EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms A Khalid	v	**(1) Santander UK Plc**
		(2) Santander UK Operations Limited

(OPEN) PRELIMINARY HEARING

Heard at: Bury St Edmunds **On:** 28 June 2018

Before: Employment Judge M Warren

Appearances:
For the Claimant: In person.
For the 1st Respondent: Mr P Thompson, Solicitor.
For the 2nd Respondent: Miss E Deeley, Solicitor.

JUDGMENT

1. The respondents' application for the claimant's claims to be struck out or for a deposit order to be made are refused.

REASONS

1. The first thing to note is that on the Tribunal's records the name of second respondent needs to be amended to Santander UK Operations Limited.

2. Before me today is an application for strike out and/or deposit order. By way of background these proceedings were commenced by a claim form received on 5 August 2017 and in it the claimant purports to bring claims of unfair dismissal and race/sex/religious discrimination. The proceedings are resisted by both respondents. Subsequent to the claim form, a further letter was received from the claimant dated 10 November 2017 in which she sets out what she describes as additional details in relation to her claim.

3. The matter first came before Employment Judge Sigsworth on 15 November 2017, he identified that the precise detail and nature of the claimant's claim was not entirely clear and he referred to the letter of 10 November 2017 suggesting it may simply be further and better particulars or it may contain amendments to the original claim. He had not conducted a detailed analysis. He noted that there was a dispute as to jurisdiction, but the parties had suggested to him and he exceeded to their suggestion that it was a matter that might be resolved by judicial mediation and therefore he gave directions for preparations of a schedule of loss and a subsequent telephone hearing to consider whether judicial mediation would be appropriate. That subsequent telephone hearing took place before Employment Postle on 29 January 2018, therein he records that the claimant had not provided a schedule of desired outcomes but merely a schedule of loss seeking a sum in the region of £74,000 and on discussion with the parties it appears he reached the conclusion that judicial mediation was not going to be appropriate but that this matter should have been set down for an open preliminary hearing to consider whether any of the claims should be struck out or whether a deposit order should be made and thus the matter comes before me today.

4. Before me today I have a bundle of documents consisting of 39 pages, kindly put together by the respondents which includes therein skeleton arguments from respective solicitors on behalf of each of the two respondents. What I unfortunately did not have before me at the beginning of the day, but received from the claimant during closing submissions was a detailed skeleton argument from her, I think must have been prepared by an acquaintance of hers who is an employment lawyer. I am told prepared by a solicitor from whom the claimant had sought legal advice. So, I took those from her and I have read them before reaching these conclusions. It is worth saying that the respondents themselves did not receive these I do not think until last night. Very late last night apparently.

5. First of all, I would just highlight as un-controversially as I can the 'employment' history, obviously the company name suggests the two respondents are of the same group of companies. The claimant has provided her services to them, always through an agency, latterly Reed. The claimant worked originally for the first respondent from March 2012. The work upon which she was engaged transferred to the second respondent in December 2016 and staff engaged in that work including the claimant transferred to the second respondent. In respect of those who were employees that would be by virtue Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

6. The claimant's relationship with the second respondent is governed by a contract which is in the bundle starting at page 29, between Reed Specialist Recruitment Limited and the 'intermediary' who is described in the schedule as being Meezan Limited. Meezan Limited is a company of which the sole shareholder is Ms Kahlid. The contract schedule refers to the client, namely the second respondent known at that time as Geoban UK and the contractor is named as Ms Khalid. It is a one-year fixed term contract said to commence by 23 January 2017 and to end on 31 January 2018.

7. Coming now to these proceedings, whilst before me is an application for strike out or a deposit order and on reviewing the papers what is apparent is that what is not resolved as identified by Employment Judge Sigsworth is the need for a hearing potentially to determine the status of the claimant and to identify the issues. But not resolved also is the status of the claimant's letter of 10 November 2017 and whether that contained new allegations which should be treated as an application to amend and/or mere further and better particulars of her stated case in the ET1. And it follows from that, that the issues in this case have never been identified and the Tribunal cannot way up the claimant's prospects of success without first being clear as to what his or her case is. I therefore set about today seeking to identify the issues with the claimant.

8. It is clear to me after those detailed discussions and from analysis of the letter of 10 November 2017 that in that letter the claimant is providing further and better particulars, in particular, of the allegation in the claim form where she complains of being continuously discriminated against because of my race and religion from July/August 2016 onwards until my departure. For the avoidance of doubt, insofar as anything in the letter of 10 November 2017 might have properly been regarded as amendment and having regard to guidance in <u>Selkent Bus Co Ltd v Moore</u>; <u>Abercrombie v Aga Rangemaster Ltd</u> and <u>Chohan v Derby Law Centre</u>, I allow the claimant to amend her claim in accordance with her letter of 10 November 2017.

9. So, now to identify the issues so that I can consider prospects of success.

<u>Unfair dismissal claim</u>

10. The claimant says that she resigned her contract whilst working for the second respondent because she had been told that there was a job for her with the first respondent, and then having done so she was told that that job with the first respondent was no longer available. The second respondent did not then allow her to retract her resignation. She says that she resigned because in effect of the respondent's breach of the implied term to maintain mutual trust and confidence by forcing inducing her to resign by saying that there was a job for her to go to when there was not. The claimant said to me today when I asked her who her employer was, that it was respondent one and/or respondent two. In respect of one set of performance obligations it cannot be based, and it must be it seems to me on the facts if she is employed by either of them, which she is employed by respondent two.

11. The respondents put forward two fairly obvious points. Firstly, in fact the claimant was employed by her own company, Meerzan Limited, or secondly, if she was not she was certainly employed by the agency Reed.

12. The claimant is right though in her written submissions to refer to the case of <u>Catamaran Cruisers Ltd v Williams</u> which is authority for the proposition that one cannot simply assume that because an individual is employed by their own service company that they cannot in fact be employed as a matter of law by the organisation for which that person actively works. And on the agency point, we have the case of <u>Dacas v Brook Street Bureau UK Limited</u> [2004] ICR 1437, when the Court of Appeal opened up the possibility that in some circumstances

perhaps there might be a contract of employment between an individual otherwise placed with the end user by an agency, rather than a contract of employment with the agency. That case was followed by a flurry of litigation and reported cases which come to an end really with the case of James v Greenwich London Borough Council, where Sir Patrick Elias, President of the EAT at that time, now of course in the Court of Appeal, gave guidance on the circumstances in which it may be possible to find that there was an employment contract between the worker and the end user. Amongst that guidance are remarks to the effect that such situations will be rare and that there must be some words or conduct to entitle the Tribunal to conclude that the agency arrangement no longer adequately reflects how the work is actually being performed, and he commented that the fact that an agency worker has worked for a particular client for a considerable period does not justify implication or a contract between the two.

13. The claimant also argues in her skeleton argument that the contract in the bundle is a sham and does not reflect the reality of the situation. Referring of course to the Court of Appeal's authority of Autoclenz Ltd v Belcher and she set out in her skeleton argument, I am not going to read them all out, a long bullet point list of why it is she says the reality of the relationship was that she was employed by the second respondent. These are complex questions, the answer to which requires detailed analysis. There is no doubt that the claimant is up against it when she argues she was employed by the second respondent or as she tried to argue the first respondent, even though up against it, and it is right to say that one's instinct in a situation like this will be to think that the claimant must surely not be an employee of the end user. But nevertheless, I say these are complex questions which require detailed analysis which is not appropriate on a summary basis, and I therefore decline to make either a strike out or a deposit order in respect of the unfair dismissal claim.

Discrimination claim

14. We are going to refer to an individual called Mr Smith, he works for the first respondent and to an individual called Mr Hughes, he worked for the first respondent until 2016 and transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) as previously referred to, to respondent two. One should note that as a contract worker the claimant would appear to be protected from discrimination under the Equality Act 2010 by virtue of s.41. One should also note that s.39(1) of the Equality Act 2010 prohibits discrimination in relation to offers of employment.

15. Turning then to the allegations, the first allegation and this is one which is clearly set out in the ET1, is in respect of the complaint that she was told that a job was available for her with the first respondent by employees of the first respondent who told her that she had to resign first and that she therefore resigned on 10 March 2017. She was then told that the job with the first respondent was no longer available. A man called Mr Tran then started in that very role she says on 13 March 2017. The claimant's case is that this is direct sex discrimination. She says that she and Mr Tran had similar experience and qualification, indeed at an earlier stage, apparently, she had recommended him for the role. She says that her advantage over him was that she was already

working in the business. She says that when Mr Tran subsequently left for whatever reason he was replaced by another man. She acknowledges that that person subsequently left and was replaced by a woman, but that was after she had filed her ET1 and had complained of sex discrimination. She says that the only explanation was her gender. Actually, at the moment we have no explanation from the respondent as to why Mr Tran was selected for this post and why the claimant was told it was unavailable, even though that this is her case is tolerably clear from the ET1. On the bare facts it is plainly potentially a case of direct sex discrimination by the first respondent in who it chose to offer employment to and on that basis, I will not strike the claim out, nor will I order a deposit order.

16. The second complaint of discrimination is of not being allowed to retract her resignation, that is an allegation against the second respondent. The claimant refers to a comparator, Mr Johal. I am told that he is an Indian non-Muslim male, and he had been allowed to retract his resignation. The claimant therefore points to that and says that the refusal to allow her to retract her resignation amounted to less favourable treatment. The excuse on the claimant's case offered by the respondent for not allowing her to retract her resignation was that it was taking the opportunity to reduce costs. In response to that the claimant says that her role was in fact offered to someone called Ms Rebecca Newton who is a Caucasian non-Muslim, and she will also say that the second respondent chose to keep another team manager, Mr Scott Liebenberg as a team manager at a reduced rate of pay and that the respondent did not make a similar offer to the claimant. Mr Liebenberg is Caucasian and non-Muslim.

17. The next complaint of discrimination is that the respondent investigated complaints against the claimant. The claimant acknowledges that there were complaints against her in June or July 2016. She says that she was subjected to investigation, the complaints as I understand it were not upheld. The claimant contrast this with three other instances as I have noted them firstly, she complained to Mr Smith about three people; a Miss O'Casey, a Miss Apostolides and a Mr Luxton. She said those individuals had a vendetta against her. Mr Smith she says did nothing. The second comparison is that the claimant says that she complained to Mr Smith that Miss O'Casey had defamed her to somebody who did not work in her team called Miss Handapangoda. She is alleged to have told her that the claimant was always shouting, angry and a bad manager. That individual subsequently went to work for the claimant in her team, told her what she had been told by Miss O'Casey and had said that it was not at all true. Having told Mr Smith about that he did nothing. The third comparison the claimant makes is that Mr Hughes retained the services of two individuals, Ms Watson and Mr Liebenberg even though the claimant had raised complaints about their performance, and indeed she says he concealed the concerns which she had raised.

18. The next complaint of discrimination is in respect of comments to the claimant by Mr Smith, she says in the Autumn of 2016. The comment she quotes is:

> "You're a Muslim, are you a virgin?"

That itself, if true, is potentially harassment on the grounds of sex or religion, and if not, that certainly direct sex or religious discrimination. As a standalone allegation if I take that at its highest as I have to, it is clear I cannot strike out that allegation, nor would it be appropriate for me to make a deposit order. The Tribunal must hear evidence about that allegation and decide whether or not it is true.

19. Lastly, there is a claim of victimisation, the protected act is said to be that the claimant told Mr Smith that it was unfair that she had been investigated, but the concerns which she had raised about others as referred to above were not. The claimant says that Mr Smith was aware that her concerns implicitly were that the others were Caucasian and non-Muslim. The detriment to which she says she has been subjected as a consequence of that protected act is firstly in Mr Smith not investigating and dealing with her complaint. Secondly, in not accepting the retraction of her resignation.

20. Then we have a background allegation regarding the alleged treatment of a Mr Aziz who is Asian Muslim. It is alleged that on 14 March 2017 Mr Johal told him falsely the claimant and others had described him as a “shit manager” and that the team did not respect him. Secondly, Mr Johal had told Mr Aziz that it was unacceptable for him to take breaks to pray.

21. So, to my conclusions on the discrimination allegations overall, I repeat one has to take the claimant’s case at its highest. One has to assume the factual allegations are made out, and if they are a Tribunal could conclude absent explanation and by and large we do not have an explanation yet of course from the respondent, no criticism there, we could conclude that race, sex or religious discrimination variously is likely to lie behind these matters, either in the form or direct discrimination or harassment though of course mutually exclusive. In those circumstances it is not appropriate for me to order a strike out, nor am I prepared to order a deposit. So, then overall the applications for strike out and deposit orders are refused.

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Employment Judge Warren

Sent to the parties on:
13 July 2018

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For the Tribunal:

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