



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms C Dymond

**Respondent:** Barclays Bank

**HELD AT:** Manchester

**ON:** 5 September 2017

**BEFORE:** Employment Judge Holmes

## REPRESENTATION:

**Claimant:** Mr R Rixon, Consultant

**Respondent:** Ms R Snocken, Counsel

## JUDGMENT ON PRELIMINARY HEARING

It is the judgment of the Tribunal that the hearing of the respondent's application to strike out the claimant's claims be postponed to **27 November 2017 at 10.a.m. at Manchester**, listed for 3 hours.

## REASONS

1. The Tribunal this morning has been listed to determine an application by the respondent to strike out the claimant's claims on the grounds that they have no reasonable prospects of success, and that a number of the allegations are out of time.

2. The claims before the Tribunal have come about in a slightly unusual way, in that there are in fact two claims: one which was submitted to the Birmingham Employment Tribunal and one which was submitted to the Manchester Employment Tribunal. The claimant submitted the claim to the Manchester Employment Tribunal herself, and that was received on 23 June 2017, and in that claim form she complains of unfair dismissal, marriage discrimination, sex discrimination and also made claims for holiday, and she set out in box 8.2 of that claim form some basic details of her claims, one of which included an allegation of whistle-blowing although that had not actually been one of the claims that was referred to specifically in the other box in section 8.1 but that was one of the claims that she wanted to make, and

consequently that claim was received, the respondent responded to it and it was dealt with in the usual way.

3. Additionally, a claim was also submitted to the Birmingham Employment Tribunal by solicitors acting on behalf of the claimant, and that claim was submitted to that Tribunal on 25 June 2017. That was, as one would expect, a more formally pleaded document in which the claims made on behalf of the claimant were of unfair dismissal and sex discrimination, that being the only box that was ticked under the discrimination section of box 8.1. Along with the formal parts of the ET1 were particulars of claim drafted by the claimant's solicitors, in which they set out the details of her constructive dismissal claim and indeed the details of her sex discrimination claims. Consequently that claim too was responded to by the respondent in due course.

4. There being two sets of proceedings in two different Employment Tribunal offices, not surprisingly an application was made, firstly, that the Birmingham case be transferred to Manchester, and, secondly, that they both be consolidated. In terms of the transfer, that was effected on 23 August 2017, and consolidation was proposed by a letter of 25 August 2017, that consolidation to be taking place in fact today in this hearing.

5. This hearing had been listed as a preliminary hearing, but in the light of an application made by the respondent of 1 August 2017 by email, the Tribunal subsequently acceded to the respondent's request that this hearing be converted into a public preliminary hearing to determine those applications, and notification that this hearing would indeed be converted to this type of hearing was given by the Tribunal, following an order by myself on 25 August 2017. Consequently, since this 25 August 2017 this hearing has been listed for three hours to determine the applications made by the respondent.

6. The claimant, however, by email of 16:07 on 4 September 2017 contacted the Tribunal to inform it that she was unable to attend today's hearing. The reason for that is given in the email that her father, who is some 86 years old, had on or about 1 September 2017 it would seem, fallen out of a tree and, because the claimant's mother was disabled and her other siblings were unable to attend to his needs, she was having to look after him. Consequently she would not be available to attend this hearing. She had apparently spent yesterday, 4 September 2017, trying to contact Mr Rixon of the firm that is representing her, but was unable to do so and consequently she sent this email directly to the Tribunal seeking this postponement. Mr Rixon was in fact contracted yesterday afternoon and was unaware of these developments, and consequently the Tribunal did not consider any further yesterday the application for a postponement made by the claimant, but has considered the matter this morning when both parties' representatives have appeared before it.

7. In terms of how the Tribunal was to proceed, the respondent's application, not unnaturally, was that the Tribunal should continue and hear the application to strike out that it has made in its email of 1 August 2017. For the claimant Mr Rixon, who appears today, did not initially oppose that application in the sense of that being heard today, save to the extent that it would involve consideration of an application to strike out not only the discrimination and other claims but also the claimant's constructive unfair dismissal claim. In relation to that there is apparently, although the Tribunal has (rightly) not yet seen it, an email that is to be relied upon by the

respondent, which the respondent had not disclosed until today and consequently Mr Rixon and the claimant have not seen it. Mr Rixon has had no opportunity to take instructions upon it. Other than that, in terms of the constructive dismissal claim, where he has submitted that if the respondents wish to rely upon that evidence in support of their application, that he would seek a postponement of that part of the application, he was content that the application in relation to the other heads of claim could proceed.

8. In relation to that, the response from Ms Snocken for the respondent was that the late disclosure of the email need not be fatal to the Tribunal considering her applications today, and that the respondent could, and indeed would, in the alternative, seek a deposit order and if the Tribunal was not satisfied that the constructive dismissal claim had no reasonable prospects of success the respondent would nonetheless rely upon the email, allowing for the fact that it may be contested, of course, as potentially supporting an argument that her complaint of constructive unfair dismissal had little reasonable prospect of success so as to entitle the Tribunal to make a deposit order in relation to it.

9. In terms of other issues that might arise in relation to particularly the making of the deposit order, such as means, no information or evidence would be before the Tribunal as to the claimant's means and Mr Rixon did not seem to indicate that means would be advanced as a reason for not making a deposit order, and Ms Snocken in any event indicated the Tribunal could be invited to make what could be regarded as a modest deposit order that the claimant would be likely to afford, and that this too should not be stumbling block to determination of the applications today.

10. During the course of the hearing, however, Mr Rixon's position changed slightly, to the extent that considering that issue as to means and indeed other potential issues in relation to the respondent's applications, he did rather move towards favouring an application to postpone the respondent's applications for the orders that they seek, and consequently that was, at the end of the submissions, the position that he took; the respondent maintaining its position that basically there was no reason why its applications, or at least most of them in the alternative, could not be heard today. The Tribunal accordingly has considered the position and how it should proceed.

11. The starting point it seemed to the Tribunal is this: an application for an order striking out is, of course, as is frequently said, a draconian and very serious part of the Tribunal's armoury and is an application which, if granted, should only be granted in exceptional circumstances. The same is also probably true of deposit orders which effectively are conditional strike out orders, whereby if a party does not pay a deposit the effect upon their claims is the same and they are struck out if the Tribunal so orders, so although a lesser form of order, it is nonetheless a serious order of the nature of a strike out under rule 37. Normally a party facing an application of that nature would be present or represented before the Tribunal, and indeed a party has a right to be present before a Tribunal when such an application is being determined. If a party is represented, of course, that party need not attend, because they can attend by means of a representative, and if they wish to so proceed then the Tribunal would proceed on that basis.

12. The difficulty in this case, however, seems to be this: and that is that as of 16:07 on 4 September 2017 when she wrote to the Tribunal her email of that time

the claimant was clearly intending to attend this hearing, and seems to have made somewhat frantic attempts yesterday to contact her solicitors to inform them of the difficulty that she was having because of the incident with her father last week, so it certainly appears to be the case that the intention was that she would attend. She has not, in this email or indeed in any other way, indicated her consent to proceeding in her absence through her representative. Of course, she could do so, and very often that does happen, but there is no indication before the Tribunal that she is content for the matter to be dealt with that way; if anything rather the opposite.

13. In those circumstances the claimant has clearly not consented to the matter proceeding in the presence of her representative only, and the Tribunal therefore has some hesitation in acceding to the respondent's request to proceed in her absence, despite the fact that she is represented. That the matters to be considered could result in her claims being struck out is clearly an important matter, and the fact that there are some matters, such as the email referred to by the respondent, upon which at the moment she has been unable to give instructions, disclosed somewhat late in the day, is a further relevant factor, it seems to the Tribunal.

14. There are, the Tribunal appreciates, issues that arguably could and should have been addressed on behalf of the claimant before today's hearing if they were to be advanced, particularly in relation to her means, but the Tribunal does observe that the timescale between the Tribunal's direction that this hearing would indeed consider the respondent's applications to strike out, and whilst complying with the rules in terms of the minimum amount of notice, the period of notice has been relatively short, the Tribunal's notice of course being 25 August and this today being 5 September. So there has not in fact been terribly long between the notification of this hearing proceedings in this form, and today to allow much time for preparation, as is perhaps evidenced by the fact the respondents themselves have only today, I take it, produced a skeleton argument, and the email that they have referred to, which is not a criticism, but perhaps reflects that there has been a relatively short timescale in which to prepare for this hearing on both sides.

15. A further factor that has influenced the Tribunal is this: the claimant, as has been observed, put in one claim form, her solicitor has put in another. There is a difference between the two of them in terms of the claims that are made, the claimant's own claim form seeking to make claims additional to the two claims made in that submitted by her solicitors which are simply of constructive unfair dismissal and sex discrimination. Whilst this not something the respondent would be aware of because it was an email between the claimant and the Tribunal and indeed her solicitor, she did by email of 2 August to the Tribunal, copied to her solicitor, make the point that her submission included sex discrimination, constructive dismissal, discrimination by marriage, race and whistle-blowing and she said that this was the "correct" submission. There is therefore perhaps some tension between the claim form submitted by her solicitor, and that submitted by herself, but clearly as at 2 August it was the claimant's intention to maintain those additional claims over and above those included in the claim form submitted by her solicitor.

16. The Tribunal's concern, or one of them, is this: that if the Tribunal proceeds today in the claimant's absence, the claimant upon being notified of the outcome, particularly if it is to strike out any or all of her claims or order a deposit, may well seek reconsideration of that judgment on the grounds that she was not present at the hearing, and wanted to be so, and sought to be so, in circumstances that she set out

in her email of 4 September 2017. That is likely, if made, to lead to the Tribunal having to consider the matter further and the parties and their representatives, or indeed if the claimant remains represented (because of course she may take a view in relation to how the claim should proceed) , being involved in a further hearing or at least further consideration of these issues.

17. Further it is, the Tribunal considers, an important principle that a party is entitled to be present at any hearing involving that person or an organisation. Representation, of course, if an alternative means, but the claimant clearly was not agreeable, and has not consented to the matter proceeding in her absence, and , of course, Mr Rixon is somewhat handicapped by her absence in that he cannot take instructions on any matters that arise in the course of this hearing.

18. For those reasons, and with sympathy to the respondents who of course are entitled to seek to have the matter determined today as they have done, the Tribunal's conclusion is that the hearing of the applications to strike out the claims or alternative orders should indeed be postponed. The claimant has, admittedly at the eleventh hour, but in circumstances which probably could not be anticipated, on the face of it, explained that she cannot attend, she has indicated that she wanted to attend and did seek a postponement yesterday. Unfortunately that could not be dealt with and Mr Rixon has attended, but in the circumstances where the claimant has not indicated that she does consent to the matter proceeding in her own absence and simply to be dealt with by her representative, the Tribunal considers in those circumstances that the interests of justice require the postponement of the applications being heard today and will not proceed to determine them.

19. There are a number of issues that doubtless should be addressed in the meantime, and if means are to be relevant and indeed if there are any other issues that might arise in relation to the time points, because obviously the Tribunal may be invited to consider issues as to extension of time, all of those matters need to be addressed. The Tribunal takes the respondent's points that they probably could and should have been addressed a little earlier than this, but then as I have indicated there was a relatively short period of time between this hearing being convened as an application to strike out and its actually being conducted today, but those are matters that perhaps can be considered further during the postponement.

20. Furthermore the Tribunal does not consider that this is all it can do today, and having seen a draft Agenda for what could be called a case management preliminary hearing, it would proceed to deal with those issues, and indeed to make some further observations which may be of assistance to the parties going forward in any event. The ensuing case management orders are contained in a separate document.

Employment Judge Holmes

Dated : 7 September 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
8 September 2017

FOR THE TRIBUNAL OFFICE