EMPLOYMENT TRIBUNALS

Claimant: Mr C K Aninkorah

Respondent: Arriva London North Ltd

Heard at: Watford (by CVP) **On:** 16 May 2022

Before: Employment Judge Maxwell

Appearances
For the claimant: no attendance
For the respondent: Mrs Mosley-Ford

JUDGMENT

1. The Claimant's unfair dismissal claim has no reasonable prospect of success and is struck out.

2. The Claimant's race discrimination claim has no reasonable prospect of success and is struck out.

3. The Claimant's unlawful deductions claim has no reasonable prospect of success and is struck out.

REASONS

Claim

4. By a claim form presented on 9 July 2021, the Claimant complained of:

   4.1 Unfair dismissal;

   4.2 Race discrimination;

   4.3 Unlawful deductions.

5. The Claimant did not attend to clarify his claims. It appeared that his race discrimination claim was direct discrimination with respect to dismissal. The unlawful deductions claim appeared to relate to a period in mid-2020 when he was not paid by the Respondent.

Correct Respondent

6. The Claimant's former employer was Arriva London North Limited and the name of the Respondent to his claim is amended accordingly.

Procedural

7. Of the Tribunal's own motion and by order of EJ Lewis, notice of hearing was sent to the parties on 27 January 2022, listing this matter for a preliminary hearing today to determine "whether the claim has any reasonable prospect of success".

8. More recently, an invitation to join the hearing by CVP was sent to the parties.

9. The Claimant did not attend at 2pm. The Tribunal caused a telephone call to be made and an email sent in the hope of securing his attendance, without any success.

10. Proper notice of this hearing having been sent to the parties and the Respondent being in attendance, I decided it was in the interests of justice to continue.

Facts

11. The Claimant was employed by the Respondent from 2017 as a bus driver.

12. The examples of gross misconduct in the Respondent's disciplinary policy include:

> **Failure to observe rules affecting the safety of other staff or of the public including a breach of the policy on mobile phones and earpieces.**

13. The Respondent's mobile phone and electronic device policy includes:

> **PCV Vehicles**
>
> **3.1 Under no circumstances should a mobile phone be used whilst driving or being in control of passenger carrying vehicles. Staff that do carry mobile phones should switch them off and place them in their locker or bag whilst driving.**

14. A notice displayed at the Respondent's premises includes:

> **it is a specific offence to use a hand-held mobile phone or similar device when driving. There is a £60 fixed penalty with three penalty points for the offence rising to £1,000 on conviction in court. This figure increases to £2,500 for drivers of buses, coaches and heavy goods vehicles. For the most serious cases, motorists who use mobile phones at the wheel could face up to two years in jail.**
>
> **Whilst most staff understand and respect the issues and behave in a sensible and mature way there appear to be others who do not and who believe that they are exempt from the law, PSV Regulations and ARRIVA London's Policy on this matter.**

It is for the benefit of this small minority that this notice is written so that they are left in no doubt as to where they stand and this Company's position, which is one of zero tolerance, fully supported by Unite the Union.

Any member of staff who is found to have used a mobile telephone whilst driving any of our vehicles will be dealt with under the formal disciplinary procedure. In certain circumstances it may be necessary to suspend an employee from his/her duties pending a disciplinary hearing.

If the charge to proven It may be deemed to a case of Gross Misconduct (Failure to observe the rules affecting the safety of other staff or the public)

In such circumstances the employee concerned may be dismissed without notice and in any event the minimum disciplinary award is likely to be a Final Caution.

For those of you that do carry a mobile telephone, please ensure that you switch it off before you commence driving to avoid the temptation to respond to someone who may be calling you.

15. Whilst the Claimant did not attend today to clarify his claims, Mrs Mosley-Ford anticipated his unlawful deductions claim related to a period for which he was not paid, from 1 August 2020 to 11 September 2020. She explained the Respondent's position on this, namely that the Claimant was one of a number of bus drivers who were placed on furlough in the early part of 2020. In Mid-July 2020, the Claimant was asked to come back to work from 1 August 2020. He did not do so. It appears that he was in Ghana at this time. The Claimant returned to work on 11 September 2020 and was paid thereafter.

16. On 13 April 2021, the Claimant was suspended from work with pay. The Respondent had been prompted to look at the CCTV for 10 April 2021 by the Claimant claiming for overtime, when there had been no recorded delay on his route. In the course of reviewing the recording, the Claimant was seen to be using his mobile phone whilst driving the Respondent's bus.

17. An investigation meeting (the notes of this call it a suspension review) took place on 15 April 2021. The CCTV was viewed with the Claimant, who agreed the footage showed him handling his phone, with the screen illuminated, whilst operating the Respondent's vehicle.

18. The Claimant was told he would be required to attend a disciplinary hearing and because of his prebooked holiday, this would take place after his return to work on 10 May 2021. The Claimant then said he was not flying back until 24 May 2021. This return date was queried and it was said it was not what had been approved by the Respondent. Following further adjournment and discussion, the hearing was fixed for 13 May 2021. The Claimant was advised that if he did not attend the disciplinary hearing, it would be conducted in his absence.

19. A letter of 15 April 2021 invited the Claimant to a disciplinary hearing on 13 May 2021, in connection with an allegation of:

> **Observed using a mobile phone whilst in control of a bus following the viewing of CCTV in relation to an investigation on late running/overtime dockets.**

This was said to amount to gross misconduct and he was warned that summary dismissal was a possible outcome. The letter attached evidence the Respondent relied upon, including stills from the CCTV showing the Claimant in the driver's cab holding and looking at what appeared to be a mobile phone with an illuminated screen.

20. The disciplinary hearing took place on 13 May 2021. The Claimant was not present and a decision was made to proceed in his absence on the basis that the consequences of him not attending had been made clear. The CCTV footage was viewed and a decision made that the Claimant was guilty of the misconduct alleged. The sanction imposed was summary dismissal. This outcome was confirmed in a letter of the same date.

21. By an email of 19 May 2021, the Claimant appealed against his dismissal. He said he had been in Germany at the time of the disciplinary hearing and called to inform the Respondent of this. He said he had been told he would be recorded as absent. The Claimant said he would return to the UK on 15 June 2021.

22. The appeal hearing took place on 17 June 2021. After much discussion of the logistics of the disciplinary hearing, the Claimant's main argument appeared to be that although he was seen on the CCTV handling his phone, he had not actually used this to make a telephone call. The Claimant agreed he was aware of the mobile phone warning poster and understood this to be the same as in Germany, namely that you couldn't use your phone whilst driving.

23. The Claimant's appeal was dismissed on the basis that the prohibition on the use of mobile phones whilst driving or being in control of a vehicle was not limited to making telephone calls.

Law

Strike Out

24. Rule 37(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 provides:

> **(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 any 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[…].**

25. The test of "no reasonable prospect of success" was considered in **North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 CA**, per Maurice Kay LJ:

> **26 […] what is now in issue is whether an application has a realistic as opposed to a merely fanciful prospect of success. […]**

> **29 […] It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation.[…]**

26. The greatest caution should be exercised before striking out discrimination cases as having no reasonable prospect of success; see **Anyanwu v South Bank Students' Union [2001] IRLR 305 HL** per Lord Steyn:

> **24. In the result this is now the fourth occasion on which the preliminary question of the legal sustainability of the appellants' claim against the university is being considered. For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. Against this background it is necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university.**

27. There is, however, no prohibition on strike-out in discrimination cases; see **Ahir v British Airways PLC [2017] EWCA Civ 1392**, per Underhill LJ:

> **8. There is force in Mr Burns's point. Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be '*little* reasonable prospect of success'**

28. Consideration of striking out often arises when attempts have been made to clarify the claims being made. Guidance in this regard was provided in **Cox v Adecco [2021] ICR 1307 EAT**, per HHJ Tayler:

> **28. From these cases a number of general propositions emerge, some generally well-understood, some not so much:**
>
> > **(1) No-one gains by truly hopeless cases being pursued to a hearing;**

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;

(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

(4) The Claimant's case must ordinarily be taken at its highest;

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

[…]

30. There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success. Often it is argued that a claim is bound to fail because there is one issue that is hopeless. For example, in the protected disclosure context, it might be argued that the claimant will not be able to establish a reasonable belief in wrongdoing; however, it is generally not

> **possible to analyse the issue of wrongdoing without considering what information the claimant contends has been disclosed and what type of wrongdoing the claimant contends the information tended to show.**
>
> **[…]**
>
> **32. This does not mean that litigants in person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim. The employment tribunal can only be expected to take reasonable steps to identify the claims and issues.**
>
> **[…]**
>
> **34. In many cases an application for a deposit order may be a more proportionate way forward.**

29. Where English is not a claimant's first language, this factor will need to be considered; see **Hassan v Tesco Stores Ltd UKEAT/0098/16**.

Conclusion

Unfair Dismissal

30. Separately from such conduct involving the potential commission of a criminal offence, the Respondent's rules on mobile phone use could scarcely be much clearer. The prohibition was not limited to making telephone calls and for good reason, as interacting with screens on mobile devices is plainly a distraction from driving and danger to public safety. The prospect of dismissal was express.

31. Irrespective of whether an argument could be made to the effect that the Claimant's disciplinary hearing should have been postponed, he did in any event have an opportunity to advance his substantive defence on appeal. His main point, namely that he had not made a telephone call, is obviously a weak one and its rejection unsurprising.

32. The Claimant's unfair dismissal claim has no reasonable prospect of success.

Race Discrimination

33. The only race discrimination claim is with respect to dismissal. The Claimant has identified no factor which suggests that race had anything whatsoever to do with the decision to dismiss him. Whilst I am mindful of the need for caution in this regard, there is simply nothing here to support a conclusion that the decision to dismiss was direct race discrimination. Such a claim has no reasonable prospect of success.

Unlawful Deductions

34. The Claimant was not paid because he failed to attend for work when required. The Respondent was not in breach of the obligation to provide pay because at the material time, the Claimant was himself in breach of the obligation to do work and, therefore, no entitlement to pay arose. At its heart the contract of employment is a work-wage bargain and this requires both sides to comply. There is no reasonable prospect of the Claimant showing that less was paid than was properly payable.

35. Separately, given the Claimant's complaint refers to a period ending 11 September 2020 and assuming his pay was due at the end of that month, or latest in October 2020, then his claim in July 2021 would have been substantially out of time. When he contacted ACAS in June 2021, the limitation period would have already expired and there was no extension. Given the Claimant was back at work from September 2020 until April 2021, there is no reasonable prospect of him showing that it was not reasonably practicable to present his claim in time. He appears to have been prompted to bring the wages claim only by his subsequent dismissal.

EJ Maxwell

Date: 16 May 2022

Sent to the parties on:

4/6/2022

For the Tribunal Office:

N Gotecha