EMPLOYMENT TRIBUNALS

Claimant: **Ms J Celerier**

Respondent: **Chargepoint Network (UK) Limited**

Heard at: **Nottingham**

Hearing On: **29 April 2019**

Reserved Judgment on: **Friday 10 May 2019**

Before: **Employment Judge Blackwell (sitting alone)**

Representatives

Claimant: **No Parties Attending**
Respondent: **No Parties Attending**

RESERVED JUDGMENT

1. The Claimant will not be permitted to amend her claim form so as to include:-

1.1 The allegation at paragraph 9 of the Scott Schedule concerning an allegation of winking by Chris Burghadt.

1.2 The allegation at paragraph 15 of the Scott Schedule concerning an allegation of leg touching by John Grady.

1.3 The allegation at paragraph 49 of the Scott Schedule that:

"My termination was purposefully timed to happen just before the end of my most successful quarter and days before my biggest opportunities were to close. The timing and my termination was planned to prevent me qualifying for my commission and over achievement bonuses which would have totalled over £44,000 and likely being £57,000."

1.4 The same allegation repeated at paragraph 107 of the Scott Schedule.

1.5 The allegation at paragraph 112 of the Scott Schedule concerning alleged discrimination/harassment which concerned post dismissal events.

2. The Respondent's applications for strike out orders under Rule 37 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and in the alternative for deposit orders under Rule 39 of the said schedule are both refused.

Issues and the Law

3. The purpose of the hearing is to determine the following preliminary issues:-

> "(i) what complaints the claimant wishes to pursue and whether any of the complaints the claimant wishes to pursue against the respondent is not made in her claim form and in respect of any that is not, whether she should be permitted to amend his claim form so that she can pursue that complaint. In deciding this issue ("amendment issue") and issues (ii) and (iii), the Tribunal may need to consider issues connected with the time limits for bringing Tribunal claims ("time limits issue");
>
> (ii) Whether any part of the claimant's claim has no reasonable prospects of success and if so whether, pursuant to rule 37, all or any part of the claim should be struck out;
>
> (iii) whether any specific allegation or argument forming part of the claimant's claim has little reasonable prospects of success and if so whether, pursuant to rule 39, the claimant should be ordered to pay a deposit (and if so how much) as a condition of continuing to advance any such specific allegation or argument."

REASONS

Background

4. Ms Celerier brought an originating claim received by the Tribunal on 13 August 2018. The Respondents both served a response and an application for further and better particulars together with an application to strike out.

5. There followed a closed telephone Preliminary Hearing conducted by Regional Employment Judge Swann on 20 December 2018. As one of the consequences of that hearing Ms Celerier withdrew claims of equal pay and indirect discrimination and they were dismissed on withdrawal on 14 January 2019. Thus as recorded by Regional Employment Judge Swann the following claims remained:-

> "1.1 That she was subjected to less favourable treatment by reason of discrimination on the basis of the protected characteristic of sex contrary to the Equality Act 2010 being claims of direct discrimination and harassment.
>
> 1.2 That she was subjected to less favourable treatment by way of victimisation for having raised protected acts.

1.4 On termination of her employment there was a breach of contract/unauthorised deduction of wages claim in respect of outstanding commission/expenses and a bonus that she maintains she was entitled to on termination."

6. The Respondents have throughout denied all of Ms Celerier's claims.

7. Regional Employment Judge Swann made orders requiring Ms Celerier to prepare and serve a Scott Schedule and to give further and better particulars in respect of the claim relating to the outstanding expenses, bonus and commission.

8. A Scott Schedule was served by Ms Celerier some 3 days late on 21 January 2019.

9. By letter of 25 January the Respondent's solicitors renewed their application to strike out and/or to pay deposits.

10. Accordingly Employment Judge Camp set down for hearing the 3 issues set out above in paragraph 3. Turning then to the first issue which in summary is to determine whether any of the matters set out in the Scott Schedule require permission for Ms Celerier to amend her claim form so that she can pursue that complaint. Mr Milson made both general submissions in relation to the Scott Schedule and specific submissions in relation to paragraph numbers therein. As to his general submission he says that the schedule goes far beyond the confines of the original pleadings. He refers me to the decision in **Chandock and Another v Tirkey** [2015] ICR 327. He refers me also to **Selkent** the well-known authority and the four matters that **Selkent** requires to be considered namely:-

10.1 The nature of the amendment.

10.2 The applicability of time limits.

10.3 The timing and manner of the application and;

10.4 Most importantly the balance of prejudice and achieving justice between the parties.

11. Ms Celerier's submissions were that in preparing the Scott Schedule she felt she was complying with the instructions that Regional Employment Judge Swann gave, that she was a lay person with no legal knowledge and accordingly she submitted that the Scott Schedule should be viewed in that context. I note that she was not directed to make an application or applications to amend and I have treated the Scott Schedule where necessary as such application.

12. Turning specifically to the paragraphs which Mr Milson submits require amendment I set out below those paragraphs which in my view **do not** require an amendment and my reasons for so doing. Before doing so however some general points emerge:-

(a) Ms Celerier makes reference both in her claim form and in the Scott Schedule to male comparators and they are variously described. The comparators are Jon Cerino, Adam Hart, Martin Hale, Gilles Michaud, Joury De Reuver and Norbert Jurchem.

(b) In respect of the claim of victimisation Ms Celerier relies upon only one "protected act" namely that on 12 March 2018 she confronted her Line Manager Tony Mills alleging that he had picked on her because he did not want a female member of the team".

(c) It follows that where Ms Celerier has in the Scott Schedule labelled a matter as constituting "victimisation" that cannot be correct as a matter of law if the act complained of occurred before 12 March 2018. This simply arises because of Ms Celerier's misunderstanding of the relevant law.

(d) As to outstanding expenses the Respondent now understand what is being claimed though there remained a small difference between them in monetary terms.

(e) As to the claim for bonus/commission I agree with Mr Milson's submissions that the matter remains unclear notwithstanding the Scott Schedule and I make directions accordingly.

Paragraphs not requiring amendment

13. References are to paragraph numbers in the Scott Schedule and to the relevant page number in the agreed bundle.

14. Paragraph 13 (155/156) relating to a phone call from Jon Grady. This does not require amendment because it is simply particularisation of the complaint that Ms Celerier had to provide her own meeting generation support.

15. Paragraph 17 (159/160), this is simply particularisation of the general complaint about Mr Mills's attitude towards Ms Celerier.

16. Paragraph 18 (160), this is particularisation of the allegation that Mr Mills treated Ms Celerier as an Administration Assistant.

17. Paragraph 18 (page 161) as referred to above, this is wrongly labelled as victimisation. It is simply particularisation of the claim for expenses.

18. Paragraph 21 (161/163), this is particularisation of the allegation of lack of support.

19. Paragraph 23 (163), again this is particularisation of Mr Mills's general treatment of Ms Celerier.

20. Paragraph 29 (166), as per paragraph 23.

21. Paragraph 46 (175/176), particularisation of the complaint that Ms Celerier was treated as an Administration Assistant. I should note that there are in fact two paragraphs 46 and the second appearing at page 176 but again the second 46 relates to particularisation of Ms Celerier's treatment by Mr Mills.

22. Paragraph 47 (176/177), again wrongly labelled as victimisation. This is particularisation of the specific allegation that Mr Mills copied Ms Celerier's personal e-mail address to others.

23. Paragraph 52 (179/180), again wrongly labelled as victimisation.

24. Paragraph 52 (179/180), again not victimisation, simply a particularisation of part of the claim for expenses.

25. Paragraph 55 (181), again wrongly labelled victimisation, it is particularisation of the pleaded failure to provide a computer.

26. Paragraph 56 (181/182), again particularisation of the allegation that Mr Mills treated Ms Celerier as an Administration Assistant.

27. Paragraph 59 (181/183), again wrongly labelled as victimisation, in fact particularisation of the allegation that Ms Celerier was treated differently to male comparators when ill.

28. Paragraph 65 (186/187), a factual paragraph countering the reason given for dismissal.

29. Paragraph 69 (188), particularisation of the allegation that males were complimented on success when Ms Celerier was not.

30. Paragraph 72 (189), again wrongly labelled as victimisation in fact particulars of the allegation that males were complimented on success when Ms Celerier was not.

31. Paragraph 73 (190), as per paragraph 72.

32. Paragraph 74 (190/191), again wrongly labelled as victimisation, particularisation of the general complaint about Mr Mills's treatment of the Claimant and the failure to compliment her.

33. Paragraph 82 (195), particulars of allegation of bullying.

34. Paragraph 84 (196/197), particularisation of the claim for expenses.

35. Paragraph 87 (197), particularisation of the allegation of a lack of support.

36. Paragraphs 91 and 92 (200/201), particularisation of allegations of lack of support/complimenting male comparators.

37. Paragraphs 94 to 101, as per paragraphs 91 and 92.

38. Paragraph 95 (201/202), again as paragraphs 91 and 92.

39. Paragraphs 96 (203), simply background information.

40. Paragraph 97 (203/204), again particularisation of the general treatment of Ms Celerier by Mr Mills.

41. Paragraph 98 (204/205), as per paragraph 97.

42. Paragraphs 108, 109, 110, 111, 113 to 124 (pages 210/214), these paragraphs deal with the appeal against dismissal process. Mr Milson submits that in describing the appeal process as an act of direct discrimination/victimisation, such would require amendment. I do not agree.

Whilst I accept that paragraph 10 of the claim form reads as follows:

> "The company has failed to deal fairly or at all with my appeal against dismissal and has not followed the ACAS Code of Practice."

That has to be read with paragraph 9 which reads as follows:

> "My dismissal was influenced by discriminatory motives (sex). The discrimination to which I have been subjected has taken the form of direct and indirect discrimination and victimisation."

43. In my view the appeal against dismissal must be read as being part of the dismissal and in my view it is open to Ms Celerier to allege that the decision to uphold the alleged discriminatory dismissal was itself discriminatory and/or an act of victimisation."

44. If I am wrong about that I would have granted permission for Ms Celerier to amend so as to include that allegation again applying the **Selkent** principles given that the claim whilst out of time deals with matters of which the Respondents are fully aware. It would also seem illogical that Ms Celerier could not argue that the upholding of a dismissal which is alleged to be discriminatory and/or an act of victimisation is not itself discriminatory and/or an act of victimisation.

Paragraphs requiring amendment

45. Paragraph 9 (154), this is an allegation of sexual harassment against Chris Burghadt. Ms Celerier accepts that there is no reference in her claim form to this allegation and she further accepts that she did not raise it by way of grievance or appeal.

46. The same can also be said of paragraph 15 (157), an allegation of sexual harassment against Jon Grady.

47. In relation to both these matters Ms Celerier says that she had not raised them earlier because she was fearful of the consequences of so doing. However she accepts that they could have been included within the claim form. Applying the **Selkent** principles I refuse an application to amend so as to include the allegations set out in paragraphs 9 and 15. The main thrust of Ms Celerier's claim is her treatment at the hands of Mr Mills and her subsequent dismissal. The refusal in respect of these two matters does not in any way prevent her from pursuing that main allegation.

48. Paragraph 49 (178), part of that paragraph reads as follows:

> "My termination was purposefully timed to happen just before the end of my most successful quarter and days before my biggest opportunities were due to close. The timing of my termination was planned to prevent me from qualifying for my commission and overachievement bonuses which could have totalled over £44,000 and likely been £57,000."

49. As I understand the paragraph, Ms Celerier is alleging that the timing of the dismissal was an act of victimisation so as to prevent her earning her commission.

50. Again applying **Selkent** whilst the same monetary claim has been advanced as a breach of contract/unlawful deduction from wages to describe it as an act of victimisation is in my view not simply a relabelling exercise but is an entirely new claim and in all the circumstances should not be permitted as a freestanding claim of victimisation. Again as to the balance of hardship it does not prevent Ms Celerier pursuing the claim as a breach of contract/unlawful deduction from wages as is pleaded in paragraph 11 of her claim form. The same point is made at paragraph 107 (page 209) and for the same reason that amendment is also refused.

51. Paragraph 112 (page 211), this is an allegation that Mr Mills made derogatory remarks post dismissal. Again it is a matter not referred to in the claim form and is an entirely new head of claim which would have to be brought under Section 108 of the Equality Act.

52. Again applying **Selkent** permission is refused to amend in that way.

Strikeout/Deposit

53. Striking out:-

> "Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:-
>
> > (1) 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:-
> >
> > > (a) that it is scandalous or vexatious or has no reasonable prospect of success;
> > >
> > > (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
> > >
> > > (c) for non-compliance with any of these Rules or with an order of the Tribunal;
> > >
> > > (d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."

Deposit Order

54. Deposit order:-

"Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:-

(1) Where at a preliminary hearing (under rule 53) 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 ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order:-

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),
otherwise the deposit shall be refunded.

> (6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

55. Mr Milson's submissions begin by drawing my attention to the burden of proof provisions in the Equality Act, namely Section 136:-

> "Section 136 - Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."

56. He goes on to draw my attention to the following paragraph 56 of Mummery LJ's judgment in **Madarassy v Nomura** [2007] ICR 867:

> "There may still be occasions when a claim can be properly struck out, where on the case pleaded there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which only indicate a possibility of discrimination. They are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Claimant had committed an unlawful act of discrimination."

57. The test for strike out is "no reasonable prospect of success" and for the ordering of a deposit "little reasonable prospect of success".

58. However on the other hand there is for example that often cited (but not by Mr Milson) quotation from the judgment of Lord Brown Wilkinson in **Glasgow City Council v Zafar** [1998] ICR 120 HL wherein he said those who discriminate "do not in general advertise their prejudices: Indeed they may not even be aware of them". Thus it is almost always the case that a Tribunal will need to draw inferences from the evidence presented to it. For example Ms Celerier's case is that the grounds for her dismissal were without foundation. Were she be able to prove that a Tribunal might draw an inference.

59. Having read the pleadings and recognising that it is likely that the Respondent will prove that Ms Celerier was the highest paid employee in Europe and that she was replaced by a woman and having read the correspondence leading to Ms Celerier's appeal and its outcome I am not persuaded that Ms Celerier's claims of direct sex discrimination, harassment and victimisation have either no reasonable prospects of success or little reasonable prospect of success.

60. However a word of warning to Ms Celerier. This is not a green light. The burden of proof is with her. Statistically a very small proportion of claims brought under the Equality Act succeed at a hearing. I would respectfully suggest that she needs the advice of a competent employment lawyer.

The breach of contract/unlawful deduction from wages claims

61. As to the claim for expenses the parties are not far apart and I would hope that Ms Celerier's claim can be agreed and met.

62. As to the claim for bonus and commission, as I have said above whilst I recognise that there is an arguable claim based upon the contract of employment (see clause 4 at page 234) and the letter of appointment (see page 257 in the sum of £22,000 net of any payment made in respect of commission) I do not understand how Ms Celerier arrives at the figure of £35,992, see page 526. I have accordingly made a direction that she particularise how she arrives at that figure. Given that the Respondent's appear to have paid a sum of about £8,000 already in respect of commission, it cannot be said that this claim has no reasonable prospect of success or little reasonable prospect of success.

DIRECTIONS

1. I am of the view that this case is appropriate for Judicial Mediation, therefore within 14 days of the date of this order the parties must inform each other and the Tribunal whether they are prepared to engage in Judicial Mediation.

2. Ms Celerier must within 14 days of the date of this order, if she wishes to pursue a claim in excess of £22,000 in respect of bonus commission, set out clearly how much that claim is and the contractual provisions whether written or oral upon which she relies. If she does not do so then her claim in this regard will be limited to a maximum of £22,000 net of any payment already made by the Respondents.

3. The Respondents if so advised have liberty to serve an amended response by not later than 21 June 2019.

4. The case remains listed at the Leicester Employment Tribunal Hearing Centre, Kings Court, 5A New Walk, Leicester LE1 6TE from 25-29 November 2019 inclusive.

5. Within 28 days of the date of this order Ms Celerier is to submit an updated schedule of loss to the Respondent's solicitors.

6. By not later than 14 June 2019 the parties shall disclose to each other all documents in their possession, power or control which are relevant to any issue in the case, including in respect of remedy **whether or not the document supports that party's case**.

7. By not later than 28 June 2019, a single bundle of documents is to be agreed. The Respondent shall have the conduct for the preparation of the bundle for the hearing. The bundle is to be bound, indexed and paginated. The bundle should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response and case management orders if relevant;
- documents which will be referred to by a witness;

- documents which will be referred to in cross-examination;
- other documents to which the tribunal's attention will be specifically drawn or which they will be asked to take into consideration.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is material to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally either be simple chronological order or chronological order within a number of defined themes e.g. medical reports, grievances etc

- correspondence between the Tribunal and the parties, notices of hearing, location maps for the Tribunal and other documents which do not form part of either parties' case should never be included.

Unless an Employment Judge has ordered otherwise, bundles of documents should <u>not</u> be sent to the tribunal in advance of the hearing.

8. By not later than 27 July 2019, the parties shall mutually exchange the witness statements of all witnesses on whom they intend to rely on. The witness statements are to be cross-referenced to the bundle and will be the witness's main evidence. The Tribunal will not normally listen to witnesses or evidence not included in the exchanged statements. The Claimant's witness statement must include a statement of the amount of compensation or damages they are claiming, together with an explanation of how it has been calculated and a description of their attempts to find employment. If they have found a new job, they must give the start date and their take home pay. Witness statements should not routinely include a précis of any document which the Tribunal is to be asked to read. Witnesses may of course refer in their witness statements to passages from the documents which are of particular importance, or to the inferences which they drew from those passages, or to the conclusions that they wish the Tribunal to draw from the document as a whole.

9. The morning of 25 November 2019 will be allocated for the Tribunal to read in. The parties are therefore not to attend until 2:00 pm on 25 November. The Respondents are to deliver to the Leicester address by not later than 21 November, 4 copies of the agreed trial bundle and 4 copies of the exchanged witness statements.

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Employment Judge Blackwell

Date 22 May 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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.