



# EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Miss K Dailyeva

City and Kent Cleaning Ltd

## PRELIMINARY HEARING

Heard at: London South  
Employment Tribunal

On:

02 July 2020

Before: Employment Judge Hyams-Parish (Sitting alone)

Representation:

For the Claimant: Mr Bayram (Lay Representative)

For the Respondent: Mr S Joshi (Solicitor)

## JUDGMENT

The Respondent's application for a strike out order fails.

The Respondent's application for a deposit order succeeds in part. The Claimant is ORDERED to pay a deposit of £250.00 (£50.00 for each claim) as a condition of being permitted to continue to advance the claims at paragraph 12 above, to be paid not later than 21 days from the date this order is sent to the parties.

## REASONS

1. This preliminary hearing was conducted by video (CVP). The Claimant did not initially attend the hearing, thinking that she did not need to. However, I asked Mr Bayram to contact the Claimant and ask her to participate, given that I was being asked to decide whether to strike out her claims and/or make a deposit order.

2. There had already been three preliminary hearings in this case. The case is currently listed for a final hearing on **8 and 9 December 2020**.
3. The purpose of this preliminary hearing was to consider whether all or any of the claims should be struck out on the grounds that they are not being actively pursued by the Claimant and/or have no reasonable prospects of success; alternatively, whether a deposit order should be made. The hearing was listed by Employment Judge Bryant QC at a previous case management discussion when neither the Claimant nor her representative attended.

### Overview

4. I spent a considerable amount of time trying to understand the claims being brought by the Claimant. I was very conscious of the fact that neither the Claimant nor Mr Bayram are legally represented and therefore I did not expect them to be familiar with the legal technicalities of the claims. However, during this hearing the Claimant was often not able to provide essential detail concerning the claims, such as dates, which are going to be important for her to be clear about at the final hearing.
5. I have taken this broad overview of the Claimant's case from the pleadings, the response to further and better particulars, and the information provided to me by the parties.
6. The Claimant was employed as an Accounts Assistant for the Respondent from 27 September 2017 to 23 January 2019. The Claimant accepted that the termination date in her claim form is incorrect. It was agreed that the termination date is 23 January 2019, which is when the Claimant was summarily dismissed and paid in lieu of notice.
7. The Claimant suffered an accident at work on 19 November 2018 when she slipped on a set of stairs resulting in her breaking her ankle. The accident resulted in a period of absence. The Claimant returned to work towards the end of December 2018. The Claimant could not remember the exact date of her return but says it was after Christmas.
8. The Claimant sought advice from a firm of solicitors who wrote to the Respondent about the accident at the end of December 2018 or beginning of January 2019. This letter was not available at the hearing and the Claimant was not able to provide me with the exact date when the solicitors wrote to the Respondent.
9. On 22 January 2019 the Claimant was invited to attend a capability meeting to discuss various concerns with her performance. The letter required the Claimant's attendance the very same day at 2.30pm. the hearing did not take place on 22 January 2019 but was postponed to the next day. During

this preliminary hearing, Mr Joshi confirmed that the Claimant had not received any formal warnings or been the subject of formal disciplinary action up to this point, but she had received a letter of concern regarding her performance.

10. The Claimant's position is that the Respondent was unhappy that she had instructed solicitors concerning the accident at work. She subsequently wrote a grievance wherein she complained about health and safety failures which caused her accident and being placed under pressure to retract the letter written by solicitors. It is the Claimant's position, listening to her during this hearing, that this is the reason why she was dismissed. She also complains that the decision was driven by the fact that she is a Bulgarian national and that if she was not a Bulgarian national, she would not have been dismissed.

### **Claims**

11. Looking at the Claimant's complaints as set out in her claim form, supplemented by her response to the request for further and better particulars and what she told me during this hearing, there appeared to be a consensus that, in legal terms, the Claimant was bringing the following claims:
  - a. Automatic unfair dismissal pursuant to s.103A Employment Rights Act 1996 ("ERA") (Whistleblowing dismissal);
  - b. Automatic unfair dismissal pursuant to s.100(1)(c) ERA (Health and safety dismissal);
  - c. Being treated less favourably because of race pursuant to s.13 Equality Act 2010, the less favourable treatment being the dismissal on 23 January 2019 (Direct race discrimination).
12. Other acts of direct race discrimination are identified from the further and better particulars and/or were raised at this hearing:
  - a. Not paying the Claimant for a day's sickness;
  - b. Manipulating paperwork;
  - c. Others were allowed to use their mobile phones, eat at their desk, or come into work late without reprimand;
  - d. Not being allowed to eat biscuits with her tea; and
  - e. Being asked to do additional duties.

**Strike out and deposit order applications**

13. Having listened carefully to the submissions made by the parties, I did not feel able to conclude that the claims at paragraph 11 had no reasonable prospects of success. Importantly, I could not reach a view, based on the documents provided to me and the submissions by the parties, whether and to what extent the decision of the Respondent to dismiss the Claimant was influenced by the complaints brought by the Claimant concerning health and safety risks, or about her accident, or were because of race. The timing of the events, leading to what appears to be a somewhat rushed capability hearing and dismissal, opens up the possibility that the decision to dismiss was influenced by matters other than performance, but that clearly will be a matter for the Tribunal to decide when it has heard all of the evidence. I concluded the test for striking out was not satisfied.
14. It was clear from the hearing that the claims were being actively pursued and therefore it was not appropriate to strike out the claims on that ground either.
15. For very much the same reasons as above, I was not even satisfied that the test for making a deposit order was made out in respect of the claims at paragraph 11.
16. The position regarding those allegations at paragraph 12, however, are different. The Claimant could not provide even the most basic of detail to substantiate these claims, despite requests having been made by the Respondent for her to do so. I did not believe she had given thought to whether these were acts of race discrimination and certainly on the basis of the information before me, I consider they have little prospects of success. The objective behind a deposit order is for a Claimant to think very carefully before bringing a claim that has little prospects of success. I concluded that it was appropriate for me to make a deposit order in respect of those claims of direct race discrimination at paragraph 12 above. The Claimant is therefore ORDERED to pay a deposit of £250.00 (£50.00 for each claim) as a condition of being permitted to continue to advance these claims, to be paid not later than 21 days from the date this Judgment is sent to the parties.
17. I hope that the deposit order will encourage the Claimant to think carefully about those claims at paragraph 12 above. I said to her during the hearing that if she decided that she did not want to pursue these claims at the final hearing, she would **not** need to pay the deposit order, but that she should inform the Respondent and the Tribunal within 7 days of the date this order is sent to the parties of her decision. If she does wish to pursue the claims, she must pay the deposit and provide the particulars at paragraph 18(a) below. If she fails to comply with this order and provide the information as required, the Tribunal will consider whether these claims should be struck out. Finally, I should add that the fact that the Claimant does not continue

to pursue the claims at paragraph 12 does not mean that she cannot mention them in her witness statement provided they have some relevance to the dismissal, such as where they demonstrate a racial motive on the part of the person who decided to dismiss.

18. The following is a summary of the orders which were made by consent:

Direction	By when
a. By this date and only if the claims are being pursued, the Claimant must provide specific detail of each of the allegations at paragraphs 12 above, including what happened, what date it happened, who was involved, who did what and why the Claimant believes it is race discrimination.	30/07/20
b. By this date the parties must send each other copies of all documents in their possession or under their control that are relevant to the issues in this case, including remedy and mitigation (documents relating to attempts to secure alternative employment), regardless of whether such documents are supportive or adverse to their case.	13/08/20
c. By this date the Respondent shall prepare and send to the Claimant a proposed index to the consolidated bundle to be used at the final hearing.	27/08/20
d. By this date the parties must have agreed the index to the bundle.	10/09/20
e. By this date the Respondent must prepare and send to the Claimant a copy of the consolidated and index bundle to be used at the final hearing.	01/10/20
f. By this date the parties must exchange witness statements.	30/10/20

**Disclosure of documents**

19. The term “documents” includes letters, notes, emails, memos, diary entries, audio or visual recordings, text messages and any other legible records.
20. If handwritten documents are being relied on, a typescript must be provided by the party relying on them and inserted in the bundle of documents

immediately after the handwritten document.

21. If a recording is being relied on a transcript must be prepared by the party relying on it. The transcript must be included in the bundle of documents and sent to the other party, together with a copy of the recording.
22. The Tribunal does not have facilities for playing audio or visual recordings and the parties should bring suitable equipment (certified PAT tested) if they wish to play a recording.
23. No documents or copy correspondence should be sent to the Tribunal unless a party is required to do so.

### **Final Hearing**

24. The parties should be aware that if in-person hearings have not resumed by the above hearing date, the hearing may be conducted remotely using a HMCTS video conferencing facility called CVP. All that is needed is a device, such as a computer or laptop, which provides access to the internet. A phone or tablet can be used, if absolutely necessary, but a computer or laptop is preferable. A website address will be provided to the parties, in addition to a PIN to gain access to the hearing room. The parties should carefully read the instructions sent to them in advance of the hearing. They should also test their device in advance of the hearing to ensure they can enter the hearing room and that the audio and video facility is turned on and functioning properly.
25. The parties should agree a bundle of documents for the final hearing, which the Respondent shall be responsible for compiling, paginating and indexing.
26. If the hearing is conducted at the Employment Tribunal hearing centre, the Respondent should bring **five** copies of the bundle to the hearing. If the hearing is conducted remotely using CVP, the Respondent should send a PDF of the bundle to the Tribunal to arrive not less than 7 days before the hearing. The pagination of the PDF bundle should match that of the hard copy of the bundle and preferably bookmarks should be inserted to match the index so that there is easy access to documents that the Tribunal will need to consider. When sending PDFs to the Tribunal, please ensure that the file size does not exceed that permitted by the Tribunal's IT systems. It may be necessary to send a bundle to the Tribunal in parts.
27. If the hearing is conducted remotely, it is the responsibility of the parties to ensure that all witnesses have access to a hard copy of the hearing bundle and each of the witness statements, as they may be asked to refer to these documents during their evidence.
28. The bundle should only include documents relevant to any disputed issue

in the case and those that will be referred to at the final hearing. At the front of the bundle in a separate section it is also helpful to include the claim form and response, any amendments to the response, this written record of the preliminary hearing and any other case management orders that are relevant.

29. When preparing the bundle, the following rules must be applied
  - a. unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in emails) is to be included in the bundle;
  - b. the documents in the bundle must follow a logical sequence, usually chronological order;
  - c. it must be held together so it opens flat;
  - d. it should not include the witness statements, which must be provided separately;
30. The Claimant and the Respondent shall each ensure that written statements are prepared for each and every witness they propose to call to give evidence at the hearing.
31. The statements must contain all of the evidence to be given at the final hearing. No additional witness evidence will be allowed at the final hearing without the Tribunal's permission.
32. The written statements must have numbered paragraphs, include page numbers from the bundle when referring to a document, and contain only evidence relevant to the issues in the case.
33. At the discretion of the Tribunal hearing the case, statements of witnesses may be taken as read. This means that they will be read in advance by the Tribunal and the witness will not need to read them aloud at the hearing when giving evidence.
34. It is expected that all witnesses that have provided a witness statement will be available to attend and give evidence at the hearing unless their evidence is not disputed by the other party, who have confirmed that their attendance is not necessary. The parties should bear in mind that the Tribunal may place little or no weight on the statement of any witness whose evidence is disputed and who does not attend the hearing in person to give that evidence orally and be available for questioning under oath.
35. If the hearing is conducted at the Employment Tribunal hearing centre, the

parties are each responsible for ensuring that they bring **five** copies of each of their witness statements to the hearing. If the hearing is conducted remotely using CVP, each party is responsible for sending one PDF of all their witness statements to the Tribunal to arrive not less than 7 days before the hearing.

**General matters**

36. Anyone affected by these orders may apply for it to be varied, suspended or set aside. Any applications should be made on receipt of these orders or as soon as possible after it has become apparent that a variation is required.
37. The parties may by agreement vary the dates specified in any order by up to 14 days without the Tribunal's permission except that no variation may be agreed where that might affect the hearing date. The Tribunal must be told about any agreed variation before it comes into effect.
38. This Order constitutes a notice of hearing pursuant to rule 58 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. At the hearing all parties will have the opportunity to submit written representations and to advance oral argument. If a party wishes to submit written representations for consideration at the hearing, they shall present them to the Employment Tribunal Office not less than 7 days before the hearing and shall, at the same time send a copy to all other parties.

**CONSEQUENCES OF NON-COMPLIANCE**

***Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.***

***If any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84. The Tribunal may also make an "Unless Order" providing that unless an order 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.***

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**Employment Judge Hyams-Parish  
6 July 2020**



