EMPLOYMENT TRIBUNALS

Claimant: Miss N Nyland

Respondent: Scapa UK Ltd

Heard at: Manchester remotely (by Skype)
and by written representations

On: 24 June 2020 and 10 & 11 September 2020 in Chambers

Before: Employment Judge Holmes (sitting alone)

Representatives
For the claimant: In person
For the respondents: Mr S Brochwicz - Lewinski, Counsel

RESERVED JUDGMENT AND ORDERS ON PRELIMINARY HEARING

It is the judgment of the Tribunal that:

1.The claimant's application that the response should be struck out is dismissed.

2.No further orders as to disclosure are made.

3.The respondent's application made on 23 June 2020 to amend the response is withdrawn.

REASONS

1. This preliminary hearing was listed to determine applications made by the claimant on 15 January 2020.

2. The "Code "V" in the heading indicates that this was a remote hearing by Skype conference call **,** to which the parties have consented. A face to face hearing was not held because both parties were able to deal with the application and case management issues remotely. Both parties had provided the Tribunal with a bundle of the salient documents required for the purposes of the hearing.

3. The Skype hearing commenced on 24 June 2020, with the claimant making her submissions. Unfortunately, the connection was lost at around 11.15, and the hearing had to be abandoned.

4. The Tribunal wrote to the parties on 25 June 2020 explaining the options for the resumption of the hearing, and raising certain other matters relating to the application, and case management in general.

5. Both parties agreed to proceed by making written representations. The claimant did so on 26 June 2020, and the respondent on 10 July 2020. The claimant sent further representations , and attached a number of documents, on 24 July 2020.

6. The resumed hearing, in Chambers, was listed for 10 September 2020. It is appreciated that this is close to the final hearing listed for 14 September 2020, but this was unavoidable. The Tribunal has considered the oral submissions made on 24 June 2020, and the parties' subsequent written submissions, and now gives its judgment. There is some unfortunate overlap between the bundles provided by each party, so references to page numbers will be in the format "C 1 to 4" , or "R 1 to 4", and so on, depending upon which bundle is being referred to.

The background : the claims and case management to date.

7. By a claim form presented on 3 June 2019 the claimant , who is unrepresented, brought claims of sex discrimination and for equal pay arising from her employment with the respondent between 28 July 2018 and 26 April 2019. Her claims were set out in a two and a quarter page narrative attached to the claim form. The respondent responded to the claims as it understood them.

8. A preliminary hearing was held on 20 August 2019 by Employment Judge Franey. The claimant attended in person. Her claims were summarised as follows in the Case Summary (R 31 to 32).

> *(7) The claimant was employed between July 2018 and April 2019 as a Global Category Procurement Manager – Substrates, Outsource and Packaging. For the purpose of this case she compares herself with the male comparator Graham Lanty, who was employed as Global Category Procurement Manager – Chemicals. The claimant was on a salary of £65,000 whilst Mr Lanty was paid £71,291. The claimant says that this was a breach of the equality term implied into her contract.*
>
> *(8) In addition to her equal pay claim, the claimant complains of direct sex discrimination in that she was treated less favourably than Mr Lanty because of sex. There are three elements to this. Firstly, she says that she had a heavier workload than he did. Secondly. she says that she was required to do work whilst on annual leave, unlike him. Finally, she says that she was expected to travel in the UK and overseas outside working hours so as to give her a full working day when she arrived. This created significant difficulties for her given her childcare obligations. She says that Mr Lanty was not required to do that in the same way.*

(9) Additionally, the claimant complains that because of this alleged discrimination she was forced into resigning from the respondent and therefore that her resignation should be construed as a discriminatory dismissal.

(10) The respondent resists all the complaints on their merits. In relation to equal pay, it denies that the claimant was employed on like work with Mr Lanty, but even if so it says that there were material factors unrelated to sex which explained the difference in their remuneration. These factors include differences in the job, the market forces which mean that chemical procurement attracts a higher rate of pay than the work the claimant did, and Mr Lanty's comparatively longer experience in procurement. The respondent also denies that there was any less favourable treatment of the claimant because of sex in the way she alleges."

The list of complaints and issues as they appeared to be following this discussion was set out in the Annex to the Case Management Order.

The claimant's application to strike out the response .

9. The application made by the claimant was first made in her email to the Tribunal of 15 January 2020 (R 50 to 51). The relevant parts of it read as follows:

"……..In the meantime, the respondent has provided a draft bundle. There is a number of serious concerns in this regard and I believe the respondent has falsified information and intentionally withheld plus disregarded information to support their defence.

1.*Equal Pay*

I attach a copy of the letter provided to me by the respondent confirming the salary of comparator Graham Lanty. I also for comparison an email dated 28th May internally within the respondents business clarifying the salary of my comparator Graham Lanty. These two documents provide conflicting information. The letter states the salary is £71,290 yet the internal email denotes G Lanty salary to be 117.72% of the median market data- this calculates £73,428. On this basis the respondent has not provided a clear confirmation of my comparators salary. I have asked the respondent to provide payslips for clarification and also to demonstrate bonus amounts paid to my comparator. The respondent has refused to provide this information. I am unable to demonstrate the actual equal pay gap and mitigation of loss of earnings without this information. I believe the respondent is hiding information in this regard as it is detrimental to their case.

It is also noted and of public record that the respondent has now replaced my role with that of another male comparator. The respondent refuses to supply a signed copy of this individuals contract of employment. The fact they have now employed another male in the same capacity as myself becomes further relevant as an additional comparator - Mr Peter Roebuck.

2) Travel Schedule

The respondent has provided the attached list of travel schedule of Graham Lanty my comparator. It is noted that a "red eye" flight is claimed on the 5th September 2018. Please also see attached a copy of my calendar for the 5th September 2018 and noted the flight was at 1pm. Myself and Graham Lanty travelled together on this trip. Clearly the respondent has falsified information to support their defence and the integorty of this document as whole now becomes questionable.

3) Job Description

I attach my copy of the job description supplied to me by the recruitment agency Cast UK Ltd - 3 pages in total. I attach the copy of the job description the respondent has provided in the same, of 2 pages. The middle page which includes the date of this document has been excluded by the respondent. I feel the respondent has purposely removed this middle page due to it containing the date and also in light that it is an almost word for word replica of the job description disclosed for Graham Lanty Comparator dated 2011. It is also noted that on the hidden page 2 of this document refers a number of remits within both roles that the respondent has made reference to within their grounds of resistance - eg commodity markets. Furthermore this complete document reinforces the equal pay claim in like for like work.

4) Missing Information

The respondent has withheld the attached correspondence notes between themselves and the recruitment agency Cast UK. This information has been denied of existence by Scapa under the subject access request and subsequent disclosure, however this was provided by the recruitment agency as a log of notes from all telephone calls with the respondent under a separate subject access request. This was included in my list of documents yet as it contains clear sexist remarks with regard to me carrying a handbag- the respondent has excluded this from the bundle.

5) Redacted Offer Letter

I enclose a copy of my own and my comparators G Lantys offer letters from the respondent. Also enclosed in a redacted offer letter to Mr Peter Roebuck dated 2nd October 2019. As you will see this redacted offer letter does not resemble the similarities to that of my own or G Lantys and as such I believe this is a falsified document from a basic template. The document format has been edited and there is no list of accompanying documents nor is the letter signed. On this basis I feel this document is falsified to support the respondent defence that they have now employed a male replacement to myself on the same salary as myself. It is noted and apparent that following my departure the role was advertised publicly at a higher salary and I do not believe the respondent has provided a true and accurate confirmation of my replacements salary. Again this supports my equal pay claim and direct discrimination on the basis of sex. I have asked the respondent to provide a signed contract of employment and pay slips for Peter Roebuck but they have refused.

I ask the court to assist in this regard. While the respondent is providing conflicting information and clearly falsifying documents, this is not only an abuse of the process but also unethical. A full hearing cannot be held with the tribunal with incorrect and purposely falsified and misrepresented information and now the respondents integrity is

in question as a whole. I do not consider these errors to be admissible under administration errors as there is too many errors which all coincidently support the respondent. The respondent has subsequently delayed the case management order by now totalling 3 weeks, of which I agreed to be amenable, however the delays have now resulted in the provision of falsified information and the purposeful withholding of information to support their defence. Clearly this is the second instance of withholding information following on from my email to the tribunal to assist dated 12th December 2019. On this basis and due to the respondents conduct I ask the tribunal to consider a strike out of the respondents ET3 and grounds of resistance as per below:

- ***The respondent's manner in which the which the proceedings have been conducted are scandalous, unreasonable or vexatious as per the Employment Tribunal Rules of Procedure article 37.1 (b) by way of purposely withholding information, not complying with the case management order of disclosure and mis representing information for the purpose of falsified defence***
- ***It not no longer possible to have a fair hearing given the lack of integrity and honesty displayed by the respondent in the intentional falsifying of information and documentation. As per the Employment Tribunal Rules of Procedure article 37.1 (e)"***

10. The Tribunal listed the preliminary hearing (originally for 26 May 2020) by letter of 6 February 2020. The purpose of the hearing was set out as :

"To consider the claimant's application to strike out the response, and any other issues about disclosure."

The claimant's submissions.

11. The claimant's submissions were as follows, taking them in the order of her application which she had then set out as a Statement of Issues document at C 1 to 2. In summary, combining her oral and written submissions, her application was advanced as follows.

Item 1 : Disclosure of Internal communications

The claimant addressed this issue in her oral submissions, and referred the Tribunal to the Information Commissioner's response to her complaint to her (known as the "ICO" for short) at pages 43 to 44 of her bundle. She referred to the finding that the respondent had not complied with its data protection obligations in respect of a Subject Access Request ("SAR") which she had made. In particular she believes that are emails, notes and other material that will have been generated during the time periods in issue. She referred the Tribunal to pages 90 and 91 of her bundle, in which she set out her concerns as to what documents the respondent was till withholding, especially in connection with her grievance and the provision of a reference to her new employer. As at 19 June 2020 the case was still open with the ICO. In her further submissions , after the postponement, she accepted that it was hard to prove that a document existed, but said that here were grounds for believing that more documents did exist, citing, as an example, an email from Phillip Spibey of 29 May 2019 , in which he made reference to an email from the claimant which clearly therefore existed, but had not been disclosed. Similarly it was

most unlikely that Amanda Whitehead in HR would not have any notes or emails in relation to her dealings with the claimant. She cited , as a further example, a letter from Amanda Whitehead to her on 17 May 2019.

Item 2 : Equal Pay:

The claimant contends that the respondent has provided conflicting (or false) information as to the salary, of Graham Lanty, her named comparator. She refers to a letter from the respondent dated 17/09/19 (R page 52) stating that Mr Lanty's salary was £71,290, contrasting this to a disclosed email at R page 54 which refers to a "Compa Ratio" of 117.72% of a median of £62,375. This produces a higher figure of £73,428. She also complains that she has not been provided with a copy of the contract of employment of Mr Roebuck, her successor. In her oral submissions the claimant highlighted this discrepancy, and how she had by email of 28 May 2019 queried this. She had asked for the P60s of both Mr Lanty, and Mr Roebuck, but they had been refused.

Item 3 – Travel Schedule

The respondent has provided a schedule of Mr Lanty's travel (R page 55) which claims a "red eye" flight on 5/09/18. This is incorrect because the claimant travelled on this flight with Mr Lanty, and her diary shows this flight to have been at 13.00 (R page 56). The respondent has clearly falsified information. Whilst the respondent has provided a corrected schedule, the claimant says that the respondent should now provide corroborative evidence of every entry on that schedule (ie. in respect of all travel undertaken, irrespective of the time of travel).

Item 4 – Job Description

The claimant refers to the job description ("JD") provided to her by the recruitment agency (R 57-59), and to the same document placed by the respondent into the draft hearing bundle (R60-61). The document in the bundle has the middle page missing. The claimant feels this was done on purpose, and notes that the second page refers to a number of "remits within both roles that the respondent has made reference to within their grounds of resistance". The claimant deals with this (out of order, and under a different heading "Missing Information") on the second page of her submissions on 26 June 2020. She complains that the respondent removed this vital page without any discussion with her.

She goes on to contend that the respondent also removed (i.e did not include in the proposed hearing bundle) other evidence, in the form of call logs of discussions with the respondent and the employment agency Cast UK Ltd. These included reference to Phillip Spibey making a remark about her not carrying a handbag which she considers very important to her claims. Whilst she appreciated that she could simply provide a supplementary bundle, that was not her point, she wanted to refer to this as another example of the respondent, unilaterally removing evidence from the bundle to its potential advantage, in support of her application that the respondent was conducting the proceedings unreasonably. She then moves on to make what are further applications for what she says is outstanding disclosure.

Item 5 – Redacted Offer Letter

The claimant contends that the respondent as falsified the letter it has produced which it claims to be their offer letter of 2/10/19 to Peter Roebuck, her successor. The claimant relies upon the fact that the offer letters to herself and Mr Lanty were different. In particular, she relies upon a difference in format, an absence of attachments, and the lack of a signature. The claimant believes Mr Roebuck was in fact appointed on a higher salary than this letter sets out. The claimant requests disclosure of a signed contract of employment and payslips for Mr Roebuck.

The claimant does not further address this Item in her submissions of 26 June 2020.

Item 6 – Bonus Allocation Data

The claimant contends that the data is not representative as she was not employed by Systagenix Management Manufacturing Ltd. The respondent will not remove this documentation from the bundle. The claimant now (in her 26 June submissions) appears to agree that this is not an issue for consideration in this application.

The respondent's submissions.

12. In response , the respondent replies to each point as follows, adopting the enumeration of the claimant's original application, rather than her statement of issues document.

Issue 1 – Equal Pay (claimant's Item 2)

The letter from the respondent at R52, dated 17/09/19, was in response to the claimant's request for information dated 6/09/19 (C10) which asked for details of Mr Lanty's earnings. This request obviously related to Mr Lanty's earnings at the relevant time, ie. during the claimant's employment (from 28/07/18 to 26/04/19), and the information given related to that period and was accurate.

Some time after the end of the claimant's employment, Mr Lanty received a pay rise, and the claimant has now seen, and has referred to, evidence relating to this. The following documents refer:

i. 28/05/19 email from Phil Spibey to Amanda Whitehead (R54) – This is a contemporaneous document setting out the basis of calculations for Mr Lanty's revised salary.

ii. 10/06/19 letter from the respondent to Mr Lanty (R76), informing him of a salary raise of 3% to £73,429.58 with effect from 1/06/19. This figure is in accordance with and consistent with the figures set out in the 28/05/19 email.

Mr Lanty's salary rise post-dated the claimant's employment, so was not relevant to her request for information. In any event, it is not inconsistent with the information provided re his salary at the time of the claimant's employment for him to have been given a raise thereafter. This affords no grounds for strike out or criticism of the respondent's defence.

The claimant and the Tribunal have referred to Mr Lanty's payslips. Provided that there is appropriate redaction of personal information, the respondent does not take issue with providing these consistent with the Tribunal's indication. Accordingly, the respondent has now provided the claimant with redacted copies of Mr Lanty's P60 for the tax year ending 05/04/19 (which shows his total earnings for the prior year) and his payslips for the period 15/03/19 to 14/06/19.

Mr Roebuck and his contract are irrelevant as the claimant cannot compare herself to a successor – as the Tribunal has already noted (***Walton Centre for Neurology & Neurosurgery NHS Trust v Bewley [2008] IRLR 588, EAT***, Elias J).

Issue 2 – Travel Schedule (claimant's item 3)

This evidence is relevant to the issue defined at the previous case management hearing (EJ Franey at R41, para 3(b)) as: the claimant "was required or expected to travel to work appointments outside working hours whereas he was not".

The respondent has gone back to Mr Lanty and asked him to review the travel schedule. As a result, a slightly revised schedule has been provided to the claimant (see R136) which includes a number of changes which are set out in detail in the respondent's submissions.

Further the respondent has provided supporting documents for those occasions where Mr Lanty travelled outside of working hours (addressing the issue raised by the claimant's case). These permit the claimant to doublecheck the occasions that the respondent says Mr Lanty travelled outside working hours. Reference is then made to the pages of the respondent's bundle where these documents are to be found.

The respondent does not agree that it should provide documentation evidencing every time Mr Lanty travelled for work as this is irrelevant and disproportionate. There is no dispute that he travelled for work. The issue is whether he was required or expected to travel outside of working hours, and the documentation relevant to this has been provided.

Again, no grounds for striking out the respondent's case are revealed. The respondent has gone to lengths to provide accurate information, and has now disclosed relevant documentation in support and to corroborate. If the claimant wishes to cross-examine at trial as to the differences between the 2 schedules supplied, she is free to do so, but there are no grounds for suggesting a fair hearing cannot take place.

Issue 3 – Job Description (claimant's Item 4).

The 2nd page of the JD was accidentally omitted from the draft hearing bundle. Of course, it can and will be included, and has been added to the next draft bundle. For what it is worth, it makes no sense for the respondent to try to omit it from the bundle – as the claimant herself notes, it is relevant to the respondent's own case, and the claimant already had a copy of the full document.

This does not amount to grounds for striking out, but is precisely the sort of point that arises, and that parties check and clarify when putting together hearing bundles.

It is for the c to advance a case, if she wishes, at the substantive hearing, as to the materiality of the omission and any suggestion that it was deliberate.

Issue 4 - Missing Information (no corresponding claimant's Item in her statement of issues).

The claimant's allegations are that the respondent has withheld "correspondence notes between themselves and the recruitment agency Cast UK" (R62-5) which were provided by the recruitment agency to the claimant .

The respondent has excluded this from the draft hearing bundle.

Response:

R62-5 is plainly the recruitment agency's note from their computerised client management system of their discussions with their client, the respondent in this case. It was obtained by the claimant from the recruitment agency. It is not a list of correspondence. This document was not the respondent's to disclose. There can be no criticism of the respondent for failing to disclose someone else's document which it did not have.

Inclusion in the bundle – This document is not relevant to whether the claimant was discriminated against by being required to work harder/during holidays/leave home earlier. Nor is it relevant to the issue of equal pay compared to Graham Lanty. However, the respondent will add it to the bundle given her expressed belief of its relevance.

c. For what it is worth, it is not accepted that the "handbag/folder" reference was discriminatory – it is a simple observation that the claimant did not turn up with materials. It may also be noted that the claimant was still offered the job after this.

Issue 5 – Redacted Offer Letter (claimant's Item 5)

a. The respondent denies that the offer letter to Mr Roebuck is falsified, or that there are grounds for making such an assertion. Comparing the offer letters to Mr Roebuck, Mr Lanty and the claimant , it can be seen they in fact follow very similar formats, perhaps with a different subject heading order. It may also be noted that the document disclosed in respect of the claimant is unsigned. If the claimant wishes to pursue the point that the document is falsified, she may of course do so in cross-examination, but the respondent cannot see the basis for this. The respondent refers to the documents at:

R66 20/06/18 Offer letter to the claimant

R69 19/08/11 Offer letter to Graham Lanty

R71 2/10/19 Offer letter to Peter Roebuck (name & address redacted)

b. Further, in any event, Mr Roebuck's salary (and terms) may be noted to be irrelevant,

as he was simply a successor to the claimant, as already referred to by the Employment Judge and as per the ***Bewley*** case (above). There is therefore no proper basis for any further disclosure in relation to him.

c. Again, this point discloses no grounds for striking out the respondent's case.

Further points raised by the C outside her application to strike out

Issues over the claimant's DSAR

The claimant has referred to various matters in relation to the Subject Access Request she has made and in relation to which she has written to the Information Commissioner.

This is not a matter over which the ET has jurisdiction. In any event, the respondent takes issue with the suggestion that there has been default on its part. An issue did arise over timings, although, as can be seen from the correspondence, the respondent took the view that the claimant 's DSAR was properly raised by the claimant at a later date than possibly the claimant considers it was. The relevant correspondence is:

R80 31/01/20 ICO letter – Scapa provided info outside 1 month and 2 month extension timeframes

R119 11/03/20 Email R sols copying to ET:

R83 11/03/20 Letter R sols to C re data request – This letter sets out in detail matters in relation to the C's DSAR, addressing, inter alia:

- the date of the DSAR, which was taken as 10 June 2019;

- the identification of 18,000 documents/emails in the DSAR search which had to be and were duly processed and considered in the context of the Request;

- confirmation that a further search has now been made extending to pre-employment documents (which were not originally requested by the C).

The letter goes on to address other matters raised by the claimant of more relevance to these proceedings, such as bonus issues, details of travel out of hours for Mr Lanty, and confirmation of provision of the missing page from the bundle.

For what it is worth, the respondent understands that the case with the ICO may have been closed, but then re-opened upon subsequent request by the C, upon her raising further matters.

In any event, as stated, and as explained by Employment Judge Franey to the C at the last case management hearing (see para 24 of the Case Management Summary at R34), issues concerning the claimant's DSAR are outside the jurisdiction of the Employment Tribunal and are of no relevance to the instant application.

Point re grievance-related documents at para 1 of C1 (claimant's Item 1)

The claimant raises a request for documentation in relation to her grievance.

The respondent's response to this is that no grievance was taken forward by the claimant , and there is thus no documentation resulting. This has already been dealt with in previous correspondence, which was not, at the time, challenged by the claimant – see:

C28 12/12/19 Email from C to ET seeking disclosure of documents concerning her grievance/dispute/termination of employment.

C38 17/01/20 Email from R's solicitor to the ET re disclosure issues raised – in which it is confirmed that disclosure of all documents in relation to the C's resignation has been provided, and confirming that the C stated she did not want to pursue a grievance and therefore there are no documents relating to a grievance process.

It can also be seen to be confirmed from the latest documentation provided by the claimant – in particular, in the final paragraph of the letter to the claimant from Amanda Whitehead (HR Manager) of the respondent, dated 17/05/19 – that the claimant confirmed that she did not wish to raise a grievance.

Further disclosure requests made in C's post-hearing written submissions.

13. In her written submissions, which were supposed to be in support of her application to strike out, the C appears to be seeking additional orders for disclosure of the following documentation:

a. Remuneration committee approval to change of company bonus structures;
b. Risk assessment and policy re work related stress;

c. Copy investigation into whistleblowing report allegedly made by the C.

14. This is a repetition of the requests made by the C in her email to the ET at C28 to which the respondent responded by its email of 17/01/20 at C38. Repeating the R's position, the documents referred to at sub-paragraphs (a) and (b) above simply do not exist. The document/s referred to at sub-paragraph (c) are of no relevance to the C's claim of sex discrimination arising out of the workload and working hours applied to the C, nor to her equal pay claim. There is accordingly no basis for any order for disclosure to be made.

General Matters raised in conclusion of C's written submissions

15. The claimant refers to a bundle being sent to her previous address. This was due to the solicitor handling the case file taking maternity leave and passing the case to a different solicitor. This new solicitor needed to send a revised draft of the bundle to Claimant, and used the address recorded on the solicitors' system, not realizing that the Claimant had since moved to a new address. The claimant seems to suggest this was deliberate. It was not – it was entirely accidental.

16. The claimant further refers to the respondent's solicitors having referred to the ET proceedings in dealings with the ICO. Insofar as the respondent's solicitors have referred to the ET proceedings, there is nothing wrong in this. As has been pointed out to the claimant in correspondence, the ET proceedings are a matter of public record, and the c's consent is not required in order for the respondent's solicitors to refer to them when corresponding with the ICO. Insofar as the claimant is using the DSAR procedure as another means of obtaining disclosure beyond the ET process, it is potentially relevant for the ICO to know there are ET proceedings in the background.

17. The claimant suggests the respondent has been "underhand, negligent and dishonest". This serious allegation is strenuously denied. Having addressed the particulars of the claimant 's instant application, it can be seen there is no merit to this allegation.

The claimant's response.

18. In her document of 24 July 2020 the claimant , after addressing whether she does or does not have a victimisation claim before the Tribunal, responds to the respondent's submissions, adopting the enumeration used in the response.

19. In relation to Issue 1, she acknowledges that Mr Lanty's P60 has now been provided, which show a gross pay of £88,774. She suggests this shows the respondent has been concealing the true extent of his remuneration, which had previously been said to be £71,291. Payslips have still not been provided, which hampers her ability to prepare her schedule of loss.

20. In relation to Issue 2 , the claimant did not want each and every document proving Mr Lanty's travel commitments , she merely wants to show how inconsistent and devious the respondent had been in trying to conceal evidence, which is part of the unreasonable conduct she is relying upon.

21. In relation to Issue 3, she makes much the same point that this is evidence of the respondent's unreasonable conduct, especially when viewed cumulatively, which is designed to take advantage of her as an unrepresented party.

22. In relation to Issue 4 , she makes the same point, pointing out that all alleged errors seem to favour the respondent.

23. In relation to Issue 5, whilst the claimant accepts that Mr Roebuck, her successor, cannot be used as a comparator, she nonetheless seeks to establish that the offer letter to Mr Roebuck as disclosed by the respondent is not authentic. She seeks disclosure of his P60 and payslips to confirm, or otherwise, that his salary is as set out in the offer letter. She contends that if this is shown not to be the case, this will prove that the offer letter is a falsification. This is a highly relevant issue to her application in terms of the respondent's conduct.

Other matters relating to disclosure.

24. Finally, the claimant rightly points out that the preliminary hearing was to deal not only with her application to strike out the response, but also any outstanding disclosure issues. In that regard, she sets out her further disclosure requests. In passing, the relevance of the ICO request is further to show unreasonable conduct on the part of the respondent.

25. She sets out her request for documents relating to her grievance, in so far as she contends that she raised one, at the latest by 17 April 2019. She goes on to refer to documents relating to what she describes as her "whistleblowing" report, relevant to her victimisation claim.

26. The claimant then goes on to deal with the respondent's cross – application for disclosure of her payslips in her new employment, which she contends she has sent to the respondent. She repeats her request for further disclosure in relation to the pay of Mr Lanty.

The law

27. The relevant law is contained in rule 37 of the 2013 rules of procedure which provides:

37 Striking out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

28. There are two stages to the consideration of this application. The first is whether the Tribunal is satisfied that there has in fact been unreasonable conduct on the part of the respondent. The second is, if so, whether the response should be struck out as the

appropriate sanction for that conduct. The two-stage test was recognised in ***HM Prison Service v Dolby [2003] IRLR 694***, *EAT*, at para 15; approved and applied in ***Hasan v Tesco Stores Ltd UKEAT/0098/16*** . The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. In ***Hasan,*** the EAT held that the failure of the employment judge in that case to consider 'whether to exercise his discretion in favour of not striking out following his finding that the claims had no reasonable prospect of success' amounted to a clear error of law (para 18). According to Lady Wise, 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' (para 19). Whilst these cases refer to "claims", the principles apply equally to responses.

Discussion and ruling.

29. The Tribunal makes the following determinations. Much of the claimant's application relies upon alleged failures of disclosure by the respondent. In relation to disclosure generally, there is clearly a difference of view between the parties. There are two aspects to this. Firstly, there is the aspect which relates to documents that the respondent concedes have not been disclosed, but contends that the reason for this is that they do not exist. As observed, the Tribunal cannot order disclosure of something which does not exist, and determining whether it does or does not exist, without hearing all the evidence , cannot easily be done in a preliminary hearing. The claimant can point to expectations and likelihood, but without, in effect a "mini – trial" , it is hard to make such determinations of fact. It is hard, therefore, also to determine that any alleged failure to disclose has been deliberate. The second aspect is where the respondent agrees that there is documentation, but disputes its relevance. There is, it turns out, less of that than first appeared, and the respondent has, albeit the claimant would say grudgingly, and in piecemeal fashion, given some further disclosure, but she feels there is more.

30. Much of the claimant's application is predicated upon the basis that in :

withholding material that she claims the respondent in fact has;

not including in the proposed hearing bundle documents that had been disclosed, and she considers should be included;

promising to disclose documents that are then claimed not to exist;

putting forward what she claims are incorrect (she would say false) documents or statements;and

refusing to disclose documents that it accepts exist, but claims are irrelevant

the respondent is guilty of unreasonable conduct, entitling the Tribunal to strike out the response.

31. Dealing with the first of these, the respondent does not, of course, accept that it has behaved unreasonably in the conduct of the defence to these claims. In relation to

the claimant's specific contentions that it has, it submits that in relation to each instance there has either been a genuine error, or there is a genuine dispute as to the existence of, or the relevance of , the documents that the claimant seeks, and has sought. It is clear that the claimant and the respondent disagree as to the relevance of some of the documentation which the claimant says either it has failed to disclose, or, alternatively has previously failed to include in the hearing bundle, or still maintains should not be included.

32. Dealing with the claimant's grounds, there are two admitted acts of the respondent in its conduct of the response upon which the claimant relies, and which should be considered first, as they are not in dispute. The first is Item 3, Mr Lanty's travel schedule. The respondent concedes that the information originally provided was incorrect, and has been corrected. This, the claimant contends , shows unreasonable conduct. The allegation is that the original information was deliberately misleading, and the respondent has been forced to correct it.

33. The Tribunal does not accept that is necessarily so. It may be, and it is clearly fertile ground for cross -examination, but it equally may simply be sloppy and inaccurate preparation on the part of the respondent.

34. Similarly, the claimant complains that a page was missing from her job description when the respondent prepared the draft hearing bundle , Item 4. This is perhaps the high point of this ground of the application. The claimant contends this was deliberate, and intended to disguise the true position, to the detriment of her case, which the respondent hoped she would not notice..

35. The respondent refutes this allegation, contending that any such omission was clearly unintentional, and was simple human error. The point is made that such an omission would be, as has proved, pointless, as the claimant would be aware of and alive to it, as she knew what the document should contain.

36. Whilst understanding the claimant's concerns and suspicions, particularly against the background of the other issues she has raised, the Tribunal is not satisfied that this was a deliberate omission , done with the intention of weakening the claimant's case. If it was, it was a clumsy and pointless exercise. The Tribunal does not accept that this was unreasonable conduct.

37. The remaining grounds really boil down to issues about disclosure. A genuine disagreement as to relevance is not unreasonable conduct. Parties often have differing views as to the relevance of documents to the issues in a case, and it is ultimately a matter for the Tribunal to determine whether a document or class of document is or is not relevant to the issues before it.

38. In the case of the documents relating to the remuneration of Mr Roebuck, the Tribunal considers that there is a genuine dispute as to relevance, and the respondent has not acted unreasonably in taking the stance it has as to their disclosability . The claimant seeks yet further documents to prove that his offer letter is false. There is no foundation laid for this, other than the claimant's suspicions, aroused by the manner in which his offer letter was disclosed. She could be said, therefore , in short, to be fishing, for something that may prove this. That is not, however, a determination of whether she

is or is not entitled this material, it is however, a highly relevant factor in whether the Tribunal should regard the respondent's failure to provide this material as unreasonable conduct. It is not, it is a legitimate stance to take, which may or may not be vindicated.

39. The same is also true of the remuneration of Mr Lanty. The respondent has now given disclosure of his P60, but the claimant is not satisfied with this.

40. This is a general ground, that the respondent has not given full disclosure. There is some basis for this view, and the two examples cited by the claimant in her submissions of 26 June 2020 do suggest that there may be more. That said, the second example cited, the letter from Amanda Whitehead of 17 May 2019 does come at a time when the claimant had started the early conciliation process with ACAS, on 25 April 2019, which did not end until 24 May 2019. This letter was therefore during that period, and actually refers to the ACAS correspondence. It may, therefore, arguably be part of the early conciliation process, and any emails from ACAS to the respondent, and vice versa, or indeed between the claimant and ACAS at this time are probably not disclosable, unless both sides are prepared to waive any privilege. Be that as it may, whilst suggestive that there may be more email documentation , notes, or other materials, the Tribunal is not satisfied that this is necessarily so, and considers this a matter to be pursued in cross – examination. The Tribunal is not persuaded , on this basis, that the respondent has behaved unreasonably.

41. By way of general observation, issues of relevance are not always best determined at the preliminary hearing stage. The best judges of the potential relevance of any documents or material are the Tribunal Panel conducting the final hearing. They, fully seized of the matter, with the benefit of all the other documents presented by both parties, and the witness evidence, will be in the best position to determine relevance. Similarly, as the existence or otherwise of any particular document is a question of fact, they too will be better placed to consider whether any assertion that a document does not exist is correct. Nothing in this judgment is, or could be, any final determination of relevance or disclosability of any document. Rather the Tribunal's task has been to decide whether the respondent's conduct has been shown to be unreasonable.

42. Whilst sharing some of the claimant's misgivings, and understanding her feelings, the Tribunal is not persuaded that the respondent's conduct has been shown to cross the boundary of reasonableness, though it may be close to it. That is sufficient to dispose of the application, but , even if, however, so satisfied, the Tribunal would have to go on to consider whether the Draconian sanction of striking out was appropriate, and in particular if a fair trial was still possible. In the Tribunal's view it still is. The issues around disclosure are likely to arise upon the evidence, and the Tribunal hearing the claims will doubtless be highly vigilant as to whether any further disclosure should be given , or may draw inferences from the absence of disclosure that it would expect from the respondent. The Tribunal sees nothing which is so dramatically relevant to the main claims that the claimant makes but which is missing , so as to severely hamper her case, particularly on liability, that would require it to hold that a fair trial is not possible. The application therefore is dismissed.

Disclosure.

44. As the claimant rightly points out , the preliminary hearing was not only to determine the claimant's application to strike out the response, but also any other issues about disclosure. Sadly, there remain such issues. The claimant still seeks further disclosure of the various documents referred to in the application, particularly in relation to the remuneration of Mr Lanty and Mr Roebuck, and any internal documents realting to HR involvement with her "grievance".

45. The respondent, by the same token, seeks disclosure from the claimant of payslips in her new employment. It is a remarkable and lamentable feature of this litigation that the parties cannot even agree whether the claimant has or has not given full disclosure of her payslips in her new employment. She says that she has, the respondent says that she has not. This must be capable of a simple resolution.

46. Clearly some unfortunate events have occurred in this case, such as the erroneous sending of a bundle to the claimant's previous address, of which she again complains and contends that this was unreasonable conduct. Whilst this has been explained as an innocent mistake following a change of personnel within the respondent's solicitors, it has done nothing to foster trust on the part of the claimant.

47. The Employment Judge is not now going to make any ruling upon further disclosure. As observed above , the Tribunal Panel will be in a much better position to do that once it is familiar with the case. Any such applications, from either side, will be held over to the start of the hearing. Without tying the hands of the Tribunal conducting that hearing, it may be best placed to decide any such applications once it has completed its initial reading.

48. To that end, however, where there is no issue but that documents exist, but there is an issue as to whether they have been, or should now be, disclosed, each party should attend (or appear by CVP) the Tribunal with copies, or electronic access to them, so that if any application made is granted, the Tribunal and the parties can then be provided with any further material that the Tribunal may order.

49. Whilst such piecemeal and late disclosure is regrettable, given that a six day hearing is listed, and such eventualities are not uncommon, the Employment Judge sees no reason why the hearing should not at least commence. Any consequences arising out of any late disclosure that is permitted can be considered by the Tribunal at the time.

50. The Tribunal would add this, by way of further observation. The equal pay claim is a like work claim. The respondent accepts that the claimant's comparator , Mr Lanty, was paid more than she was. It may also be the case that her successor Mr Roebuck was too, but that is of limited relevance. The first issue in a like work claim, however, is whether the claimant and her comparator were engaged on like work. If they were not, it does not matter how much more than the claimant her comparator was paid. The focus upon what pay Mr Lanty and Mr Roebuck received is therefore rather misplaced , when the real issue is whether the claimant and Mr Lanty were engaged upon like work. It is appreciated that the claimant may require such information for formulating her loss of earnings claim, but that is quite a separate matter. The material factor defence (which, it is presumed , will be considered at the same time, and upon the same evidence) likewise is unlikely to require evidence, at the liability stage, of what Mr Lanty's higher earnings in fact were.

Amendment.

51. Finally, whilst disclosure was an issue that was before the Tribunal in the preliminary hearing, amendment was not. Potential amendment arose on both sides. For the respondent, it made an application on 23 June 2020, by email , to amend the response in relation to remedy to plead , in a new para. 37 in the Grounds of Resistance, that the claimant would have been dismissed in any event, had she not resigned, for taking unauthorised absence on 25 February 2019, which she took as paid sick leave.

52. In its submissions received on 10 July 2020, at para. 24 , the respondent does not pursue this application at this time. It is therefore, taken as withdrawn.

53. For the claimant , however, she appears to be under the impression that her claims include a claim of "victimisation". She clarifies this in her further submissions on 24 July 2020. She does so on the basis of an email (C pages 11 and 12) that she sent the Tribunal on 10 September 2019 (which she did not copy at the time to the respondent, but did on 16 September 2019) in which, having received the case management orders made on 20 August 2019, she said this:

"Within my ET1 and Agenda form I had included aggravated damages in relation to victimisation which seems to have now been discounted or missed. In light that I was representing myself and am not legally trained I appreciate that I may not have been correct in my legal terminology , however, I tried to the best of my ability to include the details of discrimination and/or victimisation within my ET1 around the details of events. I therefore ask the tribunal to include the victimisation claim within the case management summary."

The claimant then sent the Tribunal an email on 20 September 2019 to which she attached Further Particulars, and other documents, and again on 27 September 2019 she sent a further email attaching her Schedule of Loss. In that document, in three instances, she uses the term "Victimisation".

54. By letter of 6 November 2019 to the claimant , copied to the respondent, the Tribunal acknowledged the claimant's emails of 20 and 27 September 2019, but made no mention of her email of 10 September 2019. The claimant claims that it was confirmed to her in a telephone call to the Tribunal on 18 November 2019 that "victimisation had been added". There is no record on the file of this, and whoever may have informed the claimant so had no authority to do so.

55. By email of 12 December 2019 to the Tribunal (C - page 28) , again not copied to the respondent, the claimant sought specific disclosure from the respondent. That was copied by the Tribunal to the respondent, whose comments were sought upon it, by letter of 4 January 2020 (C – page 32) . In her application of 12 December 2019 the claimant made two specific references to victimisation. The respondent's response on 17 January 2020 (C – page 38) disputed the claimant's application on various grounds, and did say that the requested documents were not relevant to her pleaded claims. No specific reference, however, was made to victimisation.The claimant had , by then, of course, on 15 January 2020, made this application.

56. The position therefore, the Employment Judge considers, is this. The claimant's claims did not include, or were not understood to include, any claim of victimisation, which would fall under s.27 of the Equality Act 2010. The claimant , by her email of 10 September 2019, did query this with the Tribunal, but, unfortunately this was never specifically addressed by the Tribunal. Equally, when the respondent was invited to respond to the claimant's application for disclosure in which she used the term, no mention was made of the fact that there was no victimisation claim before the Tribunal. Hence this issue has, regrettably, been missed. This may be because the term was taken as being used (as indeed it may well be) in the lay sense of "being badly treated". The term, however, has a specific meaning in s.27 of the Equality Act 2020, which requires the claimant to have been treated unfavourably because she had done a "protected act". The act in question has to relate to the Equality Act, and would usually be some form of assertion by the claimant , in a grievance or otherwise, that the respondent had breached that Act. It was, and remains , unclear whether the claimant is seeking to make such a claim. If so, she would need to identify the protected act or acts, and then the allegedly unfavourable treatment to which she was subjected. That would require an amendment of her claims.

57. It may be, however, that the claimant on reflection, will not seek such an amendment. The context in which she has raised this issue appears particularly to be after she raised a complaint that Mr Lanty had acted improperly. That she refers to as whistleblowing. If that was the reason for her allegedly unfavourable treatment, that would not be any form of claim under the Equality Act 2010, but would potentially seek to add a whole new cause of action under protected disclosure.

58. Further, if the real relevance of what the claimant terms "victimisation" is simply bad treatment of her which increased the injury to feelings that she suffered, this is not a new claim as such, it merely falls to be considered in the overall context of the appropriate award for injury to feelings.

59. To be clear, however, the claimant does not presently have any victimisation claims before the Tribunal, and she would need to seek to amend to include any such claims, providing the necessary details outlined above. For completeness, the three bullet points at the end of the first page of her submissions of 24 July 2020 are not sufficient particularisation of any proposed victimisation claims. The protected act(s) relied upon must be specified with dates , to whom they were made, and why they amounted to protected acts. Similarly, the dates, perpetrators and details of each act of unfavourable treatment would be required for any such application to be considered. The Tribunal is not encouraging any such application, which, if made, and successful , may lead to other consequences, but it is important that the claimant is clear what claims are , and are not, before the Tribunal.

60. The Employment Judge apologises that these applications could not be determined any sooner before the commencement of the final hearing, but trusts that then parties will appreciate why this has not been possible.

Employment Judge Holmes

DATE 11 September 2020

RESERVED JUDGMENT SENT TO THE PARTIES ON

12 September 2020

FOR THE TRIBUNAL OFFICE

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