



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107050/2023

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Held in Glasgow via Cloud Video Platform (CVP) on 27 March 2024

Employment Judge Campbell

Ms J Paterson

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**Claimant
Represented by:
Mr R Mullan - Lay
Representative**

Caledonian Marts Limited

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**Respondent
Represented by:
Mr D Smith -
Counsel**

DECISION FOLLOWING PRELIMINARY HEARING

1. The claimant's application to amend her case to include complaints of pregnancy and/or maternity discrimination occurring on 28 June 2022 and 5 July 2022 is granted;
2. The claimant's application to amend her case to include a claim of constructive unfair dismissal is refused.

DISCUSSION AND REASONS

1. An open preliminary hearing took place today to decide the claimant's application to amend her claim. Mr Mullan is the claimant's partner and represented her. Mr Smith represented the respondent.
2. When initially raised, the claim included complaints of pregnancy and maternity discrimination under section 18 of the Equality Act 2010. The claimant had also ticked the box to indicate she wished to claim sex discrimination.
3. At a case management preliminary hearing on 19 January 2024 two things in particular were discussed which have a bearing on today's hearing:

- a. The judge noted that there appeared to be allegations which could be used to support a claim of constructive unfair dismissal, but no such claim was made; and
 - b. Some of the complaints made by the claimant dated to within her protected period under section 18, and therefore could be pregnancy/maternity claims, and others came after, and could only therefore be acts of sex discrimination. It was clarified that the claimant was alleging direct sex discrimination under section 13 of the Act, and she was ordered to provide further particulars of her claim generally, and the details of her comparator for any section 13 complaint in particular.
 - c. The claimant was also asked to confirm within 14 days of receipt of the judge's note whether she wished to apply to amend her case to include a constructive dismissal complaint.
4. On 12 February 2024 Mr Mullan sent a letter to the tribunal and the respondent's solicitors in response to the judge's orders. It was sent within the 14-day period permitted. The letter firstly confirmed that the claimant wished to add a constructive dismissal complaint to her case by amendment, and it also gave further particulars of the complaints under sections 13 and 18 by way of a list of 20 bullet points, detailing events between 28 June 2022 and 6 July 2023. It did not seek to clarify which complaints were made under which section, or nominate any comparators.
 5. At today's hearing Mr Smith submitted that, although not specifically recognised at the case management hearing on 19 January, for the claimant's two earliest complaints in her list to be heard she would need to amend her case, because her claim form stated that discrimination had occurred from 1 August 2022 onwards, and those two events were earlier.
 6. I therefore heard the parties' comments in relation to any amendment to the claim which would be required to include those complaints. Mr Mullan submitted that all of the complaints are closely related, particularly as they involve similar conduct by the same person (Mr Shearman, now the Managing

Director of the respondent). He also said that when preparing the list of complaints as ordered by the judge in January, the claimant gave him access to a diary that she had kept, but which he had not seen at the time of filling in the claim form. Finally, he mentioned that the claimant was not in a good state of mental health at the time when he prepared the claim form, and may not have read its contents as closely as would have been ideal. Mr Smith highlighted that the complaints would be out of time now as new claims, and that there would be prejudice to the respondent in terms of the delay, and the time and cost required to respond to the additional allegations.

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10 7. Turning to the claimant's application to amend in respect of constructive dismissal, Mr Mullan said that he appreciated what the judge had said about such a claim at the preliminary hearing, and that he had already been thinking that the claim may be of that type before then – likely to be in December, following the conclusion of the claimant's grievance and when preparing for the preliminary hearing. However, it was only after that hearing that he sought some advice and that the claimant decided she wished to make that type of claim. The claimant did not have the benefit of legal advice at an earlier stage, but Mr Mullan spoke with ACAS following the claimant's resignation. Based on what he referred to as their advice, although more likely they would have discussed the situation in more neutral terms, he drafted the claim as one of pregnancy and maternity discrimination.

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25 8. Mr Smith opposed any amendment. He emphasised in particular that when considering an amendment application, particular attention must be given to whether the new claim would be out of time, and if it would be, whether any test is satisfied to allow it to be heard despite that. He added that in this case, Mr Mullan had not shown (i) that it was not reasonably practicable for the complaint to have been raised in time (i.e. as part of the claim form originally submitted) or (ii) that in any event, the application for amendment had been made as soon as possible after it was recognised that the claim could be made. He again stressed that this would represent a new case with additional facts and evidence, which would take more hearing time to decide, all to the respondent's prejudice.

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9. After a short adjournment I confirmed my decision in relation to both parts of the amendment application.

10. I was content to allow the amendment of the existing section 18 case. This was a relatively minor amendment to the main body of the complaint which had been raised on time. It consisted of adding two events to the beginning of a sequence which will already have to be considered by the tribunal at a future full hearing. On the face of it they are competent complaints. I bore in mind that although the complaints would individually be out of time, a tribunal can allow late complaints of discrimination to go forward to a full hearing if it believes it is just and equitable to do so. Further, it may be that if they are proven along with some of the later complaints, a continuous course of conduct is established which would bring them within time. It would add little time and extra work for the parties or the tribunal. It would not appear to require the involvement of an additional witnesses, or any great volume of documents for the tribunal to review.

11. However, I did not consider myself able to allow the amendment of the claim to allow a complaint of constructive unfair dismissal. I considered the most relevant factors to be:

a. The test of whether any complaint of unfair dismissal should be accepted late is that firstly it was not reasonably practicable for it to have been raised on time, and secondly that the claimant raised it within such further time that is reasonable. The onus is on a claimant seeking to have the complaint accepted that both of those aspects applied;

b. The claim, if accepted, would be almost five months out of time;

c. The fact that the claimant was pursuing a grievance after the end of her employment does not in itself excuse the failure to submit a claim on time, and indeed the section 13/18 claim was submitted on time;

d. The claim form has a box specifically asking whether a claim of unfair dismissal, '(including constructive dismissal)' is being raised. That

should have acted as a prompt given that the claimant felt from the outset that she had been forced to resign. Mr Mullan already had a good grasp of the facts and allegations that the claimant wanted to put forward;

5 e. Mr Mullan admitted that following conclusion of the claimant's grievance in December 2023 he had been thinking about whether the circumstances amounted to constructive dismissal before the preliminary hearing. He could have made an application before or even at the preliminary hearing;

10 f. The claimant already has a validly presented claim largely overlapping with her proposed constructive dismissal complaint, and so will not be left entirely without a cause of action if the amendment is refused.

12. The claim will therefore proceed to a full hearing on the basis of the section 13 and 18 complaints alone.

15 **CASE MANAGEMENT PRELIMINARY HEARING**

13. Following conclusion of the open preliminary hearing, the parties agreed that it was desirable to discuss the management of the claim so that further time would not be lost. A closed case-management hearing therefore took place as recorded below.

20 **CASE MANAGEMENT ORDERS**

1. No later than 11 April 2024:

a. The claimant will prepare a schedule of loss and send it to the respondent and the tribunal; and

25 b. the respondent may amend the grounds of resistance to the claim to state a defence to the complaints as they are now presented, and will send a copy to the claimant and the tribunal.

2. No later than 28 May 2024 the parties shall each send to the other copies of all documents they wish to rely on at the full hearing of the claim.

3. No later than 17 June 2024 the respondent will prepare an indexed joint hearing bundle and provide a copy to the claimant.
4. No later than 1 July 2024 the parties shall each send to the other, for each witness they intend to call at the hearing (including the claimant), a witness statement covering that person's evidence in the case.
5. The parties will co-operate to ensure that the following are sent to the tribunal no later than 12 July 2024:
 - a. An electronic copy of the joint hearing bundle with index;
 - b. A copy of each witness statement;
 - 10 c. An agreed list of issues;
 - d. A provisional hearing timetable; and
 - e. If required by the claimant, an updated schedule of loss.

The parties may be asked to provide one or more hard copies of the bundle, but are not ordered to do so at this stage.

- 15 6. The full hearing of the claim will take place on 18, 19, 22, 25 and 26 July 2024 inclusive, by video. A notice of hearing with further details will be separately issued.

NOTE OF CASE MANAGEMENT HEARING

Introduction

- 20 1. This claim has been brought by a former employee of the respondent, which is a business acting as auctioneers of livestock in Stirling. It appears agreed that the claimant resigned from her position on 7 July 2023, and that this was around the end of her period of combined ordinary and additional maternity leave.

The complaints

2. The claimant brings complaints of sex discrimination and pregnancy/maternity discrimination under sections 13 and 18 respectively of the Equality Act 2010. At a case management hearing on 19 January 2024 it was explained that any
5 complaints relating to her pregnancy or maternity which arose during her protected period (i.e maternity leave or before, when she was pregnant) can and must be brought as a section 18 complaint, whereas complaints arising after the end of her protected period cannot be brought under that section, and so must be framed as section 13 complaints. (The law changed on 1
10 January 2024 so that complaints relating to pregnancy or maternity arising after the end of the protected period could be brought under section 18, but the rule-change did not apply retrospectively to events before that date and so does not affect the claimant's case.)
3. As a result of dealing with the claimant's amendment application today, the
15 claimant's list of complaints can be found in Mr Mullan's bullet-point list of further and better particulars in his letter dated 12 February 2024 to the tribunal. There are 20 complaints listed, the majority of which have a date attributed to them. The last two do not – the exact date of the second-last event is not known (but will presumably be known by the respondent in any
20 event) and the last is something said to have happened throughout the whole protected period.
4. The claimant's protected period ran from 1 July 2022 to 30 June 2023, which again the parties appear to agree. In that case, the complaints set out in points
25 1 to 15, 19 and 20 all fell within the protected period and are brought under section 18. The complaints within points 16 to 18 (all being in July 2023) fell after that, and are complaints of direct sex discrimination under section 13. As explained, those complaints require the claimant to identify a comparator. The claimant chooses a hypothetical male comparator. That person should be in circumstances not materially different from the claimant (save the
30 protected characteristic of sex being relied on) and so the proper comparator would be a male employee who had been absent from the respondent's business for an equivalent period to the protected period.

5. As a point of clarification, Mr Mullan explained that the relevance of point 17 dated 5 July 2023 was that Mr Shearman only made one attempt to contact the claimant to discuss her return to work, which was inadequate, and that he would have made more effort to speak to a comparator.

5 **Case management steps**

6. As there has been some amendment and clarification of the claimant's case, the respondent was allowed 14 days to amend its response form to reply to the complaints as they are now expressed.
7. Mr Mullan is aware of the nature and purpose of a schedule of loss. Extensive guidance can be found online if needed. He will prepare one and send it to the respondent's solicitors and the tribunal within the same 14-day period, as ordered above.
8. There was discussion about a hearing. Both parties are keen to progress to a full hearing. For different reasons the parties wished that to be by video. Mr Mullan believed that the claimant's current state of mental health would make it very difficult for her to attend a hearing in person. A video hearing would suit the respondent for logistical reasons. It was therefore agreed that the hearing would proceed in this way. The parties must ensure that they and their witnesses have adequate equipment and a suitably quiet and private place to use when taking part.
9. In relation to witness evidence, both parties requested that evidence in chief be given by way of written witness statements. Again, on the claimant's part, this would help her give her evidence in a less intimidating way, although Mr Mullan appreciates that she would still be asked questions by a representative of the respondent in cross-examination, and possible the tribunal also. Mr Smith was also in favour of using statements. Considering the Practice Direction and Presidential Guidance on the subject, there appeared to be good reasons to depart from the default approach of giving evidence in chief orally, namely putting the claimant on an even footing with the respondent by best ensuring she can provide her evidence effectively. That would be achieved by allowing her to prepare her evidence in advance, and the likely

shortening of the hearing which would result. As both parties were in favour of this approach it was agreed.

10. The parties' attention is drawn to the Practice Direction and Presidential Guidance on the use of written witness statements in Scottish employment tribunals – both can be found via the following link:
5 <https://www.judiciary.uk/guidance-and-resources/practice-direction-and-presidential-guidance-in-connection-with-the-use-of-witness-statements-in-employment-tribunal-cases-to-be-heard-in-scotland/>. They contain important details about how statements should be drafted, formatted and signed off.
- 10 11. The claimant will give evidence herself and will call two further witnesses – her father and another employee named Darren Armitage. Both are said to be witnesses to some of the events complained of. The respondent will call three witnesses, Mr Shearman the Managing Director, Mr North and Mr Gilvea. They are all known to Mr Mullan and the claimant. For the avoidance
15 of doubt, each party will need to prepare a witness statement for each witness on their side of the case. Mr Mullan will therefore need to prepare a statement for the claimant's two witnesses as well as the claimant herself.
12. Given the above, it was agreed to allocate five hearing days. In doing so it was noted that the claimant may require additional breaks or shorter sessions
20 of evidence. Taking this into account, and also some specific work commitments of Mr Mullan and Mr Shearman, a set of five days was identified.
13. The parties agreed to exchange documents on which they will rely at the full hearing by 28 May 2024. The respondent helpfully agreed to undertake preparation of the hearing bundles, with any necessary co-operation of Mr
25 Mullan, by 17 June 2024.
14. The respondent's solicitors will prepare a draft list of issues, setting out the legal questions that the tribunal will have to decide at the full hearing. They should send this to Mr Mullan at the same time as disclosing their documents, i.e by 28 May 2024. Mr Mullan should use his best endeavours to agree the
30 list where reasonably possible by 17 June 2024. If it is not possible to agree

the list entirely, a copy should be prepared showing the issues agreed and those which are not.

15. The parties should exchange their witness statements with each other no later than 1 July 2024.
- 5 16. Given the potential number of witnesses and some of their specific commitments, the parties should agree a provisional timetable for the hearing, to include a short amount of time on the first day to deal with any procedural matters and adequate time at the end for submissions.
- 10 17. In relation to the prospect of judicial mediation, both parties are especially keen to explore this. I indicated that I would make a recommendation that it be offered. The parties should receive further correspondence about this. It is important to appreciate that and case management orders must still be complied with in the meantime.
- 15 18. There were no other matters identified to deal with today and the discussion was brought to a close.
19. Should either party believe there is a material error or omission in this note or the orders issued they must contact the tribunal within seven days of receipt to raise the matter and make any request as to how it should to be dealt with.

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B Campbell

Employment Judge**8 April 2024**

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Date**Date sent to parties****9 April 2024**