EMPLOYMENT TRIBUNALS

Claimant: **Miss. K Khatun**

Respondent: **Brook Street (UK Ltd)**

Heard at: **Via Cloud Video Platform (Midlands East Region)**

On: **6th January 2022**

Before: **Employment Judge Heap (Sitting alone)**

Representation
Claimant: **Miss. S Clarke - Counsel**
Respondent: **Mr. O Lawrence - Counsel**

COVID-19 Statement

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was fully remote. A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The complaint of a failure to pay "other payments" (holiday pay) is dismissed on withdrawal by the Claimant.

2. The Ministry of Justice is added as a Second Respondent to these proceedings.

3. The Respondent's application to strike out the Claimant's claim is refused.

4. The Claimant's application to amend the claim to include the complaints set out in the grounds of complaint sent to the Tribunal on 16th December 2021 succeeds.

5. The Respondent has leave to file an amended ET3 Response pleading to the case as it is now understood provided that that amended Response is received by the Tribunal by no later than **3rd February 2022**.

6. The Orders previously made are revoked and will be replaced by those which will be notified to the parties when the claim is served on the Ministry of Justice.

7. Deposit Orders are made in respect of two of the complaints advanced. Those are detailed in separate Orders.

REASONS

BACKGROUND & THE ISSUES

1. This Preliminary hearing was listed in place of one which had been due to be conducted by telephone on 29th October 2021. That hearing was postponed by Employment Judge Clarke on the basis that the Respondent had made an application to strike out the claim against them or, alternatively, for Deposit Orders to be made.

2. By the time that the hearing today came around matters had moved on because the Claimant had now instructed solicitors who had in turn instructed Counsel and an application to amend the claim had been made. That amendment application was comprised of three parts. The first of those was to add a second Respondent, the Ministry of Justice ("MOJ"), as a party to the claim. The second was to clarify the basis of the claims which were advanced against the existing Respondent and the third was to bring additional complaints of victimisation. Those complaints were again against the existing Respondent.

3. The Respondent was neutral on the first part of the application and the remainder of it was opposed. It was agreed that I would determine firstly whether to add the MOJ as a party, secondly the amendment application in respect of the existing Respondent and finally the Respondent's applications.

4. I determined that the application to add the MOJ as a Respondent and the application to amend the claim should be granted and I gave those decisions orally with reasons at the time. Neither party has asked for those reasons to be provided in writing and so I need say no more about them.

5. However, there was insufficient time during the hearing to determine the Respondent's application for a strike out of the claim or for Deposit Orders to be made and so that decision was reserved and is now dealt with in this Judgment.

THE HEARING

6. The hearing proceeded via Cloud Video Platform ("CVP"). Whilst we did encounter some minor technical difficulties, I am satisfied that we were able to have an effective hearing.

THE LAW

Striking out a claim or part of it – Rule 37 Employment Tribunal Constitution and Rules of Procedure Regulations 2013

7. Employment Tribunals must look to the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("The Regulations") when considering whether to strike out a claim.

8. Rule 37 provides as follows:

> "*At any stage of the proceedings, either on its own initiative or on the application of a party, the 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 it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out.)"*

9. The only consideration for the purposes of this Preliminary hearing is whether the claim, or any part of it, can be said to have no reasonable prospect of success.

10. In dealing with an application to strike out all or part of a claim a Judge or Tribunal must be satisfied that there is "no reasonable prospect" of success in respect of that claim or complaint.

11. It is not sufficient to determine that the chances of success are fanciful or remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and for it to appropriate, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained in **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (paragraph 6):

> *"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"*

12. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal at a full hearing will rarely, if ever be, apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested (see **Anyanwu v South Bank Student Union [2001] ICR 391** and **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126**.

13. Particular care is required where consideration is being given to the striking out of discrimination claims and that will rarely, if ever, be appropriate in cases where there are disputes on the evidence. However, if a claim can properly be described as enjoying no reasonable prospect of succeeding at trial, it will nevertheless be permissible to strike out such a claim (see **Ahir v British Airways Plc [2017] EWCA Civ 1392**). Each case will, however, turn on its own facts.

Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013

14. Different considerations apply, however, in relation to Deposit Orders made under Rule 39 of the Regulations. Rule 39 provides as follows:

> *"(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."*

15. Thus, a Tribunal may make a Deposit Order where a claim or part of it has little reasonable prospect of succeeding. However, this is not a mandatory requirement and whether to make such an Order, even where there is little reasonable prospect of success, remains at the discretion of the Tribunal to determine whether or not such should be made.

16. The Tribunal is required to have regard to the means of a paying party both as to whether to make an Order and, if so, the amount of that Order. Otherwise, the setting of a Deposit which the paying party is not able to pay will amount to a strike out by the back door (see **Hemdan v Ishmail & Anor 2017 ICR 468**).

CONCLUSIONS

17. It is necessary to consider each of the allegations pursued by the Claimant separately.

18. The first of those is a complaint of unfair dismissal contrary to Section 99 Employment Rights Act 1996, that is to say that the Claimant was dismissed because of her pregnancy related illness. It is common ground that the reason given to the Respondent by the MOJ for ending her assignment with them centred around the Claimant's absences and suffering from morning sickness (being sick whilst taking telephone calls etc). However, it does not follow that that same reason was the reason for the ending of the Claimant's employment by the Respondent approximately one and a half months later.

19. The Respondent says that the Claimant's employment was terminated because she had not kept in contact with the Respondent as she was required to do under

the terms of her contract of employment (see below) and that is consistent with the reasons given in the dismissal letter the relevant part of which said as follows:

"Thank you for completing your last assignment, which ended with us on 04/06/2021.

We have not heard from you since then, but we would be happy to revisit your interest if you wish to seek further assignments with us in the future.

However as you are aware, it is a requirement of our employment contract that you stay in contact and attend assignments that may be offered to you. We appreciate that you may not have maintained contact for a variety of reasons, but in line with our policy we hereby give you notice that your employment will be terminated with effect from 23/07/2021".

20. The Respondent relies on paragraph 6.5 of the Claimant's contract of employment which says as follows:

"You are obliged to work when required by Brook Street. You acknowledge that Brook Street may terminate your employment if, in Brook Street's sole discretionary opinion, you unreasonably refuse to undertake an Assignment offered to you, in particular following the end of an Assignment, you will be provided with information on potential future Assignments. If you do not accept a new Assignment within four weeks of the end of your last Assignment or, if you fail to contact Brooke Street within that period of time to confirm your availability for work, Brook Street may terminate your employment".

21. Mr. Lawrence submits that the letter terminating employment is consistent with that clause and the Claimant has advanced nothing other than speculation that the real reason was related to her pregnancy. He rightly submits that the burden is on the Claimant to demonstrate that was the real reason and his position is that nothing that is in her pleaded case comes close to doing so.

22. Miss Clarke submits that this complaint needs to be dealt with after hearing evidence from the decision maker who decided to terminate the Claimant's employment and with the benefit of there having been disclosure and cross examination.

23. Ultimately, I accept that submission. Miss Clarke points to the fact that no further assignments were offered to the Claimant after the one with the MOJ came to an end and I note that clause 6.5 of the Claimant's contract of employment indicates that that will take place. The Claimant's case is also that the Respondent had told her that they would be in touch with her to offer assignments. If that is found to be correct and if no contact to offer assignments was made as promised, then that begs the question why not and potentially undermines the Respondent's arguments that they dismissed in accordance with clause 6.5 (although I put it no higher than that). This part of the claim is also inextricably linked with the complaint of discrimination on the grounds of pregnancy and I come to that below.

24. For all of those reasons I therefore do not consider that the claim has no reasonable prospect of success or little reasonable prospect of success and my view is that it needs to proceed to a full hearing where the Tribunal will have the

benefit of hearing evidence from the decision maker who terminated the Claimant's employment.

25. The next complaint is of pregnancy discrimination contrary to Section 18 Equality Act 2010. These complaints fall into three parts. The first and second are linked. The first complaint is the failure to offer the Claimant any assignments after the termination of her employment with the Respondent. Again, if the Claimant's case is accepted that she was told that she would be offered further assignments (and that is in accordance with clause 6.5 of the contract of employment) and that did not happen then that begs the question as to why not and calls for an explanation from the Respondent. It is accordingly a complaint that will turn on the facts and is not in my view apt either for strike out or for a Deposit Order to be made.

26. The second complaint of pregnancy discrimination is the termination of the Claimant's employment. Whilst I accept that the dismissal letter is consistent with the case put forward by the Respondent, I nevertheless accept the submissions of Miss Clarke that there is rarely a smoking gun in discrimination cases and the matter is all about inferences to be drawn. That cannot be properly considered without hearing the evidence. For those reasons and the reasons that I have already given in respect of the complaint of unfair dismissal, I do not consider that this part of the claim has no or little reasonable prospect of success and so it is not appropriate to strike it out or make a Deposit Order.

27. The final complaint of pregnancy discrimination is the failure of the Respondent to respond to or address the alleged discrimination of the MOJ in terminating the Claimant's assignment. This is a part of the claim that I consider has little reasonable prospect of success such that a Deposit Order should be made.

28. I have made that determination on the basis that it is plain from an email at page 184 of the Preliminary hearing bundle dated 7th June 2021 that the Respondent was saying that they wanted to support the Claimant in relation to the termination of her assignment, including asking the MOJ to reconsider their decision but they needed further details from the Claimant. The Claimant replied the following day to say that she or her trade union representative would be in touch. It does not appear to be suggested that that contact from the Claimant or a representative in fact took place. Therefore, this complaint is not one that is supported by the contemporaneous documentation and there does not appear to be anything to say that the Respondent would not have asked the MOJ to reconsider once they had heard from the Claimant. However, as I have already set out above that contact does not appear to have happened.

29. I do not consider that the complaint has no reasonable prospects of success as there are still potential questions to be asked as to the timing and legitimacy of the offer by the Respondent and those can only be dealt with by hearing the evidence. As such, a strike out of this part of the claim is not appropriate. However, for the reasons that I have already given it does in my view have little reasonable prospect of success such as to merit a Deposit Order being made.

30. A separate Deposit Order accompanies this Judgment and deals with the amount of the deposit which I am Ordering the Claimant to pay in order to proceed with this aspect of the claim.

31. The Claimant also advances complaints of victimisation of which there are eight separate complaints. Those are as follows:

    a. The refusal to provide HR details for either the Respondent or the MOJ;
    b. The Claimant being told that she should not have told anyone about the termination of her assignment;
    c. The Claimant being told that the Second Respondent could terminate her assignment for any reason, including pregnancy related issues;
    d. The refusal to put in writing the reasons that the Claimant had been told for the termination of her assignment;
    e. The refusal to communicate with the Claimant in writing when she had requested that and seeking to only communicate by telephone;
    f. The Respondent failed to offer the Claimant any further assignments;
    g. The Respondent failed to ask the MOJ to reconsider the termination of the Claimant's assignment; and
    h. The Claimant's dismissal.

32. The Claimant contends that the above acts were motivated by the fact that she had done a protected act or that the Respondent believed that she may do one in respect of issuing Employment Tribunal proceedings.

33. I accept the submissions of Miss Clarke that, with the exception of one complaint which I deal with below, the others need to be determined on the basis of the evidence and, particularly, after cross examination of each of the relevant witnesses. Particularly, there is it seems to me, questions to be answered as to the alleged reluctance of the Respondent to provide HR contact so that the Claimant could challenge the legitimacy of the termination of her assignment, taking her to task for telling others about the end of the assignment, the statement that the MOJ were entitled to terminate the assignment including for pregnancy reasons and the apparent reluctance to commit themselves in writing about the reasons for termination. I say that on the basis that if those matters were all found to be factually correct it might (and I put it no higher than that) be that that happened because the Respondent was concerned that the Claimant intended to bring a claim and seek to prevent that from happening. It might well of course be a source of embarrassment or other damage for the Claimant to commence legal proceedings against what is no doubt an important client for the Respondent.

34. I would also make the same observations with regard to the issue as to a failure to offer assignments and the termination of the Claimant's employment as I did in connection with the complaint advanced under Section 18 Equality Act. All of those matters are in my view ones where the prospects of success cannot be determined without having heard the evidence.

35. However, I consider that the complaint about the failure of the Respondent to ask the MOJ to reconsider their decision is one that has little reasonable prospect of success such that it is appropriate to make a Deposit Order. My reasons for making that Order are the same as for the complaint under Section 18 advanced on very similar facts. This is not inconsistent in my view with the possibility of the other complaints of victimisation succeeding because it may well have been in the interests of the Respondent for that decision to be reviewed as it may have avoided the Claimant issuing proceedings at all.

36. I ask the Claimant to note that the fact that I have not struck out the complaints that she now advances does not mean that I am indicating to her that I consider that she will definitely succeed in them. She should give careful thought to the burden of proof at all stages of the claim and particularly at the point of disclosure of documentation and exchange of witness statements.

37. The parties are agreed that there is no need for a further Preliminary hearing to make further Orders to progress to a full merits hearing. Some steps have already been taken in terms of disclosure of documentation but given that the claim is now to be served on the MOJ, that will most likely need to be revisited. Upon service on the MOJ I will therefore make further Orders for the parties to comply with and if it transpires that a further Preliminary hearing is required then they are of course at liberty to apply.

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Employment Judge Heap

Date: 18th January 2022
JUDGMENT SENT TO THE PARTIES ON

19th January 2022

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Note:

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