EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"**This has been a face to face hearing which was practicable because of the relaxation of social-distancing requirements and to facilitate participation by the litigant in person."**

Claimant: Mr V Abromaitis

Respondent: Abbey View Produce Ltd

Heard at: Watford **On:** 28 May 2021

Before: Employment Judge George (sitting alone)

Appearances
For the claimant: Ingrida Abromaitis (Daughter)
For the respondent: Mr Lee Beckwith, HR Manager

Interpreter in the Lithuanian language (remotely, by CVP): Ms E Jodonyte.

JUDGMENT

1. The following claims are struck out under rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 because they have no reasonable prospects of success:

    a. The claim for unpaid holiday pay on termination of employment in so far as it relates to a period of time up to and including the 31 December 2018;

    b. The claim in respect of failure to pay national minimum wage;

    c. The claim of unauthorised deduction from wages claim struck out r.37

2. The respondent's application for an order that the claimant pay a deposit as a condition of being able to pursue a particular allegation is dismissed.

3. No order is made at present on the respondent's application for a preparation time order which may be considered following final determination of the claims.

REASONS

1. This claim was brought in respect of the claimant's employment by the respondent. The claimant said in his claim form that his continuous employment started on 4 August 2014 and that he had been a warehouse operative. The respondent said his title was in fact "operative" and agreed with the dates of employment given by the claimant (see the contract of employment in the documentation before me).

2. There was an incident on 10 April 2019 when the claimant was allegedly present in a restricted area and was also smoking when he was not on a break. He was dismissed on 16 April 2019 for alleged gross misconduct; the reason given by the respondent was a number of health and safety breaches. After a period of conciliation that lasted from 3 to 23 July 2019 he presented a claim on 21 August 2019. That was responded to.

3. Employment Judge Bedeau conducted a telephone preliminary hearing on 14 May 2020 and set out the issues in paragraph 11 of his record of the hearing. He recorded that the claimant was complaining about unfair dismissal, direct age discrimination, failure to pay notice pay because he had been summarily dismissed and unauthorised deduction from wages. Although those alleged deductions were referred in Judge Bedeau's order to be complaints about deductions from wages in respect of bank and public holidays which he claimed to have worked, in the claim form at paragraphs 20-22 the complaints included at that stage were that,

   "The company continuously makes unlawful deductions from wages (For example early end/late starting work during Christmas, Easter or Summer Parties)."

   and then at 21, "The company has not paid before accordingly by National Minimum Wage."

   and at 22, "The company do not pay correct annual leave entitlement (Most of the employees worked a lot of overtime hours, no annual leave entitlement based on overtime)."

4. I listed today's preliminary hearing on 1 February 2021 in circumstances which I set out in the record of that hearing. In brief, the respondent had applied for orders that the claims should be struck out under Rule 37 of the Rules of Procedure 2013 or the subject of deposit orders under Rule 39. Unfortunately, those application could not be dealt with at the earlier open preliminary hearing, conducted by CVP, because the claimant and his daughter, who represents him, had not had notice that they were going to be determined on that occasion because the Employment Tribunal had not sent the requisite information to them.

5. As on the previous occasion, the claimant's daughter spoke on his behalf and he used the Tribunal appointed interpreter when giving evidence. It had not been possible to secure the services of an in person interpreter for the open preliminary hearing. The claimant and his daughter agreed that, since the only need for evidence at this hearing was of that concerned with means to pay any deposit

order and his explanation for delay in presenting a claim about failure to pay national minimum wage, this would be satisfactory. At one point Ms Abromaityte intervened because a word had been used which was capable of more than one interpretation, as Ms Jodonyte confirmed and the translation was clarified. However, the claimant uses a hearing aid and it seems to me that for a final hearing when more factually contentious matters will be the subject of oral evidence it is necessary for the interpreter to be in person and not working remotely.

6. I had available to me documents prepared in three PDF documents submitted by the respondent by email on 28 January 2021: PDF1 and PDF2 contained the documents listed on page 2 of PDF1 but included the case papers and the claimant's witness statement dated 16 December 2020; PDF 3 was the preparation time order application. It was agreed by the respondent that, if any part of the claim was to proceed to final hearing, it was more convenient for the preparation time order to be dealt with at that time. I also had the claimant's letter of 27 May 2020 which included a schedule of loss. The respondent also sent in further documentation on 17 May 2021 with 5 PDF files.

The claims

7. The thrust of the claimant's arguments in relation to his unfair dismissal claim are essentially that the sanction was too harsh; that it was outside the range of reasonable responses; that the respondent took an inconsistent approach to Mr Abromaitis' case compared with that to other individuals; that they relied upon an expired warning and that it was predetermined. The age discrimination case complains that the dismissal itself and no other act was an act of direct age discrimination. In relation to that, Mr Abromaitis relies upon the treatment of five allegedly comparable individuals as set out in paragraph 11.3 of Judge Bedeau's order. The respondent disputes that the circumstances of the individuals concerned were comparable to those of the claimant.

8. The comparators relied upon by the claimant are Mr Igor Petkus (30-40 years of age); Mr Andrias Kaselis (30-40 years of age); Mr Dalvaras Kacenavicius (40-50 years of age); Ms Alexandria Firea (21 years of age) and Ms Felicia Bostina (36 years of age). The claimant was aged 59 years at the time of the incident. He does not dispute that he entered the restricted area, that he used a fire exit to leave the building and propped it open, that he went into the yard in white hygiene overalls which should not have been worn outside the building, that he smoked during working hours and that he was smoking next to wooden pallets which was therefore a fire hazard. There is also some evidence that he stubbed out his cigarette on those pallets.

9. The money claims (by which I mean the breach of contract claim and several different unauthorised deduction from wages claims) were particularised in response to orders of Employment Judge Manley in a schedule of loss that was dated 27 May 2020. Mr Beckwith complains, with some justification, that there have been a number of attempts to get clarification from the claimant of the way the case was to be argued and to get compliance with orders to particularise and to set out details of the claim. He also expresses frustration that the particular arguments relied upon change with particularisation. I am not going to go into the

whys and wherefores of that, but I do note that there is some evidence that the claimant has not responded as quickly as the Tribunal asked him to on occasion and also that particular elements of the money claims have not been consistently followed through in all sets of particulars. This has made reaching a conclusive list of all matters in dispute somewhat protracted.

10. The schedule of loss that is dated 27 May 2020 makes clear that the breach of contract claim is, as I have said, essentially a wrongful dismissal claim. The claim in relation to annual leave is expressed in the following way. First it is complained that the claimant has only been paid 20 days of annual leave for every year that he has worked and that that is short of the statutory requirement. Secondly, it is alleged that he has worked bank holidays for which he has not been paid. As explained to me, those are two sides of the same argument: it is said that there are eight days a year that the claimant was not being paid for and that he had worked for bank holidays when he should have been entitled to leave.

11. The contract provides that the claimant should be entitled to 20 days including bank holidays and it was explained to me by Mr Beckwith that, on the respondent's case, that was because when you analyse the shift pattern that was worked by the claimant and other operatives on the same contract, and apply the statutory annual leave pro-rata for the number of shifts that they work, paying them 20 days is in fact the right pro-rata'd annual leave taking into account both the statutory leave under reg.13 of the Working Time Regulations 1998 and the statutory additional leave under reg.13A. The claimant worked 4 days on and 4 days off: an 8 day shift pattern. Mr Beckwith stated that the calculation provided by the claimant as to the holiday entitlement appeared to have entered incorrect information into the government online calculation tool: as if it were a 4 day shift which would result in the claimant working 365 days a year. If the correct calculation were done, the result was slightly less than 20 days, which the respondent rounded up to the 20 day contractual entitlement, he argued.

The Law

12. The Employment Tribunals (Rules of Procedure) 2013 Sch.1 include the following:

"**37.— Striking out**

(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;

(b) …

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

…

39.— Deposit orders

(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…..

(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."

13. The power to strike out a claim on the ground that it has no reasonable prospect of success comes from rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013. It is a power to be exercised sparingly, particularly where there are allegations of discrimination and unlawful detriment on grounds such as protected disclosure or health and safety grounds.

14. In the case of Anyanwu v South Bank University [2001] IRLR 305 HL, the House of Lords emphasised that in discrimination claims the power should only be used in the plainest and most obvious of cases. It is generally not appropriate to strike out a claim where the central facts are in dispute because discrimination cases are so fact sensitive. The same point was made by the Court of Appeal in the protected

disclosure case of Ezsias v N Glamorgan NHS Trust [2007] I.C.R. 1126 CA where Maurice Kay LJ said this at paragraph 29

> "It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words "no reasonable prospect of success". It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

15. Furthermore, there is a particular public interest in ensuring that allegations of discrimination are heard and determined after appropriate investigation of the circumstances because of the great scourge that discrimination, whether on grounds of race or other protected characteristic, represents to society. It is relevant to bear in mind that s.136 of the Equality Act 2010 provides for a shifting burden of proof. That is not to say that any lower test is applied to the non-discrimination elements of the claimant's complaint. At this preliminary stage the question is whether the claimant has no reasonable prospect of establishing the essential elements of each of his claim, taking into account the burden of proof in respect of each of those elements.

16. That said, where it is plain that a claim – even a discrimination claim - has no reasonable prospects of success (interpreting that high hurdle in a way that is generous to the claimant), then the tribunal does have and, in a plain and obvious case, may use the power to strike out the claim so that the respondent and the tribunal system are not required to spend any more resources on a claim which is bound to fail: Anyanwu para.39 per Lord Hope. Such an example is given in the quotation from Ezsias.

17. The test under rule 37 contrasts with that under rule 39 of "little reasonable prospects of success". This has been described as being less rigorous than that for a strike out under rule 37 but "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." (Hemdan v Ismail [2017] I.C.R. 486 EAT para 13). In doing so, the Employment Judge may take into account more than simply the legal issues but may take into account the likelihood of a party establishing the facts essential to their case: Arthur v Hertforshire Partnership University NHS Trust (UKEAT/0121/19). Before making such an order the Employment Judge must take reasonable steps to find out whether the party will be able to satisfy a deposit order and take account of that information when exercising the discretion whether or not to make the order.

Conclusions

18. I bear in mind that, at final hearing, in relation to age discrimination the Employment Tribunal would apply the two stage burden of proof under s.136 of the Equality Act 2010. The Tribunal would have to exclude the respondent's

explanation when first deciding whether the claimant has provided evidence from which discrimination could, in the absence of any other explanation, be inferred. Although the respondent puts forward an explanation for the treatment of the comparators that certainly has a superficial plausibility, it therefore seems to me that the way the burden of proof in discrimination claims should be applied means that there is a reasonable prospect that the claimant would get over the first hurdle and that the burden of proof would transfer to the respondent meaning the Tribunal would have to look to the respondent for an explanation and that affects how I view the test of whether there are no reasonable prospects or little reasonable prospects of success.

19. The arguments that are put forward by the respondent to the effect that the circumstances of the comparators was materially different to that of the claimant do not persuade me that the Rule 37 test of no reasonable prospects of success is met in relation to the age discrimination case. What the claimant did does not appear to be significantly in dispute, but the facts about what the comparators did does seem to be in dispute and the extent to which their situations differ to that of the claimant is in dispute. Those factual disputes can only be resolved at a final hearing.

20. I then go on to consider whether there are little reasonable prospects of the age discrimination claim succeeding. Here not only is the test a little bit less stringent but also, although I am not to carry out a mini trial, I do take into account the evidence that the parties have put forward in the form of submissions but also in the form of documents and extracts from documents. The respondent has put forward documentation from the disciplinary process followed in relation to the comparators and argues that, reading those, the claimant has little reasonable prospect in showing less favourable treatment and, in the absence of a comparator, given that he admits the conduct for which he was dismissed, there is little reasonable prospect of him succeeding.

21. The claimant argues that in relation to the allegedly comparable employees, even if you take into account what the documents provided by the respondents show on their face and the information they have put forward about the treatment of those comparators there are questions for the respondent to answer at final hearing which mean that I cannot safely conclude at this stage that there are little reasonable prospects of success. So, Ms Abromaityte commented on the investigation minutes and outcome letters that the respondent has disclosed. She argued that the outcome letter for the first one, who is referred to as employee A, records that, although they committed gross misconduct, they have a good attitude at work and that that was taken into account in mitigation. She asserted that the claimant also had a good attitude at work and queried why that was not taken into account.

22. It seems to me to be a valid point that it is not only a question of whether the behaviour of the individuals is comparable but what the treatment of the individuals shows. S.23 of the Equality Act 2010 says that on a comparison of cases - what is often described as an “actual” comparator - then there has to be no material difference between the two cases. It certainly seems to me that the information put forward by the respondent, if accepted, suggests that there are

material differences between each of the five individuals and the claimant. However, that does not mean that evidence of the way they were treated by the respondent is not valid evidence from which inferences might be drawn of how the respondent would have treated someone who had done what the claimant did but was not of his age group – how they would have treated a hypothetical comparator. As I say, it is not just what the comparators have done, but also the way that mitigation that they put forward was regarded which will need to be considered.

23. In relation to employee B, it was pointed out that although the offence might be comparable and he was dismissed, he also had live warnings and it was argued essentially that that raises the prospect about whether sufficient weight was given to the clean sheet that the claimant had at the time of the offence because of his previous warning having expired. In essence, Ms Abromaityte was arguing that there was a failure to treat different cases differently which raises a question about why the claimant was treated the same as someone who did not have the mitigation that he had.

24. There was not the same decision maker in those cases which is a factor that would be borne in mind at a final hearing but these are matters that underline to me how fact sensitive discrimination cases can be and how careful a judge should be with a claim which undoubtedly presents as having evidential difficulties when deciding whether it can be said at this preliminary stage that there are little reasonable prospects of success. It was also argued that there had been effectively an overloading of the charge sheet against the claimant in listing 10 breaches. I am not going to pass comment on that. I am taking a broad brush approach to the evidence and considering whether there is little reasonable prospect of the respondent failing to explain the apparent difference in treatments with reference to non-discriminatory reasons.

25. I notice that in relation to the two female alleged comparators the decision maker was Mr Ord, who was the investigator in the claimant's case. Sometimes it can affect the weight to be given to a comparison between cases where there is not the same overlap of personnel. So, although as I say there are a number of differences between the incidents for which the claimant was dismissed and those for which the comparators were disciplined, it seems to me that there is enough there that provides evidence from which the claimant could argue that had a hypothetical person in a younger age bracket then his done what he did they would not have been dismissed without a prior live warning and given his contrition and his apology. All I am judging is whether on the information put forward to me I think that the claimant's case has little reasonable prospects of success and I am not satisfied that that is so taking all of that into account. That is not to say that I am saying I think it is a strong case.

26. As far as the unfair dismissal case is concerned, it seems to me to be relatively likely that the respondents would satisfy a final tribunal that they had in mind conduct when they decided to dismiss and the question on an ordinary unfair dismissal would be, would no reasonable employer have dismissed for this? It would not be whether the employment tribunal itself would have dismissed for this but whether no reasonable employer (in the same business as this employer)

would have dismissed for this misconduct. That can be a difficult test for an employee to succeed in.

27. None of the alleged comparators appear to be in exactly comparable circumstances and the case law on comparing like for like in unfair dismissal cases tends to focus on individuals who have been involved in the self same incident. It is generally quite difficult for an employee who does not dispute the actions that were alleged against them to successfully argue that the decision to dismiss was outside the range of reasonable responses. Consequently, the judgment about whether I think that the unfair dismissal claim has little reasonable prospects of success is finely judged. However, were the claimant to succeed in his allegation that his dismissal was less favourable treatment related to age, then it seems to me that no reasonable employer would dismiss in circumstances when they were influenced by age and on that basis it seems to me to be wrong to conclude that there are little reasonable prospects of success on the unfair dismissal case. Had the unfair dismissal claim been the only claim relating to dismissal, then my decision might have been different. It is logical to treat the claim for notice pay in the same way as the unfair dismissal claim and I do not strike out or make a deposit order in relation to that either.

28. Turning to the money claims, I consider first the claim in relation to annual leave. The respondent has demonstrated that the calculations by the claimant were based on an incorrect analysis of the government website. It was accepted by Ms Abromaityte that she had entered incorrect data when doing her calculation but she was still concerned that 20 days holiday did not amount to the 5.6 weeks provided for in the Working Time Regulations 1998. That was how the holiday pay claim was articulated on the schedule of loss.

29. It is argued in the ET1 that the calculation of holiday pay accrued over a year did not include overtime, but that has not been advanced in writing in the schedule of loss written in response to the Tribunal case management order that the claimant set out a calculation of the compensation claimed. This caused Mr Beckwith to argue that the claimant keeps changing the argument he runs and that that is prejudicial to the respondent. I had sympathy with that argument but the complaint that overtime should have been but was not included in the calculation of holiday entitlement was in the ET1 and therefore is a claim and has not been impliedly withdrawn by the omission from the schedule of loss.

30. The claimant is said by the respondent to have taken more annual leave in the final leave year than he had accrued since 1 January 2019 and I am not sure what the claimant's position on that is. However, the Working Time Regulations 1998 do not permit leave to be carried over from one year to the next in the absence of a relevant agreement (reg.13(9) and 13A(7)) – subject to the recent changes due to the coronavirus pandemic which are not applicable to the present case. There can only be a payment in lieu on termination of employment (Reg.14).

31. It seems to me that the argument that the claimant is entitled to annual leave in relation to earlier years has no reasonable prospect of success. First, the original argument that the claimant's contractual entitlement was less than his statutory

entitlement seems now to be accepted to have been based on an incorrect calculation. Secondly, the way that the Working Time Regulations 1998 work means that any untaken leave cannot carry over from one leave year to the next (although there are exceptions in relation to certain types of leave, such as long term sick leave and maternity, which prevent the individual taken leave). Consequently, any leave from earlier years was not available to the claimant as at 1 January 2019 to be potentially there at the end of the employment.

32. When I delivered oral judgment I did not know whether the claimant accepted that, during the final leave year, he took more leave than had accrued. It was subsequently confirmed that he accepted that he had taken 8 days' leave in that period. My judgment is that there are no reasonable prospects of a claim for unpaid annual leave succeeding insofar as it is based on the leave year prior to that starting on 1 January 2019. I shall make a Case Management Order for the claimant to particularise how he calculates any amount claimed for the leave year 1 January 2019 onwards. I am minded to make that on the basis that the claimant should show cause why the annual leave claim should not be struck out by providing a detailed calculation of the leave that was accrued but not yet taken from 1 January 2019 to the effective date of termination by a particular date. The reason why I make the order on that basis is that it has taken a long time to get to the point of particularising the claims without inclusion of arguments or calculations which do not stand up to scrutiny.

33. The respondent is correct in their argument about the way that the annual increase in the national minimum wage (or NMW) should be applied. Regulation 4B of the National Minimum Wage Regulations 2015 (S.I. 621/2015) provides that the rate of NMW payable is the rate applicable at the start of the pay period. Therefore, if the rate changes between the first date of a pay period and the first date of the next pay period, then the first pay period is paid at the original rate and the second pay period is paid at the revised rate. Additionally, the last deduction was made more than three months before the claim because the claim dates back to 2018 and there is no reasonable explanation for the failure to claim sooner. The claimant's evidence was to the effect that he was worried that he would lose his job if he brought a claim during his employment but there is no evidence that he raised it with his employer at the time and no evidence from which to infer that this was a reasonable fear. For these reasons, the claim of a failure to pay national minimum wage has no reasonable prospects of success and I strike it out under Rule 37.

34. The respondent has demonstrated through screenshots included in the documents that the claimant was paid work on the bank holiday on 27 August 2018. That, plus the fact that that date was considerably more than three months before the presentation of the claim means that the claim based on that date has no reasonable prospects of success. I strike it out under Rule 37.

35. So far as the unauthorised deduction from wages claim based on the early and late finishes is concerned, the claimant has not put forward specific dates on which he says he was not paid. The respondent has done an analysis where they say the last occasion when there was either an early or late finish was 1 January 2017. The claimant explained that the reason why he had not claimed

these matters before was that he was fearful that he would lose his job and he also said that his understanding about the right to claim an employment tribunals dated from after he was dismissed. I have taken into account the time limit that is in s.23 of the Employment Rights Act 1996 and decided that there are no reasonable prospects of succeeding in that claim because it is out of time. I think it was reasonably practicable despite what the claimant says about his reason for not claiming to bring that sooner.

36. The claimant also claims that he was not paid the same amount as a colleague between October 2012-July 2013. There are no reasonable prospects of that claim succeeding because it is dated before the employment period set out in the claim form. It would in any event be out of time. I note that the evidence put forward by the respondent suggests that the claimant may not have been on the same contract as a comparator. However, I conclude that the complaint about treatment from 2012-2013 has no reasonable prospects of success within these proceedings now for the first two reasons.

37. What remains is the unfair dismissal, age discrimination and notice pay claims. I have also not struck out the claim for holiday pay from 1 January 2019 onwards but, as I say, I shall separately order the claimant to show cause why that should not be struck out by writing in with a calculation within a particular period of time.

I confirm that these are my PH Judgment and Reasons with reasons in case number 3321538/2018 and that I have approved the Judgment for promulgation.

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Employment Judge George

Date:…12 July 2021 ……

Sent to the parties on:

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For the Tribunal:

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