



**EMPLOYMENT TRIBUNALS**

**Claimant:** Mr F Saber

**Respondent:** Bread Ahead Limited

**OPEN PRELIMINARY HEARING**

**Heard at London South:** by CVP

**On:** 15 October 2021

**Before:** Employment Judge Truscott QC (sitting alone)

**Appearances**

For the claimant: Ms I Simeniuk solicitor

For the respondent: Mr C Malec Director

**JUDGMENT on PRELIMINARY HEARING**

1. The claim of unfair dismissal contrary to section 103A of the Employment Rights Act is dismissed on withdrawal.
2. The claims for a written statement of particulars, wrongful dismissal, holiday pay and unlawful deduction of wages are not struck out as having no reasonable prospects of success nor are they subject to a deposit order.
3. A merits hearing will be listed.

**REASONS**

**Preliminary**

1. This Preliminary Hearing was listed to determine the issues which were identified at a Preliminary Hearing on 11 June 2021. That hearing noted that the claimant brings the following claims against the respondent:

Automatic unfair dismissal (s.103A ERA)

Breach of the right to a written statement of particulars

Wrongful dismissal

Holiday pay claim

Unlawful deduction from wages.

4. This Tribunal was to consider whether all or any of the claims should be struck out as having no reasonable prospects of success or make a deposit order.

5. A bundle of documents was presented to the Tribunal which was not in a form which was of much assistance to it. It was not at all clear from any documentation available to the Tribunal exactly what the claimant was claiming and the basis for it.

6. With the assistance of the claimant's solicitor, the claims were clarified as follows:

The claim of unfair dismissal contrary to section 103A in relation to a protected disclosure was withdrawn.

The claim for a written statement related to May 2020 when he had received an increase in pay.

The claimant disputes that he committed the gross misconduct relied upon by the respondent. If he is successful, he will be entitled to 1 week's pay.

He claims 6 week's holiday pay, 4 for 2019 and 2 for 17 March 2020 to 1 April 2020 which he did not take.

Unlawful deduction from wages, he says he was not paid his pay increase in May 2020 amounting to £833.33.

### Relevant Legal Framework

7. The following statutory provisions were considered in relation to the merits of the claims and time limits:

Employment Tribunals Extension of Jurisdiction (E&W) Order 1994 art3

Working Time Regulations 1998/1833

Employment Rights Act

Deduction from Wages Limitation Regulations 2014.

### Striking out

8. An employment judge has power under Rule 37(1)(a), at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the ground that it has no reasonable prospect of success. In **Hack v. St Christopher's Fellowship** [2016] ICR 411 EAT, the then President of the Employment Appeal Tribunal said, at paragraph 54:

Rule 37 of the Employment Tribunal Rules 2013 provides materially:-

“(i) At any stage in 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) Where it is scandalous or vexatious or has no reasonable prospect of success...”

55. The words are “no reasonable prospect”. Some prospect may exist, but be insufficient. The standard is a high one. As Lady Smith explained in **Balls v Downham Market High School and College** [2011] IRLR 217, EAT (paragraph 6):

“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 words “no” because it shows 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 the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects...”

56. In **Romanowska v. Aspirations Care Limited** [2014] (UKEAT/015/14) the Appeal Tribunal expressed the view that where the reason for dismissal was the central dispute between the parties, it would be very rare indeed for such a dispute to be resolved without hearing from the parties who actually made the decision. It did not however exclude the possibility entirely.

9. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. See also **Hassan v. Tesco Stores** UKEAT/0098/19/BA at paragraph 17 the EAT observed:

“There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of *Dolby* the test for striking out under the *Employment Appeal Tribunal Rules 1993* was interpreted as requiring a two stage approach.”

10. It has been held that the power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v. Reilly** [2012] IRLR 755, at para 30). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute.

11. In **Mechkarov v. Citibank N A** UKEAT/0041/16, the EAT set out the approach to be followed including:-

- (i) Ordinarily, the Claimant’s case should be taken at its highest.
- (ii) Strike out is available in the clearest cases – where it is plain and obvious.
- (iii) Strike out is available if the Claimant’s case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

### Deposit Orders

12. A deposit order can be made if the specific allegation or argument has little reasonable prospect of success. In **Hemdan v. Ishmail** [2017] IRLR 228, Simler J, pointed out that the purpose of a deposit order ‘is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails’ (para 10), she stated that the purpose ‘is emphatically not to make it difficult to access justice or to effect a strike out through the back door’ (para 11).

**Discussion and decision**

13. The claimant provided some detail as to the basis of his claims. The details were sufficient to potentially establish the claims and they should go forward to a hearing. It remains necessary that the claims are clearly identified, related to any relevant document and quantified. The Tribunal made no definitive decision about time bar in any of the claims.

14. In relation to wrongful dismissal, the claimant is not comparable to unfair dismissal, it revolves around whether he actually committed gross misconduct or not. Ms Simenuik's references to procedure and appeal would not be relevant, as they might have been in unfair dismissal.

15. There was no need for a deposit order.

16. Case management Orders for a hearing have been issued separately.

**Employment Judge Truscott QC**

15 October 2021