



EMPLOYMENT TRIBUNALS

Claimant: Mr A Johnson

Respondent: Sainsbury's Supermarkets Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Watford (by CVP)

On: 17 August 2021

Before: Employment Judge Alliot (sitting alone)

Appearances

For the claimant: Ms Alexandria Panagiotarakou (Lay Representative)

For the respondent: Mr Stefan Liberadski (Counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claims of disability discrimination and unfair dismissal have no reasonable prospect of success and are struck out.

REASONS

Introduction

1. The claimant was employed by the respondent on 15 November 2017 as a Customer Service Assistant. He was dismissed on 3 June 2020 for gross misconduct. By a claim form presented on 28 October 2020, following a period of early conciliation from 30 August to 29 September 2020, the claimant brings complaints of unfair dismissal and disability discrimination.
2. This preliminary hearing was directed by Employment Judge Lewis to determine the following issue:

“Whether the claim should be struck out and/or subject to deposit orders as the case appears to have no/little reasonable prospect of success; and for case management.”

3. I have been provided with an unpaginated bundle consisting of the pleadings and the further information filed by the claimant relating to what he says his disabilities were and how he puts his disability discrimination claim.

The law

4. Rule 37 Employment Tribunal's (Constitution & Rules of Procedure) Regulations 2013 provides as follows:-

“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... has no reasonable prospect of success;”

5. I have taken into account the fact that the EAT has on numerous occasions stressed that to strike out a discrimination claim is only appropriate in the clearest of cases due to the fact sensitive nature of discrimination claims and a claimant's entitlement to have his case heard by an Employment Judge sitting with Lay Members.

6. As regards the issue of disability, I have taken into account the guidance on the definition of disability (2011) as follows:-

“A7 It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. For example, liver disease as a result of alcohol dependency would count as an impairment, although an addiction to alcohol itself is expressly excluded from the scope of the definition of disability in the Act. What is important to consider is the affect of an impairment, not its cause – provided that it is not an excluded condition.

And

A12 Certain conditions are not to be regarded as impairments for the purposes of the Act. These are:

...

- Tendency to steal;

A13 The exclusions apply where the tendency to ... steal ... constitute an impairment in themselves. The exclusions also apply where these tendencies arise as a consequence of, or a manifestation of, an impairment that constitutes a disability for the purposes of the Act. It is important to determine the basis for the alleged discrimination. If the alleged discrimination was a result of an excluded condition, the exclusion will apply. However, if the alleged discrimination was specifically related to the actual disability which gave rise to the excluded condition, the exclusion will not apply. Whether the exclusion applies will depend on all the facts of the individual case.”

7. As regards the unfair dismissal claim, I have taken into account the fact that a dismissal may be unfair both procedurally and substantively. Further, that even if Polkey or issues of contribution were to arise, a claimant is nevertheless entitled to a declaration that he has been unfairly dismissed if he was unfairly dismissed. Further, that for a dismissal to be substantively unfair, the claimant will have to show that the decision to dismiss was outside the range of reasonable responses of a reasonable employer.

The facts

8. On 18 November 2019, the claimant was suspended on full pay to investigate an allegation that he had been taking money from the tills at Sainsburys. The claimant's claim form states:

“I admitted my wrongdoing straight away”.

9. Whilst the claimant disputed that he had taken £628.09, he accepted that he had taken about £200. The respondent has suggested that the money was taken on 14 occasions although it may have been only 12 times. There is CCTV coverage of the claimant putting the money on occasions into his pocket.
10. An investigation meeting was held on 22 November 2019 and, initially, a disciplinary hearing arranged for 29 November 2019. It is the respondent's case that the disciplinary hearing was delayed due to the claimant raising some grievances and making a Subject Access Request.
11. In due course, the disciplinary hearing was heard on 28 February 2020. It was adjourned to allow the claimant to prepare more. The disciplinary hearing was resumed on 21 May 2020 and adjourned to allow further viewing of the CCTV footage. On 28 May 2020, the disciplinary hearing was resumed and adjourned to allow the manager to consider her decision. On 3 June 2020, the disciplinary hearing was resumed and the claimant was informed that he was dismissed with immediate effect for gross misconduct. The claimant appealed and his appeal was dismissed on 14 August 2020.
12. The claimant asserts that he suffers from the following disabilities:

“diabetes, high blood pressure, limited joint movement on both hands, feet and back due to cervical cord decompression, anxiety and depression.”
13. For the purposes of this application I have assumed that the claimant will establish that he has the aforesaid physical and mental impairments.
14. The claimant was subjected to the disciplinary process for theft. In my judgment, the claimant stands no reasonable prospect of establishing that being subjected to the disciplinary process and dismissed was less favourable treatment than a comparator who would have to be a non-disabled colleague. Further, it would appear that the something arising in consequence of the disability was the claimant's tendency to steal. In my judgment, that is excluded from the definition of impairment and the

claimant stands no reasonable prospect of establishing that he was treated in the way he was because of his actual disability as opposed to a tendency to steal which may have arisen as a consequence of or manifestation of that impairment.

15. As regards indirect discrimination and/or failure to make reasonable adjustments, in my judgment, the claimant stands no reasonable prospect of establishing that a PCP, namely subjecting him to the disciplinary process, put disabled people at a particular disadvantage when compare with non-disabled people.
16. In my judgment, it is quite clear that the disability discrimination claim has no reasonable prospect of success and so will be struck out.
17. As regards the unfair dismissal claim, the claimant claims that there was a failure to follow due process. However, the claimant accepts that his taking of the money constituted gross misconduct and that he admitted it early on. In my judgement, in such circumstances, the claimant has no reasonable prospect of establishing that the procedure was flawed. There was an investigation meeting followed by a disciplinary hearing that was adjourned on several occasions to allow further preparation by the claimant. He was afforded an appeal.
18. I have concluded that the claimant stands no reasonable prospect of successfully establishing that the decision to dismiss him for theft of at least £200 was outside the range of reasonable responses of a reasonable employer.
19. Consequently, the claimant's claims are struck out in their entirety.

Employment Judge Alliot

Date: ...1 September 2021.....

Sent to the parties on:

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For the Tribunal Office