it may not. The claimant will seek to balance the history against comments she alleges were made at the time and ask the Tribunal to find in her favour, the alleged comments or the context of them being disputed by the respondent. Core factual matters remain in dispute.

23. In relation to PCP 4.6 and 4.7 the respondent says that no PCP can be shown. As in **Starmer** (above) the PCP may have applied to the claimant alone and this does not mean it is not a PCP within Equality Act 2010.

24. With PCP 4.8 the respondent says that the legal department referred to by the claimant consist of only three people and that only the clamant had applied for flexible working. However, the claimant will assert that the PCP applies to the legal department based upon comments allegedly made by the respondent and therefore core facts are in dispute.

25. In relation to PCP 4.9 the respondent says that the arrangements relied upon by the claimant are detailed and unique to her and that she seeks to dress up a trial arrangement as an indirect discrimination complaint. That may be the case but it is for the Tribunal to find after hearing evidence. Because of the detail in the arrangements the claimant may have the most difficulty in proving a PCP which results in indirect discrimination but I consider that this also needs to be tested in evidence and therefore I cannot say at this stage it has little or no reasonable prospect of success. In addition, it is a relatively small part of the claimant's case and it would serve little purpose to remove it when the Tribunal will have to determine what had occurred in any event.

26. The respondent goes further and says that the claimant has produced nothing from which can be shown that the apparently neutral PCP applied by the respondent places women at a particular disadvantage when compared when men. Again, in my view that is a matter for the final hearing and not for submissions at a preliminary hearing. As the claimant says, she will not need to show why the respondent's PCP's had a disparate impact but as the respondent submits, a disparate impact on persons of a different protected characteristic will need to be shown as is explained in the first "salient feature" in **Essop** above.

27. The respondent says that there is nothing inherently disadvantageous to women or men in requiring them to work in offices rather than at home. The respondent refers to **Whiteman v CPS Interiors Ltd and Others ET 2601103/2015** and **Sinclair, Roche and Temperley and Others v Heard and Another [2014] IRLR 763 EAT** and **Hacking & Patterson and Another v Wilson 0054/09.** It is arguable that the Tribunal may be unable to rely upon any assumptions or "common sense" conclusions that women have a greater responsibility for child care than men in 21st century society and assumptions made in times past may be no longer tenable.

28. The claimant will need to show that the PCP of the respondent equally to men and women causes a disadvantage to women generally as well as to herself. The claimant will not need to show the reason for the disadvantage nor will she to show that the disadvantage applies to all women in an appropriate group. This is evident from **Essop** above. As the claimant submits I consider that this is a matter of evidence and although the claimant will not be able to produce a "white rabbit" proving disadvantage to a group I consider it is not a case where the claimant has little or no reasonable prospect of proving this important element of indirect discrimination when no finding has been made as to what the respondent's PCP in applying to the claimant was. It is in my view, one of the weakest parts of the claim but not a plain and obvious case so as to put it in the category of having little or no reasonable prospect of success without assessment of evidence and finding facts.

29. There is a dispute between the parties as to how far the claimant may be able to rely upon a common-sense assumption, if such can be made, that a refusal of home working would naturally place women at a disadvantage compared to men. Again, I believe that is too weighty an argument to be pursued in a vacuum at a preliminary hearing when no findings of fact have been made as to the provision, criterion or practice imposed by the respondent and its effects. That is a matter for a full hearing. At that stage findings of fact will be made and also decisions made as to what inferences can be drawn from such primary facts.

30. Similarly, the respondent says that the claimant is unable to show any adverse effect and that in reality the disadvantage the claimant has by being unable to spend more time with her children, in particular that one of her children has a disability, is to do with the distance the claimant lives from work, and that is the cause of any disadvantage rather than the respondent's refusal, limited in whatever way, to allow the claimant to work from home as she requested.

31. On reading the claimant's statement it is apparent that the claimant attributes a good deal of the disadvantage sustained by her is to the commuting time between her home and office and the early departure and late returns, the children spending time at a nursery whilst she is at work. Again, the respondent argues that should the claimant work from home she would find it extremely difficult to at the same time as working provide care for a three and five year old child. The respondent refers me to the ACAS guidance on home working in that respect. Common sense does dictate that caring for two young children, one with special and additional needs, whilst working on detailed advice in complex land transactions on an "as and when required" basis is not feasible.

32. Again this is a matter in my view for a final hearing and I do not believe I can categorise any of these arguments as showing that the claim or any part of it has little or no reasonable prospect of success.

33. I consider when making this judgment that striking is draconian and should only be made in the most obvious and clear of cases. I am uncomfortable in reaching such a conclusion without the opportunity, as part of a Tribunal, to assess the evidence and make findings of fact as to what the respondent did and whether it had an impact which caused a greater disadvantage to women rather than men and caused the claimant such disadvantage.

34. I apply similar logic to the application for a deposit order in that it may inhibit the claimant from pursuing a claim, but that is a secondary issue as primarily I have to see whether I can categorise the claim as having little reasonable prospect of success or that any argument or allegation can be so categorised. For the similar reasons to that of the strike out application, I decline to do so in the absence of findings of fact and therefore the claim will go forward to a final hearing.

Employment Judge Trayler

Date 24 January 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

30 January 2018

FOR THE TRIBUNAL OFFICE