Case No: 2204767/2021

EMPLOYMENT TRIBUNALS

Claimant: **Miss U Carrigan**

Respondent: **Generator Hostels Limited (R1)**
Kennedy Pearce Consulting Limited (R2)

Heard at: **London Central (Video)** **On:** **23 February 2022**

Before: **Employment Judge D Henderson**

Representation

Claimant: Ms H Platt (Counsel)

Respondent: Mr J Green (Counsel) R1
Mr S Smith (Managing Director – R2)

PRELIMINARY HEARING - JUDGMENT

1. The respondents' applications for strike out of the claimant's claims for breach of contract and direct sex discrimination are refused;

2. The respondents' applications for deposit orders for the claimant's claims for breach of contract and direct sex discrimination are refused.

3. The parties agreed that the Final Hearing listed for 12-15 July 2022 should be conducted as a video hearing and confirmed that all parties had the appropriate equipment to carry out such a hearing.

NOTE: Reasons were given orally at the end of the Preliminary Hearing. The claimant requested full Reasons in writing.

REASONS

1. This was an application by R1 (also relied on by R2) for strike out of the claims for breach of contract and sex discrimination; alternatively for a deposit order.

Background and Claims

2. By a claim form presented on 27 August 2021, the claimant, who is female, brought complaints of direct sex discrimination (section 13 Equality Act 2010-EQA) and breach of contract against both respondents. R1 was her employer and R2 was the recruitment agency who had introduced the claimant to R1 and with whom she had the majority of her pre-employment communications.
3. R2 had written to the tribunal asking to be removed from the proceedings as it was not her employer and had never had any contractual arrangement with the claimant.
4. However at a Preliminary Hearing for Case Management purposes held on 8 December 2021, EJ Brown referred to ss. 109 & 110 EQA and the provisions regarding principals and agents. She observed that on the factual matrix of this case, R2 might be liable as agent for R1 (the principal): accordingly, the respondents may be joint and severally liable for any claims.
5. EJ Brown ordered that both respondents provide a response to the agency/principal issue by 14 January 2022. On 13 January 2022 (page 129) R1 accepted that R2 acted as its agent during the course the claimant's application for employment; R1 did not rely upon the reasonable steps to fence in respect of any act allegedly done by R2 and R1 denied that any act done by either respondent amounted to unlawful discrimination. On the same day, (page 130) R2 accepted that it acted as agent for R1 but disputed being part of any decision-making process internally at R1. Further R2 said it was not involved in drafting and was not a signatory to the employment contract between the claimant and R1. R2 denied any unlawful discrimination against the claimant.

The breach of contract claim

6. The claimant said that she had agreed to work for R1 on the basis that the job was “work from home”, but the day before her employment commenced she was told that she must attend the office. The claimant had objected to working from R1’s office in April 2021, at a time when Government advice was to work from home where possible. R1 then withdrew the offer of employment with immediate effect.
7. R1 said that the claimant had signed a contract stating that her normal place of work was at its headquarters. The claimant had refused to attend that office on her first day for an induction process: accordingly the offer of employment with was withdrawn. R1 said that the claimant had committed a repudiatory breach of contract by refusing a reasonable management instruction to attend the office on her first day of work to receive her laptop and the appropriate training in its use and company processes generally. The withdrawal was the acceptance of the claimant’s repudiatory breach. R1 denied that the claimant was owed one week’s notice as provided for in the employment contract.

The direct sex discrimination claim

8. The claimant alleged that the withdrawal of the offer was less favourable treatment which was because of her sex. She referred to Rajan Sharma (RS) as an actual comparator who had been allowed in his contract of employment to work from home 3 days a week. The claimant also referred to a hypothetical male comparator who was allowed to work from home for the duration of his employment. R1 said that RS was employed in a very different role to the claimant and was not an appropriate comparator.

Conduct of the Hearing

9. The Tribunal was presented with an agreed bundle of documents (264 pages) the claimant also added 4 pages of messages relating to R1 from a website which provided “reviews” of employers- which were added to the agreed bundle as pages 265-268. Page numbers in these reasons are references to

that agreed bundle unless otherwise specified. The Tribunal was also assisted by written submissions from Mr Green and Ms Platt.

The Respondents' Applications

10. Mr Green relied on the written submissions provided by R1 (pages 104-108). Mr Smith said he also relied on the submissions and had nothing to add (page 109).
11. As regards strike out, he relied on rule 37 (1) (a) of the Employment Tribunal rules 2013: he relied on the ground that the claimant's claims had no reasonable prospect of success. If this application was unsuccessful, he relied on rule 39 (1) whereby a Tribunal could make a deposit order where any specific allegation/argument had little reasonable prospect of success.
12. Mr Green acknowledged that as a general principle discrimination claim should not be struck out except in the very clearest of cases: **Anyanwu v South Bank Union [2001] UKHL 14**. However, he cited the case of **Ahir v British Airways [2017] EWCA Civ 1392,** in which he said the Court of Appeal had made clear that employment Tribunal's should not be deterred from striking out claims (including discrimination claims involving disputes of fact) if they were satisfied that there was no reasonable prospects of the facts necessary to establish liability, being proved.
13. He said the central facts were not in dispute: namely that having signed her contract of employment dated 9 April 2021 (pages 202-215) the claimant had refused on 14 April 2021 to attend the office on her first day (15 April) to collect her laptop and complete the induction process. R1 considered this a repudiatory breach of contract and withdrew the offer of employment. The claimant said this was a breach of contract.
14. Mr Green said the only real dispute of fact was R1's reason for taking this action. The claimant said this was because of her sex: this was denied by the respondents.
15. Mr Green said that both claims were fanciful and had no or little reasonable prospect of success.
16. Mr Green cited the offer letter (page 200) and the contract of employment both of which stated that the employment was based at R1's office: the claimant had signed both the offer letter and the contract. Mr Green also referred to the

remote interview in March 2021 with the claimant, RS and Mr Alistair Boyle. Mr Green referred to the claimant's Particulars of Claim (page 19) which he said by her own account, the claimant acknowledged that RS had told her that she would be in the office 1-3 days per week working with Mr Boyle.

17. However, Mr Green did not mention that the reference made by the claimant was to an email she had sent to R2 in which she recorded that fact but noted that she was not prepared to travel to the office as she had not yet been vaccinated. This does raise a dispute as to whether the claimant accepted that she was prepared to attend the office.
18. I noted Mr Green's references to the offer letter in the contract of employment. I asked whether these were the standard contractual terms for "normal times" or whether any consideration had been given to amending the contractual provisions bearing in mind the situation arising from the pandemic. Mr Green was unable to respond to this question. I suggested that this was exactly the sort of evidence that the Tribunal would want to hear at a final hearing.
19. As regards the sex discrimination claim, Mr Green said that there was no evidence to suggest that a man in the same circumstances the claimant would have been treated any differently. He noted that RS performed a very different role and was in fact the claimant's line manager.
20. I also noted that RS' contract of employment (pages 233-246) contained a variation of the "standard" clause 7 (Place of Work and Travel) included in the claimant and Mr Boyle's contracts. RS's contract stated that "it is agreed that you will work from home for a minimum of 3 days per week and subject to business requirements work from your normal place of work 1 to 2 days per week."
21. As pointed out by Ms Platt this suggested that R1 gave more favourable treatment to RS in that he was allowed to negotiate a "work from home" clause into his contract of employment where is this was not allowed for the claimant. R1 may well cite the fact that RS was in a different role to the claimant but this was a further matter for evidence at the final hearing.

<u>The Claimant's Response</u>

22. In her written submissions, Ms Platt clarified some of the nuances of the claimant's complaints. She noted that the claimant had not been legally

represented at the Case Management Preliminary Hearing on 8 December 2021.

23. Ms Platt noted that the allegation of less favourable treatment was that both respondents had repeatedly misinformed the claimant that the role was "work from home", whereas in fact R1's expectation was that the role was predominantly office-based. Both respondents also appeared to ignore the claimant's requirement to work from home, given her concerns about Covid and pressured her to attend the office on 15 April 2021 even after she had made it clear that she was not comfortable travelling to and working in an office without being vaccinated and whilst the Government guidelines were to "work from home" where possible.
24. There were several emails in the agreed bundle which supported the claimant's reference to wishing to work from home. The conversations concerning this were predominantly with R2 and it was unclear what R2 had told R1 about the claimant's concerns in this regard. This was another area of evidence which would have to be fully explored at a final hearing.
25. Ms Platt also noted that as well as relying on RS as an actual comparator, the claimant also relied on a hypothetical male comparators whose concerns would not have been ignored in the same or similar circumstances. Again, the claimant was unable to fully express the nuances of her claim at the previous Preliminary Hearing.
26. Ms Platt noted that the claimant also relied on a culture of toxic masculinity and misogyny evidenced by the anonymous reviews from former employees (pages 265-268). Mr Green challenged the validity of these documents as evidence of such a culture, given that they were posted online anonymously. However, I noted this was yet again another evidential issue which would benefit from being heard and tested before the Tribunal in a full hearing.
27. Ms Platt cited the established authorities concerning the high threshold for striking out a claim, especially a discrimination claim. (**Ezsias v North Glamorgan NHS Trust [207] EWCA Civ 330** and **Anyanwu**). She also noted that Tribunals must exercise particular care with litigants in person as they may present a poorly pleaded claim or response (through no fault of their own) which might cause their case to appear to have little or no reasonable prospect of success. The Tribunal should exercise real caution to ensure it is properly understood the case.

Conclusions

28. I gave my decision (with summary reasons) orally at the end of the preliminary hearing. Ms Platt asked for written reasons to be provided (as she was unsure whether the claimant would continue to be represented by her at subsequent hearings).

Strike Out Applications – refused

29. The respondent's application for strike out on the breach of contract claim is refused. During the course of submissions and discussion at the preliminary hearing it was evident that there was a clear factual dispute between the parties, in particular with regard to what the claimant told R2 concerning her wish to work from home during the pandemic and consequently what R2 told R1. The dispute turns on whether R1 can establish a repudiatory breach of the contract of employment by the claimant justifying her summary dismissal. In scrutinising the documents provided to the Tribunal there was also a question as to whether the claimant expressly refused to attend R1's office (page 223). The question also arose concerning whether the claimant's contract of employment was a "standard" contract for "normal" times with no variations or adjustments to consider the situation during a national pandemic/lockdown.
30. Given the clear factual disputes, it was desirable that they should be determined at a full merits hearing where each party's evidence could be given orally and tested in cross-examination.
31. The strike out application on the claimant's direct sex discrimination claim was also refused. The Tribunal was mindful of the high threshold set in the **Anwaynu** and **Ezsias** cases.
32. I noted Mr Green's submissions concerning **Ahir**: but that that case had very specific facts. In that case, the issue related to false representations made by the claimant in his CV which were clear grounds for dismissal. The claimant had said the respondent had sent anonymous letters to itself in order to trigger an investigation. Those very specific facts are not replicated in this case. I also accept that the claimant was not able at the Case Management discussion hearing with EJ Brown (when she was not legally represented) to fully express the nuances of her sex discrimination claim.

Deposit Order Applications – Refused

33. The applications for deposit orders on the breach of contract and the sex examination claims are refused. I find that there is sufficient conflict on the facts for it to be preferable for this to proceed to a full merits hearing. I heard no evidence from either side at the preliminary hearing; however, during the course of the hearing all three parties identified areas where it would have been useful to hear such evidence.
34. I also considered the case of **Tree v South Eastern Coastal Services**: which noted that there must be a "*proper basis for doubting the likelihood of a party being able to establish facts essential to their case*". There was no such basis established here: the Tribunal needs to hear the evidence in full. There is a core factual conflict which should be properly resolved at a full hearing where the evidence is heard and tested.

Final Hearing to be by video

35. The parties confirmed that full case management directions had already been given by EJ Brown in the Case Management Order of 8 December 2021, and that many of the directions had been complied with.
36. I discussed with the parties the method of the Final Hearing. Their preference was to have the Final Hearing using the video platform and it was not required to be in person. I note this accordingly in the Order.

D Henderson

Employment Judge

DATE: 2 March 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

.02/03/2022..

FOR THE TRIBUNAL OFFICE