EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr A Armah v **ABM Facility Services UK Limited**

Heard at: London South by CVP **On: 12 April 2022**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: In person
For the Respondent: Mr A O'Neill solicitor

JUDGMENT

1. The claim is struck out under Rule 37(1)(a) on the ground that the claim has no reasonable prospect of success.

2. Costs are awarded against the Claimant in favour of the Respondent of £1250.

REASONS

1. The hearing considered an application made by the Respondent for strike out of the claim on the ground that it had no reasonable prospect of success and costs. The Tribunal heard submissions from both parties and had written submissions from the Respondent. There was a bundle to which reference will be made where necessary.

2. The Claimant said he had not worked since he was dismissed and that he had rent arrears of £4000 but produced no documentation to support what he said.

3. There was a Costs Schedule which amounted to approximately £2500 to include this hearing.

4. **Chronology**

Date	Event	Page
17 September 2020	Claimant issued with Final Written Warning for sleeping on duty	51-52
12 October 2020	Date of incident witnessed on CCTV	
13 October 2020	Complaint received from Respondent's customer (TFL) alleging theft	59

14 October 2020	Claimant's investigation meeting	
16 November 2020	Claimant's disciplinary hearing during which the Claimant admits taking a box and covering it with a newspaper because it looked "nice"	
16 November 2020	Claimant's stated date of termination in ET1	8
18 November 2020	Claimant notified of disciplinary outcome – dismissal without notice confirmed effective as 21 November 2020	89-91
21 November 2020	Effective date of termination	91
20 February 2020	Date by which ACAS EC process should have been commenced (3 months less one day)	
1 March 2020	Claimant commences ACAS EC process	4
2 March 2020	Claimant concludes ACAS EC process and certificate issued	4
7 March 2020	Claimant commences proceedings and submits ET1	5
9 April 2020	ET3 submitted and out of time point raised with ET and Claimant	31
9 April 2020	Out of time point and lack of prospects specifically raised with Claimant by Respondent's solicitors	94-95
10 January 2022	Out of time point and lack of prospects specifically raised again with Claimant by Respondent's solicitors	96-98
11 January 2022	Notice of Preliminary Hearing sent out by ET	33-34
4 February 2022	Case Management Orders sent out by ET	35-36
29 March 2022	Date by which the parties were due to exchange documents and Claimant was required to provide a witness statement to address time limit point	35

Law

Unfair dismissal - Time limits

5. The time limit for a complaint of unfair dismissal is set out in section 111 of the Employment Rights Act.

   111 Complaints to [employment tribunal]

   (1) A complaint may be presented to an [employment tribunal] against an employer by any person that he was unfairly dismissed by the employer.

   (2) [Subject to the following provisions of this section], an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal—

   (a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

6. In accordance with section 207B(4) of the ERA 1996, compliance with the early conciliation procedure extends time:

> "If a time limit would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period".

7. There are two limbs to the formula of reasonable practicability. First, the employee must show that it was not reasonably practicable to present the claim in time. The burden of proving this rests on the Claimant (**Porter v. Bandridge Ltd** [1978] ICR 943 CA). Second, if he succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

8. In **Dedman v. British Building Engineering Appliances Ltd.** [1974] ICR 53 CA, Lord Denning held that ignorance of legal rights, or ignorance of the time limit, is not just cause or excuse unless it appears that the employee or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences. Scarman LJ indicated that practicability is not necessarily to be equated with knowledge, nor impracticability with lack of knowledge. If the applicant is saying that he did not know of his rights, relevant questions would be:

> 'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing in ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse".

9. This approach was endorsed in **Walls Meat Co. Ltd. v. Khan** [1979] ICR 52 CA. Brandon LJ dealt with the matter as follows:

> 'The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him'.

10. **Palmer & Saunders v. Southend-on-Sea Borough Council** [1984] ICR 372 CA followed this line and talked in terms of reasonable possibility at page 384-385.

11. What is reasonably practicable is “what is reasonably capable of being done” according to **Bodha v. Hampshire Area Health Authority** [1982] ICR 200, at 204.

12. The time limits are to be strictly applied. In **Beasley v. National Grid** [2008] EWCA Civ 742, the Court of Appeal upheld the decision of the ET that a claim form, submitted electronically, which was 88 seconds late was out of time for the purposes of section 111(2)(b), and that it was reasonably practicable for the Claimant to have brought the claim in time. In **Beasley**, Tuckey LJ, with whom Mummery LJ and Sir Paul Kennedy agreed, said, at paragraph 25:

> “With legislation less strictly worded this is a case which might easily have passed over a time bar on some equitable basis: the respondent was not prejudiced by the delay and 88 seconds is, in any event, neither here nor there. But the plain fact is that section 111(2) does impose a harsh regime”.

13. The Claimant must also demonstrate that the claim was brought within a further reasonable period under section 111(2)(b) ERA 1996. Whether a claim was submitted within a further reasonable time means a Tribunal must consider all the circumstances of the particular case, including what the Claimant did; what he or she knew, or reasonably ought to have known, about time limits; and why it was that the further delay occurred. The EAT emphasized that Tribunals should always bear in mind the general principle that litigation should be progressed efficiently and without delay (**Nolan v. Balfour Beatty Engineering Services** EAT 0109/11*).*

14. When a claim is late, even if it is through no fault of the claimant or his or her advisers, the claimant must act quickly to minimise the delay as soon as he or she becomes aware of it (**Golub v. University of Sussex**, unreported 13.4.81, CA).

STRIKING OUT

15. Rule 37 of the Employment Tribunal Rules 2013 provides:

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 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).

16. 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.

17. 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."

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18. 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.

19. 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.

COSTS

20. A costs order may be made in favour of a party in respect of the costs he has incurred whilst legally represented or represented by a lay representative. The costs will relate to actual costs incurred and can be assessed up to £20,000, or subjected to a detailed assessment by a county court or employment judge above that figure. Costs are the exception rather than the rule; costs do not follow the event in employment tribunals (eg para 8 **Vaughan v. London Borough of Lewisham** [2013] IRLR 713)

21. Tribunals have a wide discretion to award costs where they consider that there has been unreasonable conduct in the bringing or conducting of proceedings under Rule 76(1)(a). Every aspect of the proceedings is covered, from the inception of the claim or defence, through the interim stages of the proceedings, to the conduct of the parties at the substantive hearing. Unreasonable conduct includes conduct that is vexatious, abusive or disruptive.

22. When making a costs order on the ground of unreasonable conduct, the discretion of the tribunal is not fettered by any requirement to link the award causally to particular costs which have been incurred as a result of specific conduct that has been identified as unreasonable (**McPherson v. BNP Paribas (London Branch)** [2004] ICR 1398, Mummery LJ (at para 40):

> 'The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring [the receiving party] to prove that specific unreasonable conduct by [the paying party] caused particular costs to be incurred".

23. In **Barnsley Metropolitan Borough Council v. Yerrakalva** [2012] IRLR 78 CA, at para 41:

> 'The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects if had".

24. In relation to a costs warning Harvey said at para 1087.01:

> "This is a particularly important step to take in the case of an unrepresented claimant, as the failure to do so might result in no costs being awarded where otherwise they would have been"

25. In **Rogers v. Dorothy Barley School** UKEAT/0013/12 (14 March 2012, unreported), the EAT refused to award costs against the appellant, who was unrepresented and who refused to accept that his claim was wholly misconceived. Mr Recorder Luba QC said:

> "There is a number of features of this application for costs that lead me to the conclusion that it would not be right to order Mr Rogers to pay costs. The first is that the Respondent employer has known for many months that Mr Rogers is

> acting in person and is simply not grasping the jurisdictional question that his appeal raises, yet there is no letter or other correspondence or intimation to him warning him that if he proceeds, an application for costs will be made. Secondly, no recent notice of the application for costs has been given at all, even though it must have been apparent within the last days and weeks that the appeal would be pressed to a full hearing and that costs might be sought; as I say, no intimation whatever was given. Thirdly, the applicant for costs, the Respondent, has not given any notice to Mr Rogers of the extent of the costs it would seek, so he has had no opportunity to assess or contest the amount that is proposed. Finally, I take into account the underlying difficulty that has given rise to these proceedings in the first place."

However, in paragraphs 18 and 19 of **Vaughan**, it was said:

> "If there is any criticism, it could only be that they did not write to her at an early stage setting out the weaknesses in her claims and warning that a costs order would be sought if they failed."

26. If a well-argued warning letter is sent, a failure by the Claimant to engage properly with the points raised in it can amount to unreasonable conduct if the case proceeds to a hearing and the Respondents are successful for substantially the reasons that were contained in the letter. In **Peat v. Birmingham City Council** UKEAT/0503/11 (10 April 2012, unreported) at para 28:

> "We think that if they had engaged with that issue the Appellants, even if they considered they had a reasonable prospect of success, would have been likely to have appreciated that it was so thin, that it was not worth going on with the hearing".

27. The status of the litigant is a matter that the tribunal must take into account (**AQ Ltd v. Holden** [2012] IRLR 648, EAT) - at para 32:

> "A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel for the claimant] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional adviser. Tribunals must bear this in mind when assessing the threshold tests in [rule 76(1)(a)]. Further, even if the threshold tests for an order of costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice."

28. However, it is not the case "that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity" (para 33).

29. These comments were endorsed by Underhill J in **Vaughan v. London Borough of Lewisham** [2013] IRLR 713, EAT, at para 25, a case in which the tribunal made a substantial order for costs against an unrepresented claimant. The EAT did

not interfere with the order. Underhill J stated that there was no reason to suppose that the tribunal had not taken her lack of representation into account, and observed that:

> 'the basis on which the costs threshold was crossed was not any conduct which could readily be attributed to the appellant's lack of experience as a litigant' [but was] 'her fundamentally unreasonable appreciation of the behaviour of her employers and colleagues' (para 25)

30. There is discretion in rule 84, whereby tribunals may have regard to the paying party's ability to pay. The fact that a party's ability to pay is limited does not, however, require the tribunal to assess a sum that is confined to an amount that he or she could pay (see **Arrowsmith v. Nottingham Trent University** [2012] ICR 159, at para 37). In **Arrowsmith**, the Court of Appeal, in upholding a comparatively low costs order of £3,000 made by an employment tribunal against a claimant of very limited means, commented that '[h]er circumstances may well improve and no doubt she hopes that they will' (per Rimer LJ).

DISCUSSION and DECISION

31. The Claimant’s dismissal became effective no later than 21 November 2020. This is a date later than the Claimant himself says. The claim is out of time. The claim was not presented until 7 March 2021, 15 weeks after dismissal. The ACAS process was started outside the primary time limit and therefore does not assist the Claimant.

32. It was not impracticable for the Claimant to submit his claim in time. Despite being given the opportunity on 4 February 2022 to provide evidence of why he may have failed to submit his claim in time, he has not done so. He did not explain why he delayed and did not do so at the hearing other than to say that he could not afford a lawyer.

33. Even if it was not reasonably practicable for the Claimant to have presented this claim within time, it was not in any event presented within a further reasonable period. Despite being given the opportunity on 4 February 2022 to provide evidence of why he may have failed to submit his claim in time, he has not done so. He did not explain why this further period of delay was a reasonable period.

34. In exercising its discretion, the Tribunal must consider all the circumstances, bearing in mind the general principle that litigation should be progressed efficiently and without delay. The Claimant failed to comply with the original case management orders prior to the Preliminary Hearing being listed and the failure by the Claimant to comply with the revised case management orders in preparation for the Preliminary Hearing as evidence that the Claimant is unwilling and/or unable to meet the timetables imposed on parties. The claim is out of time.

35. In relation to the merits of the claim, the Claimant’s actions are recorded on CCTV which show his actions on 12 October 2020. The Respondent was alerted to the issue by its customer, TFL. The Claimant’s explanations were in breach of HOT protocol [39] which requires suspicious items to be reported immediately to the site manager and his line manager.

36. The Claimant knew this process which he recited at the disciplinary hearing. His explanations were also not believed. He confirmed at the disciplinary hearing:

36.1. he searched two bags without gloves and without contacting a supervisor [84 -85] as he thought they were rubbish;

36.2. he removed a box [83] which he then covered with a newspaper due to covid because he did not have gloves [84];

36.3. he was aware of and was able to recite the HOT procedure (page 85) which he did not follow and which the Claimant agreed he did not follow – "*yes okay*" [85]; and

36.4. he thought the box was empty [86];

36.5. he took the box covered in a newspaper because he thought it was "*looking so nice*" [86]; and

36.6. he was asked about a phone by David Vanner of TFL.

37. This was not his original version of events. In his statement for the investigation [54] the Claimant states:

37.1. he states he took found two bags and then <u>later</u> found a box under a bin which was near where he found the bags;

37.2. he took the box upstairs to hand over to management and left it in the cleaner's storage (notwithstanding this confirms the Claimant left a box in an office which could have been a bomb or other device); and

37.3. he was asked where the phone from the bags by David Vanner but he said he did not find a phone just two bags "*and this box which is a perfume found later on that I kept here on the table to give to you*"

38. This incorrect explanation was also given to a colleague at the time of the incident [71]. This confirms that the Claimant told the colleague he later found a box with perfume.

39. The Claimant states initially that he knew the box had perfume in which is correct [photos 56 – 57]. He knew it was not empty or rubbish as stated at the disciplinary hearing. Further he could not know what was in it without having looked and seen it contained perfume, in breach of the HOT protocol. This initial explanation is also not of course what the CCTV shows.

40. The Respondent followed a fair procedure: investigation meetings with the Claimant and witnesses and a disciplinary hearing which was rearranged due to illness [79-81]. The Claimant failed to appeal.

41. The Claimant was already subject to a final written warning for which any further act of misconduct would have resulted in his dismissal [51].

42. Accordingly, the Respondent:

42.1. had a potentially fair reason to dismiss, namely conduct.

42.2. carried out a fair investigation appropriate to the nature of the case and the evidence; and

42.3. acted within the band of reasonable responses in treating such reason as sufficient to dismiss the Claimant in the circumstances, bearing in mind its size and administrative resources and the facts of the case.

43. This is a case to which **British Home Stores Ltd v. Burchell** [1978] IRLR 379, EAT applies. Notwithstanding the reality of events as they transpired and for which the Claimant was dismissed, the Respondent is only required to the demonstrate:
43.1. it genuinely believed the Claimant guilty of misconduct,
43.2. it had grounds for its belief which were reasonable; and
43.3. it carried out as sufficient an investigation into the facts as was reasonable,

44. There is no prospect that the Claimant will be able to succeed on challenging the Respondent on any of these issues. The Respondent was entitled to dismiss without notice, such being entirely within the band of reasonable responses.

Strike out

45. The ground relied on in this case is that the claim had no reasonable prospect of success in accordance with rule 37(1)(a). The Tribunal considered that the claim had no reasonable prospect of success on the merits and it was also out of time.

46. The Tribunal acknowledged, as per paragraph 5 of **Blockbuster Entertainment Limited v. James** [2006] IRLR 630, that rule 37 is a "draconic power, not to be readily exercised". The Tribunal is satisfied, having regard to the nature of the claim and its history that a strike out is proportionate and appropriate.

Costs

47. The Claimant made an unmeritorious claim against the Respondent which was out of time. The Respondent explained the situation to him by letter dated 9 April 2021 [95] which also told him of the consequences. The Respondent wrote again on 10 January 2022 [96-98]. The Claimant paid no attention and continued with his claim only appearing at the hearing to say he had no money. On one view, the Respondent is entitled to its entire costs. With considerable hesitation, the Tribunal decided to limit the award, not because there was anything untoward with the Costs Schedule and not because it believed the Claimant that the reason for his predicament was that he had no money and was in debt but because it was likely he had little money. The costs award is £1250.

Employment Judge Truscott QC

Date 20 April 2022