EMPLOYMENT TRIBUNALS

Claimant: Ms M Milewska

First Respondent: DS Smith Packaging Limited

Second Respondent: Abstract Recruitment Limited

HELD AT: Norwich (Via CVP) **ON:** 28th February 2023

BEFORE: Employment Judge Anderson (sitting alone)

REPRESENTATION:

Claimant: In Person

First Respondent: Mr Lassey (Counsel)

Second Respondent: Mr Potter (Director)

PRELIMINARY HEARING JUDGMENT

1. The applications by the First and Second Respondents for strike out and/or deposit orders is refused.

REASONS

Introduction

1. This matter came before me today by way of a Public Preliminary Hearing.

2. The Claimant claims that she has been automatically unfairly dismissed and subjected to pregnancy discrimination as prohibited by s.18 Equality Act 2010.

3. I was provided with a joint list of issues for the purpose of the Preliminary Hearing.

4. To summarise, the Claimant complains against both Respondents under s.18 Equality Act in respect of the ending of her assignment with the First Respondent.

5. The Claimant further claims against the Second Respondent that she was an employee and automatically unfairly dismissed for the purposes of s.99 Employment Rights Act 1996 and/or discriminated against for the purposes of s.18 Equality Act 2010 in the termination of her contract as an agency worker (i.e. the ending of her relationship with the Second Respondent, irrespective of what happened with her assignment with the First Respondent).

Procedural Points

6. At the outset of the hearing, considerable time was spent ascertaining the exact nature of the hearing and the procedure to be adopted.

7. On the 8th November, a Preliminary Hearing (Case Management) was held by telephone. All parties completed agendas for that hearing. The Second Respondent did not attend that hearing.

8. My starting point is the Case Management Order of the hearing on the 8th November. Paragraph 14 states:

   "The 1st Respondent requested a further Preliminary Hearing to consider its application for strike-out or a deposit order. This was on the basis that it believes it was documentary evidence to show that the decision to dismiss was made before the Claimant notified either of the Respondents of her pregnancy."

9. Directions were given in respect of disclosure and witness statements.

10. In the Preliminary discussions at the outset, it became apparent that there was no such documentary evidence. Rather, the Respondent sought to rely upon witness evidence in order to establish its lack of knowledge.

11. I viewed this seriously. A fair reading of the case management order is that the phrase 'documentary evidence' was a key element in persuading the Judge to list this matter. Preliminary hearings are not listed as a matter of course. The listing of such hearings is a judicial decision. Many Respondents faced with a discrimination claim will at the case management stage will assert that the evidence will show that the claim will not succeed. It does not

follow that a hearing is granted. Hence why the phrase 'documentary evidence' is explicitly referenced at para 14.

12. Furthermore, at no time since, has the record been corrected.

13. The First Respondent was clear that it pursued the applications in respect of strike out and deposit and wished to call witness evidence in support of those applications. This was the First Respondent's application to make and this was not a paper exercise.

14. In terms of what application was being made in respect of what, I permitted the hearing to proceed on the basis that both Respondents were making applications for strike out and/or deposit. The applications related solely to the issue of either Respondents knowledge of the Claimant's pregnancy. I was satisfied that this had been raised in both Respondent's agendas for the previous preliminary hearing and that the ambiguity in the wording of the order as to whether it was one or both Respondents making the application should be resolved in favour of the allowing the Second Respondent to make its application alongside the First Respondent.

Facts Relied upon in Respect of the Application

15. The First Respondent called Mr Benjamin and Mr Sartain.

16. The Second Respondent called Mr Potter. I would note that in respect of the Second Respondent, Mr Potter was not a direct witness of fact in respect of conversations with the Claimant (or possibly the First Respondent) regarding the ending of her assignment with the First Respondent or what happened after that.

17. I permitted the Claimant to give oral evidence, notwithstanding the fact that a witness statement had not been provided. It was a discrete point, her error, whilst unacceptable, was common and it would be overly prejudicial to allow a strike out application to be based on only one side calling witnesses.

18. The evidence of the First Respondent was that a decision was taken to end the Claimant's engagement with the First Respondent at an internal meeting on the 24th May when a review of staff was carried out. The Claimant continued to work on the assignment and that she informed Mr Benjamin of her pregnancy on the 1st June. Following that information being provided, a decision was then taken that the 1st June would be the Claimant's last shift. This was communicated to the Claimant whilst she was travelling to her shift the following day.

19. The witness statement of Mr Potter from the Second Respondent was brief on the point. It is far from clear as to what he was a direct witness of, as opposed to giving hearsay or opinion evidence. He refers to a contact on the 26th May

making 'us aware' of performance issues. Indeed, the witness statement of Mr Benjamin suggests that any contact was with Aneta and not Mr Potter. At paragraph 4 there is a reference to ending the Claimant's assignment.

20. The evidence of the First and Second Respondents witnesses were potentially corroborative of each other, but it is fair to say that these were not accounts that were bound to be accepted or totally corroborative. I formed the view that these were accounts that needed to be subjected to the proper scrutiny of a properly constituted full hearing.

21. I viewed the Claimant's evidence as relatively straightforward, but it was subjected to only limited scrutiny given the nature of the hearing.

The Law

22. Rule 37 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that:

> *"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a 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…"*

23. There are repeated authorities, following the House of Lords in Anyanwu v South Bank Students Union and South Bank University [2001] IRLR 305 that strike out is not normally appropriate where there are substantial disputes of fact, most notably in fact-sensitive discrimination claims.

24. In only the clearest cases should a discrimination claim be struck out: Mechkarov v Citibank NA [2016] ICR 1211.

25. Rule 39 contains the power to make a deposit order. This provides:

> *"(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.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

26. The purpose of a deposit order is to identify at an early stage, claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails c.f.: *Hemdan v Ishmail and Another [2017] ICR 486*
27. In *Ahir v British Airways Plc [2017] EWCA Civ 1392* Underhill LJ noted:

> *"16. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'. ...*
>
> *[However,] Where there is on the face of it a straightforward and well-documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that the explanation is not the true explanation for what happened without the claimant being able to advance some cogent basis for that being so."*

Conclusions

28. I declined to strike out the Claimant's claims. In this case, knowledge of the Claimant's pregnancy can easily be said to be a 'trial issue'. I do not accept that a Tribunal hearing this issue will be bound to find that the First and Second Respondent were unaware of the Claimant's pregnancy. It is a matter of genuine dispute. For the purposes of strike out, the Claimant's claims should be taken at their highest.

29. The First Respondents somewhat bold submission was that the Claimant could not discharge the first stage of the burden of proof contained within s.136 of the Equality Act 2010. I do not accept this submission.

30. The height of the Claimant's claim is that she informed the First Respondent of her pregnancy and the next day received a telephone call whilst going into work indicating that her assignment had been ended. These facts don't appear to be disputed. Before anything else is looked at, those are primary facts from which an inference of discrimination can be drawn. The proximity of the information being provided to the end of the assignment is a fact from which an inference of discrimination could be drawn.

31. Under s.136(2) It will then be for the Respondent to prove that it has not discriminated against the Claimant. Alleging that it held an undocumented meeting in the absence of the Claimant in which a decision was taken but not communicated does not automatically discharge that burden or render the Claimant's case as inherently implausible. Furthermore, even on the Respondents own evidence, a specific decision to stop the Claimant attending

further shifts was only taken after it was notified of the Claimant's pregnancy. It is plainly an issue for a full hearing.

32. I declined to order a deposit order in respect of any of the Claimant's claims. I accept that there is wider latitude to take into account facts and potentially disputed facts than there would otherwise be on strike out, but in my Judgment, this is a classic example of a case that should be heard on its merits and that careful findings of fact must be made. It is possible (and not fanciful) that some or all of the findings of fact fall in favour of the Claimant. It is also possible that the opposite happens in favour of the Respondent.

33. This case is not proceeding on the basis of a mere assertion that the explanation is not the true explanation (c.f. Ahir v BA [2017] EWCA Civ 1392). In particular, I would note that there are a number of points which mean that it cannot be said that the claims have 'little reasonable prospects of success'. These include:

    a. The proximity of the Claimant providing the information of her pregnancy to the ending of her assignment.
    b. The First Respondents decision making process in which it is said that there is an earlier undocumented decision on the 24th May but that the decision as to when the Claimant's last shift would be is taken only after she informs the First Respondent of her pregnancy.
    c. The absence of documentary evidence from the First and Second Respondents relating to the contentions now relied upon prior to being informed of the Claimant's pregnancy. This includes both primary documentary evidence but also secondary, more circumstantial evidence. It is important to note that orders in respect of disclosure had been made for the purposes of todays hearing (paras 19-22) and therefore the totality of the disclosure on the point should have been before me. These are points from which inferences of discrimination could potentially be drawn.
    d. The lack of consistency in the Respondents case. The fact that the Preliminary Hearing was told of documentary evidence that it now accepts does not exist.
    e. The email from Mr Benjamin after the event is capable of being read in more than one way. The First Respondent relies on it to rebut the allegation of discrimination. A different reading of it could be seen as a somewhat defensive after the event justification. The correspondence leading to that email from the Second Respondent is not clearly supportive of the First Respondents case in that it does not set out or refer to events in the way that the First Respondent then does. There may be an explanation for that, but it requires scrutiny. On any analysis, it is a matter for the fact finding Tribunal.
    f. Further, the email from Mr Benjamin (at page 93) opens up further questions relating to the potential for the Claimant to continue to be engaged by the First Respondent and that not succeeding. This requires scrutiny in terms of being relevant evidence for the s.18 claim

but also any arguments as to how the Claimant's assignment is defined for the purposes of understanding that s.18 claim.

34. In respect of the Second Respondent only, there is a further point. That is to say that there is a claim (paras 2 and 8 of the list of issues) relating to the ending of the Claimants engagement with the Second Respondent. Mr Potter was not a direct witness on this point. Given the emails in the bundle, the Second Respondent was aware of the Claimants pregnancy at this point. Mr Potter did ask the Claimant some questions on this point. It is fair to say that those questions made matters less clear. Findings of fact will need to be made on what work was available, what work was offered to the Claimant and what discussions were had regarding the Claimant's appointments for ante-natal care. The issue of the Claimant's time off for pregnancy related medical appointments was touched on in the evidence and this could form part of the s.18 claim. The circumstances in which the Claimant's employment/ contractual relationship with the Second Respondent ended is a question of open fact. For the sake of completeness, because it is clear that the Second Respondent did have knowledge at this point and the application for a strike out/deposit related to the issue of knowledge. I note for the avoidance of any doubt, that I do not order strike out and/or deposit in relation to this claim either.

35. Case Management Orders to progress this matter to a full hearing have been provided separately.

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Employment Judge Anderson

Date 28th February 2023

REASONS SENT TO THE PARTIES ON

4th March 2023

GDJ

FOR THE TRIBUNAL OFFICE