EMPLOYMENT TRIBUNALS

Claimant: **Mr J Humphrey**

Respondent: **Oracle Asset Finance Limited t/a Oracle Care Finance**

HELD AT **Sheffield** **ON: 26 January 2024**

BEFORE: **Employment Judge Brain**

REPRESENTATION:

Claimant: **Written representations**
Respondent: **Written representations**

JUDGMENT AT A PRELIMINARY HEARING

The Judgment of the Employment Tribunal is that:

1. It cannot be said that the claimant's complaints have no reasonable prospect of success. The respondent's application made pursuant to Rule 37(1)(a) of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 for an Order that the claims be struck out upon this basis is refused.
2. The Tribunal considers that the claimant's claims set out in the Schedule to the judgment have little reasonable prospect of success. Accordingly, the claimant shall pay a deposit of £50 *per* allegation as a condition of continuing to advance each allegation. The deposit is to be paid on or before **1 March 2024.**
3. The complaint by the claimant that the respondent failed to permit him to take time off to deal with the needs of a dependant pursuant to section 57A of the Employment Rights Act 1996 stands dismissed upon withdrawal.

THE SCHEDULE

1. That the respondent treated the claimant less favourably than the respondent treats or would treat others on the grounds of sex by dismissing him. (This is a

complaint brought pursuant to section 13 when read with section 39(2)(c) of the Equality Act 2010).

2. That the reason or the principal reason for the dismissal of the claimant by the respondent was that the claimant took a period of paternity leave which complaint the claimant brings pursuant to section 99 of the Employment Rights Act 1996.

REASONS

Introduction and preliminaries

1. The claimant presented his claim form on 14 August 2023. Before doing so, he went through mandatory early conciliation as required by the Employment Tribunals Act 1996. Early conciliation commenced on 13 June 2023 and concluded on 19 July 2023.

2. The respondent presented their grounds of resistance on 16 October 2023. Paragraph 2 of the grounds of resistance describes the respondent's business as *"providing finance and funding options to individuals and businesses to purchase prestige, classic and high value vehicles."*

3. There is no dispute that the claimant worked for the respondent as a business controller and that he worked in that capacity from 3 April 2023 until 19 May 2023.

4. The case benefited from a case management hearing. This came before Employment Judge Shepherd on 10 November 2023.

5. Employment Judge Shepherd observed, in paragraph 10 of the case management order sent to the parties on 10 November 2023, that *"it is difficult to understand the claims … presented."* He directed the claimant to provide further information of the claims being brought. These were identified in paragraph 1 of the case management order as:

    5.1. *Unfair dismissal brought pursuant to section 99 of the Employment Rights Act 1996.*

    5.2. *Direct discrimination brought pursuant to section 13 of the Equality Act 2010.*

6. The claimant complied with Employment Judge Shepherd's Order. He filed further information of his claim on 19 November 2023. He confirmed that he was seeking to pursue complaints of unfair dismissal and direct sex discrimination arising out of the respondent's decision to end his employment on 19 May 2023.

7. The claimant's unfair dismissal complaint (as set out in the further information of the claim dated 19 November 2023) is that the decision to dismiss him was because he had taken a period of paternity leave. There is not dispute that the claimant took three weeks of paternity leave between 24 April 2023 and 14 May 2023. He returned to work on 15 May 2023 (and was dismissed four days later).

8. In his further information, the claimant also gave further particulars of the complaint of sex discrimination. He cited two female comparators. He contends that he was less favourably treated than were his female comparators as he was dismissed whereas they were not.

9. The respondent's solicitor replied to the claimant's further information. The reply is dated 8 December 2023. In the reply, the respondent's solicitor made the application for an Order that the claims be struck out upon the basis that they have no reasonable prospect of success. An Order was therefore sought pursuant to Rule 37(1)(a) of Schedule 1 to the 2013 Regulations.

10. On 19 December 2023 Employment Judge Maidment directed that the respondent's application for strike out (or in the alternative for an Order that the claimant pay a deposit) shall be determined at a preliminary hearing on the papers. He observed that the claimant had failed to provide information about his ability to pay any deposit ordered as had been directed. Therefore, the Employment Judge determining the issue may proceed on the assumption that the claimant will be able to pay a deposit whatever level it might be set.

11. On the same day, the notice of preliminary hearing was sent to the parties. This directed that the case would be heard on 26 January 2024 with a time allocation of three hours. The parties were directed not to attend the preliminary hearing.

12. No further submissions have been received by the Tribunal from either party.

The relevant law

13. The Tribunal will now set out the relevant law. The principles derived from the relevant law will then be applied to determine the respondent's application.

14. The Tribunal will start with a consideration of the law as it applies to the claimant's claims.

15. The Tribunal starts by looking at the unfair dismissal claim. To pursue such a complaint, the claimant needs to show that the reason or the principal reason for his dismissal is one for which the usual two years' qualification requirement does not apply. This is because section 108 of the 1996 Act provides that the right to complain of unfair dismissal does not apply to the dismissal of an employee unless they have been continuously employed for a period of not less than two years ending with the effective date of termination. The two years' qualification requirement does not apply for those cases that fall in section 108(3) of the 1996 Act. One of these is at section 108(3)(b) which applies in cases of a dismissal in contravention of section 99 of the 1996 Act.

16. Section 99 of the 1996 Act provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason for dismissal relates to (amongst other things) paternity leave.

17. The Tribunal pauses here to observe that the claimant said in his further information that he suffered a detriment for taking paternity leave. The detriment caused to him for taking paternity leave was his dismissal.

18. The claimant was an employee of the respondent. Accordingly, where the detriment complained is dismissal, then it is not open to the employee to pursue a complaint of detriment pursuant to 47C of the 1996 Act. Such a complaint must be pursued as one of unfair dismissal. This proposition arises, in the case of paternity leave, by application of Regulation 28(2) of the Paternity and Adoption Leave Regulations 2002.

19. Where, as here, the employee lacks the requisite continuity of service to pursue an unfair dismissal case in the ordinary way and needs to rely upon one of the exceptional cases where the two years' qualifying service does not apply, then they acquire the legal burden of proving, on the balance of probabilities, that the

reason for dismissal was an automatically unfair reason. This principle was established by the Court of Appeal in **Smith v Hayle Town Council** [1978] ICR 966, CA. This is based upon the general principle that a person relying on an exception to statutory provisions must show that the exception applies to them.

20. That said, Lord Denning MR said in the **Hayle Town Council** case that tribunals should weigh the evidence according to "*the proof which it is in the power of one side to have produced and in the power of the other side to have contradicted."* In other words, once an employee has presented some *prima facia* evidence that they were dismissed for their prohibited reason, it is up to the employer to produce evidence to the contrary. In **H Goodwin Limited v Fitzmaurice and others** [1977] IRLR 393, EAT it was held that tribunals should deal with an employee's alleged reason first but should not dismiss the claim without hearing evidence of the employer's stated reason. This is because if the employer's stated reason was unproved it could bolster an employee's otherwise weak allegation. The employee generally will not be in possession of as much information about matters as will be the employer.

21. The Tribunal now turns to the complaint of sex discrimination. By section 13(1) of the Equality Act 2010, *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".* By section 23(1) of the 2010 Act, *"On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case."*

22. By section 39(2) of the 2010 Act, the employer must not discriminate against the employee in several ways. These include (by section 39(2)(c)) dismissing the employee and by section 39(2)(d) by subjecting the employee to any other detriment.

23. The claimant's complaint is solely about the decision to dismiss him. Accordingly, for the purposes of the 2010 Act, the claimant's case is one of direct discrimination upon the grounds of sex, which discrimination was the reason or material reason for his dismissal.

24. Upon a complaint of direct discrimination, the Court of Appeal in **Madarassy v Nomura International Plc** [2007] EWCA Civ 33 held that a claimant must establish more than a difference in status (in this case, sex) and a difference in treatment (in this case that the claimant's chosen comparators were not dismissed whereas he was) before a Tribunal will be in a position where they could conclude that an act of discrimination had been committed.

25. By section 136(2), *"If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred"* and by section 136(3*), "But subsection 2 does not apply if A shows that A did not contravene the provisions".*

26. Accordingly, it is for a claimant (who complains of discrimination) to prove on the balance of probability facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination. If the claimant does not prove such facts, then he or she will fail. If facts are shown, then the burden of proof moves to the employer to show that the treatment was in no sense whatsoever on the grounds of sex.

27. Accordingly, for the burden of proof to shift, there must be something to suggest that the treatment was due to the claimant possessing a protected characteristic. What must be shown is that it is possible that the treatment was unlawfully discriminatory.

28. The Tribunal now turns to a consideration of the power to strike out under Rule 37(1)(a) of the 2013 Regulations. As a preliminary point, if it is established that a claim has no reasonable prospect of success, then the Tribunal must go on to exercise discretion as to whether to strike out. As it was put in **Hassan v Tesco Stores Limited** (UK EAT/0098/16) the second stage is important as it is *"a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit."* Accordingly, even where grounds to strike out are made out, the Tribunal must then go on to ask whether it is appropriate and just to strike out the case on that basis.

29. The EAT gave some guidance as to how to approach strike out applications involving unrepresented parties in **Cox v Adecco** (UK EAT/0339/19). HHJ Taylor said (amongst other things) that:

    (1) No one gains by truly hopeless cases being pursued to a hearing;

    (2) Strike out is not prohibited in discrimination or whistleblowing cases,but special care must be taken in such cases as it is very rarely appropriate;

    (3) If the question of whether a claim has a reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

    (4) The claimant's case must ordinarily be taken at its highest;

    (5) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing. Reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case.

30. Cases should not, as a general principle, be struck out as having no reasonable prospect of success when the central facts are in dispute (**Ezsias v North Glamorgan NHS Trust** [2007] EW CA Civ 330). Many weak cases will involve a dispute of fact and where that is the case, they cannot be resolved at a strike out application and must be resolved at a full hearing on the merits. There is an exception to this principle which is where the fundamental assertion underlying the claim is so fanciful that it can be struck out. If, even taking the claimant's case at its highest, it cannot credibly be pursued then it will have no reasonable prospect of success. In **Ahir v British Airways Plc** [2017] EWCA Civ 1392, the Court of Appeal concluded that the case asserted by the claimant was so inherently implausible that it was legitimate that the Tribunal had concluded it to have no reasonable prospects of success.

31. In **Mechkarov v City Bank N.A** (UKEAT/0041/16) the EAT summarised the approach that should be taken in a strike out application in a discrimination case as follows:

    (1) Only in the clearest case should a discrimination claim be struck out;

    (2) Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;

    (3) The claimant's case must ordinarily be taken at its highest;

(4) If the claimant's case is conclusively disapproved by or is totally inexplicably inconsistent with undisputed contemporaneous documents, it may be struck out.

32. A Tribunal should not conduct an impromptu mini trial of oral evidence at a strike out application hearing to resolve core disputed facts. A similar approach applies in a complaint of unfair dismissal. In **Balls v Downham Market High School and College** [2011] IRLR 217, EAT the EAT held that the question is not whether it is possible or likely that the claim will fail. What must be demonstrated is the high hurdle that there must be no reasonable prospect of success.

33. The Tribunal now turns to the law as it relates to deposit orders. By Rule 39 of Schedule 1 to the 2013 Regulations, where at a preliminary hearing 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 to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument. The Tribunal must 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.

34. Following a making of a deposit order, if the Tribunal goes on at a full hearing to decide the specific allegation or arguments against the paying party for substantially the reasons given in the deposit order, then this creates a rebuttable presumption that the person subjected to the deposit order has acted unreasonably in pursuing the allegation or argument for the purposes of the making of a costs order pursuant to Rule 76. In such circumstances, the deposit is paid to the other party (otherwise the deposit shall be refunded). Therefore, the effect of a deposit order is that the party against whom it is made has the risk of an Order for costs made against them if they continue to pursue the specific allegation or argument. Further, if the deposit is not paid then the specific allegation or argument in question will be struck out. There is no discretion.

35. In **Hemdan v Ishmail** [2017] IRLR 228, the EAT said that the deposit order *"operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party, with a presumption in particular circumstances that costs will be ordered where the allegation is pursued, and the party loses."*

36. In the same case, the EAT held that, in fixing the amount of the deposit, the object is not "*to make it difficult to access justice or to effect a strike out through the back door."*

37. The criterion for making a deposit order is that the specific allegation or argument has little reasonable prospect of success. This denotes a lesser degree of certainty of failure than is the case upon a strike out application made under Rule 37(1)(a) of the 2010 Regulations which applies where it can be said that there is no reasonable prospect of success. As the deposit order will have a practical effect on access to justice – probably more due to the costs warning than the deposit sum itself – there must be a proper basis for making such an order.

38. The Tribunal therefore must have regard to the likelihood of the party in question being able to establish the facts essential to their case and in doing so reach a provisional view as to the credibility of the assertions being put forward. The authority for this proposition may be found in **Van Rensburg v Royal Borough of Kingston upon Thames** (UKEAT/0095/07). There must be a proper basis for

doubting the likelihood of the party being able to establish the facts essential to the claim or response.

39. Care must be taken to understand the basis of the claimant's claim particularly in cases of discrimination where a deposit order is being considered. As was said by Lord Hope in **Anyanwu v Southbank Student Union** [2001] UKHL 14, *"discrimination issues … should as a general rule, be decided only after hearing the evidence."* Only in the clearest of cases of discrimination will it be apt for a deposit or strike out order to be made. Where there is a core factual dispute, it should properly be resolved at a hearing.

Discussion and conclusions

40. The Tribunal now turns to apply the relevant to the issues which arise at this preliminary hearing. The Tribunal shall start with the consideration of the unfair dismissal case.

41. There is no dispute that the claimant was allowed by the respondent to take a period of three weeks' paternity leave. He did not have the requisite continuity of employment to qualify for paternity leave. He had only been in the role for three weeks when the respondent permitted him to take paternity leave. Further, he was allowed to take more than the statutory entitlement of two weeks' leave.

42. The respondent pleaded, in the grounds of resistance, that a card and flowers were sent to the claimant and his wife following the birth of the baby. Further, the claimant brought the baby in to the office on 10 May 2023. The claimant did not take issue with this part of the respondent's pleaded case when he presented his further information on 19 November 2023.

43. Taking the claimant's case at its highest, therefore, he was dismissed on 19 May 2023 very shortly after coming back from a period of discretionary paternity leave and where the respondent had been very supportive of him. The claimant returned to work on Monday 15 May 2023. He was dismissed four days after his return on Friday 19 May 2023. The respondent says that he was dismissed because of him displaying a poor attitude and poor performance.

44. In the further information of 19 November 2023, the claimant says that he can demonstrate from documentation following a Data Subject Access Request (made pursuant to the General Data Protection Regulation 2018) that he was seeking extra training to improve his performance. If this is the case, it tells against the claimant having a poor attitude to work. He has also produced documentation to show that as of 24 April 2023 (when he commenced paternity leave) he was one of only four employees who had achieved 100% of their targets.

45. As he has less than two years of service, then he has the burden of proving the reason for the dismissal. The height of his case is that the respondent could not entertain a reasonable belief that the claimant was poorly performing given the figures in the table of 24 April 2023 or that he had a poor attitude given his request for support and additional training upon his return from paternity leave. If the employer's stated reason for dismissal (based upon attitude and performance) is unproven then it could serve to bolster what on the face of it appears to be a weak allegation that the reason or the principal reason for dismissal was that the claimant took paternity leave. That is a weak allegation on the face of it given the support given to the claimant by the respondent which the respondent had no legal obligation to offer.

46. It cannot be said, in the Tribunal's judgment, that the unfair dismissal case has no reasonable prospect of success. There are factual disputes. The respondent's solicitor took issue (on the respondent's behalf) on 8 December 2023 with much of what was said by the claimant in the further information provided by him on 19 November 2023. The Tribunal is in no position to weigh the evidence advanced by the claimant and that advanced by the respondent on paper. To do so will be to run the risk of conducting an impromptu mini trial. Such a course should not be taken where the parties are present to give oral evidence. A mini trial certainly should not be undertaken where the Tribunal has to evaluate material on paper without having the benefit of hearing the parties.

47. The Tribunal does not consider the claimant's contentions to be wholly fanciful. Why would the respondent take the view that he was displaying a poor attitude and performing poorly where he was seeking additional support and training during his probationary period and on the face of the documentation produced on 19 November 2023 appeared to be performing reasonably well? This question can only be answered by hearing evidence from each party. If it is the case that the respondent's account unravels in cross-examination, then an adverse interest may be drawn which will serve to strengthen the claimant's case.

48. The Tribunal does consider, however, that the unfair dismissal case enjoys little reasonable prospect of success. The undisputed fact of the respondent being very supportive of the claimant by allowing him an extended period of discretionary paternity leave tells against that being the reason or principal reason for his dismissal. It is undoubtedly a formidable obstacle in the claimant's way. The inference to be drawn in favour of the respondent from their generous treatment of the claimant will be difficult (but certainly not impossible) to displace.

49. For these reasons, the Tribunal concludes that the claimant's complaint of unfair dismissal can be said to have little reasonable prospect of success. A deposit will be ordered to be paid by the claimant as a condition of him continuing with the claim.

50. The Tribunal now turns to the claim of sex discrimination. The claimant names two actual female comparators. These are Chloe Lingwood and Ingrid Smith. The Tribunal agrees with the respondent's solicitor that Ingrid Smith is not an appropriate comparator as she is a senior business controller with duties and responsibilities different from that of the claimant who was employed in a junior position as business controller. On any view, therefore, by application of section 23(1) of the 2010 Act Ingrid Smith cannot stand as a statutory comparator.

51. Taking the claimant's case at its highest, he is on firmer ground in comparing his treatment with that of Chloe Lingwood. It appeared not to be in dispute that she started at around the same time as did the claimant and held the same position. The Tribunal does not accept that she is a statutory comparator as her circumstances are not the same or similar as those of the claimant. An appropriate comparator, it seems to the Tribunal, must be a female employee who has taken a period of paternity leave. (This could happen, for example, where a female couple adopt a child). An appropriate female comparator may also be one who took maternity leave – the circumstances of the complainant and the comparator do not have to be identical but merely similar. There is no suggestion that Miss Lingwood took maternity or paternity leave at any stage.

52. That does not mean to say that Miss Lingwood's circumstances are of no utility. Evidence about the respondent's treatment of her may be helpful in constructing how a hypothetical comparator in the same or similar circumstances to the claimant would have been treated. Miss Lingwood may therefore stand as an evidential comparator.

53. Taking the claimant's case at its highest, as we must, the table dated 24 April 2023 shows that the claimant was performing better according to the criteria set out in the table than was Miss Lingwood. The second table (labelled *"Exhibit 4"* by the claimant) shows that Miss Lingwood completed two more jobs than did the claimant. He had completed 32 whereas she completed 34. None of the jobs *"paid out"* for either of them. (It is not clear to the Tribunal exactly what this means). However, on any view, the claimant and Miss Lingwood appear to have been performing at around the same level.

54. The claimant, obviously, has a different protected characteristic from Miss Lingwood. He was treated differently to her. He was dismissed whereas she was not. Upon the authority of **Madarassy**, that is not sufficient to move the burden of proof to the respondent. Something else needs to be shown.

55. Taking the claimant's case at its highest, the something more is the respondent's unwillingness or refusal to afford the claimant extra training as he requested. He also contends that his trainer pointed out his shortcomings in his performance on his return to work in front of the whole office. Unreasonable behaviour is of course not necessarily discriminatory, but it may produce the *"something more"* coupled with the difference in protected characteristic and difference in treatment. The claimant's case about the trainer's attitude towards him (coupled with the evidence uncovered by him pursuant to the Data Subject Access Request about a negative response to his request for training) is, it seems to the Tribunal, sufficient to constitute the *"something more"* to move the burden of proof to the respondent to call for an explanation that sex was in no material sense the reason for the claimant's dismissal.

56. As with the unfair dismissal case, the Tribunal considers that the discrimination case can be said to have little reasonable prospect of success. Again, the claimant faces a formidable obstacle in the favourable treatment of him by the respondent in affording him generous discretionary paternity leave. The Tribunal also notes the respondent's solicitor's comments that by application of criteria set out in the spreadsheet Miss Lingwood was better performing.

57. It cannot be said, in the Tribunal's judgment, that the complaint of sex discrimination has no reasonable prospect of success. Only in rare cases of truly fanciful allegations should a discrimination claim be struck out. Much in this case will turn upon the evidence of the parties coupled with a consideration by the Tribunal of the contemporary documentation. Again, it would be wrong in principle for the Tribunal to be tempted to embark upon an impromptu mini trial (particularly only upon the papers). On the face of it, it cannot be said that the claimant has no reasonable prospects of succeeding in at least shifting the burden of proof to the respondent. However, the respondent, it seems to the Tribunal, has a strong argument that the favourable treatment of the claimant by allowing him paternity leave is suggestive of an organisation with a family friendly attitude towards male staff as well as female staff. For this reason, the Tribunal consider that it can be said there is little reasonable prospect of the claim succeeding.

58. The claimant did not file with the Tribunal any documentation about his financial circumstances. The Tribunal must of course be cognisant that a deposit order is not to be used as a back door way of effectively striking out a claim. The amount of the deposit should therefore not be set at too high a level. The Tribunal takes into account that the claimant has responsibility for looking after his baby son. The Tribunal also takes judicial notice of the cost-of-living crisis which is affecting everybody. Further, the real purpose of the deposit order is not so much the amount of the money payable by way of deposit but the costs warning which is effectively served by it.

59. Taking all these factors into account the Tribunal makes it a condition of the claimant continuing with each claim that he pays a deposit of £50 *per* claim. To be clear, if the claimant wishes to pursue both the unfair dismissal claim and the discrimination claim then the deposit payable is £100. The deposit(s) shall be paid on or before 1 March 2024.

60. For the avoidance of doubt, a complaint by the claimant that the employer failed to permit him to take time off to deal with the needs of a dependant pursuant to section 57A of the Employment Rights Act 1996 stands dismissed on withdrawal. The claimant withdrew such a complaint in the further information dated 19 November 2023.

Employment Judge Brain

Date: 12 February 2024

Notes

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