



# EMPLOYMENT TRIBUNALS

**Claimant:** N Sumula

**Respondent:** Virgin Active Limited

**Heard at:** Watford (by CVP)      **On:** 16 July 2021

**Before:** Employment Judge O'Dempsey

## **Representation**

Claimant: self

Respondent: S Way (Counsel)

# JUDGMENT

**1. The Claimant's claims for unfair dismissal, breach of contract and unlawful deductions from wages are dismissed, on being struck out under rule 37 of the Employment Tribunal Rules.**

**2. The Claimant's claims for disability discrimination in relation to:**

**(a) paragraphs 1-8 of the Claimant's Employment Tribunal Statement of Particulars; and**

**(b) paragraphs 19-20 of the Claimant's Employment Tribunal Statement of Particulars**

**are struck out under rule 37.**

**3. The Claimant's claim that his dismissal was an act of disability discrimination is not struck out.**

**1. I do not make any order that the claimant should pay a deposit.**

# REASONS

## **The dismissed claims**

2. This is an application by the respondent to strike the claimant's claims (or parts) out under rule 37 of the Tribunal Rules 2013 as having no reasonable prospects of success. Failing that there is an application that I should order a deposit be paid by the claimant as a precondition of his being able to pursue the claim any further.

3. At the start of the proceedings I checked to see whether the parties had all the relevant documents and it appeared that they did. Although this was the case, it emerged that the claimant had not been able to access the respondent's skeleton argument due to the fact that the person who helps him with his sight problems as been ill. Nevertheless it was clear that about a week before the hearing the respondent's skeleton argument and the authorities had been served on the claimant. The claimant had every opportunity to consider the arguments put forward in it.

### **The law**

4. The respondent relies on rule 37. This states:

#### **Striking out**

**37.—**(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) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
- (c) for non-compliance with any of these Rules or with an order of the Tribunal;
- (d) that it has not been actively pursued;
- (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(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.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

5. The respondent in the alternative relies on rule 39, asking for a deposit order of £1000 to be made. This provides:

#### **Deposit orders**

**39.—**(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.

6. In respect of the claim for unfair dismissal, section 108 of the Employment Rights Act 1996 is relevant. This provides

**108 Qualifying period of employment.**

(1) Section 94 [the right not to be unfairly dismissed] does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

**Background to this application – the claimant's claims**

7. By a claim form presented to the tribunal on 25 September 2020 the claimant claims unfair dismissal and disability discrimination. The early conciliation notification was received by Acas on 24 August 2020 and the certificate issued 16 September 2020. He also claims that he is owed notice pay and arrears of pay. He says that he suffered a retina detachment as a result of surgery carried out in 2007. The claimant says that whilst on holiday in June 2019 his right eye swelled up and he had to consult a doctor. A doctor's report was sent to his line manager. When he returned to work his manager started to complain about his sickness absence. He told him that he has a detached retina with total right eye blindness and the medical advice was that he should seek medical attention and stay away from work to avoid the risk of lengthy infections.

8. He was invited to a meeting on 30 July 2019. He was told that his 40 hour contract was being changed and replaced with a part-time contract of 30 hours. He was told that he would be sacked if he failed to accept the alternative part-time work. He complains that his manager did this as soon as he knew that he had a disability. He said that he began to lose confidence and experiencing anxiety and panic attacks. He says that his manager continuously threatened his dismissal if he failed to accept the proposed changes. He submitted a grievance on 12 August 2019.

9. He had requested annual leave on 5 August 2019 which was 14 days before the date for the intended leave (19 August 2019 until 26 August). This was to enable him to attend a court hearing outside the UK. He returned on 27 August 2019. He explained that he needed to attend the court because originals of document needed to be signed in relation to his late mother's family affairs. He was the only one who had access to the safe. Human resources asked to have a meeting with his to investigate this matter. The claimant said he had had an emergency and requested five days as leave to appear in court. There was then an investigation. On 15 September 2019 the claimant insisted on the grievance investigation being carried out. The investigator asked for more time. However the grievance was not resolved. Four weeks later the claimant contacted the investigator again and he asked his to be patient.

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10. On 27 November 2019 the claimant took a day of annual leave to attend a hospital review. However the manager emailed him asking where he was because he said that the claimant was supposed be on duty. It appears that the claimant's supervisor had failed to update the staff rota. The claimant complains that this was the second time he was accused of being absent without leave.

11. The claimant says that the club manager and supervisor were looking for ways to get rid of him. Paragraph on 25 October 2019 the claimant applied for annual leave for 29 January 2020 he was going to return on 2 March 2020. He booked 10 days paid leave in 10 days unpaid leave so that he could travel abroad for family reasons.

12. The first 10 days ended on 14 February 2020. The claimant says that he informed his supervisor and human resources that his intended date of return to work was 2 March 2020. However the health of the claimant's child was a problem and the claimant had stay over and support the baby and the mother for the child's recovery.

13. Whilst the claimant was abroad his supervisor sent physical mails to the home address in the UK. This included a letter serving a summary termination of his employment.

14. The claimant became aware of this on 27 February 2020 which was the day before his leave expired. He had asked a neighbour to pick up invoices and was informed of the termination letter. The claimant says that he asked for permission to stay and support the baby on 27 February 2020. He had also lodged a grievance on 12 September 2019 which had still had not been fully investigated.

15. A meeting was arranged for 24 March 2020 but on 22 March due to the pandemic the claimant's return flight to the UK was cancelled.

16. On 30 March 2020 the human resources department wrote to the claimant stating that he had been put on furlough until further notice. This letter states that the claimant would be paid a percentage of his pay (and in a later in relation to his "normal" pay).

17. The claimant complains that the supervisor refused to honour the furlough wages from 28 April 2020 until 9 September 2020. That is claimed either as a claim for breach of contract or unlawful deduction from the claimant's wages.

18. The claimant complains of disability discrimination contrary to section 15 of the Equality Act 2010. He says that he was forced to work with swollen eyes and the supervisor did nothing to alleviate his situation.

19. The claimant also claims to have been unfairly dismissed and it became plain during the hearing that he is asserting that this an act of disability discrimination under section 15.

20. The respondent raises the question of whether the claims have been presented within the time limits applicable. It says that all of the claims apart from the claim relation to termination of employment are more than four months out of time. It says that it was reasonably practicable for the claimant to submit the unfair dismissal claim or unpaid wages claim before the time limit.

21. More fundamentally the respondent says that the claimant does not have the required period of qualifying period of continuous service for a claim of unfair dismissal under section 108 ERA 1996.

22. In relation to disability the respondent does not accept that the claimant is disabled (see paragraph 51 of the Grounds of Resistance).

23. It denies the substance of the claims. In relation to the alleged furlough payments the respondent says that letters were sent to the claimant in error the employment terminated before the dates of furlough. It says that the error was obvious.

24. On 13 November 2020 the respondent made an application to strike out the claim. On 7 March 2021 the tribunal sent out notice of the preliminary hearing and orders for it. The claimant was ordered to provide by 22 March 2021 why it was not reasonably practicable for him to present his complaint of unfair dismissal to the tribunal on or before 25 May 2020. He was also asked to provide details of why it would be just and equitable to allow any out of time discrimination complaints to be pursued. By 5 April 2021 he was to provide an impact statement relating to the disability. There were other directions relating to disclosure of documents and to the provision of a schedule of loss. The claimant provided an impact statement appears and his schedule of loss accordingly.

25. The claimant's opposition to the application to strike out was set out in writing to the tribunal and consists in matters which ought properly to be tested in evidence in relation to the question of whether it is just and equitable for the tribunal to extend time for his discrimination claim (as it relates to the termination of his employment). He pointed out that the UK government granted permission in August 2020 for UK residents stranded in Ghana to be flown back to the UK on specially arranged charter flights while the lockdown was still in place. The claimant returned on 21 August 2020 and started the claim against the respondent shortly afterwards.

26. The claimant says that while he was in Ghana he tried to contact law firms for representation but all of the offices were closed down because the pandemic. The claimant also points to the fact that he received the furlough letter on 27 March 2020 and he says "this meant my contract was still running that the respondent line management blocked my wages for all this period April to September 2020 whilst furloughed". Taken it its highest as I must at this point as it is an application to strike out, that appears to have caused at least confusion for the claimant, on his account.

27. On 14 April 2021 the respondent wrote to the tribunal concerning its application to strike out on the basis of the limitation problems with the claim. The claimant's reply to that was to ask for a fair hearing for both sides of the argument.

28. On 6 June 2021 the tribunal wrote to the parties stating that the preliminary hearing was to be an open one to deal with the following issues:

Whether the claim should be struck out under rule 37 because:

1. there are no reasonable prospects of the claim of establishing that a final hearing that all any of the claims had been presented within the prescribed time limits.

2. the manner in which the proceedings are being conducted by the claimant been unreasonable;
3. the claimant has failed to comply with orders of the tribunal; and
4. the claim has not been actively pursued.

29. At the hearing Mr Way indicated that he was not pursuing 2-4.

30. On 16 June 2021 the case management order was made stating that by 30 June 2021 the claimant was to provide the respondent with a copy of the witness statement which must contain his full answer to the questions asked in the notice of the preliminary hearing dated 7 March 2021 and any other matter upon which the claimant intends to rely in support of his case that his claims have been brought within the time limits.

31. The hearing had been listed for 2 hours. Some of this was lost due to technical difficulties and although the claimant appeared willing at one point to have his evidence heard on the question of time limits due to the way in which the hearing progressed and the fact that we sat late (until nearly 5 pm), I did not consider it appropriate to determine any aspect on hearing evidence. Some time was taken up with trying to ensure that the claimant had the respondent's skeleton argument before him so that he could read it.

### **Discussion and conclusions**

32. The claimant's claim for unfair dismissal is struck out on the basis that the claimant does not have sufficient qualifying service under the Employment Rights Act 1996. The claimant was employed on 27 May 2018. He was dismissed with immediate effect on 26 February 2020. The claimant appealed his dismissal and relies on this for the proposition that his employment continued until its determination on 9 September 2020. In the light of cases such as **West Midlands Co-Op Society Ltd v Tipton [1986] ICR 192**, that is not an arguable point as the appeal did not revive the other terms of his contract of employment for the purposes of unfair dismissal law.

33. The claimant's claim for breach of contract is also struck out because the claimant had no contract of employment at the time of the alleged breach of contract.

34. Viewed as a claim for unlawful deductions from the claimant's wages, the claim under section 13 must be struck out on the basis (i) that there was no contract of employment but even if I am wrong about that and there was a contract of employment survived (and forms the basis of what I am told is a contractual right to appeal) it operated by suspending all the terms of the contract except for the right of appeal. Thus at the time of the alleged deductions the sum properly payable was zero because there was no right to pay under the extant terms of the contract. There was, it appears, a conditional right to pay which would vest in the claimant if his appeal succeed, but at the time of the alleged unlawful deduction there was no right to pay (or a percentage of normal pay) as the dismissal had (at its highest) suspended all of these rights pending successful appeal.

35. So the ultimate problem for the claimant therefore is that even if the furlough letters revived his contract it was a contract in which his right to pay had been suspended. He had a right to 0 pay and the furlough letter promised to pay him hundred percent of his pay and later 80% of his pay but regardless of which percentage it was it was a percentage of no pay and therefore there were no sums properly payable under section 13 of the Employment Rights Act 1996. Consequently there were no deductions made from his wages.

36. For those reasons I have concluded that the claims mentioned above stand no prospect of success and must be struck out.

**The 2019 discrimination claims**

37. Having heard further argument on the discrimination aspects of the claim it was submitted to me by Mr Way that I should strike out the claim based on discrimination under rule 37 because it has no reasonable prospect of success and in relation to the events in June and July 2019 (at paragraphs 1 to 8 of the particulars) I have reached the conclusion that they stand **no** reasonable prospect of success.

38. I consider that there is no prospect of a judge concluding taking the statement of evidence and the matters that the claimant has added to them concluding that it would be just and equitable to extend time in relation to these matters which are very substantially outside the time limit. I take into account that the judge making that assessment would need to consider all the circumstances but that would include matters such as the impact of the passage of time in relation to those meetings with supervisors. The claimant has also offered no explanation for his delay in relation to these events, save perhaps that he had a grievance, but that does not explain his delay.

39. I consider that there is no prospect of a judge finding that the that it would be just and equitable to extend time.

40. I take a similar view in relation to the matters set out in paragraphs 19 to 20 of the statement of particulars which relate to the failure to update the staff rota in 27 November 2019. It seems to me that the same arguments apply there and I have taken into account that a judge could take into account the fact that the claimant appears to have sought to try and resolve certain of these matters via a grievance but I cannot see that there is any prospect of a judge being persuaded his to extend time in those circumstances. Again no explanation appears to be offered by the claimant as to the delay that occurred at that time.

**The claim that is not struck out**

41. In relation to the claim for disability discrimination concerning the dismissal of the claimant I do not strike that out. I do not consider that it has no reasonable prospects of success. I do not consider that prior to testing the claimant's evidence on the question of why he did not bring the claim in time that it is possible to say either that it has no or little prospect of success. There was not sufficient time for this process and this made me somewhat hesitant to strike out the claim or order a deposit order given the importance in social policy terms of discrimination claims being determined on their merits where possible.

42. So I take a different view in relation to the attempt to strike out the claim relating to dismissal. I do not think that I can reach the conclusion that it is so weak a case on the question in particular of whether time should be extended that I can strike it out or make an order for a deposit on this point, as the effect of doing that would be very similar in the claimant's case.

43. In relation to the allegations surrounding the dismissal as acts of discrimination I conclude that it would not be appropriate to strike out the case at this stage but it would be appropriate for the limitation issue to be dealt with after evidence on it has been heard. I heard submissions as to whether that should be dealt with by way of a separate preliminary hearing or as a point taken at the full merits hearing. I made case management orders to deal with such a hearing having heard submissions from both parties on the point.

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Employment Judge **O'Dempsey**

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Date:19/7/2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....05/08/2021.....

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FOR EMPLOYMENT TRIBUNALS