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EMPLOYMENT TRIBUNALS

Claimant: Mr A K Tewari

Respondent: Trustees of Vishwa Hindu Parishad- a registered charity

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 9, 10 and 13 December 2021

Before: Employment Judge Hallen (sitting alone)

Representation

Claimant: Ms. Esther Godwins- Advocate

Respondent: Mr. Kishan Bhatt- Solicitor

JUDGMENT ON OPEN PRELIMINARY HEARING

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face-to-face hearing was not held because the relevant matters could be determined in a remote hearing.

1. The claims of unfair dismissal and wrongful dismissal are not struck out as having no reasonable prospects of success nor are they subject to a deposit order.
2. A full merits hearing for 6 days has been listed for 8 to 10 February and 13 to 15 February 2023 at the East London sitting Centre.

REASONS

Background and Issues

1. The Claimant in a Claim Form submitted on 3 March 2021, brought claims for: unfair dismissal, wrongful dismissal, breach of contract, unlawful deduction of wages and breach of statutory duty.

2. In a written application on 6 July 2021, the Respondent requested a public preliminary hearing to determine its application for a strike out order and in the alternative a deposit order on behalf of the Respondent. The Respondent contended in its applications that the Claimant's claims had no reasonable prospects of success as, the unfair and wrongful dismissal claims were misconceived on the basis that the Claimant had been reinstated prior to the Claim Form being issued. The breach of contract and breach of statutory duty had not been sufficiently particularised. The unlawful deduction of wages claim had not been sufficiently particularised and was out of time.

3. Following an unsuccessful judicial mediation between the parties on 7 September 2021, the Tribunal on 11 September 2021 sent written notice to the parties that the Respondent's application would be considered at a hearing on 9 December 2021, the Tribunal having already listed the claims for a three day final hearing on 15-17 February 2023.

4. With the assistance of the Claimant's representative, the claims were clarified as follows: Unfair dismissal contrary to section 98 Employment Rights Act 1996 (ERA) and automatic unfair dismissal under section 100 relating to health and safety. Wrongful dismissal in respect of the Respondents failure to pay statutory notice to the Claimant. A failure to pay holiday pay for the two years preceding the commencement of the claim. A failure to pay national minimum wage for two years prior to the commencement of the claim.

5. At the beginning of the hearing, the parties agreed that the application would not be determined in one day as they wished to call oral evidence in support of the application. I accommodated the parties by ensuring that the applications could be determined in a three-day consecutive sitting running from 9, 10 and 13 December 2021 rather than the application going part heard.

6. At the outset of the hearing, I directed that the primary issues for deciding the Respondent's strike out/deposit application, were identified were as follows: Was the Claimant a worker? if yes, does the Tribunal have jurisdiction to hear a claim for unfair dismissal and or failure to pay statutory notice pay (wrongful dismissal); Was the Claimant an employee employed under a contract of employment, either express or oral? If the Claimant was employed under a contract of employment was he dismissed by the Respondent? The Respondent stated that although the Claimant was dismissed, he was reinstated under the same terms and conditions as he previously enjoyed. The Tribunal, therefore had to ascertain whether this was the case. If it was not the case, the Tribunal had to decide whether the Claimant should be permitted to pursue his claims for unfair dismissal and failure to pay notice. I directed that the issues related to inadequate particularisation of the claim could be dealt with by way of submission and permission to provide further particulars either during the course of the hearing and/or prior to the final hearing. These latter matters were not part of the Respondents application.

7. An agreed bundle of documents was presented to the Tribunal made up of 470 pages. During the course of the proceedings the Claimant and Respondent were permitted to produce one supplementary document by way of additional disclosure. The Respondent called four witnesses to give oral evidence and each of these witnesses had prepared witness statements which dealt with the application under consideration albeit their statements dealt with other issues not under consideration. These witnesses were Om Joshi, Christopher Edgley, Vijay Kheterpal and Dr. Pratibha Datta. The Claimant also gave oral evidence and had the assistance of a Hindi interpreter throughout his oral evidence. I

was satisfied that the Claimant could give his evidence via the interpreter and understood what the interpreter had to say to him. The witnesses were subject to cross examination from their respective legal representatives and from me.

Relevant Law

8. 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 1996.

Striking Out

9. 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.

10. 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."

11. 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...."

12. 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.

13. 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.”

14. 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.

15. 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

16. 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).

Decision

17. The Claimant gave cogent and consistent evidence on the detail and the basis of his claims for unfair and wrongful dismissal. The details were sufficient to potentially establish the claims of wrongful and unfair dismissal and they should go forward to a hearing. The Tribunal made no definitive decision about time bar in any of the claims.

18. There was no need for a deposit order.

19. Case management Orders for a hearing will be issued separately.

Employment Judge Hallen

17 December 2021