EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Turner	v	**Home Office**

OPEN PRELIMINARY HEARING

Heard at: London South **on: 16 March 2021**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: in person
For the Respondent: Mr B Randle of Counsel

JUDGMENT on PRELIMINARY HEARING

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

2. The claim of direct sexual orientation discrimination has no reasonable prospect of success and is struck out under Rule 37(1)(a).

REASONS

Preliminary

3. This has been a remote hearing because of emergency arrangements made following Presidential Direction because of the Covid 19 pandemic. The form of remote hearing was fully video. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.

4. This Preliminary Hearing was listed to determine the following issues which were identified at a Preliminary Hearing on 15 January 2021 as follows:
Whether to strike out all or any of the claims
Whether to make a deposit order in respect of all or any of the claims.

5. The claimant has pursued claims for unfair dismissal and direct discrimination on the grounds of race, sexual orientation and age. He confirmed in correspondence and at the hearing that his discrimination claim was confined to sexual orientation.

6. Both the claimant and respondent submitted written submissions and made oral submissions. There was a bundle of documents to which reference will be made where necessary.

The claim

7. The claimant was employed as an Executive Officer by the respondent in a highly sensitive role dealing with foreign criminal offenders.

8. On 24 August 2018, the claimant was arrested by police officers and escorted from his work premises. Subsequently, he was charged and plead guilty to blackmail and disclosing private sexual photographs and films of a victim with intent to cause harm; this offence is colloquially known as 'revenge porn'.

9. On 17 June 2019, he was sentenced at Croydon Crown Court as follows:
   a. 14 months imprisonment for blackmail and 8 weeks imprisonment for the revenge porn; these sentences were due to run concurrently although they were suspended for 24 months;
   b. 140 hours community service for each offence;
   c. 5-year restraining order under the Protection from Harassment Act 1997;
   d. He was also ordered to pay the victim £140.

10. The respondent has a disciplinary policy [44] which sets out different types of misconduct and how it will be treated [50-51]. Examples of gross misconduct [51] are threatening behaviour and sexual harassment including accessing or circulating material of an offensive nature and actions bringing the Department into disrepute, serious breach of the Civil Service Code [52] and serious criminal conviction, the list being said to be non exhaustive. Inappropriate behaviour outside the workplace is also addressed [71]. The respondent has a Personal Conduct Policy [87] which sets out principles [89]. The respondent has a Civil Service Code [92] sets out standards of behaviour, integrity "You must comply with the law" [94]. The Code is part of the contractual relationship [96]. There is an arrest and conviction policy [98] which provides for disciplinary assessment [100] to address the impact on an employee's suitability to continue in that role [101].

11. The respondent carried out a disciplinary investigation contained in a report by Grant Richmond [106]. There was a disciplinary hearing which had as its outcome a finding of gross misconduct [135-6] with effect from 10 September 2019 on the grounds that:
   a. his actions brought the Respondent into disrepute and caused reputational damage;
   b. He was in breach of the Civil Service Code and the Respondent's Personal Conduct Policy: [23/b].

12. Thereafter, the claimant appealed, the decision was to uphold the dismissal [149]. He raised the issue of Ms Terry's integrity but said he was content for her to conduct the disciplinary hearing [146].

Relevant Legal Framework

Unfair dismissal

13. The reason for dismissal was misconduct. The determination of the question whether the dismissal was fair or unfair, is established in accordance with section 98(4) of the Employment Rights Act, which states:

> (4)Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

14. In the context of misconduct, the test of a fair dismissal is that it is sufficient if the employer honestly believes on reasonable grounds, and after all reasonable investigation, that the employee is committed the misconduct. In considering reasonableness in this context, the judgment in **British Home Stores Ltd v. Burchell** [1980] ICR 303 contained guidelines, cited in most tribunal cases involving dismissal for misconduct and are contained in the following quotation from the Employment Appeal Tribunal's judgment at paragraph 2:

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. […] It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion

> on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being sure' as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter beyond reasonable doubt'. The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."

15. In **Scottish Daily Record & Sunday Mail [1986] Ltd v. Laird** [1996] IRLR 665, the Inner House of the Court of Session said, as regards the application of the **Burchell** test, that if the issue between the employer and the employee is a simple one and there is no real dispute on the facts, it is unlikely to be necessary for the employment tribunal to go through all the stages of the **Burchell** test.

16. The Court of Appeal further considered **Burchell** in **Graham v. Secretary of State for Work and Pensions (Jobcentre Plus)** [2012] IRLR 759 by Aikens LJ at paragraphs 35-36:

> "35 …once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.
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> 36 If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee."

17. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness: **Taylor v. OCS Group Ltd** [2006] ICR 1602 at [46] and [47]).

Direct Discrimination

18. Section 13 of the Equality Act 2010 provides:

> "…
>
> **13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> …"

19. Identifying direct discrimination involves the making of a comparison. Pursuant to section 23 (1) on a comparison of cases for the purposes of section 13 (direct discrimination) there must be "no material difference between the circumstances relating to each case".

20. In addressing the term "because" at section 13 (1) **Chief Constable of Greater Manchester Police v. Paul Bailey** [2017] EWCA Civ 425 at [12] confirms the correct approach:

> "…it remains common to refer to the underlying issue as the "reason why" issue. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in his seminal speech in *Nagarajan v London Regional Transport* [1999] UKHL 36, [2000] 1 AC 501, referred to as "the mental processes" of the putative discriminator (see at p. 511 A-B)."

21. Tribunal's will normally consider the following test in direct discrimination cases (see **Shamoon v. Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 288 at [7] and [55 - 56]:

a. Was the claimant treated less favourably than colleagues or less favourably than colleagues would have been treated (who did not share the claimant's race or religion).

b. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's race, age and/or sexual orientation?

c. If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

22. However, in some cases the less favourable treatment issue cannot be resolved without at the same time deciding the 'reason why' issue, particularly in a case (like this) where there is no suitable comparator: see **Shamoon v. Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 288 at [6 – 7].

STRIKING OUT

23. 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…"
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> 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.

24. 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."

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25. 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.

26. 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.

27. 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'.

28. 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."

DEPOSIT ORDERS

29. A deposit order can be made if the specific allegation or argument has <u>little</u> reasonable prospect of success. In **Hemdan v. Ishmail** [2017] IRLR 228, Simler J, 9as she then was), pointed out 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' (para 10), she stated that the purpose 'is emphatically not to make it difficult to access justice or to effect a strike out through the back door' (para 11).

30. As a deposit order is linked to the merits of specific allegations or arguments, rather than to the merits of the claim or response as a whole, it is possible for a number of such orders to be made against a claimant or respondent in the same case.

CONCLUSION

31. The Tribunal considered the claim of unfair dismissal and concluded that it was plainly fair. There was no dispute about the misconduct as evidenced by the criminal conviction. Even applying the **Burchell** test to a case such as this where it is not necessary to do so, the respondent had both a genuine and reasonable belief that the claimant was guilty of the acts of misconduct because criminal charges were brought against him in respect of that conduct and he plead guilty, no significant further investigation was required. Nonetheless, the respondent conducted a full investigation and disciplinary process and in his ET1 the claimant has not raised any complaint about the investigation having been inadequate.

32. The fact that the claimant was dismissed for conduct which constituted a serious criminal offence and the sensitive nature of his work (which included dealing

with offenders), dismissal was within the band of reasonable responses. The Tribunal concluded that the unfair dismissal claim had no reasonable prospect of success. The claimant said that the respondent had a scheme for employing offenders and that he would qualify. Even if correct, and the Tribunal was not in a position to say that it was, it would not affect the decision to dismiss.

33. The Tribunal then considered the claim of sexual orientation discrimination. There was no basis for any assertion that his treatment constituted direct discrimination; any employee pleading guilty to similar crimes would equally have been dismissed in a similar fashion. The claimant has alleged that he was dismissed because he was gay (sexual orientation). He has not pointed to any comparators to demonstrate that any person in similar circumstances not sharing his protected characteristic was treated (or would be treated) more favourably. There are no primary facts from which the Tribunal could properly or fairly conclude that his treatment was because of his protected characteristic. The claimant did assert that his disciplinary manager had been overheard making homophobic comments but there was nothing to support the assertion and any perceived prejudice was contradicted by his confirmation on appeal that he had no objection to her conducting the disciplinary hearing. Furthermore, the respondent's explanation for dismissing the claimant is that he plead guilty to a serious criminal offence in circumstances which have already been summarised above. Therefore, it had a non-discriminatory reason for its actions. On this basis, the Tribunal concluded that this claim had no reasonable prosect of success.

34. The Tribunal then took on board the authoritative exhortation about not striking out discrimination cases and sought not to be too pedantic about the pleadings when weighing up the appropriate course of action as the claimant was a party litigant. The Tribunal considered all the matters the claimant relied on in support of his claims and considered the claims in the round and also individually. The Tribunal concluded it should exercise its discretion to strike out the claims based on unfair dismissal and sexual orientation discrimination under Rule 37(1)(a) of the Employment Tribunal Rules because it was proportionate to do so as no amendment could cure the deficiencies of the claims.

35. The Tribunal considered whether it should make a deposit order rather than strike out the claims but the claims are incurably deficient.

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Employment Judge Truscott QC

19 March 2021