EMPLOYMENT TRIBUNALS

Miss S Skinner

Claimant

-and-

Carers Lewisham

Respondent

PRELIMINARY HEARING

Heard at: London South Employment Tribunal (Croydon)

On: 6 October 2017

Before: Employment Judge John Crosfill

Appearance:

For the Claimant: In person

For the Respondent: Mr J Heard of Counsel instructed by DAS Legal Limited

Judgment

1. The Claimant's claim of direct discrimination because of race contrary to Sections 13 and 39 of the Equality Act 2010 relating to the decision(s) by the Respondent in relation to her grievance brought in December 2016 has little reasonable prospects of success and shall be made the subject of a deposit order contained in a separate Case Management Order. The application to strike out the said claim is dismissed.
2. The Claimant's claim for 7.5 days of holiday pay accrued but untaken at the time of her dismissal brought pursuant to regulation 30 of the Working Time Regulations 1998 or the same claim if brought under Part II of the Employment Rights Act has little reasonable prospects of success and shall be made the subject of a deposit order contained in a separate Case Management Order. The said order shall relate only to holiday accrued in the calendar year from 1 January 2016. The application to strike out the said claim is dismissed.
3. The Respondent's application for a deposit order and/or strike out in relation to the Claimant's claim for unfair dismissal is dismissed.

REASONS

1. On 21 September 2017 EJ Harrington listed this matter for a hearing to deal with the Respondent's application to strike out the Claimant's claims and/or order a deposit.

2. At the outset of the hearing the Claimant identified her claims as follows:

   2.1 The Claimant's claim for direct discrimination because of race related to the decision by the Claimant to deal with a grievance she raised by e-mail and relating to the disciplinary procedure against her in writing and without a hearing either of the grievance or an appeal hearing. She accepted that the decisions complained of took place in December 2016.

   2.2 The Claimant's claim for holiday pay (which she referred to variously in her ET1 as a claim for unlawful deductions/holiday pay) was for 8.5 days of leave accrued but untaken at the date of her dismissal and which she claimed either under Part II of the Employment Rights Act 1996 or under Regulation 30 of the Working Time Regulations 1998.

   2.3 The Claimant further contends that her dismissal was unfair contrary to section 94 of the Employment Rights Act 1996.

The law to be applied

"Strike Out"

3. The power to strike out a claim at a preliminary stage before a final hearing is found in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and in particular in rule 37 the material parts of which read as follows:

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

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

4. The power to strike out a claim under Rule 37(1)(a) on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances ***Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly*** **[2012] IRLR 755**, at para 30.

5. It will generally not be appropriate to strike out a claim where the central facts necessary to prove the case are in dispute. It is not the function of a tribunal such an application to conduct a mini trial. The proper approach is to take the Claimant's case at its highest as it appears from his (or her) ET1 unless there are exceptional circumstances ***North Glamorgan NHS Trust v Ezsias*** **[2007] IRLR 603**. Such exceptional circumstances could include the fact that the Claimant's case is contradicted by undisputed contemporaneous documents or some other means of

demonstrating that 'it is instantly demonstrable that the central facts in the claim are untrue' ***Tayside***.

6. In discrimination claims where findings of fact can depend upon whether or not it is appropriate to draw inferences from primary facts particular care needs to be taken before striking out a claim ***Anyanwu v South Bank Students' Union*** **[2001] IRLR 305, HL.**

7. The statements of principle derived from the cases referred to above do not in any way fetter the discretion of a tribunal to strike out a case where it is appropriate to do so ***Jaffrey v Department of the Environment, Transport and the Regions*** **[2002] IRLR 688 at para 41**. Where, as in one of the present claims (the RCN issue), it is suggested that the claim cannot succeed as a matter of law, then it would be appropriate to strike it out if the Tribunal were to accept that submission.

8. In ***Chandhok & Anor v Tirkey*** **UKEAT/0190/14/KN** Mr Justice Langstaff made the following comments:

> *"20. This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in Madarassy v Nomura [2007] ICR 867):*
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> *"…only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*
>
> *Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike-out a claim should be sparing and cautious. Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a Tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision."*

Deposit Orders

9. The power to order a party to pay a deposit as a condition of proceeding with a claim or issue in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and in particular in rule 39 the material parts of which read as follows:

> *"39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a)the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b)the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

10. The legal principles applicable to making a deposit order are the subject of the recent case of ***Hemdan v Ishmail & Anor*** **(Practice and Procedure: Imposition of Deposit) [2016] UKEAT 0021** where the President stated:

"*10. A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit.*

11. The purpose is emphatically not, in our view, and as both parties agree, to make it difficult to access justice or to effect a strike out through the back door. The requirement to consider a party's means in determining the amount of a deposit order is inconsistent with that being the purpose, as Mr

Milsom submitted. Likewise, the cap of £1,000 is also inconsistent with any view that the object of a deposit order is to make it difficult for a party to pursue a claim to a Full Hearing and thereby access justice. There are many litigants, albeit not the majority, who are unlikely to find it difficult to raise £1,000 by way of a deposit order in our collective experience.

12. The approach to making a deposit order is also not in dispute on this appeal save in some small respects. The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.

13. The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise. Where, for example as in this case, the Preliminary Hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested.

14. We also consider that in evaluating the prospects of a particular allegation, tribunals should be alive to the possibility of communication difficulties that might affect or compromise understanding of the allegation or claim. For example where, as here, a party communicates through an interpreter, there may be misunderstandings based on badly expressed or translated expressions. We say that having regard in particular to the fact that in this case the wording of the three allegations in the claim form, drafted by the Claimant acting in person, was scrutinised by reference to extracts from the several thousand pages of transcript of the earlier criminal trials to which we have referred, where the Claimant was giving evidence through an interpreter. Whilst on a literal reading of the three allegations there were inconsistencies between those allegations and the evidence she gave, minor amendments to the wording of the allegations may well have addressed the inconsistencies without significantly altering their substance. In those circumstances, we would have expected some leeway to have been afforded, and unless there was good reason not to do so, the allegation in slightly amended form should have been considered when assessing the prospects of success.

15. Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had for

example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved, and the case is likely to be allocated a fair share of limited tribunal resources, are also relevant factors. It may also be relevant in a particular case to consider the importance of the case in the context of the wider public interest.

16. If a tribunal decides that a deposit order should be made in exercise of the discretion pursuant to Rule 39, sub-paragraph (2) requires tribunals to make reasonable enquiries into the paying party's ability to pay any deposit ordered and further requires tribunals to have regard to that information when deciding the amount of the deposit order. Those, accordingly, are mandatory relevant considerations. The fact they are mandatory considerations makes the exercise different to that carried out when deciding whether or not to consider means and ability to pay at the stage of making a cost order. The difference is significant and explained, in our view, by timing. Deposit orders are necessarily made before the claim has been considered on its merits and in most cases at a relatively early stage in proceedings. Such orders have the potential to restrict rights of access to a fair trial. Although a case is assessed as having little prospects of success, it may nevertheless succeed at trial, and the mere fact that a deposit order is considered appropriate or justified does not necessarily or inevitably mean that the party will fail at trial. Accordingly, it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued (see, for example, the cases to which we were referred in writing by Mr Milsom, namely Aït-Mouhoub v France [2000] 30 EHRR 382 at paragraph 52 and Weissman and Ors v Romania 63945/2000 (ECtHR)). In the latter case the Court said the following:

> *"36. Notwithstanding the margin of appreciation enjoyed by the State in this area, the Court emphasises that a restriction on access to a court is only compatible with Article 6(1) if it pursues a legitimate aim and if there is a reasonable degree of proportionality between the means used and the aim pursued.*
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> *37. In particular, bearing in mind the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, the Court reiterates that the amount of the fees, assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed his or her right of access to a court or whether, on account of the amount of fees payable, the very essence of the right of access to a court has been impaired …*
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> *42. Having regard to the circumstances of the case, and particularly to the fact that this restriction was imposed at an initial stage of the proceedings, the Court considers that it was disproportionate and thus impaired the very essence of the right of access to a court …"*

17. An order to pay a deposit must accordingly be one that is capable of being complied with. A party without the means or ability to pay should not therefore be ordered to pay a sum he or she is unlikely to be able to raise. The proportionality exercise must be carried out in relation to a single deposit order or, where such is imposed, a series of deposit orders. If a deposit order is set at a level at which the paying party cannot afford to pay it, the order will operate to impair access to justice. The position, accordingly, is very different to the position that applies where a case has been heard and determined on its merits or struck out because it has no reasonable prospects of success, when the parties have had access to a fair trial and the tribunal is engaged in determining whether costs should be ordered."

11. The threshold for making a deposit order is less than that for striking out a claim and in considering whether or not to make such an order a tribunal is entitled to have regard to the likelihood of a party making out any factual contention and reach a provisional view of the credibility of any assertion see ***Van Rensburg v The Royal Borough of Kingston-Upon-Thames and others*** **UKEAT/0096/07**.

12. In making a deposit order it is mandatory to have regard to the paying party's ability to pay – see R39(2) and if more than one deposit order is made it may be necessary to have regard to the totality of the orders ***Wright v Nipponkoa Insurance (Europe) Ltd*** **UKEAT/0113/14/JOJ and** ***Hemdan v Ishmail***.

Time limits in discrimination claims

13. The time limit that applies is that set out in Section 123 of the Equality Act 2010. A claim must be presented within 3 months of the act complained of or within such further period as is just and equitable. The test for extension under Section123(2)(b) allows for the Tribunal to extend time where it is just and equitable to do so. That discretion is the exception rather than the rule: ***Robertson v. Bexley Community Centre*** **[2003] IRLR 434, at para 25**. Although the discretion is wide, the burden is on a claimant to displace the statutory time limits, lest her claim be shut out irrespective of its validity: ***Chief Constable of Lincolnshire Police v. Caston*** **[2010] IRLR 327**. In ***Abertawe Bro Morgannwg University Local Health Board v. Morgan (Unreported)*** **(UKEAT/0305/13/LA)**, Langstaff P held at para 52 that a litigant could hardly hope to satisfy the burden unless she provides an answer to two questions: The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is reason why after the expiry of the primary time limit the claim was not brought sooner than it was.

14. In ***British Coal Corporation v. Keeble*** **[1997] IRLR 336**, the EAT considered Limitation Act 1980, s.33 to provide a useful checklist for a Tribunal's consideration of whether to exercise its discretion to extend time. That checklist sets out the following factors:

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had cooperated with any requests for information;

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to cause of action;

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

15. The courts have subsequently clarified that this is merely a useful checklist rather than a statutory requirement: ***Southwark London Borough Council v. Alfolabi*** **[2003] IRLR 220.**

16. The tribunal should consider whether to exercise its discretion to extend time separately in respect of each claim rather than doing so on a global basis: ***Morgan*** (supra), at paras 51 and 55 and the summary.

Discussion

17. In assessing the applications I am dealing with, I have had regard not only to the Claimant's case set out in her ET1, but also to the documentation contained in the bundle provided by the Respondent. I have paid particular regard to the contract of employment and the contemporaneous documents relating to the Claimant's grievance.

The claim for direct discrimination

18. Mr Heard on behalf of the Respondent argued, correctly in my view, that the claim of direct discrimination was presented outside of the 3 month time limit imposed by Section 123 of the Equality Act 2010. He recognised that the hearing had not been listed to determine time limits and that the question of whether it would be just and equitable to extend time was not strictly before me. He argued that I should regard the fact that the Claimant would need to persuade the Tribunal that it was just and equitable to extend time in determining whether the claim had little or no reasonable prospects of success. I consider that to be the proper approach but note that the facts alleged are inextricably bound up with the dismissal and that if the claim is out of time (which it appears to be) it will only just be so.

19. Mr Heard then argued that the claim had no apparent merit. I considered the context of the grievance. From the documents that I have seen the following emerged:

    19.1 Firstly, it does appear that a safeguarding concern had not been reported to social services when good practice determined that it should have been: and

    19.2 As such it is likely that there was an ostensibly good reason for commencing disciplinary proceedings that does not appear to relate to race; but

    19.3 There appeared to be a degree of animosity towards the Claimant from Kevin Duggan in his investigatory report [page 58 and 59] and in the coarse of the disciplinary hearing itself.

20. I note that the Claimant does not suggest that the decision to dismiss her was discriminatory. She did not refer to any evidence other than the fact of her race and the fact that the grievance was not conducted as she expected to support her contention that her treatment was because of race. Whilst the Claimant sought to identify a comparator it was not clear that there was no material difference in circumstances. I consider that the appropriate comparator would be a person not sharing the Claimant's race but who also brought a grievance in the context of disciplinary proceedings. I consider that many employers would wrap up a grievance about a disciplinary process within that process rather than embarking on satellite issues.

21. On the evidence before me I considered that the allegations of the Claimant in this respect have little reasonable prospects of success and a deposit order is appropriate. I cannot however say that they cross the line into having no reasonable prospects of success. There is the, as of yet unexplained, apparent animus of Mr Duggan and it may be that that might assist the Claimant to persuade a tribunal that that her race played a part in any adverse decision.

22. The claim for holiday pay is more technical. Mr Heard took me to the contract of employment. That provides that the holiday year follows the calendar year. It also provides that holiday should not be carried over without permission. He says, and the Claimant agreed, that no permission was sought to carry over any holiday accrued but untaken in 2016. She was dismissed on 13 January 2017 just 13 days into the new holiday year. The Claimant says that as she was suspended she did not know how to or whether she needed to seek permission.

23. I find that the Respondent has a compelling case that the Claimant has lost the right to claim for holiday accrued in the previous holiday year. As such the claim has little reasonable prospects of success. The only reason I do not strike out the claim as requested is because I can see it just about possible that an argument might be advanced that during a period of suspension the Claimant was prevented from taking annual leave. For that reason, I do not make a strike out order.

24. Mr Heard sought to persuade me that the unfair dismissal claim was hopeless. He argued that the Claimant had essentially accepted a failure which related to safeguarding for which she had management responsibility. He said that it was evident that the process followed and the sanction of dismissal fell within a range of reasonable responses.

25. The Claimant's ET1 has focused primarily on the procedure followed rather than on the substance of the allegations. However, a tribunal will be obliged to have regard to the questions identified in ***British Home Stores Ltd v Burchell*** **[1978] ICR 303**. In particular, it will need to consider whether there were reasonable grounds of the Respondent's conclusion that there was misconduct. Having reviewed the notes of the disciplinary meeting I do not consider that the Claimant made any admissions that she was responsible for any failures. Whether there were reasonable grounds for concluding otherwise is a live issue.

26. I read the investigation report of Mr Drugan. The closing passages of that report include an attack on the Claimant's work and character not related to the misconduct she was accused of. I also note that the correspondence in the run up to the disciplinary hearing contains at least 2 threats to dismiss if instructions were

not followed. In the course of the disciplinary hearing there were interventions by Mr Dugan who, arguably incorrectly, tried to limit the involvement of the Claimant's chosen companion.

27. The existence of a compelling ostensible reason for dismissal is not conclusive that that is the real reason or the principle reason see for example ***Associated Society of Locomotive Engineers & Firemen v Brady*** **[2006] IRLR 576**.It seems to me that despite the existence of an ostensibly fair reason for dismissal this is not a case where it is so clear that that was the actual reason that I should simply accept the Respondent's assertion that that is so. The documents I have seen would suggest that there could arguably have been other matters which the decision makers may have had regard other than the matters forming part of the disciplinary charges. Indeed they are expressly invited to have regard to such matters in the investigation report. In addition in applying the test of fairness under Section 98(4) of the ERA 1996 the Tribunal will have regard to the entirety of the process and as indicated above there are matters which on the papers cry out for some explanation.

28. I consider that it is impossible for me to say on the papers that the claim for unfair dismissal has little reasonable prospects of success and I therefore cannot make a strike out or a deposit order.

The deposit orders

29. I have concluded that it is appropriate to make 2 deposit orders for the reasons set out above. I discussed the claimant's means with her. She has just obtained fresh employment on a comparable salary to her work with the Respondent. She has a mortgage but did not wish to discuss her finances. She was happy to acknowledge that she was an ordinary Londoner on an average salary. I find that she has a modest disposable income.

30. I make a deposit order of £250 on the direct discrimination claim. I do so because that issue alone is likely to extend the ordinary hearing time to deal with more complex legal and factual issues. The sum is chosen to encourage the Claimant to reflect on the merits of that claim but is not so large to shut her out of the litigation If she considers that she could establish her claim at trial. I make a modest deposit order of £50 in respect of the holiday pay claim. The claim itself is modest and the arguments fairly straightforward. The sum chosen is affordable if the Claimant contends that it could succeed.

Employment Judge Crosfill

Dated 15 November 2017