THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

BETWEEN:

Miss H Brew

Claimant

And

The Seeing Ear Limited

Respondent

ON: **4 June 2019**

Appearances:

For the Claimant: Mr M Foster, Solicitor
For the Respondent: Mr P Clarke, Consultant

COSTS JUDGMENT

The Respondent is ordered to pay the Claimant's costs of £640 incurred in relation to the hearing on 4 June 2019.

REASONS

1. The hearing was listed to consider the Respondent's application for strike out of the pregnancy and constructive dismissal claims. It was the Respondent's submission that the pregnancy discrimination complaints were out of time and that the constructive dismissal claim had no reasonable prospect of success.

2. The Claimant's contends that she resigned in response to a fundamental breach of contract by the Respondent in that it would not allow her to return from maternity leave on the same terms but instead sought to unilaterally change her contract to full time office-based hours. The Claimant relies on this as a last straw act in relation to her constructive dismissal claim and an act of pregnancy discrimination, amongst others.

3. In relation to the pregnancy discrimination claim, the Claimant identified 4 alleged acts said to have occurred after 23 February 2018, the last date for limitation

purposes. 2 were said to have occurred on 11 April 2018 and were i) telling the Claimant that she was not entitled to holiday pay and would have to work under new contract terms on her return from maternity leave and; ii) threatening the Claimant with formal disciplinary action on her return to work. All of these acts are, on the face of it in time and there is therefore the potential for the Claimant to argue that earlier acts, predating 23 February 2018 are continuous. Such an argument is more apt to be considered at the full hearing before a full panel, after all the evidence had been heard. It was therefore not appropriate for me to consider strike out at this point.

4. In relation to the constructive dismissal claim, it was the Respondent's case that the Claimant had agreed a variation to her contract and therefore her claim had no reasonable prospect of success. This was denied by the Claimant. The Respondent accepted that the Claimant had not signed a new contract but relied on an email from the Claimant dated 25 September 2017 for its contention that there was an agreed variation. In that email, the Claimant says: "***I only have a draft copy of my contract, is this the one you want signing? If not can you send a final version in the post please?***" She ends the email with: "***Please let me know if I should been (sic) signing the draft contract, or if you will be sending a final version over***." The Respondent replied on 26 September 2017 stating: "***There have been no changes so signing and returning the copy marked Draft will be fine***…."

5. Whilst the Claimant's email is an indication that she was prepared to sign the new contract, without her having done so, and without having worked under the new terms, it is open to argument whether the variation was agreed. That is a dispute that can only be determined after all the evidence is heard and that should be done at the full hearing. I cannot therefore say at this point that the Claimant's case has no reasonable prospect of success. The application to strike out the constructive dismissal claim is refused.

6. The Claimant applied for her costs for today's hearing. The application was made pursuant to rule 74 of the Employment Tribunal Procedural Rules 2013 on grounds the Respondent's acted unreasonably in pursuing the strike out application as it had no reasonable prospect of success.

7. On 9 April 2019, the Claimant's Solicitors sent a costs' warning to the Respondent in which they enclosed a list of the 4 discrimination allegations referred to above in support of their contention that the discrimination allegations were in time. The Respondent was invited to withdraw its application with the threat that costs would be sought if it did not do so.

8. The Respondent ignored the warning and submitted that it was reasonable for it to do so because the Tribunal was obliged to deal with matters of jurisdiction. Whilst that is correct, it does not necessarily have to deal with them at a preliminary hearing. Indeed, in cases where there are allegations of discrimination said to be continuous with in-time acts, the normal course is for those matters to be dealt with at the final hearing.

9. I consider that the Respondent acted unreasonably in failing to heed the costs warning and pressing on with the strike out application regardless, when it should have been clear to it that there was no reasonable prospect of the discrimination claim being struck out.

10. Although the costs warning letter did not address the constructive dismissal claim, knowing that the Claimant had not signed the new contract, it should have been obvious to the Respondent that the Tribunal would not strike out the claim on the basis that she had agreed it. I find that the Respondent acted unreasonably in pursuing its application in relation to this claim.

11. I therefore find that the threshold for a costs order has been met.

12. The Claimant instructs her representative on a conditional fee basis under which she is liable for 25% of the legal costs and 100% travel costs incurred in attending the hearing. Those amount to £640.

13. In the absence of any argument from the Respondent as to means, I make a costs order in the sum of £640.

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Employment Judge Balogun
Date: 17 June 2019