



EMPLOYMENT TRIBUNALS

Claimant: Mr O Petrov

Respondent: Amazon UK Services Ltd

JUDGMENT AT AN ATTENDED PRELIMINARY HEARING

Heard at: Leicester

On: 23 April 2021

Before: Employment Judge Ahmed (sitting alone)

Representation

For the Claimant: In person

For the Respondent: Ms Iris Ferber of Counsel instructed by Eversheds
Sutherland

JUDGMENT

1. The application to strike out the unfair dismissal complaint is dismissed.
2. The application for a deposit order in relation to the complaint of unfair dismissal is dismissed.
3. All of the allegations in relation to the complaint of breach of contract other than the claim for notice pay are struck out. There is no order for a deposit in relation to the notice pay claim.
4. Case management orders in relation to the final hearing are given separately.

REASONS

1. This was a preliminary hearing to determine whether the Claimant's complaints of unfair dismissal and breach of contract should be struck out.

2. The claimant has brought three claims against the Respondent. The first (2600241/2019) was a claim of disability discrimination. That was struck out on 7 November 2019. It is understood that a subsequent appeal to the EAT has been dismissed.

3. The second case (2601011/2020) is a claim for breach of contract which is currently live and was part of the proceedings for today.

4. The third case (2601883/2020) is a claim for unfair dismissal and was also a part of the proceedings for today.

5. The claim for breach of contract appears to rely upon three allegations - namely changing the claimant's duties without his agreement on 1 November 2019, changing the Claimant's shift/ hours without his agreement on 2 November 2019 and not dealing with his grievance in line with the Respondent's grievance policy. As claimant was dismissed without notice or pay in lieu of notice there is an implicit claim for damages for the notice period.

5. It is principally and relation to the unfair dismissal complaint that the respondent applies striking out or a deposit to be ordered. The claimant was dismissed for gross misconduct in relation to allegations of sexual harassments. More accurately there are two instances of alleged gross misconduct, the first relates to an incident involving a colleague who wrote her name on a board and the claimant's name was written above hers. He is alleged to have said "*I have a dirty mind. I'm happy where there is a pretty girl under me.*" There is no suggestion of any physical act of harassment. The allegation relates to the words spoken.

6. The second incident relates to the same person. The colleague is said to have made an error at work. As part of his duties Mr Petrov went to that individual to provide feedback. The individual said: "*sorry I'm still in bed*" implying that says she was not thinking carefully to which the claimant is alleged to have said: "*with whom are you in bed?*" Following this incident the claimant noticed another mistake by the same individual and he is alleged to have said to her "*do you want me to slap your butt to wake you up?*"

7. In deciding whether to strike out the complaint of unfair dismissal as having no reasonable prospect of success I have taken into consideration the guidance given by the EAT. In Sajid v Bond Adams (UKEAT/0196/15) the EAT cited with approval the following passage from Tayside Public Transport Co Ltd t/a Travel Dundee v Reilly:

"Counsel are agreed that the power conferred by rule 18(7)(b) [now Rule 37(1)(a)] may be exercised only in rare circumstances. It has been described as draconian (*Balls v Downham Market High School and College* [2011] IRLR 217 at paragraph 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore, where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts (*ED & F Man Liquid Products Ltd v Patel* [2003] 24 LS Gaz R 37, Potter LJ at paragraph 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (*ED & F Man Liquid Products Ltd*

v Patel, supra; Ezsias v North Glamorgan NHS Trust [2007] IRLR 603. But in the normal case where there is a 'crucial core of disputed facts', it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out (Ezsias v North Glamorgan NHS Trust, supra, Maurice Kay LJ, at paragraph 29)."

8. This preliminary hearing took place largely in the absence of the Claimant. He attended the hearing but at the start he objected to the Tribunal having a copy of the bundle on the grounds that he did not have one sent to him at least 4 days ago in accordance with the general guidance that the Tribunal will not be able to use or accept paper bundles on the day of the hearing. Mr Petrov was sent an electronic copy of the bundle yesterday (as was the Tribunal) but although he has a printer at home he says does not have the resources to print out a large bundle. He did not bring any device from which he read it electronically. His application was therefore that the hearing could not and should not go ahead.

9. Ms Ferber pointed out that there had been no direction or case management order for any bundle to be prepared or exchanged and if necessary she was prepared to limit her submissions to the ET1 and ET3.

10. Whilst I appreciate that Mr Petrov may have found it impracticable to print off a large bundle and whilst I also appreciate that he should not have to touch a bundle which was not sent to the Tribunal in accordance with the standard guidance of the Tribunal for Covid-19 reasons, I cannot see any reason why he should not be able to refer to the ET1 and ET3 separately and for this hearing to be conducted without a bundle. As such I considered that the hearing could proceed. I had no sooner finished saying that when Mr Petrov picked up his things and left the hearing. I determined that there was no reason to postpone as there were no special circumstances and it was both possible and necessary to proceed having regard to the overriding objective which requires tribunals to avoid delay and expense.

11. I do not however consider that it is appropriate to strike out the complaint of unfair dismissal. The issue is largely whether the employer's actions were proportionate and therefore whether they fell in or outside the range of reasonable responses. The Claimant says in his appeal that the 'allegations are made up' so there seems to be a dispute of fact though his position appears to have changed from the disciplinary hearing when he seemed to admit the remarks but thought they were a joke. However the central question of whether dismissal was in all of the circumstances fair having regard to the provisions of section 98(4) of the Employment Rights Act 1996 is best determined after hearing all of the evidence.

12. Whilst the test for ordering a deposit is different and has a lower threshold, for largely the same reasons I do not consider that it is appropriate to order a deposit. A deposit is essentially to act as a deterrent. I do not consider that a deterrent would be appropriate when the evidence has not been heard and where the Tribunal will need to consider the range of reasonable responses test. As the Claimant left the hearing there was no opportunity to consider his financial means which is also a necessary requirement notwithstanding that what is being sought by way of a deposit sought is a nominal sum.

13. I should add thought that the Claimant should not consider this decision not to strike out as a vindication of his case. Even if he is successful it is likely that there will

be significant issues as to contributory conduct and, if the dismissal was procedurally unfair, of a **Polkey** reduction.

14. In relation to the breach of contract claim, save for the notice pay claim I do not consider that there are any reasonable prospects of success. The allegations do not arise nor were outstanding on the termination of employment. They appear to relate to matters some time earlier and concern an alleged breach of express as well as breach of implied terms during his employment. As such I do not consider that the tribunal has jurisdiction to hear them. As Mr Petrov decided to leave the hearing at a very early stage he was not in a position to make any submissions on the point. Other than the notice pay claim therefore all allegations in relation to the breach of contract claim are therefore struck out.

Employment Judge Ahmed
Date: 5 May 2021

Sent to the parties on:
18 May 2021
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For the Tribunal:
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NOTES

- (i) **The compliance dates in this Order stand even if this written record of the Order is not received until after compliance dates have passed. A party may apply to have any date for compliance extended by making a written application.**
- (ii) **Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.**
- (iii) **The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with the claim (or, as the case may be) the Response (ET3) shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a hearing.**
- (iv) **An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.**

- (v) The parties are reminded of Rule 92: *“Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so.”* If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.
- (vi) The attention of the parties is drawn to the *Presidential Guidance on General Case Management* which contains useful information on matters such as amending your claim, preparing witness statement etc. A link to the Presidential Guidance is given below.
- (vii) Any further applications not made at this hearing should be made on receipt of this Order or as soon as possible.

Links to legislation and statutory material

[Employment Rights Act 1996](#)

[The Equality Act 2010](#)

[The Employment Tribunal Rules of Procedure 2013](#)

[Presidential Guidance on Case management](#)