EMPLOYMENT TRIBUNALS

Claimant: **Mr D Uzunov**

Respondent: **ABM Technical Solutions**

OPEN PRELIMINARY HEARING

Heard at: **London Central** **On: 22 October 2021**

Before: **Employment Judge Brown**

Appearances

For the claimant: **In person**
For the respondent: **Mr A O'Neill, solicitor**

Interpreter in the Bulgarian language: **Ms L Karavanova**

JUDGMENT

1. The Claimant's complaints of race discrimination and disability discrimination are struck out because they have no reasonable prospects of success.

2. Time is extended for the Respondent to present its ET3 response to 16 July 2021.

3. The Claimant brought his complaints of automatic and ordinary unfair dismissal in time on 1 May 2020.

4. The issue of whether the Claimant had sufficient service to bring a claim of ordinary unfair dismissal will be determined at the final hearing.

5. The Claimant shall pay a deposit of £ 450 as a condition of continuing to advance both his unfair dismissal claims; he shall pay a deposit of £150 as a condition of continuing to advance his automatically unfair dismissal claim on the grounds of trade union membership and/or activities and £300 as a condition of continuing to advance his ordinary unfair dismissal claim.

Issues for Open Preliminary Hearing

(1) This open preliminary hearing had been listed to determine the following:

(i) Whether to accept the ET3 out of time.
(ii) Whether the tribunal has jurisdiction to hear the claims bearing in mind the time limits in sections 111 of the Employment Rights Act 1996 and section 123 of the Equality Act 2010.
(iii) Whether the tribunal has jurisdiction to hear a claim for unfair dismissal when the claimant has less than two years' service.
(iv) Whether the claim or any part of it should be struck out as having no reasonable prospect of success.
(v) Whether the claim should be struck out because the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious relying upon the claimant's email to the respondent sent on 19 July 2021 at 23:49 hours.
(vi) Whether the claimant should be ordered to pay a deposit, not exceeding £1,000 per claim as a condition of continuing to advance any allegation or argument on grounds that it has little reasonable prospect of success.
(vii) Case management as necessary including, if applicable, listing the full merits hearing.

(2) An interpreter in the Bulgarian language attended the hearing.

The Background

(3) By a claim form presented on 1 May 2020 the claimant Mr Dimo Uzunov brought complaints of unfair dismissal, race and disability discrimination and unlawful deductions from wages against the Respondent, his former employer. He also said he claimed about "*my registration with Unite the Union".*

(4) On 19 November 2020 the tribunal wrote to the parties to apologise for the considerable delay in serving the claim. The tribunal was unfortunately unable to explain exactly why a batch of claims, including this one, was not processed during lockdown.

(5) The claim was initially rejected by Employment Judge Snelson on grounds that it could not sensibly be responded to. Judge Snelson considered that the claim form did not identify recognisable claims and the claimant had less than 2 years service and had not explained why he said he was unfairly dismissed.

(6) On 10 December 2020 the claimant sought a reconsideration of the decision to reject his claim. On 7 May 2021 Judge Snelson reconsidered the decision, because the defects he had identified had been rectified. Judge Snelson said that the original decision to reject the claim was correct, but that the defects had been rectified, the claim was treated as accepted with effect from 10 December 2020.

(7) On 7 May 2020 the Tribunal sent Notice of the claim to the respondent. The respondent was given until 4 June 2021 to file a Response to the claim. The respondent did not file a response by that date.

(8) On the ET1 claim form itself, the claimant gave his dates of service as 1 April 2019 to 29 January 2020. On that basis, he did not have 2 years' service.

(9) The claimant had worked for the respondent as an Electrical Maintenance Engineer. The respondent is a facilities management company.

(10) A preliminary hearing took place on 21 June 2021 before Employment Judge McKenna. The claimant attended, the respondent did not.

(11) On 21 June 2021 the respondent's solicitors wrote to the tribunal. They said that the respondent had not received notice of the claim. They said that the first correspondence they had received from the tribunal was dated 18 June 2021. They asked to be placed on record. They wrote twice on 21 June and once on 1 July. In their letter of 1 July, they said that they still had not received any documentation sufficient to be able to respond to the claim.

(12) The respondent's solicitors wrote a further letter on 16 July 2021. In that letter, the respondent made an application for an extension of time to present its ET3 Response, which it attached. It said that the effects of the pandemic meant that the receipt of the Claim was simply missed. The documentation was located on 14 July 2021 and the solicitors were submitting the Response two working days afterwards. The solicitors said that there was no prejudice to the Claimant in allowing the Response to be accepted, other than having his Claim contested, whereas there would be significant prejudice to the respondent in being unable to defend this Claim. They said that the respondent had real prospect of defending the claim given: a. It was significantly out of time; and b. The Claimant was dismissed for a very serious breach of health and safety, which could potentially have led to a fatality, due to his failure to comply with very basic safety requirements when working with electricity and water. c. The Claimant's defence to the allegation of gross misconduct for which he was dismissed was that all the evidence was fabricated and all his colleagues were lying, which included voice recordings. It had been confirmed that fabricating the voice recordings was not possible.

(13) The respondent also applied to strike out the claim on grounds that it had no reasonable prospect of success or for a deposit order on grounds that it had little reasonable prospects of success for the following reasons: it was out of time; it lacked particulars and that some or all of it disclosed no reasonable prospect of success.

(14) In a second letter also dated 16 July 2021 the respondent sought from the claimant particulars of the claim following the decision of the EAT in *Cox v Adecco EAT/0339/19* (HHJ Tayler – judgment 9 April 2021). In that case Judge Tayler said that a tribunal cannot decide whether a claim has reasonable prospects of success if it did not know what the claim was. Before considering strike out, or making a deposit order, reasonable steps should be taken to identify the claims,

and the issues in the claims. With a litigant in person, this involves more than just requiring the claimant at a preliminary hearing to say what the claims and issues are; but requires reading the pleadings and any core documents that set out the claimant's case.

(15) On 20 July 2021 the respondent sought strike out on a further ground under *Rule 37(1)(b) ET Rules of Procedure 2013* because of the manner in which the proceedings had been conducted by the claimant was scandalous, unreasonable or vexatious. The respondent relied on an email from the claimant sent late at night on 19 July 2021 to a junior member of the HR team at the respondent, in response to the request for further particulars, saying: *"All this is a big lie and everyone has their consequences!!!",* which was considered by the respondent to be a threat.

(16) There was a further preliminary hearing before EJ Elliot on 12 August 2021. She ordered the claimant to provide to the respondent, on or before **2 September 2021,** the particulars of his claim as requested in their letter to him of 16 July 2021, page 2 points 1 – 4 . The claimant confirmed, during that hearing, that he had received that letter. The letter was resent to him during that hearing.

(17) EJ Elliot also ordered the Claimant, also by 2 September 2021, to confirm, if there is a claim for disability discrimination, "what is his disability and how he says the respondent knew about it. Who did he tell and when?"

(18) She ordered the Claimant, if he brought a claim for arrears of pay (rather than compensation), "to explain this claim and say what he was not paid under his contract of employment."

(19) EJ Elliot ordered the parties to exchange any documents they would rely on at the Open Preliminary Hearing by **16 September 2021**. She ordered that the claimant should include in his documents any documentation relevant to his financial situation, including, if he is working, a copy of his most recent payslip.

(20) The Claimant did not provide the particulars which had been ordered. On 13 September 2021 EJ Elliot wrote to the parties, telling them that the Open Preliminary Hearing on 22 October 2021 would also consider whether the claim should be struck out because it was not being actively pursued and/or the claimant had failed to comply with Tribunal Orders.

The Claims

(21) It is appropriate to set out what the claimant has said in his claims. In his ET1 claim form, presented on 1 May 2020, the claimant ticked the boxes unfair dismissal, race discrimination, disability discrimination and "other payments". On the form, he said, "Unfair Dismissal - including race/discrimination and disability, also my registration with Unite the Union." In paragraph 8.2 the claimant said that he had attached a copy of a "file" regarding his case.

(22) On searching through the electronic filing system available to judges at London Central during this hearing, EJ Brown located the “file” and provided it to the parties.

(23) This “file”, or rider to the ET1 provided the following details of the claims,

> “I am writing this message because I want to inform you and to report the company I worked for and from which I was unfairly removed and fired.
>
> The company name is ABM Technical Solution / ABM Building Value.
>
> I worked at the same place at Broadgate Campus for five years and one, two months.I signed my first contract with 'COFELY GDF Swiz' on January 9/2015.
>
> After one year on 30/03/2016 the company was renamed to ENGIE Building Services. One year after that the company lost its contract and on 01/04/2017 my contract was transfered via TUPE to the new company - 'George Birchall Services Ltd'. After few months I was transfered to another building in Broadgate Campus because the company could not to find an qualified Electrical Engineer to cover the position for the money they was offering, and because I was at their hand with lies and manipulation they transfered me without my consent. All the time I was manipulated and used for anyting, then I signed up for Unite the Union and start to comunicate with them, what was happening to me. On 28.03.2019 George Birchal Ltd lost their contract at Broadgate Campus. On 01.04.2019 come ABM Technical Solution with with which we signed a temporary contract. They told as that this contract will be probation for six months which has not been renewed to the end. The contract stated that we were unemployed and were starting a new job in the same place and the same conditions as we had in the previous company. My managers was informed that I am registered with Unite the Union and they looking for a way to eleminate me until one day on 11.12.2019 I was suspend from my position with lies and fraud. Two three days before I was suspended I attended on their conversation at our Building office between one lady from Engineering Management Office and my Technical Manager Peter Shore and my supervisor Barrie Arnold and the shift leader Marthin .....She told them "Guys we must to start paying you right because you see what he do". It was about me so I comunicate with Unite the Union. It was a matter of paying them more money but hiding the Tax, and in order not to change their wages they decided to eleminate me. I woul like if is posible to check the company I was fire from because they are evading thaxes from HRMC .”

(24) That “file” had not been located by the Tribunal when the claim was first served on the respondent. It also appeared that EJ Snelson had not seen the “file”.

(25) After the Claimant’s claim was rejected, on 10 December 2020 the Claimant emailed the Tribunal. He said in material part, “… I worked in Broadgate Campus for five and a half years and I was cast out as the last criminal because I was registered with Unite the Union and I corresponded with them about my situation in the company ABM Technical Solutions. My managers hear about it and

decided to fire me because I hindered them in the tricks they did. It is not at all fair to take advantage of someone's work and kindness and to make the career on his back. .. ".

TUPE transfer, Length of Service and Time Limits

(26) During this OPH hearing on 22 October 2021, the respondent was provided with the "file" he Claimant had attached to his ET1, for the first time. Having had time to consider the "file" the respondent accepted a number of matters. First, the claimant had set out his employment history in his claim, and appeared to be contending that he had been subject to a TUPE transfer, so that he had more than 2 years' service. Second, that the claimant had, in his original claim, presented on 1 May 2020, contended that he had been dismissed because of his membership and/or communication with Unite the Union.

(27) The respondent therefore agreed that the claimant had presented a claim for automatic unfair dismissal in time, on 1 May 2020. That claim could proceed to a final hearing.

(28) Looking at the "file" rider to the ET1, I said that I considered that the claimant had also pleaded the facts of an ordinary unfair dismissal claim. At the top of the "file" he said, " I want to inform you and to report the company I worked for and from which I was unfairly removed and fired." He had also said that " they looking for a way to eleminate me until one day on 11.12.2019 I was suspend from my position with lies and fraud." The claimant appeared to be contending that he was dismissed for an unfair reason. I said that, while the claimant had contended that the reason for dismissal was his trade union membership/activities, it was for the respondent to prove that it had dismissed for a potentially fair reason. Even if the tribunal did not find that union membership / activities were the principal reason for dismissal, the claimant was still contending that there was not a fair reason for dismissal.

(29) (I acknowledged that, if the Claimant does not have 2 years' service the burden of proof will be on the Claimant to show the principal reason for dismissal was Trade Union grounds).

(30) The respondent said that, in that case, it was not in a position to address the question of whether the claimant had been TUPE transferred to it, so that he had more than 2 years service. It had not received the claimant's "file" until this hearing and the Claimant had not told the respondent, otherwise, before this hearing, that he was contending he had been TUPE transferred.

(31) The claimant told me that he believed he had been TUPE transferred to the respondent, because he had been dismissed by his previous employer, which was in administration, on 28 March 2019, but had immediately been offered new employment in the same job by the respondent on 29 March 2019. He said that he had never paused his work - his work had continued seamlessly from his previous employer, George Birchall Service Ltd, to the respondent.

(32) Having heard from the claimant, and having found his "rider" on the electronic tribunal file system, I considered that there was a real issue as to whether the claimant's employment had been TUPE transferred to the respondent. I noted that, because George Birchall Service Ltd was in administration, the respondent might not be able to rely on *reg 8(7) TUPE 2006* which provides.

> "Regulations 4 [transfer of employment contracts and liabilities] and 7 [control of dismissals of employees because of relevant transfer] do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner."

(33) The respondent would have to give evidence about the potential TUPE transfer. It was not in a position to do so at this hearing. Disclosure and witness evidence on that issue had not yet been ordered or exchanged.

(34) I therefore concluded that the question of whether the claimant had been TUPE transferred to the respondent, so that he had sufficient service to bring an ordinary unfair dismissal claim against the respondent (as well as his automatic unfair dismissal claim), should be decided at the final hearing. The parties would have exchanged all relevant documents by the final hearing, so that the matter could then be resolved fairly.

(35) Although the question of whether the claimant had sufficient service to bring a claim of unfair dismissal had been ordered, by another Employment Judge, to be determined at this hearing, there had been a material chance of circumstances. The "file" attachment to the ET1 had been discovered and the new issue of a TUPE transfer had been raised.

Extension of Time for Presenting ET3 Response

(36) By *r20 ET Rules of Procedure 2013*

"**Applications for extension of time for presenting response**

(1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reason why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and if the respondent wishes to request a hearing this shall be requested in the application.

(2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.

(3) An Employment Judge may determine the application without a hearing.

(4) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside.

(37) In *Pendragon plc (t/a CD Bramall Bradford) v Copus* [2005] ICR 1671, Burton J, the EAT said at para 17, that the absence of a good reason for delay in presenting a Response does not rule out consideration of 'all the other matters, which

inevitably must be considered on a discretionary decision by the tribunal, including, but not limited to, the reasonable prospect of success'.

(38) In *Pendragon*, Burton J said that the power to review a decision not to accept a Response (under the ET Rules of Procedure then in force) should be exercised in accordance with the principles set down in *Kwik Save Stores Ltd v Swain* [1997] ICR 49, EAT. In Kwik Save the EAT said that all relevant documents and other factual material must be put before the tribunal to explain both the non-compliance and the basis on which it is sought to defend the case on its merits, and the employment judge in exercising his discretion must take account of all relevant factors, including the explanation or lack of explanation for the delay and the merits of the defence, and must reach a conclusion which is objectively justified on the grounds of reason and justice, 55 B - D.

(39) In *Kwik Save*, Mummery J commented that an important part of exercising discretion will be to take account of the prejudice to each party, p55C- D. Another factor to take into account is the merits of the case. “Thus, if a defence is shown to have some merit in it, justice will often favour the granting of an extension of time, since otherwise there will never be a full hearing of the claim on the merits. If no extension of time is granted for entering a Notice of Appearance, the [employment] tribunal will only hear one side of the case. It will decide it without hearing the other side. The result may be that [a Claimant] wins a case and obtains remedies to which he would not have been entitled if the other side had been heard. The Respondent may be held liable for a wrong which he has not committed.. This does not mean that a party has a right to an extension of time on the basis that, if he is not granted one, he will be unjustly denied a hearing. The applicant for an extension has only the reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner. This will involve some consideration of the merits of his case.”

(40) I considered that the Respondent had honestly admitted its mistake in overlooking the claim. It had acted quickly when the documents were located, presenting its Response and an application to extend time 2 days later. It had pleaded a defence on the merits, including that the claim was only treated as having been presented on 10 December 2020, many months out of time.

(41) As *Kwik Save* has advised, if a defence on the merits has been shown, justice will often favour the granting of an extension of time, since otherwise there will never be a full hearing of the claim on the merits. The result may be that a Claimant wins a case and obtains remedies to which he would not have been entitled if the other side had been heard. The Respondent may be held liable for a wrong which he has not committed.

(42) I decided that the justice of the case required that the Respondent be allowed to defend the claim. I accepted the Respondent’s contention that there would be little or no prejudice to the Claimant in allowing the Response to be accepted, other than having his Claim contested, whereas there would be significant prejudice to the Respondent in being unable to defend this Claim. The Respondent has shown a defence on the merits and there are significant issues

regarding whether the claim has any real prospect of success at all. The Respondent has permission to present its ET3 Response out of time.

Strike Out - Discrimination claims

(43) In his ET1 claim form, the Claimant ticked the boxes: unfair dismissal; race and disability discrimination; and "other payments". He did not say what race or disability he relied on.

(44) During this hearing, the Claimant told me that he had attached a document to his ET1 claim form. He did not have a copy of that document. Initially, I did not accept that the Claimant had attached a document to his claim form. It was not originally found by the Tribunal and was not served on the respondent. The claimant had not retained the document and had not provided a copy of it.

(45) However, having examined the local electronic file, which had been recently created, I found the Claimant's attachment. I therefore reconsidered my decision that he had not attached a file to his claim.

(46) In his "file" attachment to the ET1, the Claimant did not mention race or disability discrimination.

(47) In his letter of 10 December 2020, responding to EJ Snelson's initial rejection of his claim, he did not mention race or disability discrimination at all.

(48) On 12 August 2021 the Claimant was ordered to provide the following particulars of his race and discrimination claims by 6 September 2021:

> "a. What instances of less favourable treatment do you rely on?
> b. When do you say each alleged instance of less favourable treatment took place, and who do you say the perpetrator was?
> c. Who do you say is the appropriate comparator? This is a person who is the same as you in every material way but does not share your race and/or disability. You must show that you were treated less favourably than this person.
> d. Why do you say that you were subjected to each alleged instance of less favourable treatment because of your race and/or disability?"

(49) The Claimant did not provide the particulars of his discrimination claims. He said to me in the Tribunal today that he had sent lots of emails to the Respondent, which were evidence of how he was treated by the Respondent. He said that he was not a solicitor and he did not have time to provide particulars because he was busy working through an agency.

(50) Mr O'Neill said that the Claimant had sent him about 40 emails before the 12 August 2021 hearing in front of EJ Elliot, but it was not for the Respondent's solicitors to sift through the Claimant's evidence and emails and guess, from the evidence, what claims he was bringing. That was why the Claimant had been ordered by EJ Elliot to provide particulars of his claim.

(51) I considered that the Claimant had had ample opportunity, before today's hearing, to provide particulars as required in *Cox v Adecco* EAT/0339/19 (HHJ Tayler – judgment 9 April 2021). I considered that reasonable steps had been taken to identify the claims, and the issues in the claims. The Claimant was asked to provide particulars, but had failed to do so, because he says he is too busy. His pleadings also disclose none of the essential facts which might rise to a discrimination claim; they do not identify the nature of the claimant's protected characteristic- what race, or disability he relies on. They plead no unlawful acts done because of his (unspecified) race or disability. They plead no comparator.

(52) The claimant has not applied to amend the claims to plead any facts upon which a discrimination claim might be advanced. If he did, any amendment application, pleading new facts, would be likely to be subject to time limits.

(53) I decided that there was no reasonable prospect of success in the claimant's discrimination claims, which disclose none of the essential facts required for such a claim to succeed. The claims are struck out.

Strike Out - Claim for Other Payments

(54) The Claimant had not provided any particulars of his claim for other payments either. He told me, at this hearing, that the Respondent had not paid him a redundancy payment because they sacked him. His claim is for a redundancy payment.

(55) However, the Claimant has not pleaded any facts on which the ET could decide that the Claimant was dismissed for redundancy. The Claimant does not allege that he was, in fact, redundant. He also told me that he had accepted a redundancy payment in respect of his dismissal by George Birchall Ltd on 28 March 2019, less than 2 years before his dismissal. He had not served a further 2 years employment thereafter in order to gain the right to a further redundancy payment.

(56) I considered that the Claimant had no reasonable prospect of success in his claim for a redundancy payment. He does not say that he was redundant, or that he was dismissed for redundancy. His claim for "other payments" is struck out.

Unfair Dismissal Claims – Not Struck Out

(57) The Claimant brings claims of ordinary unfair dismissal and automatically unfair dismissal under *s152 TULRCA 1992*, because of Trade Union membership and activities.

(58) S152(1)(a) and s152(b) TULRCA 1992 provide:

"S152 TULRCA 1992

(1) For purposes of [Part X of the Employment Rights Act 1996] (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—
(a) was, or proposed to become, a member of an independent trade union, …
(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, …

(59) The claimant told me that he is a member of Unite the union and had been in touch with his Unite representative during his employment, who had contacted the building manager. The building manager was annoyed that the claimant was complaining to the Union and that the Union was regularly contacting the building manager and the respondent dismissed the claimant as a result.

(60) The respondent says that the claimant, an electrician, was dismissed for extremely serious breaches of health and safety, at least one of which he admitted during his disciplinary hearing. He admitted not "locking out" a distribution board which he was working on. He also switched the board on when there was significant water damage in the area.

(61) Having discussed the claims with the Claimant and the Respondent, I was able to identify the issues in the claims as follows:

1. Does the Claimant have the 2 years' service required to bring an ordinary unfair dismissal claim?

2. Has the Respondent shown that the Claimant was dismissed for the potentially fair reason of conduct, in that he:

a. Failed to carry out instructions as given by supervisor on making a safe Distribution Board and not following Lock Out Tag Out (LOTO) on 10th December 2019.

b. Switched the board on when there was significant water damage on 10th December 2019 which was a risk to the Claimant and others.

3. If not, did the Respondent dismiss the Claimant for the automatically unfair reason/s or trade union membership and/or activities?

4. If the respondent has shown that it dismissed the Claimant for the potentially fair reason of conduct, did the Respondent nevertheless act unfairly in dismissing the Claimant because:

i. The decision to dismiss was predetermined – the respondent had already decided to dismiss the claimant and used the electricity allegations as a pretext for doing so;
ii. The evidence on which the respondent relied in dismissing the claimant was fabricated or manipulated: the audiotapes were edited and water was sprayed onto the relevant area before photographs were taken.
iii. The respondent did not have reasonable evidence on which to dismiss the claimant because the photographs of the relevant area on which it relied were of the wrong place; the claimant was working on the second floor but the photographs were of the fifth floor.

Iv. The respondent had not provided the claimant with any training in 5 years - the respondent failed to send the claimant on an inspection and testing course.
V. The respondent did not provide the claimant with tools
Vi. The claimant had only one day's notice of the investigatory meeting.

(62) Mr O'Neill, for the respondent, produced the record of the claimant's disciplinary hearing on 15 January 2020. The disciplinary hearing notes record that, during the hearing, audiorecordings, showing the instructions given to the claimant on the relevant day, were played for the claimant to listen to. The notes record that the disciplinary hearing manager pointed out that the recordings, played to the claimant during the hearing, showed that the claimant had been given instructions on what to do

"AP – I know it says on your statement that Barry did not tell you what to do, but the recording says otherwise, do you agree?
DU No…".

(63) The notes also record the claimant admitting that he did not "lock out" the distribution board:
"AP – When Barry asked you to switch off the board, did you lock it out?

DU – No, I switched it off. Called him and told him I found the fault. He called me and told me to find the problem with the lighting on 2nd floor."

The notes also record the claimant saying that he turned the board on, and the hearing manager saying that there was water damage in the area,

" AP – You said the lights on the boards were off and there was no water, you switched the board on.
DU – Just turned on the MCC board for just for 1 minute to check what the fault is
AP – Which feed the lightboard. Did you turn it back off? Why?
DU – Yes, I was told to
AP – No water?
DU – No
AP – I saw the water damage."

(64) Mr O'Neill said that the claimant's unfair dismissal claims should be struck out because there was no reasonable prospect of the ET finding that that the Respondent was able to fabricate time-stamped audio recordings as the claimant has alleged. He said that there was no reasonable prospect of the ET finding that the dismissing officer did not have a reasonable belief in the claimant's guilt of the misconduct: from the record of the disciplinary hearing, the dismissing officer went to the relevant location himself and saw the water. He also said that there was no reasonable prospect of the ET finding that there had been a conspiracy to dismiss the claimant, with evidence fabricated to do so. Instead, as was clear from the note of the disciplinary hearing, the claimant admitted that he did not "lock out" and "tag out". Mr O'Neill said that it was self-evident that an electrician should not work on any live electricity. A tag is tied around the relevant electrical equipment to show that someone is working it. There was no reasonable prospect

an ET finding that such a serious failure in health and safety would not result in dismissal. Mr O' Neill said that there was no requirement under the ACAS Code of Practice to give notice of an investigatory meeting.

(65) Mr O'Neill said that, in the alternative, it was clear that a deposit order should be made.

(66) The Claimant said that he was telling the truth. He said that he was a qualified electrician. He said that he only received one day's notice of the investigatory meeting. He said that he would tell the ET that the dismissal was because the building manager got sick of Unite the Union complaining all the time.

Strike Out - Law

(67) An Employment Judge also has power to strike out a claim on the ground that it is scandalous, vexatious or has no reasonable prospect of success under *Employment Tribunal Rules of Procedure 2013, Rule 37(1)(a*).

(68) The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances, *Teeside Public Transport Company Limited (T/a Travel Dundee) v Riley* [2012] CSIH 46, at 30 and *Balls v Downham Market High School & College* [2011] IRLR 217 EAT. In that case Lady Smith said: "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 word 'no' because it shows that 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 submissions and deciding whether their written or oral recessions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect".

(69) A case should not be struck out on the grounds of having no reasonable prospect of success where there are relevant issues of fact to be determined, *A v B* [2011] EWCA Civ 1378, *North Glamorgan NHS Trust v Ezsias*, [2007] ICR 1126; *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] CSIH 46. On a striking-out application (as opposed to a hearing on the merits), the tribunal is in no position to conduct a mini-trial. Only in an exceptional case will it be appropriate to strike out a claim for having no reasonable prospect of success where the issue to be decided is dependent on conflicting evidence. Such an exceptional case might arise where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents *E D & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, or, where the facts sought to be established by the claimant were 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation', Ezsias para 29, per Maurice Kay LJ.

(70) I did not strike out either of the unfair dismissal claims. I did consider that the claims were close to ones where there was no real substance in the claimant's factual assertions about the reason for dismissal, as they were contradicted by

contemporary documents *E D & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, and, where the facts sought to be established by the claimant were 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation', *Ezsias* para 29, per Maurice Kay LJ. The reasons for dismissal set out in the dismissal letter were, on the face of it, very serious. The Claimant was alleging that relevant evidence of his failings had been fabricated, which was inherently unlikely given that it was audio and photographic evidence.

(71) However, I concluded that there was a core of disputed fact as to the reason the claimant was dismissed; whether the respondent had dismissed the claimant because of his Trade Union membership and activities. The claimant will say that he made use of the Trade Union and his officer telephoned the company, causing the building manager to become weary and irritated by the claimant's trade union membership and activities and that the claimant was dismissed as a result. Without hearing the evidence and without disclosure of all relevant documents, including records of communication with the union, it was not appropriate to say that there was no reasonable prospect of success in the claimant's unfair dismissal claims. Inferences might be drawn from records of discussions with the union and any internal communications following these discussions. Furthermore, there is a dispute of fact regarding whether a relevant photograph was of the correct location. If it was not, there would be a question about whether the respondent had reasonable evidence on which to dismiss, on one of the allegations against him.

Deposit Order

(72) If, at a Preliminary Hearing, an Employment Judge considers that and specific allegation or argument in a claim or response has little reasonable prospect of success, he or she may make an order requiring that party to pay a deposit not exceeding £1,000 as a condition of continuing to advance the allegation or argument, *r39(1) ET Rules of Procedure 2013.*

(73) The Tribunal is required to make reasonable enquiries into the paying party's ability to pay the deposit and to have regard to such information into account in deciding the amount of the deposit, *r39(2).*

(74) When determining whether to make a deposit order, a Tribunal is not restricted to a consideration of purely legal issues but is entitled to have regard to the likelihood of the party being able to establish the facts essential to his case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward (*Van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07, [2007] All ER (D) 187 (Nov). Although, as Elias J pointed out in that case, the less rigorous test for making a deposit order allows a tribunal greater leeway to take such a course than would be permissible under the test of no reasonable prospect of success, the Tribunal 'must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response' (para 27).

(75) I decided that the claims were clearly ones in which a deposit order should be made, because the claimant's contentions have little reasonable prospects of success.

(76) **I ordered the claimant to pay a deposit as a condition of continuing to advance his automatic unfair dismissal claim** because I considered that **there is little reasonable prospect of the Tribunal finding that the principal reason for dismissal was the claimant's trade union membership/activities, rather than that he failed to operate lock out , tag out on making a safe distribution board and that he switched the board on when there was significant water damage.**

(77) On the contemporaneous record of the disciplinary hearing, the claimant admitted that he did not "lock out and tag out" the distribution board – he said he simply turned it off. He also agreed that he had turned the distribution board on. He therefore admitted much of the central allegations against him. Further, on the audiorecordings, the claimant had been given instructions to carry out the relevant work. The claimant contends these recordings of his instructions are fabricated. I decided that there was little reasonable prospect that the Tribunal would find, on the claimant's bare assertion, that the audiorecordings had been invented. Accordingly, there was little reasonable prospect that the Tribunal would find that the claimant had not made serious health and safety breaches in carrying out work which he had been instructed to do.

(78) In order for the claimant's automatic unfair dismissal claim to succeed, the trade union membership and activities would need to be the "principal" reason for dismissal. There was little reasonable prospect of this, given that the claimant's admitted actions, in failing to make a distribution board safe and turning on a live distribution board, in an area where the dismissing manager had himself seen water damage. These actions were evidently dangerous for an electrician and likely to result in dismissal, whatever his employer felt about his trade union activities and membership.

(79) I also ordered the Claimant to **pay a deposit as a condition of continuing to advance his ordinary unfair dismissal claim**, and, in particular, **2 central arguments in it.**

(80) **First, I considered that there was little reasonable prospect of the Tribunal finding that the dismissal was predetermined and evidence was fabricated to ensure this.** The claimant contends that audiotapes were tampered with and that the respondent sprayed water in the area, in order to entrap the claimant and invent evidence against him.

(81) I agreed with the respondent that there was little reasonable prospect of the ET finding that audiotapes, which were time recorded, could have been tampered with. The claimant's contentions rely in an alleged conspiracy and highly deceitful behaviour, for which the claimant advances no evidence, apart from his assertion. I accepted is inherently very unlikely that the tribunal would prefer the claimant's assertion of conspiracy and invention over actual photographic and audio evidence.

(82) **Second, I considered that there was little reasonable prospect of the claimant succeeding in his argument that his dismissal was unfair because the respondent did not train him**. I considered there was little reasonable prospect of ET finding that an electrician was not at fault in failing to operate safe practices regarding live electricity and water damaged areas; these circumstances are obviously dangerous, even to an untrained individual. The claimant told me that he is a trained electrician. I considered that there was little reasonable prospect of the ET finding that any alleged lack of training by the respondent, specifically, meant that a decision to dismiss for serious health and safety failings regarding live electricity was not within the band of reasonable responses. Such failings are so serious, given the risk of death, that it is highly likely that dismissal will be found to be fair.

(83) I considered the appropriate amount of the deposit orders.

(84) The respondent said that the claimant had been required to exchange documents in relation to his means by 16 September 2021and had failed to do so. It said that the tribunal had therefore already made reasonable enquiries into the claimant's means and did not need to investigate further.

(85) I considered that it would not be appropriate to order a deposit which the claimant could not afford to pay, as that would potentially deny him access to a fair hearing. I asked the claimant about his income and assets. He said that he had been working for 3 months through an agency until Friday 15 October 2021 as an electrical and maintenance engineer. He produced 3 recent weekly payslips, showing that he was paid £606.79 net on 10 October 2021, £485.19 net on 26 September 2021 and £493.39 net on 5 September 2021. Such sums were broadly in line with his pay at the respondent. The Claimant said that he had been unemployed for 8 months last year.

(86) The claimant lives at 79 Spearman Street, Woolwich. It is a rented property, owned by a private landlord. The claimant pays £1,250 rent each month.

(87) I considered that there was no reason why the claimant would not be able to obtain alternative agency work as an electrician / maintenance operative almost immediately. It is generally known that there is a shortage of skilled tradespeople. He ought to be able to earn at least what he was earning each week until 15 October.

(88) I ordered the claimant to pay a total deposit of £450 as a condition of continuing to advance his unfair dismissal claims - £150 as a condition of continuing to advance his automatic unfair dismissal claim and £300 as a condition of continuing to advance his ordinary unfair dismissal claim. I considered that 2 of his contentions in his ordinary unfair dismissal claim had little reasonable prospect of success.

(89) I considered that the claimant ought to be able to afford to pay the total amount of the deposit. When he is in work, he earns more than £2,000 each month, net. With rent of £1,250, each month he has more than £750 for other spending,

including necessities. It is important that the claimant thinks seriously about whether he wishes to continue with these claims.

(90) I explained to the claimant that the real force of a deposit order lies in the costs risk attached to the Claimant if he continues to pursue the allegations when a deposit order has been made.

Strike out for Unreasonable Conduct Refused

(91) An Employment Judge has power to strike out a claim on the ground that the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious; under Employment Tribunal Rules of Procedure 2013, Rule 37(1)(b).

(92) In *Bolch v Chipman* [2004] IRLR 140, EAT, Burton J said that there were four matters to be addressed in deciding whether to strike out a claim because the Claimant has behaved scandalously, unreasonably or vexatiously. First, there must be a conclusion by the tribunal, not simply that a party has behaved scandalously, unreasonably or vexatiously, but that the proceedings have been conducted by or on his behalf in such a manner: 'If there is to be a finding in respect of [rule 37(1)(b)] … there must be a finding with appropriate reasons, that the conduct in question was conduct of the proceedings and, in the circumstances and context, amounted to scandalous, unreasonable or vexatious conduct.' Second, even if such conduct is found to exist, the tribunal must reach a conclusion as to whether a fair trial is still possible. In exceptional circumstances (such as where there is wilful disobedience of an order) it may be possible to make a striking out order without such an investigation, but ordinarily it is a necessary step to take. Third, even if a fair trial is not considered possible, the tribunal must still examine what remedy is appropriate, which is proportionate to its conclusion. It may be possible to impose a lesser penalty than one which leads to a party being debarred from the case in its entirety. Fourth, even if the tribunal decides to make a striking out order, it must consider the consequences of the debarring order. For example, if the order is to strike out a response, it is open to the tribunal, pursuant to its case management powers under [r 29] or its regulatory powers under [r 41], to debar the respondent from taking any further part on the question of liability but to permit him to participate in any hearing on remedy.

(93) The respondent asked that I strike out the claim because of the claimant's unreasonable conduct and his failure to comply with orders. The unreasonable conduct was the claimant sending an email late at night on 19 July 2021 to a junior member of the HR team at the respondent, in response to the request for further particulars, saying: *"All this is a big lie and everyone has their consequences!!!".* That happened once and was not repeated. I considered that a fair hearing was still possible at this stage – and that that conduct was not so unreasonable as to justify strike out in those circumstances.

(94) I did warn the claimant, however, that if he continued to fail to comply with orders for exchange of documents and evidence, it would more and more likely that his claim would be struck out because a fair hearing would not be possible.

(95) I told the parties that I would make orders for preparation for the final hearing. I agreed with the respondent that a 3 day final hearing would be needed, as the claimant requires the assistance of a Bulgarian interpreter.

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Employment Judge Brown

22 October 2021

Judgment sent to the parties on:

26/10/2021.

For the Tribunal:

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