**EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4100691/2017 Preliminary Hearing at Glasgow on 31 January 2018

Employment Judge: M A Macleod

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| Mrs Lisa Chalmers | Claimant<br>In Person |
| Airpoint Ltd | Respondents<br>Represented by<br>Mr D MacKinnon<br>Solicitor |
| Andrew Whyte | |
| David Hughes | |
| Katy Marshall | |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that the respondent's applications for strike out of parts of the claimant's claim, which failing a deposit order, are refused; and that the claimant's applications, for strike out of the respondent's response, which failing a deposit order, is also refused.

**REASONS**

1. In this case, the claimant complains that she has been unfairly dismissed and subjected to discrimination on the grounds of sex by the respondent. The case has a considerable procedural history, including two Preliminary Hearings before Employment Judge Peter Wallington QC and Employment Judge Laura Doherty, in June and October 2017 respectively.

2. A further PH was fixed to take place on 31 January 2018, in order to address the respondent's application dated 5 December 2017 for strike out of parts of the claimant's claim, which failing a deposit order against the claimant as a condition of continuing with her claim.

3. The claimant, similarly, submitted an application for strike out of the respondent's response, failing which a deposit order as a condition of being permitted to present their response, and this was to be determined at this hearing.

4. There is an urgency to this matter because the case has been listed for a full hearing on the merits, due to commence on 26 February 2018, and run for that and the 8 subsequent days laid down.

5. The claimant appeared on her own behalf, and the respondent was represented by Mr MacKinnon.

6. At the outset, Mr MacKinnon tendered an email dated 6 April 2017 between a representative of the respondent and an ACAS conciliator, and advised that he wished to rely upon it; while at the same time, paradoxically, he confirmed that the claimant had sought to present this email in the proposed bundle of documents to be relied upon at the forthcoming hearing on the merits, and that the respondent wished to object to this on the basis that it was privileged.

7. The claimant opposed the production of this email for two reasons: firstly that she had understood that no documents and no evidence would be

considered at this hearing, and that had she known that documents were to be allowed, she would have sought to produce a number of her own; and secondly, the respondent had not given 7 days' notice of their intention to produce the document.

8. I refused to permit the document to be lodged at this hearing. I was not persuaded that it would be in the interests of justice, nor consistent with the overriding objective of the Employment Tribunal, to allow the introduction of a document when no evidence would be heard about it. In addition, I raised the concern that if this document were to be permitted, others were likely to appear, and that would be likely to deflect the Tribunal from its primary focus in this hearing.

9. Mr MacKinnon then addressed me in support of his application. He referred me to a document, initially produced by him in a version attached to the email of 5 December in which he had made his application, setting out the respondent's responses to the claimant's claims, in the form of a table, and then produced by the claimant in a version which provided her responses to their comments. No such colour version of the document was available to me but the claimant helpfully submitted a spare copy of the one she had.

10. The colour version was important because at the end of the columns, some of the heads of claim were denoted by either orange or red shading to be the subject of the application for a deposit order (orange) or strike out (red).

11. Mr MacKinnon explained that he was not seeking strike out of all claims, nor a deposit order for each, but seeking to identify difficulties for the respondent in preparing for the hearing due to commence in February. He was concerned, he said, to ensure that the process which was being undergone assisted the Tribunal and the parties by focusing on the issues of dispute between them. The claims which have been brought are unspecified, weak or repetitive. He chose to proceed by way of example. The first example he gave was at paragraph 1 under Direct Discrimination, the claimant complains that she was excluded from the respondent's Christmas party. He criticised the claimant's emotive use of language -

"excluded" - when she was invited to the party in the same way as all staff, but found that it was on a date when she had a competing personal social engagement, and therefore declined the invitation. A number of arrangements had been made with England-based staff to travel and stay in Glasgow, and the respondent's position was simply that there is no reasonable prospect that unknowingly fixing a party on a date which did not suit the claimant and not agreeing to move it at her request could possibly amount to discrimination on the grounds of sex.

12. In addition the claimant has identified a comparator which is not correct. She has compared herself to a male colleague who went to the party, but this is wholly wrong. She should be comparing herself to a colleague who also suffered from a clash of dates but for whom the party was moved. There is therefore no real comparator, and any hypothetical comparator has not been identified.

13. With regard to the indirect discrimination claim, the claimant has, he submitted, simply failed to identify a PCP upon which she can properly rely.

14. The harassment claim, he said, is one which is sufficiently defined as to require ventilation before the Tribunal, primarily in order to resolve factual disputes between the parties.

15. The victimisation claim, however, the respondent seeks to be struck out. In short, the party was scheduled on 2 December to take place on 13 December. On 6 or 7 December, the claimant requested that the party be shifted and that was declined. On 13 December she complained to the second respondent. There is a dispute as to whether that amounted to a protected act, but what is certain, he said, was that anything that happens before the protected act cannot amount to victimisation.

16. So far as the constructive dismissal claim is concerned, Mr MacKinnon observed that there are 40 separate points which are identified by the claimant under this heading, but there is little coherence of thought and presentation. The claim seems to be a last straw claim but it is not clear whether each of the acts set out by the claimant under this heading are

intended to be shown to be fundamental breaches of contract of themselves, each justifying resignation on the part of the claimant. There are inconsistencies - for example, the claimant seems to argue at one point that the respondent completely failed to investigate complaints, and then at another point that they failed to investigate the complaints appropriately or adequately.

17. All of this, he said, creates difficulty for the respondent in seeking to prepare for and present a defence to the claim of constructive dismissal. He is very concerned that the claimant intends to go through each of these 80 points (40 under discrimination and 40 under constructive dismissal) in exhaustive detail, making it very difficult for the respondent to defend itself.

18. The claimant then sought to respond to Mr MacKinnon's submissions. On the point of the constructive dismissal claim, I asked the claimant to confirm precisely what she intended by submitting her 40 points under that heading. She explained that she regards this as a "last straw" case. That was the phrase she used in her letter of resignation. The outcome of the grievance process, when she received it, was the cause in time of her presenting her resignation.

19. However, she sought to argue that the events leading up to that final straw, the vast majority of which took place in the two or so weeks before her resignation, were each fundamental breaches of contract justifying her resignation. Accordingly, she wished to preserve that position for the hearing.

20. Mr MacKinnon noted what had been said but it was clear the respondent remains concerned about the hearing and its course.

21. With regard to the remainder of her response to the submissions made by Mr MacKinnon, the claimant asserted that the respondent's solicitor had "factually altered" her claims, to the extent that he had "fabricated" them.

22. She then argued that the respondent has failed to provide any reasons for strike out or a deposit order, but has merely identified the areas where he is

seeking each by use of colours. The test is a high one and the respondent's submission fails to meet it.

23. With regard to the direct discrimination claim, the claimant disputed that the facts were in any way agreed. She asserted that the party was deliberately held when all of the female staff were unable to attend, but all the male staff could. It is also not true to say that hotel bookings had already been made and paid for. The respondent's response is "spurious".

24. She argued that disagreement about the comparator or the appropriate comparator is not grounds for strike out of the claim. The respondent has erred about the appropriate comparator and evidence needs to be led about this. She submitted that a comparator is not required by the Equality Act, but here there was a "double coincidental impact", that is, none of the females benefited but all of the males did.

25. She submitted that her PCP in the indirect discrimination case was the provision to fix the date of the party and refuse to alter it.

26. The respondent, she said, may argue that this does not amount to a PCP but do so at the full hearing.

27. With regard to the victimisation claim, the protected conversation took place after the arrangements, and the claimant submitted that there are disputed facts about what was said and when. She did not accept that the victimisation took place before the protected act, and submitted that the matter should go forward to a hearing on the merits.

28. The claimant then advanced her submission in support of her application for strike out of the respondent's response, or part of it, or a deposit order in the alternative.

29. She submitted that the respondent's responses have little reasonable prospect of success as they simply amount to bare denials of her assertions. She then moved on to refer to the alterations to her claims which the respondent had made In the response document previously referred to. She said that she was very surprised when she received this

document to find that her claims had been altered. She thought that she was allowed to make her claim, and that it would not be up for debate, but she said that more than 25 of her claims have been altered by the respondent.

30. She alleged that the “real purpose" behind this process was to alter and weaken the claim as presented to the Tribunal, and to "fool” the Tribunal into looking only at that document, and not at the original claims made. It is a diversionary tactic to enable them to benefit. Mr MacKinnon is an officer of the court and yet seeks to benefit from this tactic.

31. The respondent, she said, has had considerable leeway following 2 Preliminary Hearings, and yet she still does not know the nature of the defence being tendered by them. She has made a claim that she was ostracised, and had thought that the pleadings would be considered today alongside the documents already prepared for the hearing, but what she asserted was that the respondent cannot possibly defend this claim on the facts.

32. In the course of the respondent’s response, they have said that something was more than 3 months out of time when in fact it was not. It was simply arithmetically wrong.

33. The claimant repeated that she has no idea what the defence will be. There is no evidence in the final bundle which will enable them to defend their claims. That is because, she said, she did not believe that there was any such evidence.

34. She referred to some case law supporting her submissions that it is critical that a party knows the case they have to meet.

35. Mr MacKinnon replied to this application, and then responded to the claimant’s response to his application.

36. He objected to the claimant’s spurious application for strike out of the response. The claimant has, he said, 13 closely typed pages of defences in

front of her, and therefore the respondent is at a loss to know why she does not understand what the defence is.

37. For example, the claim that she was ostracised is met with a bare denial. The reason for this is that the respondent says it did not happen. It cannot say any more than that to prove a negative. The claimant knows that the respondent denies this factually, and the evidence will therefore be required in order to determine whether she or they are correct. It is for the claimant to bring evidence to support her allegation that these events took place.

38. The strike out application has no substance to it at all, said Mr MacKinnon. The respondent has sought to summarise the claimant's claim, and he submitted that this has been done in a way to reflect the claims made. The language used is not necessarily identical but it was done simply to clarify and assist the Tribunal in dealing with the claims.

39. Any alteration of the wording is minor and insignificant. The claimant's language and behaviour throughout the Tribunal process has been unhelpful. Her approach to these matters is not reasonable.

40. With regard to the claimant's responses to the respondent's application, Mr MacKinnon reiterated that there is no significant factual dispute in the victimisation claim. He accepted that the issue of whether the claimant has properly addressed the PCP will be addressed at some point, and that that point may appropriately be the submissions at the conclusion of the hearing on the merits.

**Discussion and Decision**

41. As both parties acknowledged, an application for strike out on the basis that the claim, or the response, has no reasonable prospects of success, has a high bar to pass before it can succeed.

42. Dealing firstly with the respondent's application, Mr MacKinnon, entirely reasonably, in my view, did not seek to have the entirety of the claimant's claim struck out, and in discussion during the course of the PH acknowledged that it would be highly unusual for the Tribunal to take such a

draconian sanction without hearing any evidence, especially in a claim involving allegations of discrimination.

43. Indeed, it is difficult to find that Mr MacKinnon was advancing a strike out application with great force, in the end. However, the application is before me and therefore requires to be considered carefully.

44. In my judgment, it is quite clear that the respondent's primary concern here is to ensure that when the hearing begins, they understand the scope and nature of the claimant's claims. That is a fair concern, and in a case such as this, with an unrepresented claimant, they wish to do as much as possible to avoid facing unexpected allegations or allegations which come in an unclear form.

45. However, it would be quite disproportionate, and contrary to the interests of justice, to prevent the claimant's claims being allowed to proceed to a hearing on the merits because of such a concern alone. The claimant has, in fairness, sought to identify as clearly and in as much detail as possible, the facts which she wishes to prove in order to support her assertions of constructive dismissal and sex discrimination. That she may have done so in a way which is repetitive, or not particularly strong, does not mean that her claims have no reasonable prospects of success.

46. The overriding objective of the Employment Tribunal is to hear cases justly, including, so far as possible, placing the parties on an equal footing. In this case, an unrepresented claimant has, with the urging of two separate Preliminary Hearings, sought to define as precisely as possible the claims that she is making.

47. It is clear that there are outstanding factual disputes between the parties. This is a very contentious matter. Indeed, it is clear that there is a fairly substantial dispute between them as to whether or not there are certain factual disputes ongoing. Mr MacKinnon suggested several times that the facts were agreed (about the exclusion from the Christmas party), whereas the claimant insisted that they were not.

48. In these circumstances, it would, in my judgment, be quite premature and unjust to exclude any of the claimant's claims of discrimination from the hearing on the merits to come in February. It is not at all clear whether any saving of time would be represented by the exclusion of certain allegations, and in any event many of the facts pled fall under both discrimination and constructive dismissal claims.

49. I made it clear at the hearing that it is my decision that the claim of constructive dismissal is one which is permeated by a factual disputes, and which therefore cannot be resolved without recourse to evidence from both parties at the merits hearing.

50. In light of that finding, and my conclusion that the discrimination claims must not be excluded at this stage without evidence having been heard, I refuse the respondent's application for strike out of those claims identified by them as suitable for strike out. This is not a case in which such a draconian sanction is justified.

51. It is clear that there are a number of live issues about whether or not the claimant's claim will succeed at hearing, especially given the arguments I have heard about the appropriateness of the comparators or the claimant's alleged failure to identify a suitable PCP, but these are matters which cannot be detached from all of the other claims being advanced and which should therefore be addressed at the stage of submissions following the conclusion of the evidence.

52. I am not persuaded that the circumstances in which these claims have been raised, nor the terms of the claims themselves, are such that a deposit order is justified. It is plain that the hearing would proceed in any event, and in my judgment, no purpose is served by imposing a sanction on the claimant which is not in any event justified. I do not consider that it can clearly be said, at this stage, that there is little reasonable prospect of success that the claimant's claims will succeed, and accordingly I refuse the respondent's application for a deposit order as a condition to allow the claimant to continue with her claims.

53. So far as the claimant's application is concerned, she made a number of points in support of that application.

54. The claimant asserted more than once that the respondent's solicitor had deliberately sought to "fool" the Tribunal by altering the terms of the claim in such a way as to weaken it. The purpose of this hearing was not to decide whether or not the respondent's solicitor was guilty of fabrication, as the claimant alleged, though in fairness I saw no basis for such an assertion. The difficulty here is the contentious nature of these proceedings. The claimant appears to have reached a point where she considers that the actions of the respondent and their representative cannot be taken at face value. As she observed, Mr MacKinnon is an officer of the court. In my judgment, the respondent has simply attempted to provide a concise summary of the claimant's claims in order to assist all parties. It is not an unusual step to take, and I am prepared to accept that it was done with the intention of assisting all parties, and the Tribunal.

55. However, the claimant may rest assured that the Tribunal will concentrate, fundamentally, upon her claim, and what she relies upon as her claim, and her position on this is quite clear. She is clearly an articulate and intelligent individual, and is already alive to the possibility that her claims may not be represented in the summary document as she would wish. The Tribunal will hear from her in the hearing on the merits and will expect her to make clear the basis upon which she makes her claim, and will allow her the opportunity to do so in her own words. As a result, if the respondent has not summarised her words quite accurately, it is open to her to make that clear and to allow the Tribunal to judge her claim, and not the respondent's summary of it.

56. Leaving that aside, the claimant's application for strike out appears to rely on the fact that much of what she alleges has simply been denied. In my judgment, that does not justify strike out of the response. The respondent denies much of the claimant's factual basis of claim, and therefore it will be necessary for the Tribunal to hear the evidence in support of that basis of claim, and to determine whether or not it accepts the claimant's averments

or the respondent's denial. It would therefore be quite premature and unjust to prevent the respondent from having the opportunity to present its defence to the Tribunal, and the claimant's application for strike out is therefore refused.

57. Finally, the claimant suggested that a deposit order should be granted on the basis that the respondent's response has little reasonable prospects of success. In my judgment the submissions before me provide the Tribunal with no basis at all for such a finding, and again it is not in the interests of justice for such an application to be granted.

58. The claim and defence will therefore be permitted to proceed in full.

59. One final point arises. I made clear to the parties that 9 days having been allocated to this hearing, I expected that the hearing would not exceed that diet. A significant allocation of Tribunal time has been given to the parties in this case, and it is expected that they will make reasonable efforts to ensure that the time allocated is adequate to address all of the evidence and issues before the Tribunal.

Employment Judge: Murdo Macleod
Date of Judgment: 31 January 2018
Entered in register: 02 February 2018
and copied to parties