EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Sackey	**v**	John Lewis Plc

Heard at: Norwich (by CVP) **On:** 12 August 2020

Before: Employment Judge M Warren

Appearances
For the Claimant: In person.
For the Respondent: Ms L Bell, Counsel.

COVID-19 Statement on behalf of Sir Ernest Ryder, Senior President of Tribunals
This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claimant's claims of unfair dismissal and disability discrimination have been brought in time.

2. The claimant was not at the material time a disabled person as defined in the Equality Act 2010; his claims of disability discrimination are therefore struck out.

3. The claimant's claim of unfair dismissal will be subject to a Deposit Order requiring him to pay a deposit of £100 by the date 28 days from that order being sent to the parties.

4. The 3 day hearing of this matter scheduled to take place in Bury St Edmunds on 1-3 March 2021 shall now be before an Employment Judge sitting alone and shall now take place over 2 days only: 1 and 2 March 2021.

REASONS

Background

1. Mr Sackey was employed by the respondent as a Warehouse Assistant between 22 June 2015 and his dismissal on 18 December 2018. Early conciliation was for one day only on 20 February 2019. These proceedings were issued on 20 March 2019.

2. The matter was case managed by Employment Judge Foxwell at a closed preliminary hearing in Cambridge on 8 January 2020. On that occasion, EJ Foxwell listed the matter for an open preliminary hearing on 9 March 2020 and for a final main hearing over 3 days on 29 April to 1 May 2020.

3. For reasons nobody seems to be able explain, the open preliminary hearing on 9 March 2020 did not proceed. The first day of the 3 day hearing on 29 April 2020, in the middle of the Coronavirus crisis, was turned into a telephone closed preliminary hearing for case management. As it happens, that was before me. With the agreement of the parties, I listed today's open preliminary hearing and listed the final main hearing for 1-3 March 2021.

The Issues

4. The issues in the case brought by Mr Sackey were identified by EJ Foxwell at the hearing on 8 January 2020.

5. Mr Sackey claims unfair dismissal and disability discrimination. The conditions he told EJ Foxwell that he relied upon as amounting to a disability were depression and stress. He told EJ Foxwell that these emerged at the beginning of 2018.

6. The respondent says that it dismissed Mr Sackey on 18 December 2018 after a poor attendance record throughout his employment but in particular, after 137 days of absence during 2018. It says that it followed a fair procedure in doing so.

7. Mr Sackey says that his dismissal was unfair and an act of disability discrimination.

8. In addition to his allegation that the act of dismissal was an act of disability discrimination, Mr Sackey further relies upon three allegations relating to events in 2017.

9. Employment Judge Foxwell expressed concern that neither claims appeared to have been issued in time. He was concerned that there were obvious difficulties in relation to the allegations pertaining to events in 2017, given that Mr Sackey's case is that his disability emerged in 2018.

He was also a concerned about the prospects of success on the unfair dismissal case, given Mr Sackey's absence record in 2018. Further, the respondent did not concede that Mr Sackey was a disabled person at the material time.

10. Accordingly, the issues before me as identified by EJ Foxwell in listing the open preliminary hearing are:

    10.1 Whether Mr Sackey's claims are in time;

    10.2 Whether any of Mr Sackey's claims should be struck out as having no reasonable prospects of success;

    10.3 Whether a Deposit Order should be made in respect of any of Mr Sackey's allegations or claims; and

    10.4 Whether Mr Sackey was a disabled person at the material time.

11. An additional issue emerged today. In a statement emailed to the Tribunal and to the respondent on 2 March 2020, Mr Sackey made reference to wishing to rely upon another disability discrimination allegation which he says took place in 2018 when he returned to work, on his last day of work prior to his dismissal. Neither party could help me with specifically when that was, but it was sometime in November 2018. The allegation he sought to rely upon is that an agency worker shouted at and potentially verbally abused Mr Sackey in a foreign language. He says that having complained and his allegation not being investigated, he felt his symptoms of depression and felt no longer able to continue at work.

Evidence

12. The respondent provided me with an agreed bundle in pdf format indexed and running to page 283.

13. Within the bundle were two statements by Mr Sackey relied upon in evidence today. The first is that which I have just referred to at page 57. The second is his Impact Statement referred to as a Disability Impact Report, it is also undated. It appears at page 243 in the bundle.

14. Mr Sackey affirmed on oath the content of these two statements were true. He was cross examined on their content by Ms Bell. He had the opportunity to clarify matters after cross examination.

15. I heard closing submissions from Ms Bell first and Mr Sackey had the opportunity of responding.

Time

16. S.111(2) of the Employment Rights Act 1996 requires a claim of unfair dismissal shall be brought before the end of the period of 3 months beginning with the effective date of termination. In Mr Sakey's case, that means that the primary limitation period for his unfair dismissal claim expired on 17 March 2019.

17. Similarly, s.123 of the Equality Act 2010 requires that any complaint of discrimination must be brought before the end of the period of 3 months from the date of the act of discrimination complained of. The primary limitation period for Mr Sackey's discrimination case also therefore expires on 17 March 2019.

18. Anyone wishing to present a claim to the Tribunal must first contact ACAS so that attempts may be made to settle the potential claim, (s18A of the Employment Tribunals Act 1996). In doing so, time stops running for the purposes of calculating time limits within which proceedings must be issued, from, (and including) the date the matter is referred to ACAS to, (and including) the date a certificate issued by ACAS to the effect that settlement was not possible was received, (or was deemed to have been received) by the claimant. Further, (and sequentially) if the certificate is received within one month of the time limit expiring, time expires one month after the date the claimant receives, (or is deemed to receive) the certificate. See s140B of the Equality Act 2010, s207B of the Employment Rights Act 1996 and Luton Borough Council v Haque [2018] UKEAT/0180/17.

19. Applied to Mr Sackey's case, this would mean that his early conciliation for the single day on 20 February 2019 extends the limitation period by 1 day to 18 March 2019. As he received the early conciliation certificate on 20 February 2019, which is within a month of the limitation period expiring, the one month extension then applies, in accordance with Haque. The respondent says that time therefore expired on 19 March 2019.

20. This gives rise to a wrinkle I had not thought of during the hearing and which has occurred to me whilst preparing my reserved decision. In the case of Tanveer v East London Bus and Coach Co Ltd UKEAT/022/16, the EAT upheld the Employment Tribunal in holding that in determining how to calculate, "a month" one should apply the "corresponding date principle" following the House of Lords case of Dodds v Walker [1981] 1WLR1027HL which means that time runs from the date of the event to the corresponding date in the following month. Thus in the case of Tanveer, where the early conciliation certificate was delivered on 30 June 2015, time expired on 30 July 2015.

21. Applying that principle to this case, time expired on 20 March 2019 which is the date these proceedings were issued and they were therefore issued in time.

22. I recognise that I did not raise this with Ms Bell during the hearing. If the respondent wishes to challenge my reasoning, it is welcome to apply for a reconsideration. However, my conclusion must be that both claims were brought in time.

Disability

The Law

23. For the purposes of the Equality Act 2010 (EqA) a person is said, at section 6, to have a disability if they meet the following definition:

"A person (P) has a disability if –

(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

24. The burden of proof lies with the Claimant to prove that he is a disabled person in accordance with that definition.

25. As the EAT observed in Morgan v Staffordshire University ICR 2002 475, the Employment Tribunal is unlikely to be satisfied that there is a mental impairment in the absence of suitable expert evidence, (although I need to bear in mind this case was before the requirement that a disability be a clinically recognised illness was removed by the Equality Act).

26. The expression 'substantial' is defined at Section 212 as, *'more than minor or trivial'*.

27. Further assistance is provided at Schedule 1, which explains at paragraph 2:

"(1) The effect of an impairment is long-term if –

(a) it has lasted for at least 12 months,
(b) it is likely to last for least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur".

28. As to the effect of medical treatment, paragraph 5 provides:

"(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –

(a) measures are being taken to treat or correct it, and
(b) but for that, it would be likely to have that effect.

(2) 'Measures' includes, in particular medical treatment …"

29. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government's office for disability issues entitled, 'Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability'. Although I acknowledge that the guidance is not to be taken too literally and used as a check list, (Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19) much of what is there is reflected in the authorities, (or vice versa).

30. As Sections A3 through to A6 of that guide make clear, in assessing whether a particular condition is an "**impairment**" one does not have to establish that the impairment is as a result of an illness, one must look at the effect that impairment has on a person's ability to carry out normal day-to-day activities. A disability can arise from impairments which include mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, unshared perceptions, eating disorders, bipolar affective disorders, obsessive compulsive disorders, personality disorders, post traumatic stress disorder, (see A5) and can also include mental illnesses such as depression. It is not necessary and will often not be possible to categorise a condition as a particular physical or mental impairment.

31. As to the meaning of '**substantial adverse effects'**, paragraph B1 assists as follows:

> *"The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect".*

32. Paragraph B12 explains that where the impairment is subject to **treatment**, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or the correction, the impairment is likely to have this effect. The word 'likely' should be interpreted as meaning, 'could well happen', (see SCA Packaging below). In other words, one looks at the effect of the impairment if there was no treatment. A tribunal needs reliable evidence as to what the effect of an impairment would be but for the treatment, see Woodrup v London Borough of Southwark [2003] IRLR 111 CA.

33. A substantial effect is treated as continuing, if it is **likely to recur**, this is explained at paragraphs C5 and C6 by cross reference to Schedule 1, paragraph 2(2) quoted above. However, it is the substantial adverse effect on the ability to carry out day to day activities that must recur, not merely a re-manifestation of the impairment after a period or remission, but to a lesser degree, (Swift v Chief Constable of Wiltshire Constabulary [2004] ICR 909 EAT).

34. Similarly, on the question of whether an impairment has lasted or is **likely to last** more than 12 months, it is the substantial adverse effect which must have so lasted.

35. As for what amounts to **normal day-to-day activities**, the guidance explains that these are the sort of things that people do on a regular or daily basis including, for example, things like shopping, reading, writing, holding conversations, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, taking part in social activities, (paragraph D3). The expression should be given its ordinary and natural meaning, (paragraph D4).

36. The guidance suggests that whilst specialised activities either to do with one's work or otherwise, are unlikely to be normal day-to-day activities, (paragraphs D8 and 9) some work related activities can be regarded as normal day-to-day activities such as sitting down, standing up, walking, running, verbal interaction, writing, driving, using computer keyboards or mobile phones, lifting and carrying (paragraph D10). That needs to read in light of Paterson v Commissioner of Police of the Metropolis [2007] ICR 1522 EAT and Chacon Navas v Eurest Colectividades SA [2007] ICR 1 ECJ, which are authority for the proposition that normal day to day activities includes activities relevant to participation in professional life, and Chief Constable of Dumfries and Galloway Constabulary v Adams [2009] ICR 1034 EAT which clarifies that does not apply to specialist skills.

37. As to what amounts to a **'substantial effect'**, the guidance is careful not to give prescriptive examples but sets out in the Appendix a list of examples that might be regarded as a substantial effect on day-to-day activities as compared to what might not be regarded as such. Physical examples include, *'difficulty picking up and carrying objects of* moderate *weight, such as a bag of shopping or a small piece of luggage, with one hand'* which would be regarded as a substantial effect, as compared to, '*inability to move heavy objects without assistance or a mechanical aid, such as moving a large suitcase or heavy piece of furniture without a trolley'* which would not be so regarded.

38. Mental health examples in the appendix include, *'difficulty going out of doors unaccompanied…"* or *"*difficulty *waiting or queuing, for example, because of a lack of understanding of the concept…"* or *"difficulty entering or staying in environments that the person perceives as strange or frightening, because the person has a phobia.."* which would be regarded as substantial effects, as compared to, *'inability to speak in front of an audience simply as a result of nervousness;"* or *"some shyness and timidity…"* which would not be so regarded.

39. The word, "**likely**" in the context of the definition of disability in the Equality Act 2010, means, "could well happen", or something that is a real possibility. See SCA Packaging Ltd v Boyle [2009] ICR 1056 HL and the Guidance at paragraph C3. This is because we are not concerned here

with weighing conflicting evidence and making findings of fact, but are in the realm of medical opinion and assessing risk or likelihood in that sense.

40. A claimant must meet the definition of disability as at the date of the alleged discrimination. That means for example, if the impairment has not lasted 12 months as at the date of the alleged discrimination, it must be expected to last 12 months as at that time, (not the date of the hearing). (Richmond Adult Community College v McDougall [2008] ICR 431 CA, Tesco Stores Ltd v Tennant UKEAT0167/19).

41. The indirect effects of an impairment must also be taken into account, (the Guidance at D22). For example, where the impairment causes pain or fatigue, that pain or fatigue may impact on the ability to carry out day to day activities to a degree that it becomes substantial and long term.

42. In Goodwin v Patent Office [1999] ICR 302 the EAT identified that there were four questions to ask in determining whether a person was disabled:

    1. Did the Claimant have a mental and/or physical impairment?
    2. Did the impairment effect the Claimant's ability to carry out normal day-to-day activities?
    3. Was the adverse condition substantial? and
    4. Was the adverse condition long term?

43. In J v DLA Piper UK LLP [2010] IRLR 936 Mr Justice Underhill, President of the EAT at time, observed that it is good practice to state conclusions separately on the one hand on questions of impairment and adverse effect and on the other hand on findings on substantiality and long term effect. However, Tribunals should not feel compelled to proceed by rigid consecutive stages; in cases where the existence of an impairment is disputed, it makes sense to start by making findings about whether the Claimant's ability to carry out normal day-to-day activities is adversely effected on a long term basis and then consider the question of impairment in light of those findings. It is not always essential for a Tribunal to identify a specific 'impairment' if the existence of one can be established from the evidence of an adverse effect on the Claimant's abilities. That is not to say that impairments should be ignored, the question of impairment can be considered in light of findings on day-to-day activities.

44. There is one further aspect to the case J v DLA Piper UK LLP, that is the passage at paragraph 42 which emphasises the importance of distinguishing between a reaction to adverse circumstances at work (which does not amount to a disability) and a 'mental illness' or 'mental condition' which is sufficient to amount to a disability. The difficulty with this distinction can, as the EAT recognise, be exacerbated by the *"looseness with which some medical professionals and most lay people, use such terms as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'"*. Mr Justice Underhill continues:

> *"Fortunately, however, we would not expect those difficulties often to create a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at paragraphs 40(2) above, a Tribunal starts by considering the adverse effect issue and finds that the Claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long lived".*

Discussion and Conclusions

45. I am afraid I did not find Mr Sackey a credible witness. He was evasive in his answers, seeking to circumvent the questions put to him. It was clear to me that his Disability Impact Report contained considerable exaggeration, having been written on the basis of research he had carried out and using templates that he had found.

46. I also found that he sought to mislead me over the timing of when and how much medication he was taking and the dates his symptoms began as recorded in the medical records.

47. He sought to add as a disability that he suffered from anxiety, although he had not mentioned this in his ET1 nor in his discussions with EJ Foxwell. In that respect, I recognise that it is unhelpful to focus too much on labels, what is important for me is the impact on day to day activities and the duration thereof, of manifestations of the mental impairment, whatever the label may be.

48. Mr Sackey did not have any time off work for mental health issues before 21 April 2018. Fit notes produced by Mr Sackey for periods of absence in 2016 and 2017 were for neck pain. The first fit note relating to mental health issues is dated 19 April 2018, which refers to work stress. Further fit notes for work related stress were issued on 23 April 2018, 11 May 2018, 13 June 2018 and 2 July 2018. On 31 July 2018 the fit note issued referred to depression. Further fit notes for depression were issued on 4 September 2018, 17 September 2018, 24 November 2018 and 5 December 2018. Mr Sackey returned to work in October 2018 and left work for the last time shortly before 24 November 2018.

49. Mr Sackey acknowledged that his work related stress was triggered by his being subjected to a warning for a disciplinary issue in January 2018.

50. In cross examination, Mr Sackey said that he was first prescribed Sertraline in June 2018. The medical records which Mr Sackey produced, (very brief that they are) begin with an entry for 22 May 2018, "mixed anxiety and depressive disorder". The same medical records reveal prescription of Sertraline in August 2019 and not before, (pages 241-242).

There is no evidence before me on what impact this had on his ability to undertake day to day activities.

51. The Impact Statement, (page 243) gives no dates whatsoever for the impact Mr Sackey describes "such as being often unable to move due to gastric pain, finding it difficult to lift, carry or move everyday objects". These are examples of what I find to be exaggeration. When it was put to him that there were no dates in his statement, he acknowledged that some were post dismissal because he wanted to give an outline, "of everything".

52. None of the symptoms Mr Sackey describes in his Impact Report, were expressed by him in his many meetings with Occupational Health during the course of his employment.

53. In his statement at page 55 Mr Sackey wrote:

> "I argue that even though the evidence may have shown that the impairment was not long term to satisfy the definition of disability at the time of the allegations mentioned at the private preliminary hearing. I argue that there was evidence which had shown that I was suffering from a disorder or impairment and in time could potentially lead to disability …"

54. I had no evidence before me on the likelihood of any effects of stress and depression lasting more than a total of 12 months as at the date of dismissal, nor of any likelihood of reoccurrence.

55. I find that:

    55.1 Mr Sackey had symptoms of stress from 23 April 2018 and of depression from 31 July 2018.

    55.2 The impact of these impairments was lethargy and low motivation, (and not the other symptoms described by Mr Sackey in his statements).

    55.3 It is more likely than not that these impairments amounted to a substantial impact on Mr Sackey's day to day activities from 23 April 2018 when he was certified as not fit for work.

    55.4 The impairments ceased in October 2018 and resumed on 24 November 2018. There was no such impairment in 2017, (the time of the allegations other than dismissal) and as at the date of dismissal, the impairments had not lasted more than 12 months, were not likely to last more than 12 months and were not likely to reoccur.

56. Mr Sackey's mental health impairments did not therefore amount to a disability as defined in the Equality Act 2010 during the relevant period. His complaint of disability discrimination cannot therefore succeed and is struck out.

Merits of the unfair dismissal claim

The Law

Strike Out

57. Employment Tribunals Rules of Procedure, rule 37 provides that:

> *(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;*

58. It is the reasonable prospect of success aspect of that rule which concerns us. A tribunal should be slow to strike out a claim brought by a litigant in person on the basis that it has no reasonable prospects of success, see Mbuisa v cygnet Healthcare Ltd UKEAT 0119/18. Strike out is a draconian step that should only be taken in exceptional cases. If a case is poorly pleaded, the appropriate step is to record how the case is put, ensure that the pleading is amended and make a deposit order if appropriate.

Deposit Order

59. The Employment Tribunals' rules of procedure at Rule 39 provide as follows:

> *(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.*

60. In the case of Hemdan v Ishmail and another UKEAT/0021/16, Mrs Justice Simler, (as she then was) reviewed the legal principles to be applied when considering whether or not to make a Deposit Order. She said at paragraph 10:

> *"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."*

At paragraph 12:

> *"The test for ordering payment of the 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 emphasis the fact that there must be such a proper basis."*

She says at paragraph 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. …a mini-trial of the facts is to be avoided…"*

Lastly, at paragraph 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."

The overriding objective

61. In exercising discretion, a Tribunal should have regard to the overriding objective. Rule 2 sets out the Overriding Objective as follows:

> *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*

62. In exercising discretion, one must also balance the relative prejudice to the parties.

Unfair Dismissal

63. The right not to be unfairly dismissed is contained in Section 94 of the Employment Rights Act 1996, (ERA).

64. Section 98(1) and (2) of the ERA set out five potentially fair reasons for dismissal, which include the capability or qualifications of the employee for performing work of the kind which he was employed to do and some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

65. Where an employee is dismissed for breach of parameters set in an absence management policy, it may be that the reason for dismissal within the meaning of Section 98 is not, "capability" as the employee may be perfectly capable of performing his duties but is unfortunately, frequently absent for a variety of reasons. The reason for dismissal may then be that

the employee is a frequent absentee, in breach of the employer's absence management policy and such a reason for dismissal would then come within the parameters of, "some other substantial reason". See Wilson v the Post Office [2000] IRLR 834.

66. The basic tenets for a fair dismissal based upon an employee's lack of ability are that there has to be a genuine belief in the individual's lack of ability based upon reasonable grounds, (Taylor v Alidair Ltd 1978 IRLR 82 CA) and the employee must have been given fair warning and an opportunity to improve, (Polkey v A E Dayton Services Ltd 1987 IRLR 503 HL).

67. Where an employee is dismissed by reason of lack of capability occasioned by ill health, the question must be, when looking at the fairness of the dismissal, whether in all the circumstances the employer can be expected to wait any longer, and if so how much longer? One should take into account the nature of the illness, the likely length of continuing absence and the need of the employer to have done the work which the employee was engaged to do, see Spencer v Paragon Wallpapers Ltd [1976] IRLR 373.

Discussion and Conclusions

68. On the basis that Mr Sackey already had a poor attendance record before 2018 and that during 2018, he had 137 days of absence, I have serious misgivings as to the prospects of success of his unfair dismissal claim, particularly when one has regards to the grounds of resistance which appear to set out a fair and reasonable process for managing absence which it is said was followed.

69. That said, striking out a claim is a draconian step. I would not go so far as to say that the unfair dismissal claim has no reasonable prospects of success, but I would say that they have little reasonable prospects of success. I will therefore make a Deposit Order.

70. In his statement at page 55, Mr Sackey explained that he earns £293.12 per week and he has less than £1,000 in savings. Clearly anticipating a Deposit Order of £1,000, he said that if such an order were made he would have to borrow from friends or pay by instalments, (which is not an option).

71. A Deposit Order should not be a bar to a claimant proceeding. It is a warning to a claimant that if he proceeds and loses, he may be ordered to pay the costs of the respondent. Such a costs order would not be limited simply to the amount of money paid by way of a deposit, the costs to be paid may be much, much more.

72. On the basis that Mr Sackey tells me that he does have savings, I will order him to pay a deposit of £100 by the date 28 days from the date on which the Deposit Order is sent to the parties. He must understand that if he fails to pay the deposit by that date, his claims will be struck out automatically without any further reference to him.

Application to amend

73. As the disability discrimination claim has been struck out, the question of Mr Sackey's application to amend by way of adding an additional allegation of disability discrimination does not arise.

Final Hearing in March 2021

74. As the disability discrimination case has been struck out, the case may now be heard by an Employment Judge sitting alone. Tribunal Members will not be required. I will reduce the length of hearing to 2 days; it will now take place on 1 and 2 March 2021.

_____
Employment Judge M Warren

Date: 25 August 2020

Sent to the parties on: 7/9/2020

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For the Tribunal Office