Case Number: 1301337/2017

EMPLOYMENT TRIBUNALS

Claimant | Respondent

Miss A McLean -v- **OCS Group UK Ltd**

OPEN PRELIMINARY HEARING

Heard at: **Centre City Tower, Birmingham** On: **14 August 2017**

Before: **Employment Judge Perry** (sitting alone)

Appearances

For the Claimant: **Mr I Jones (solicitor)**

For the Respondent: **Mr A Johnston (counsel)**

JUDGMENT

The claimant's complaints pursuant to s.18 Equality Act 2010, reg. 19 Maternity and Parental Leave etc. Regulations 1999 and s.47C Employment Rights Act 1996 have no reasonable prospects of success and are struck out.

REASONS

1. This claim was listed for strike out and deposit by EJ Macmillan of his own motion at a CPH on 29 June 2017. I suggested to the parties at the outset that I hear submissions on prospects of success and if I determined the claim had little reasonable prospects I would hear from the parties further submissions concerning the deposit. That was agreed.

2. As to s.18 Equality Act 2010 this is a complaint that the claimant was treated unfavourably, not less favourably. No comparison, hypothetical or actual, is required. The issue in essence is whether the claimant was treated differently to the way she would have been treated had she not been pregnant.

3. Whilst it is not expressed in her claim form it is common ground the claimant's immediate line manager's role was advertised as vacant on the respondent's web site whilst the claimant was on maternity leave. The claimant asserts that as a result she lost the opportunity to apply for that role because the vacancy had not come to her attention whilst she was on maternity leave.

4. The respondent pleads to previous job applications that the claimant had made when she was not pregnant asserting that they and she was treated in the same way during the maternity leave to that when she had been at work. There is no pleading that the claimant learned of the other roles that she did apply for when she was in work because she was in work or any argument that *she* would have done so in this instance only because she was in work. Mr Johnston thus suggests the claim as put essentially requires the respondent to take positive steps to inform the claimant of any roles that arose whilst she was pregnant.

5. Mr Jones accepted that the claimant's claim does not specifically state how she alleges she had been treated when she was at work to the way she was treated when she was

pregnant or how she had come to know of the roles she applied for when not on maternity leave.

6. I remind myself that in *Blockbuster v James [2006] IRLR 630 CA*, a case involving strike-out under r.18(7)(c) 2004 Rules – conduct of the proceedings, Sedley LJ observed (para. 5) that the power (to strike out under r.18(7)(a)) is a draconic power, not to be readily exercised (see also *Tayside v Reilly [2012] CSIH 46*, upholding the decision of Lady Smith in the EAT to set aside the ET strike-out order, as she did in *Balls v Downham Market High School [2011] IRLR 217).*

7. His Honour Judge Serota QC in *QDOS Consulting Ltd & Ors v Swanson UKEAT/0495/11* summarised the position thus:-

> *49. … However, applications to strike out on the basis that there is no reasonable prospect of success should only be made in the most obvious and plain cases in which there is no factual dispute and which the applicant can clearly cross the high threshold of showing that there are* no *reasonable prospects of success. Applications that involve prolonged or extensive study of documents and the assessment of disputed evidence that may depend on the credibility of the witnesses should not be brought under rule 18(7)(b) but must be determined at a full hearing. Applications under rule 18(7)(b) that involve issues of discrimination must be approached with particular caution. In cases where there are real factual disputes the parties should prepare for a full hearing rather than dissipate their energy and resources, and those, I would add, of Employment Tribunals, on deceptively attractive shortcuts. Such applications should rarely, if ever, involve oral evidence and should be measured in hours rather than days.*

8. Maurice Kay LJ in *North Glamorgan NHS Trust v Ezsias [2007] IRLR 603*:

> *"It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the Employment Tribunal to decide otherwise. […] It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success where the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably consistent with the undisputed contemporaneous documentation. The present case does not approach that level."*

9. In *Dossen v Headcount Resources Ltd UKEAT/0483/12/SM* his Honour Judge Richardson was of the view that the allegations the appeal concerned were part of the disputed core of the case and not peripheral such that they ought to be determined on the evidence. He stated *"It would therefore require an exceptional case before striking-out would be appropriate."* He distinguished that from instances *"that sometimes arises at an Employment Tribunal, where there are peripheral allegations that are unsustainable in the light of the documents and can usefully be cleared away"*.

10. In *Sivanandan v Independent Police Complaints Commission UKEAT/0436/14* the Honourable Mrs Justice Simler shortly after her appointment as President of the EAT repeated it is only in very exceptional circumstances that a claim should be struck out as having no reasonable prospect of success when the central facts are in dispute.

11. In *Van Rensberg v Kingston upon Thames 0095/07 & 0096/07* the EAT rejected the argument that the tribunal has to assume that the facts may be established and only

make a finding that there is little reasonable prospect of success **if the case is likely to be unsustainable in law.** The EAT per Elias P at [23] saw no *"…reason to limit 'a matter required to be determined' to legal matters only. If that had been the draughtsman's intention, the rule would surely have been differently formulated so as to render the intention clear'*. Thus, contentions embraced both legal and factual matters, the Tribunal was entitled to consider both and in the case of the latter whether the facts as asserted appeared to be credible or not.

12. The EAT was of the view at [26] that given the decision of the CA in *Ezsias [citation above]* (in the context of a strike out application pursuant to r.18(7) 2004 Rules) that disputes over matters of fact, including a provisional assessment of credibility, could in an exceptional case be taken into consideration even when a strike out is considered.

13. The wording of rule 39 differs to that in r.18(7) 2004 Rules namely that before the Tribunal in *Van Rensberg*. In my judgment the wording of r.39 suggests that the draftsman made a conscious decision to reinforce the view of Elias P as he was then in *Van Rensberg* by referring to allegation (fact) or argument (law).

14. Here the claimant has not pleaded to what the specifics of that difference in treatment is. Those potential differences were matters were known to her, they concerned the roles she had previously applied for and how she came to know about them. The claimant was specifically made aware after the response had been lodged (and to reinforce the point after the listing of this hearing) of the argument the respondent advances that she was treated no differently to the way she had been treated when she was not on maternity leave. Yet she has not sought to plead to the same.

15. I asked Mr Jones in the absence of that detail how the claim could succeed given there are no facts from which inferences can be drawn; the evidential burden being on the claimant to do so. He did not advance any contrary arguments.

16. Despite the reminder from His Honour Judge Richardson in *Dossen* of the oft cited words of Lord Steyn in *Anyanwu v South Bank Students Union [2001] ICR 391*:

> *"Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field, perhaps more than any other, the bias in favour of the claim being examined on the merit, or de-merit, of its particular fact is a matter of high public interest."*

there is no dispute here over the central facts nor any basis from them from which in my judgment inferences of discrimination can be drawn. That being so the claim has no reasonable prospects of success and must fail.

17. The same in relation to the complaint pursuant to reg. 19 Maternity and Parental Leave etc. Regulations 1999 (and s.47C Employment Rights Act 1996) the detrimental treatment referred to in that regulation is required to be done for the reasons stated in reg. 19(2). The case before me is that the claimant was treated in the same way that she would have been treated had she not been pregnant and must also fail.

Employment Judge Perry
14 August 2017