EMPLOYMENT TRIBUNALS

Claimant **Respondents**
Mrs D Jenkin Jones v **Shakespeare Martineau LLP & Others**

RECORD OF AN ATTENDED PRELIMINARY HEARING

Heard at: **Nottingham**

On: **Thursday 21 March 2019**

Before: **Employment Judge P Britton (sitting alone)**

Appearances
For the Claimant: **Mr J Arnold of Counsel**
For the Respondent: **Mr R Hignett of Counsel**

CASE MANAGEMENT SUMMARY

JUDGMENT

1. The claim of s13 Equality Act 2010 (EQA) direct sex discrimination crystallised in the Mark Beesley e-mail dated 25th November 2016, is dismissed it having as a matter of law no reasonable prospect of success.

2. The claim pursuant to s13 of the EQA relating to the failure to provide evidence circa 12 October 2017 in support of the decision to compulsorily retire the Claimant is dismissed upon withdrawal.

3. The claims of victimisation reliant upon protected acts by the Claimant on 4 April 2017 and 9 June 2017 are not struck out and a deposit is not ordered.

4. The claim of unlawful deduction from wages pursuant to the Employment Rights Act 1996 – "the bonus issue"- is dismissed it having at law no reasonable prospect of success. It is also dismissed upon withdrawal as an Equal Pay claim. However, it is not struck out as a potentially s13 direct discrimination and/or s27 victimization pursuant to the EQA.

5. The two claims of harassment pursuant to s26 of the EQA relating to the 23 November 2016 and 5 September 2017 are dismissed upon withdrawal.

REASONS

Introduction

1. As both Counsel well know this is the fourth Preliminary Hearing in this matter. The agenda today was for me to consider the various applications for strike out which are encapsulated in the opening written submissions by Mr Hignett. They in turn rehearse those which were before me at Preliminary Hearing number 3.

2. Before moving on today had been listed for a two day Preliminary Hearing because I was also being asked to determine whether the Claimant was a disabled person for the purposes of the Equality Act 2010 ("the EQA"). The Respondent has conceded that she is and therefore I do not need to deal with that matter. This has considerably shortened the time that I have needed today. Yesterday having received as I directed an agreed joint bundle in this matter and Counsels' submissions and legal authorities in support, I was able to find time to read the same in which again has meant that we have been able to shorten today's hearing.

3. What I am then going to therefore do is go through the various applications for strike out and the outcome in relation thereto. I want to make it absolutely plain as I did at the start of today and have in preceding hearings that none of what I am going to do today affects at all the mainstream core claims in this case which are ones of direct sex discrimination and indirect discrimination pursuant to Sections 13 and 19 of the EQA; also a claim based upon victimisation to which I shall return pursuant to Section 26 and the same applying on the disability front. I remind us all that the claim of associated disability discrimination has long since been withdrawn.

The first issue

4. I am asked to determine as to whether the declared sentiments of Mark Beesley (MB) circa July-November 2016 constitute a distinct act of direct sex discrimination pursuant to Section 13. The Respondent submits that they do not and thus as a head of claim should be struck out. Crystallised this is in the pleaded context essentially an expression of his then intentions given he was unhappy with the Claimant's performance. As to whether he was justified in being unhappy is not for me today. So encapsulated it is his e-mail dated 25th November 2016 at Bp 113[1] in the joint bundle before me. Inter alia he says:

> *"My plan is for him to replace (the Claimant) btw in Notts. She was dreadful at her interim review, quite proud of myself for not losing it with her."*

5. Is that an act of direct sex discrimination? I have heard the competing arguments. I confine myself on this issue to simply dealing with it as a matter of law. Section 13 says:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, (A) treats (B) less favourably than (A) treats or would treat others."

Treats of course denotes something that is happening. It does not in itself in my judicial opinion extend to that which is in contemplation. It follows put simply that I do

[1] Bp=bundle page

not find that it therefore comes within the definition of Section 13.

The second issue

6. I was asked to determine whether the Claimant's request (Bp244-246) dated 8 October 2017 for inter alia the evidence justifying the decision to compulsorily retire her from the partnership dated 3 October 2016 issued by Andy Raynor (AR), and the refusal to grant the request made by Andrew Whitehead (AW), the senior partner of the Respondent, constituted in itself an act of direct sex discrimination. Suffice it to say that having been taken to the partnership agreement and Bp163 in particular, I observed that there is no requirement to give other than written reasons. Furthermore, there is no comparator evidence deployed by the Claimant despite 18 months from the onset of this claim to show that the Claimant was treated differently in being denied that which she had requested. Thus, I made plain that I was intending to at least order a deposit payable on this head of claim on the basis that it had little prospect of success. As it is, after a short adjournment the Claimant withdrew this head of claim. Accordingly, I formally dismiss it as a head of claim. Of course, it can still be deployed in terms of the fact pattern.

The third issue

7. I am asked to determine whether the stated remarks of the Claimant on 4 April 2017 and 9 June 2017, as to which see the chronology before me, were capable of being protected acts in accordance with Section 27 of the EQA. Again I heard argument from both sides and was taken to various legal authorities. I found in particular of help to me **Aziz v Trinity Street Taxis Limited and ors**[2] and in particular paragraph 29 in the IRLR report before me. I reminded myself of the definition of what is a protected act at Section 27 of the EQA, and in particular by reference to Section 27(2)(c) and (d) which were agreed by both Counsel to be the only two that could be potentially engaged. Thus:

> *(2) Each of the following is a protected act –*
>
> *…*
>
> > *(c) doing any other thing for the purposes of or in connection with this Act;*
> >
> > *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

8. What the Claimant did on each occasion was to give her prediction/observation plus in the telephone call with Victoria Tester on 4 April she was effectively saying that that what she alleged was occurring may give rise to discrimination. On the second occasion where I have more meat on the skeleton so to speak by reference to the minute before me, see Bp 145, and in the context of what I would loosely describe as her grievances at that stage, she inter alia as per the note of Emma Shipp[3]:

> *"suggested there was a risk of discrimination in the way that she was being treated by the LLP".*

9. This clearly has to be looked at within the context of the pleadings and the chronology by then. Thus essentially what she was submitting was that the granting to

[2] The IRLR copy before me did not have the date etc thus I refer to the following citation: 1988 ICR 534, CA.

[3] This was a meeting to explore the grievances the Claimant had by then raised. Also present was Mark English.

her of part time workers hours to inter alia accommodate her child caring commitments was being honoured in the breach and because no adjustment was inter alia being made to her fee income target. Thus she was alleging that she having to therefore work longer hours and more than the 3 days which had been agreed to. That is a bald summary of the situation. I am with Mr Arnold that s27(2)(c) comes into play. It is a broad brush sub section as is made plain in the commentary on this topic by the learned authors of the IDS Handbook: Discrimination at Work: latest edition paragraph 19.28. There is a connection being made by the Claimant in the context with the EQA and the protection against discrimination also afforded to part time workers "in the broad sense". I don't need to go further other that. I was with Mr Hignett in his interpretation of 27(d) which is narrower and would require a clear allegation that the employer had already contravened the EQA. But that is an observation which is otiose given my conclusion as to the engagement of s27 (2) (c) . Thus I am permitting the two pleaded acts of victimisation to stand as such for the purposes of today in that they could come within the subsection. As to whether they do is a matter of course for findings of fact by the tribunal at the main hearing.

The fourth Issue: the bonus: the engagement of Part II of the Employment Rights Act 1996 ("the ERA").

10. The Claimant has first brought a claim pursuant to s13 of the ERA for non payment of wages in relation to the fact that she was in the immediate run up to the termination of her partnership by the Respondents ruled out of any entitlement to a bonus. This was communicated to her by AW on the 27 October 2017 (Bp 248). The criteria for determination by the first Respondent partnership as to whether to grant what is a discretionary bonus is set out at Bp161, 164 and 168. This was not at the time that we are dealing with the type of bonus structure that I see in my experience as a Judge on a regular basis. That is to say where there is a base target for achieving such as paid sales or other income, thence thereafter a rising line so to speak with various trigger points entitling the individual to a specified bonus at each stage of achieving that target. Those kinds of bonus structures often do have a discretionary clause to them because an employer thereby reserves the right not to pay: a good example being if there are other aspects of the individual's performance such as working with others which go against the awarding of the bonus. Another example would be that many of those types of bonus arrangements have a clause whereby no bonus is paid if the relevant employee resigns including during the currency of the notice. This is not that type of bonus structure. It is effectively based on a set of criteria and which can be seen at Schedule 9 of the remuneration framework commencing at Bp 164. The input as to how to assess if the relevant individual, in this case the Claimant as a preferred member of the partnership, is meeting that criteria requires a considerable degree of evaluation over a range of criteria: as to who is engaged in making the assessment is set out at paragraph 1.3 at Bp168. This would include the line manager for the purpose of appraisals; team leaders over such things as inter relationship with colleagues; finance in terms of billable hours and fees earnt and matters of that nature. The point however is that some of the players in this case including directly named Respondents such as Messrs Raynor, Beesley and Taylor would have been part of the consultation process in that respect. However, and this will bring me back to the sex discrimination connotation to this, when it comes to the quantum of any such bonus it is not calculable by any formula.

11. And I have no idea what other fee earners at a similar level as the Claimant were paid in the relevant year. This is not before me. In similar vein not before me is any evidence, pleaded or otherwise, whether any colleagues in that year or the relatively recent past fell foul of the criteria in one way and so did not get a bonus or conversely despite the shortcomings, did. I repeat that this is despite this case having been going now for some 18 months. So I start from this standpoint. And here I am with Mr

Hignett. Thus this not being a quantified bonus at the time of the decision to terminate her from the partnership by way of compulsory retirement or indeed ever it seems, the bonus issue as a head of claim foul of the line of authority encapsulated first in **Farrell, Matthews & Weir v Hansen** [2005] IRLR 160 EAT[4]. The gravure is actually set out at page 3 in **Farrell**. "*A discretionary bonus which has been declared is a wage which is properly payable…".* But in this case there had been no discretionary bonus declared. There is nothing crystallised; and this flows through into the **Mouradian** case which again emphasises the crux being as to enforcement once there has been a declared a quantifiable discretionary bonus. But there has not been. I am therefore with Mr Hignett that this does not come within the definition of wages for Part II of the Employment Rights Act 1996. Therefore I dismiss it as having no reasonable prospect of success.

12. However should it be dismissed as having no reasonable prospect of success as a claim based on Section 13 EQA direct sex discrimination? Should it alternatively be made the subject of a deposit order as having only little reasonable prospect of success? Here I am not with Mr Hignett and the reason is as follows. It is impossible to determine the rationale behind not granting her a bonus without hearing the evidence of the key players who decided not so to award. In that respect the Tribunal is obviously going to hear inter alia from AR because he is a Respondent. The same applies to AW and indeed Messrs Beesley and Taylor. It is a fruit of the poisoned tree scenario. Is it that the decision not to grant her a bonus flows from discriminatory actions such as no adjustment for her part time working, or resentment she having made protected acts and which would include the whistleblowing on the health and safety fronts. These are heads of claim not on the agenda before me today. These are issues that cannot be dealt with by me as they require findings of fact: the province of the Tribunal at the main hearing. I don't accept that this is simply a bald assertion by the Claimant as to discrimination in terms of not being paid any bonus where nothing otherwise comes out of the sky, so to speak, which might support her claim. There is substance from the pleadings and the bundle to date that could for the reason which I have now gone to prima facie sustain the claim at this stage at least in terms of a potential inference to be drawn. And finally the strength or otherwise of the claim may well depend on what comes out of disclosure, and because I am acutely aware that in many discrimination cases the crucial documentary evidence will frequently be with the employer[5]. So I am not going to strike out this head of claim or order a deposit..

Equal Pay

13. This has now been withdrawn as a head of claim as Mr Hignett on instructions has confirmed that her comparator Mr Moran, who was the insolvency partner at Leicester, would have been subject to the same bonus scheme.

The Harassment Allegations Pursuant to Section 26 of the EQA

14. Suffice it to say that I made plain, having read the minutes of the meeting on 5 September 2017 (Bp 217-9), that it appeared to me that this was a difficult discussion because of course the Claimant was being told that it would be recommended that she be compulsory retired. But it was one in which the Claimant gave as good as she got. There is no evidence of oppressive behaviour by AR or AW. Then as to the other harassment claim which relates to remarks made by AT and MB on 23 November 2016, I observe that the reference to her poor performance in terms of "your figures are shit" would not of itself raise any inference that this was because of her protected characteristic of being female. And the other remarks which were made

[4] Followed in ***Mouradian v Traditional Securities and Future Limited*** *2009 EWCA civ P60.*

[5] See the line of authority starting with ***King v Great Britain-China Centre*** 1992 ICR 516 CA.

had originally been used to deploy an associated sexual orientation harassment claim as these were remarks made about two males. But this was withdrawn by the Claimant as a claim some months ago.

15. As it is, Mr Arnold having taken instructions, those two heads of claim were withdrawn and therefore I dismissed them upon withdrawal.

Last Point

16. There is an element left of the equal pay claim which is based upon the proposition that the Claimant achieved four fifths of Mr Moran's fee earnings for the financial year in the April 17 but she wasn't paid commensurately. I have already observed that I see this as a claim of sex discrimination. As it is the Claimant will have to make an election in due course as to which Mr Arnold has previously referred. Therefore, I simply reserve this matter at this stage on the basis that once he has discovery he can get further instructions from his client and make that election.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. This case is hereby listed for a total hearing period of 11 working days as follows. The hearing will be at the **Nottingham Employment Tribunal Hearing Centre, 50 Carrington Street, Nottingham NG1 7FG**. Day one will be **Friday 24 April 2020 which will be a reading in day; the parties attendance will not be required**.

2. The hearing will then run for 10 working days which it is anticipated will give sufficient time for a judgment on at least liability. Allowing for the bank holiday it will therefore **run between Monday 27 April and Monday 11 May 2020 inclusive**.

3. Counsel are agreed that they will provide me with agreed directions within 21 days of today. It is anticipated that I will then be able to simply agree the same.

Judicial Mediation

4. I canvassed this but at present it's not a viable proposition. Obviously if the position changes then the parties will inform the Tribunal.

5. Finally as I had made a decision to order a deposit today but then the relevant claim was withdrawn it follows that I recuse myself from the main hearing.

NOTES

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be

struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management': https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf

(v) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*" If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

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Employment Judge Britton

Date: 28 March 2019

Sent to the parties on:

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For the Tribunal:

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