EMPLOYMENT TRIBUNALS

Claimant: Mrs C Dakin

Respondents: 1. Evolving Edge Ltd
2. Sarah Brennan

Heard at: Manchester (remotely, by CVP) **On:** 19 April 2021
26 August 2021
(in Chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: Mr J Lister, Solicitor
Respondent: Mr G Mahmood, Counsel

JUDGMENT

The judgment of the Tribunal is that the respondent's application that the claimant should pay a deposit order on the grounds that here claims have little prospect of success fails and is dismissed.

REASONS

Introduction

1. This hearing was listed because the respondent requested that an application for strike out and/or a deposit order was considered by the Tribunal. Today, however, the strike out application has not been pursued, and the question which arises for determination is whether a deposit order should be ordered against the claimant.

The Law

Deposit Orders

2. Rule 39 states:

> "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."

3. Some of the case law on striking out is relevant as to whether a case has little reasonable prospect of success as it would be in a case of striking out where the test is no reasonable prospect of success.

4. In **Ezsias v North Glamorgan NHS Trust [2007]** it was said that:

> "To state the obvious an ET should be alert to provide protection in the face of an application that he has little or no prospect of success but it must also exercise appropriate caution before making an order that will prevent an employee from proceeding to trial in a case which on the face of the papers involves serious and sensitive issues. Further, it would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by an applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documents."

5. In respect of assessing prospects of success in a discrimination case, it is relevant to consider the law applying to proving discrimination. It is often observed that there is real difficulty for a claimant in establishing discrimination, and accordingly if a claimant can establish primary facts which suggest discrimination the burden of proof switches to the respondent, as there would rarely be evidence of overtly racist or sex discriminatory actions.

6. In **Anya v University of Oxford [2001] Court of Appeal** it states:

> "A Tribunal must consider the direct oral and documentary evidence available. It must also consider what inferences may be drawn from all the primary facts. Those primary facts may include not only the acts which form the subject matter of the complaint but also other acts alleged by the applicant to constitute evidence pointing to a racial ground for the alleged discriminatory act or decision."

7. In **Nagarajan v London Regional Transport [1999]** it states:

> "Discrimination may well affect the mental processes of the putative discriminator, in come cases subconsciously, and it is necessary for the Tribunal to determine whether or not this is the case."

8. Claimant's counsel also referred to the following cases:

- **Driscoll v Peninsula Business Services Limited & Others**
- **Qureshi v Manchester University**
- **The Commissioner of City of London Police v Mrs C Geldart UKEAT**

- **A v B and Another [2010] Court of Appeal**

9. In respect of **Driscoll** and **Qureshi** the point was made that the allegations need to be looked at in their totality and rather than treating every matter separately.

Submissions

Respondent's Submissions

10. The respondent broadly relied on the following propositions to persuade the Tribunal that a deposit order should be made as the claimant had little reasonable prospect of success:

(1) that the second respondent was an employee of the same nature as the claimant and therefore was not capable of discriminating against her;

(2) that the second respondent was not acting as an agent;

(3) that the claimant's claim was out of time and there had been no application for the Tribunal to exercise its just and equitable discretion;

(4) that the matters relied on latterly as unfavourable treatment were not capable of being so regarded as they were simply negotiations pertinent to the winding up of the business and to the sale of shares; and

(5) that no comparator has been identified.

11. The respondent in the hearing, having withdrawn the strike out proceedings, did still refer to the above points but also the additional point that the whole matter should be characterised as a partnership dispute and not as a discrimination claim. All the matters related to a partnership dispute.

12. Further, it was not accepted that there is no need for a comparator, as matters falling after the end of the protected period should be treated on a comparative basis.

Claimant's Submissions

Misunderstanding as to dates

13. The relevant dates were:

(1) 31 October 2017 (ACAS consulted);

(2) 2 November 2017 (ACAS certificate issued);

(3) 22 November 2017 (ET proceedings issued);

(4) 18 January 2018 (application made to re-label the case);

(5) 25 January 2018 (application to add second respondent).

(6) On this basis the claimant contends that the last incident in issue for the purpose of time limits would be **1 August 2017**.

14. Further, any argument regarding continuing act cannot be determined at a preliminary hearing, and the respondent agrees that.

15. The claimant has indicated that where appropriate she will be arguing it would be just and equitable to extend time.

16. In respect of continuing conduct, the claimant will argue that there was a continuing state of affairs up to the date of lodging her claim and therefore all her claims are in time.

17. Further, presently the respondent has not filed a response to the main claim and therefore their position in respect of this is not clear.

18. The matters which arose post October 2017 pleaded at paragraphs 50 onwards include matters which arose in solicitors' correspondence. The suggestion that correspondence emanating from lawyers cannot be discriminatory is misconceived. The reasons for the second respondent's conduct cannot be viewed in isolation but considered in the context of the entire factual background of the claim. The chronology put forward by the respondent ignores events on 17 October 2017 where:

(1) The claimant's solicitor had to specifically instruct the second respondent to refrain from sending correspondence directly to the claimant with inappropriate threats, and warning that she could be sued for slander;

(2) On 27 October 2017 the second respondent imposed an artificially tight deadline and then followed this with yet another threat to notify clients of the claimant's alleged fraud;

(3) On 28 October 2017 the second respondent repeated her threat to inform clients of alleged fraudulent behaviour unless the claimant accepted her deadline to purchase shares;

(4) On 6 November 2017 the second respondent again accused the claimant of acting in bad faith and deliberately withholding information.

19. There will be a number of matters that will be relied on for a course of conduct, all of which have been pleaded, and other matters from which the Tribunal will be invited to draw inferences, as is normal in a discrimination claim. The claimant has cited 13 matters from which she would ask the Tribunal to draw inferences, the overarching position being that the "fallouts" stem from the claimant's pregnancy and continued thereafter.

Comparator

20. It is perfectly reasonable for the claimant to rely on a hypothetical comparator, however where the treatment of a worker is tainted by matters relating to a unique agenda there is no need for a comparator, such as in sexual harassment and obviously in pregnancy related cases.

21. In addition, of course, the Tribunal may look at the reason for the treatment as a way of analysing the case rather than adhering to the comparator route (**Shamoon v Chief Constable of RUC [2005]**).

22. Another example where a comparator would not be necessary would be discriminatory comments, as they are intrinsically discriminatory.

23. The matters the respondent criticises, that a comparator in relation to the shares issue would have been treated the same, ignores the fact that there was a long history of dealings between the parties which the claimant characterises as discrimination because of her pregnancy and sex discrimination, and therefore it is not simply a question of pulling out one part of the series of acts and applying a male comparator to that part. The argument will be that the whole approach was tainted by a gender specific consideration, and as a man would never fall pregnant there cannot be an obvious comparator.

24. Whilst the respondent argues that post the protected period there should be a comparative approach, which is correct following **Hertz**, this case is slightly different in that inference will be asked to be drawn from the whole history of the case and not just viewing this end part in isolation.

25. Regarding the respondent's arguments on agency, there has been a finding that the second respondent is an agent for the purposes of this case, but no determination on whether she was an employee. Paragraph 9 of the Reconsideration Judgment stated:

> "The claimant agreed that there was insufficient evidence to conclude without a further hearing that SB was an employee for the purposes of section 110 but they submitted she was clearly an agent for the purposes of the section. Therefore, the issue remains to be determined and should be determined at a full hearing rather than a further preliminary hearing, particularly given the number of preliminary hearings in this case."

26. Further, paragraph 26 of the Reconsideration Judgment says that:

> "It is universally accepted directors are effectively agents of the company and as such shall have a range of fiduciary duties which are designed to avoid conflicts of interest and promote the interests of the company."

27. There has been no specific evidence on this at this stage and the matter will be argued at the full hearing, but one approach is that in respect of the share dealings the second respondent treated herself as the alter ego of the company, as is evidenced by taking the first respondent's money, altering the claimant's login credentials and otherwise acting on behalf of the company as she wished to personally without the first respondent's express approval, and therefore must have considered herself authorised to do so.

28. The point is also raised about whether or not if the second respondent is an agent, has she behaved improperly? The matter certainly needs careful consideration.

General criticisms of the claimant's claim

29. These are as follows:

(a) The fact that the Tribunal determined the parties were in a collegiate relationship does not mean the claimant suffered a detriment;

(b) The profit-sharing arrangement was altered at the behest of the second respondent. This was to the detriment of the claimant, which establishes that even where there is a collegiate relationship a detriment can arise;

(c) It seems to be suggested that a woman would not discriminate against another woman is totally unacceptable; and

(d) The allegation the claim had not been in good faith has not basis and ought to be withdrawn.

30. In respect of merit, the second respondent cannot challenge the claimant as the second respondent has not yet submitted a response form.

31. Although the claimant's submissions were based on the striking out submissions, the same submissions were more or less relied on for the request for a deposit order.

Conclusions

32. I find it is not appropriate to make a deposit order in this case for the following reasons.

Merits Assessment

33. In respect of any merits assessment of the claimant's claim, it is correct that the respondent has not served a response to the factual allegations and therefore that must be the first step that is undertaken next.

Time Limits

34. In respect of the time limits issue, the respondent has relied on erroneous timings and therefore there is no obvious case that the claimant is out of time. Nevertheless, that is a matter which will be considered at a full hearing and the claimant will have the opportunity to argue that if her claims are out of time that it would be just and equitable to extend time.

Continuous Conduct

35. As agreed, this is a matter that has to be decided at the Tribunal and therefore it cannot be said this argument has little prospect of success. Neither is it something which is suitable for a separate preliminary hearing due to the need to hear evidence.

Comparators

36. This is a moot point and will require careful factual analysis and the consideration of inferences at the Tribunal hearing. It will need evidence and it will need close consideration of motivation. Accordingly, this is not a matter that at this stage could be said to lead to the claimant having little reasonable prospects of success.

Agency

37. Again, the question of agency is a technical and difficult question which will require consideration of a number of factual matters which have not yet been determined. Again, it is not suitable for a separate hearing for the same reasons given above.

Summary

38. As the claimant has not had a deposit awarded against her the case can now proceed to a hearing, and I will arrange for a telephone hearing to take place to list the matter and give directions for the preparation of the case for hearing.

39. However, I will be issuing an order in respect of the second respondent's defence and advising that she must file a defence by the end of November 2021.

Employment Judge Feeney
Date: 4 October 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
5 October 2021

FOR THE TRIBUNAL OFFICE