EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms N White	v	**HC-One Oval Limited**

OPEN PRELIMINARY HEARING

Heard at: London South by CVP **On: 11 November 2020**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: In person
For the Respondent: Mr M Clayton solicitor

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable to do so.

JUDGMENT

The claim of unfair dismissal has no reasonable prospect of success and is struck out under Rule 37(1)(a).

REASONS

Preliminary

1. The claimant made submissions on her own behalf. The respondent was represented by Mr M Clayton solicitor who made submissions on its behalf. There was a bundle of documents to which reference will be made where necessary.

2. The issues for this hearing were identified at a case management preliminary hearing on 15 August 2019 [44B]. The sole extant issue related to the unfair dismissal claim.

Findings

3. The Tribunal, on 15 August 2019, made certain findings in relation to the employment of the claimant [44B].

4. The respondent commenced redundancy consultation at several homes in September 2018 with a redundancy announcement [93-95]. The claimant was provisionally selected for redundancy.

5. The claimant attended three consultation meetings and an appeal meeting [159].

6. She was offered voluntary redundancy which is confirmed within the appeal outcome letter [162]. There was an exchange of emails on 7 October 2018 when the claimant confirmed she sought voluntary redundancy [123]. She subsequently received a letter of dismissal for redundancy [125].

7. The claimant seeks to have issues determined by the Tribunal which relate to the reasons why she volunteered for redundancy.

LAW

8. Section 95 of the Employment Rights Acy 1995 provides:

> Circumstances in which an employee is dismissed
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
>
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),..
>
> (*c*) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Striking out

26. An employment judge has power under Rule 37(1)(a), at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the ground that it has no reasonable prospect of success. In **Hack v. St Christopher's Fellowship** [2016] ICR 411 EAT, the then President of the Employment Appeal Tribunal said, at paragraph 54:

> Rule 37 of the Employment Tribunal Rules 2013 provides materially:-
>
> "(i) At any stage in 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) Where it is scandalous or vexatious or has no reasonable prospect of success…"
>
> 55. The words are "no reasonable prospect". Some prospect may exist, but be insufficient. The standard is a high one. As Lady Smith explained in Balls v Downham Market High School and College [2011] IRLR 217, EAT (paragraph 6):
>
> "The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress

the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"

56. In **Romanowska v. Aspirations Care Limited** [2014] (UKEAT/015/14) the Appeal Tribunal expressed the view that where the reason for dismissal was the central dispute between the parties, it would be very rare indeed for such a dispute to be resolved without hearing from the parties who actually made the decision. It did not however exclude the possibility entirely.

27. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. 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. See also **Hassan v. Tesco Stores** UKEAT/0098/19/BA at paragraph 17 the EAT observed:

"There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of *Dolby* the test for striking out under the *Employment Appeal Tribunal Rules 1993* was interpreted as requiring a two stage approach."

.

28. It has been held that the power to strike out a claim 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). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute.

29. In **Mechkarov v. Citibank N A** UKEAT/0041/16, the EAT set out the approach to be followed including:-

(i) Ordinarily, the Claimant's case should be taken at its highest.
(ii) Strike out is available in the clearest cases – where it is plain and obvious.
(iii) Strike out is available if the Claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

30. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances, **Anyanwu v. South Bank Students' Union** [2001] IRLR 305 HL. Similar views were expressed in **Chandhok v. Tirkey** [2015] IRLR 195, EAT, where Langstaff J reiterated (at paras 19–20) that the cases in which a discrimination claim could be struck out before the full facts had been established are rare; for example, where there is a time bar to jurisdiction, where there is no more than

an assertion of a difference of treatment and a difference of protected characteristic, or where claims had been brought so repetitively concerning the same essential circumstances that a further claim would be an abuse. Such examples are the exception, however, and the general rule remains that the exercise of the discretion to strike out a claim should be 'sparing and cautious'.

31. In **Ahir v. British Airways plc** [2017] EWCA Civ 1392 CA, Lord Justice Underhill reviewed the authorities in discrimination and similar cases and held at paragraph 18, that:

> "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context."

Discussion and decision

32. The claimant volunteered to be dismissed by reason of redundancy. A claim based on that dismissal would not succeed as the employer would satisfactorily establish the reason and reasonableness of the decision. The claimant wished to complain about actions of her employer which broke the term of mutual trust and confidence prior to her volunteering for redundancy. She could have claimed constructive dismissal if she resigned in consequence of the breach. However, she did not resign but volunteered to be dismissed. She cannot claim unfair constructive dismissal. Any claim based on her actual dismissal will not address any of the issues she wishes to raise. The Tribunal concluded that her claim, based on actings prior to her act of volunteering, had no reasonable prospects of success. The Tribunal concluded that the claim was fundamentally flawed and should be struck out.

Employment Judge Truscott QC

Date 11 November 2020