



# EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

MS WENDY GOLDEN

BENTLEY MOTORS LIMITED

## ORDERS OF THE EMPLOYMENT TRIBUNAL ON A PRELIMINARY HEARING

HELD AT: Birmingham

ON: 25 November 2019

EMPLOYMENT JUDGE Algazy QC

### Representation

For the Claimant: Mr J.Hurd - Counsel

For the Respondent: Mr B.Wiliams - Counsel

## **ORDER**

1. The Tribunal makes no order on the respondent's application to strike out the claims set out in those paragraphs of the claimant's schedule of particulars identified in the respondent's application letter dated 4 November 2019.
  
2. The Tribunal makes no order on the respondent's application for a deposit in respect of the claims set out in those paragraphs of the claimant's schedule of particulars identified in the respondent's application letter dated 4 November 2019.

## **REASONS**

### **1. INTRODUCTION**

- 1.1. This is the third Preliminary Hearing in this case and was specifically listed to hear 2 applications by the Respondent. In respect of certain claims advanced in the paragraphs identified in the respondent's application letter dated 4 November 2019, the application is firstly to strike out those claims out and in the alternative, that the tribunal should order a deposit be paid before those claims advance to a full hearing
  
- 1.2. The background to these claims and to the way in which the claim is advanced on behalf of the claimant is more than adequately set out in the previous orders of the tribunal and I do not repeat those matters here.
  
- 1.3. In brief, it is alleged that the claimant's manager, Mr Karl Shirley, conducted a campaign of sex and age discrimination against the

claimant who had been employed as a showroom host. It is also alleged more generally that the respondent was engaged in discrimination in the way it handled the claimant's concerns.

- 1.4. The claimant was represented by Mr James Hurd of counsel and the respondent by Mr Ben Williams, also of counsel. Both produced helpful skeletons in support of their submissions

## 2. **GENERAL APPROACH**

- 2.1. This was discussed with the parties at the outset. Both counsel broadly agreed with the approach that the tribunal should take to the applications as set out in Mr Hurd's Skeleton.

- 2.2. The claimant directed the tribunal to two authorities in particular; **Kwele-Siakam V The Co-Operative Group Ltd UKEAT/0039/17/LA** and **Qdos Consulting Ltd v Swanson UKEAT/0495/11**

- 2.3. The tribunal reminded itself of the appropriate case management rules that are applicable here. Namely rule 37 in respect of strike-out and rule 39(1) in respect of deposit orders. The test being 'no reasonable prospect of success' in respect of the former and 'little reasonable prospects of success' in respect of the latter (emphasis added).

- 2.4. In helpful exchanges between the parties and the tribunal, the apparent difficulties facing both parties with regard to their respective positions were explored.

- 2.5. The claimant was reminded that the tribunal hearing was not a public enquiry into every matter of concern, misconduct or perceived misconduct by the respondent during her employment.

- 2.6. Through its counsel, the respondent fairly, and consistent with its duty to the tribunal, acknowledged the difficulties in respect of advancing such applications in discrimination claims. It further acknowledged that this is especially so where the claims are underpinned by

disputed factual contentions on behalf of the parties, as in the present case. Nonetheless, the industry of Mr Williams ensured that everything that could be said in support of the Respondent's contentions was advanced.

3. **CONSIDERATION OF THE APPLICATIONS**

- 3.1. There was a category of claims which it was accepted by both sides would need to proceed to a full hearing. There were then 4 categories of claims as identified by the claimant which were in dispute (the "disputed claims")
- 3.2. I considered the parties submissions as set out in their respective skeleton arguments and also by a brief foray into some of the documents contained in the file prepared for the last preliminary hearing. This included the claimant's grievance dated September 2017.
- 3.3. I tested the approach adopted by the respondent by reference to the appropriate legal tests. One example that was considered by both the tribunal and Mr Williams in his submissions related to allegation 1 dated 12 January 2015. This demonstrated an underlying question of fact that would require determination by the tribunal.
- 3.4. It seems to the tribunal that the concerns expressed by the respondent in respect of the allegations advanced by the claimant are, in reality, submissions that require to be made at the conclusion of the evidence. However, the evidence needs to be heard before the alleged deficiencies of the claimant's case can properly be considered. Further, it was accepted that at least some of the material in respect of the disputed allegations was likely to be called as evidence in any event as part of the background and context to the justiciable claims.
- 3.5. Save in respect of the indirect discrimination claims, there was no particular demarcation made in respect of categorisation of the disputed allegations. The respondent's Application to strikeout/ for a

deposit was maintained in respect of all of the remaining 3 of the 4 categories of disputed allegations identified by the claimant. On the respondent's case, the indirect discrimination claims, category C, required particular scrutiny.

3.6. With regard to those category C claims, the claimant's indirect discrimination claims, these were claims which indeed gave the tribunal particular pause for thought. In exchanges with the tribunal, Mr Hurd explained his approach to the PCP identified in respect of those claims as set out in paragraphs 21 and 22 of his skeleton argument.

3.7. In particular, it seemed to the tribunal that the PCP itself (as identified under Particular 15) was unusual and that the "key factual questions" set out at paragraph 22 of the skeleton were not specifically directed to establishing the existence of such a PCP.

3.8. I considered whether these allegations, at least, should be struck out or made the subject of a deposit order. In the event, I was persuaded by Mr Hurd that it was not possible to say that such allegations had either no prospect or little prospect of success at this stage.

3.9. I should emphasise that I considered the submissions in respect of strikeout and in respect of a deposit separately by applying the appropriate legal test to the disputed allegations.

#### **4. CONCLUSION ON THE APPLICATIONS**

4.1. Accordingly, I make no order on either of the respondent's applications

4.2. I will now hear the parties and make case management Orders in preparation for the substantive Hearing.

#### **CASE MANAGEMENT ORDERS OF THE EMPLOYMENT TRIBUNAL**

## **Listing the hearing**

After all the matters set out below had been discussed, we agreed that the hearing in this claim would be completed within **10** days. It has been listed at Birmingham Employment Tribunal, to start at 10 am or so soon thereafter as possible on **16 November 2020**. The parties are to attend by 9.30 am. The time estimate for the hearing is based on the claimant's intention to give evidence and call **no** further witnesses and the respondent's present intention to call **7** witnesses, and on the following provisional timetable:

- (i) 3 hours for reading in and any preliminary matters;
- (ii) maximum 7 days for oral and other evidence on liability;
- (iii) a maximum total of 3 hours (half each) for submissions on liability;
- (iv) balance of the Hearing for the Tribunal to determine the issues which it has to decide and deal with remedy, if possible, if the claimant succeeds in whole or part.

### **1. Corrections**

The parties must inform each other and the Tribunal in writing within 14 days of receipt of this Order, providing full details, if what is set out above and the Orders made are inaccurate and/or incomplete in any important way.

### **2. Judicial mediation**

2.1. The parties are referred to the "Judicial Mediation" section of the Presidential Guidance on 'General Case Management', which can be found at: [www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions](http://www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions). The parties will review their respective positions after disclosure.

**3. Statement of remedy/schedule of loss**

3.1. The claimant is to provide to the respondent a document – a “Schedule of Loss” by **27 January 2020**. This must set out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant’s complaints and how the amounts have been calculated. Any updated schedule of loss is to be served no later than 7 days before the final hearing.

**4. Disclosure of documents**

4.1. The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list and copy documents so as to arrive on or before **24 February 2020**. This includes, from the claimant, documents relevant to all aspects of any remedy sought, including any medical evidence that is relied on.

4.2. This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.

4.3. The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

**5. Bundle of documents**

5.1. It is ordered that the Respondent has primary responsibility for the creation of the single joint bundle of documents required for the hearing.

- 5.2. The Respondent is ordered to provide to the Claimant a full, indexed, page numbered bundle to arrive on or before **6 April 2020**.
- 5.3. The Parties are ordered to bring sufficient copies (at least five) to the Tribunal for use at the hearing, by 9.30 am on the morning of the hearing. It is understood that the parties have reached agreement about cost sharing in relation to the bundles and generally.

## 6. **Witness statements**

- 6.1. It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.
- 6.2. The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.
- 6.3. The facts must be set out in numbered paragraphs on numbered pages, in chronological order.
- 6.4. If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.
- 6.5. It is ordered that witness statements are exchanged so as to arrive on or before **1 June 2020**.

## 7. **Final hearing preparation**

**On the the first day of the final hearing** (but not before that day), by **9.00 a.m** the following parties must lodge the following with the Tribunal:

7.1 five copies of the bundle(s), by the parties;

7.2 five hard copies of the witness statements by whichever party is relying on the witness statement in question;

7.3 three hard copies of opening submissions/skeleton argument, by each party which will have been exchanged before the final hearing;

7.4 three hard copies of the following, agreed if possible, by the claimant and respondent respectively– a neutral chronology and a ‘cast list’.

### **CONSEQUENCES OF NON-COMPLIANCE**

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

**Employment Judge Algazy QC**

25 November 2019