



EMPLOYMENT TRIBUNALS

Claimant: Mr Guru Narasimha Sai Chandu Sharma Mahankali

Respondent: World Shirdi Sai Baba Organisation UK (a charity)

Heard at: East London Hearing Centre

On: 10th June 2022

Before: Employment Judge Reid

Representation

Claimant: Dr Narayanan (friend) (the Claimant did not attend)

Respondent: Ms McGhee, Counsel

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.

JUDGMENT (Reserved)

The judgment of the Tribunal is that:-

1. The Respondent's application under Rule 37(1)(a) of the Tribunal Rules 2013 (no reasonable prospect of success) to strike out the Claimant's claims for (automatic) unfair dismissal under s104 Employment Rights Act 1996, wrongful dismissal (notice pay), and unlawful deduction from wages under s13 Employment Rights Act 1996 is refused on the basis that it has not shown that the Claimant has no reasonable prospect of success in relation to these claims, save as set out at para 2 below as regards one part of the wages claim.
2. The Claimant's claim for unpaid wages for 6 days prior to 1st January 2020 is struck out as having no reasonable prospects of success.
3. The Claimant's claim for indirect discrimination under s19 Equality Act 2010 on the grounds of marital status under s8 Equality Act 2010 is struck out as having no reasonable prospect of success.

4. The Claimant's claim for a statutory redundancy payment is struck out because it is not his case that he was dismissed for redundancy and he does not have the required two years continuous employment under s155 Employment Rights Act 1996 to bring such a claim.
5. A deposit order of £500 under Rule 39(1) of the Tribunal Rules 2013 is made (see separate Order) in relation to the following allegation: that the reason or principal reason for the Claimant's dismissal was the assertion of a relevant statutory right.

See also separate case management orders.

REASONS

Background

1 The Claimant presented a claim on 13th September 2020 claiming (a) unfair dismissal (b) discrimination on the grounds of marital status (c) a statutory redundancy payment (d) notice pay and (e) unpaid wages. He also claimed an additional award for a failure to issue with him with a copy of his written particulars of employment under s1 Employment Rights Act 1996.

2 The Claimant does not claim to have been dismissed by reason of redundancy and did not have the required two years continuous employment to bring such a claim so that claim could not continue in any event. As regards his unfair dismissal claim he claimed that it was an automatic unfair dismissal (assertion of a statutory right) so that he did not need two years continuous employment to bring the unfair dismissal claim (page 108).

3 There is a dispute between the parties as to the start date of his employment the Claimant saying it was 20th December 2019 (page 4) but also saying he came to the UK to start work on 24th December 2020 (page 11); the Respondent says the start date is 1st January 2020 as per his contract.

4 The Respondent also brought a counterclaim against the Claimant claiming £1,918 being the reimbursement of employment costs the Claimant agreed to pay in his contract plus £500 being the Claimant's own legal fees which the Claimant had agreed to pay himself, but which the Respondent had in fact paid. The total counterclaim is £2,418.

5 The Respondent applied on 10th June 2021 to strike out his claims under Rule 37 (1)(a) of the Tribunal Rules 2013 on the basis that the claims had no reasonable prospects of success (page 126). In the alternative the Respondent applied for a deposit order under Rule 39. The Claimant resisted the applications in an email and attachment dated 19th February 2022 (page 393-397).

6 There was also an outstanding application by the Claimant dated 22nd May 2021 (page 360) to amend his claim form to include a claim for indirect discrimination on the grounds of marital status, having earlier confirmed that he did not proceed with a claim of direct discrimination on the grounds of marital status.

7 The Claimant did not attend this hearing. Only his representative Dr Narayanan attended. The Claimant was said to be in another country (not India) and does not want the Respondent to know where he is. (He intends to attend the final hearing and is obtaining permission from that other country for video evidence – see attached Orders). Because he did not attend I did not hear any evidence from him about the reasons why he delayed in bringing a claim for indirect discrimination or about his ability to pay for the purposes of the deposit order application.

8 I was provided with a 478 page electronic bundle and index and heard oral submissions on the amendment application and on the strike out/deposit order application on both sides. I was also provided with a skeleton argument on behalf of the Respondent. I gave my decision on the amendment application with reasons at the hearing but reserved my decision on the strike out/deposit order application due to lack of time. I made some case management orders at the end of the hearing should all or some of the claims proceed – see attached Orders.

9 The Respondent's case was that it had received a serious allegation of sexual harassment against the Claimant in May 2020. The name of the individual making that allegation is anonymised and identified in this judgment as S, which approach was agreed with the representatives at this hearing.

Amendment application decision – indirect discrimination on grounds of marital status s8 and s19 Equality Act 2010

10 I decided this application at the hearing and gave oral reasons. The Claimant had applied to amend his claim to add a claim of indirect discrimination based on two allegations, firstly a claim that clause 9 of his contract dated 9th December 2010 (page 138) which did not allow any family to join him in the UK until he had completed his probation period of 6 months, was indirectly discriminatory and secondly that clause 9 which required any family joining him to also work for the Respondent (and not be able to obtain their own employment elsewhere) was also indirectly discriminatory. I decided that the second allegation was already in substance in the claim form so that permission to amend was not required and refused permission to amend to include the first allegation. I gave oral reasons. The second allegation therefore fell into consideration as part of the strike out application and the Respondent's oral submissions included submissions on this claim as well as the others covered in the skeleton argument.

Relevant law – strike out

11 Rule 37(1)(a) of the Tribunal Rules 2013 provides that a Tribunal may strike out all or part of a claim or response on the grounds that it has no reasonable prospect of success (the other grounds in Rule 37(1) were not relied on by the Respondent). This is a high threshold.

12 The task of the Tribunal is to consider with care the pleaded case and whether on a fair assessment it or any part of it passed the threshold of presenting a reasonably arguable case, taking it at its highest.

13 Where the central facts are disputed, a claim should not normally be struck out, where witness evidence will be required to decide those disputed facts (*Ezias v North*

Glamorgan NHS Trust [2007] ICR 1126).

14 I considered *Cox v Adecco [2021] ICR 1307* including as to taking the Claimant's claim at its highest. I have considered the parties' pleaded cases and what Dr Narayan told me at the hearing about the basis on which the Claimant puts his indirect marital discrimination claim. I have taken into account that the Claimant does not have legal representation.

15 Particular care should be taken not to strike out a fact sensitive discrimination claim.

Relevant law - deposit orders

16 Rule 39(1) of the Tribunal Rules 2013 provides for a deposit order of up to £1,000 as a condition of a party continuing to advance a particular allegation or a particular argument. If an order is made, Rule 39(2) provides that a tribunal shall make reasonable enquiries into the party's ability to pay the deposit and have regard to that information when deciding the amount of the deposit.

17 *Hemdan v Ishmail [2017] ICR 486* (paras 10-17) sets out the principles to be applied as follows.

18 The purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage those claims by requiring a sum to be paid and by creating a risk of costs if the claim fails. The purpose is not to make it difficult to access justice or to do a strike out by the back door. The requirement to consider a party's means to decide the amount of the deposit order is consistent with that purpose. The cap of £1,000 is also inconsistent with any view that the purpose of a deposit order is to make it difficult for a party to proceed to a final hearing and thus access justice.

19 The test in Rule 39 is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, which is different to the strike out test which considers whether there is no reasonable prospect of success. The test is therefore less rigorous in that sense but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or defence. The fact that a tribunal is required to give reasons emphasises the fact that there must be a proper basis.

20 The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini trial of the facts is to be avoided, just as in a strike out application, because it defeats the object of the exercise. If there is a core factual conflict, it should properly be resolved at a full merits hearing where evidence is heard and tested.

21 Once the Tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective having regard to all the circumstances. That means that regard should be had for example

to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved and the case is likely to be allocated a fair share of tribunal resources are also relevant factors. It may also be relevant in a particular case to consider the importance of the case in the context of the wider public interest.

22 An order to pay a deposit must be capable of being complied with. A party without the means or ability to pay should not therefore be ordered to pay an amount he or she is unlikely to be able to raise. The proportionality exercise must be carried out in relation to a single deposit order or where they are imposed, a series of deposit orders. If the amount is set at a level at which the party cannot afford to pay it, the order will operate in a way which impairs access to justice.

The Claimant's claims

Unfair dismissal and wrongful dismissal claims– was there a dismissal and if so when was it

23 Both the claim for unfair dismissal and the claim for wrongful dismissal require there to be a dismissal. The Tribunal will then have to decide when that dismissal took effect.

24 The Claimant's case was that he left for India at the request of the Respondent on 27th June 2020 (page 15) and did not at that stage or any later stage resign. The Claimant's case was that he was dismissed when he received (when still in India) a termination letter dated 3rd August 2020 (page 226) from the Respondent.

25 The Respondent's case (page 30) is either (a) that the contract of employment was 'brought to an end' (not specified as to legally how or by who, whether dismissal, resignation or some other analysis) when the Claimant 'absconded' on 27th June 2020 (any previous discussions about a possible return to India only having been about a possible holiday) or (b) that the Claimant resigned with immediate effect in a Whatsapp message sent to the Respondent on 27th June 2020 (pages 28-29). It denies that the employment was terminated by dismissal when it sent the letter dated 3rd August 2020 (contrary to what the skeleton argument says at para 27). It did not explain if either of those two scenarios applied why a letter was sent to the Claimant on 3rd August 2020 terminating his employment for having left the UK (page 226) while the serious harassment allegations made against the Claimant by S which were still under investigation; if he had resigned the Respondent did not point to when it accepted that resignation and if he had absconded the Respondent did not say why it had taken over a month to send the termination letter. The skeleton argument (para 26) says the Claimant ended the contract by absconding but if so there was no identified acceptance of a resignation or explanation as to why if that were the case he was later sent a termination letter of 3rd August 2020 and not a letter acknowledging his departure/resignation and saying that the Respondent was treating it as a resignation. The sending of the termination letter on 3rd August 2020 was more in line with matters being somewhat in limbo after the Claimant's departure (a word the Respondent itself uses on page 226) until a decision was taken as to what to do about terminating his employment; his P45 (page 209) may have stated the leaving date as 30th June 2020 but that is not conclusive of when in fact his employment terminated.

26 There is a factual dispute between the parties as to what happened in discussions between them in the initial days when the Claimant had arrived in India; the Claimant's case

as described at this hearing is that initially discussions with the Respondent were cordial, entirely inconsistent he says with either viewing him as having absconded without permission or viewing him as having resigned. That matters were cordial is however inconsistent with the letter at page 200 referring to a call on 11th July 2020 with Mr Gopal and saying that Mr Gopal was being very rude and speaking very harshly. Witness evidence is therefore required.

27 I conclude that the Claimant has a reasonable prospect of success of showing that he was dismissed by the Respondent when he was sent the letter dated 3rd August 2020. This is because firstly the 'absconding' having brought the contract to an end earlier is not explained as to how that amounted to a termination of employment by the Claimant (as opposed to a ground for termination) in the light of the non-acceptance of any claimed resignation and the inconsistency in then one month later sending a termination letter (not a letter accepting a resignation or referring to any resignation in reality). Secondly the Whatsapp message is sufficiently ambiguous because it refers both to returning to India for personal reasons but also asks to come back to work saying he will definitely be back either within a couple of days or in a month. The context for this message will also require witness evidence and cross-examination because it is disputed as to whether he had permission to go to India.

Reason for dismissal – asserting a statutory right

28 The Claimant set out when he said he had asserted statutory rights (page 121). The Respondent does not accept that he made any such assertions until 9th July 2020 (email at page 190), after it says his employment ended (skeleton para 30).

29 I have concluded that the Claimant does have a reasonable prospect of showing that he was dismissed by the letter dated 3rd August 2020 and that it was that date his employment terminated. That being the case, there are therefore two written complaints by the Claimant before the date on which there is a reasonable prospect that he can show he was dismissed (9th July 2020 and 24th July 2020, page 200). Of these the 9th July 2020 email refers to not having been provided with payslips (though the Respondent disputes this so there may be an issue about the Claimant's good faith in making the assertion, if the Respondent is correct) and the 24th July 2020 letter refers to his pay not being correct and not being provided with payslips. Subject to any arguments about good faith (and I accept that these two documents were sent after a complaint of sexual harassment was made against him) the Claimant therefore has a reasonable prospect of showing at the very least that he asserted a statutory right in one or both of these two documents before the date he has a reasonable prospect of showing that he was dismissed.

30 The Claimant's claim for automatic unfair dismissal therefore proceeds.

31 However as regards whether that was the reason or principal reason for dismissal I make a deposit order - see below. It does not however meet the higher threshold of no reasonable prospect of success. This is because there is a factual dispute which will need to be resolved by witness evidence as to what was happening in between the end of June 2020 and the beginning of August 2020, including regarding what was the content of various discussions which the Claimant covertly recorded and in relation to which I have made further Orders – see attached – because full transcripts have not yet been provided to the Respondent. A disputed issue is whether the Claimant had permission to leave the UK for

at least a period of time and that will require witness evidence from him, Mr Gopal and Mr Periasamy. Whether or not he had permission is relevant to why the employment was terminated.

Wrongful dismissal – was the Claimant in serious breach of contract entitling the Respondent to dismiss without notice

32 The Respondent's case (page 31, para 21) is that it was entitled to dismiss the Claimant in any event because of either (a) having absconded and/or (b) because of the serious allegations made by S. In relation to (a) that again hangs on whether the Claimant had permission to leave the UK or not. In relation to (b) that will involve deciding whether the Claimant had in fact committed the acts he was accused of. Both of these will require witness evidence from the Claimant, Mr Gopal and Mr Periasamy, taking into account the factual dispute that the Claimant says that he was forced to admit the allegations whereas the Respondent says he accepted that the account given by S was right, but said that he did not think that it amounted to sexual harassment.

33 The Claimant's claim for notice pay therefore proceeds.

Unlawful deductions from wages

34 The Respondent says it was entitled to make deductions for various expenses it incurred in employing the Claimant and his relocation to the UK from India, totalling £2,400 (page 226), which it said the Claimant had agreed to in discussions in October 2019 when his employment terms were being discussed. The breakdown is set out in the message on page 90. The Claimant's case is that of those listed fees he agreed to pay the application processing fee of £700 and his own legal costs of £500 and says that in the end the Respondent did not meet the flight fees of £600 because he paid for the flight himself. He says he did not agree to meet the Respondent's legal fees of £600. His case is that to extent he agreed to be responsible for certain costs he did not agree that they be deducted from his wages.

35 The Respondent's case (page 31-32) is that the written contract he entered into (see below) allowed a deduction to be made for £1918 (unfortunately not broken down in the contract) and that in addition the Claimant owed £500 to the Respondent who had paid his solicitors fees for him of £500. This gave a different total of £2,418.

36 There is therefore at the very least a dispute on which witness evidence will be required as to whether the £600 flight cost is repayable at all (given it is said it was not a cost the Respondent ever in practice met) and whether the Claimant agreed to be responsible for the Respondent's legal costs of £600, taking into account the lack of breakdown in the contract.

37 The Claimant entered into a written contract with the Respondent dated 9th December 2019 (page 138) (said to be governed by both English law and the law of India (page 140) when it is not possible to have both). In that he agreed to pay employment fees cost of £1918 on the termination of his employment (page 140 clause 11) whereas the message in October 2019 had said deductions would be made for the £2,400 as they went along. The contract did not contain an agreement by the Claimant that deductions could be

made from his wages for these costs.

38 The Claimant also entered into a second document (page 148) which was a contract of employment which contained many of the particulars required to be contained in a written statement under s1 Employment Rights Act 1996. This contract did not contain an agreement by the Claimant that deductions could be made from his wages.

39 The Claimant therefore has a reasonable prospect of showing that he did not consent to all the deductions being made because firstly the amount actually due is still disputed and will require witness evidence and secondly because it has not been shown that there was the relevant consent/authorisation to the deduction within s13(1) Employment Rights Act 1996.

40 The Claimant's claim for an additional £350 per month for additional duties from January 2020 (which he does not claim was agreed in writing) will require witness evidence because based on what the Claimant says was agreed orally after the written contracts were entered into.

41 Therefore even putting to one side the separate matter of whether the Claimant was correctly paid in May 2020 and June 2020, the Claimant has a reasonable prospect of showing that although he agreed to meet at least some of the costs, he did not agree to a deduction from his wages as the way to achieve that reimbursement of costs.

42 The Claimant also claims wages for 6 days work before 1st January 2020 (schedule of loss page 356). Given he signed two contracts recording his start date as 1st January 2020 and has not identified what work he did on those 6 days I find that this particular part of his wages claim has no reasonable prospect of success. Just because the contracts were signed before 1st January 2020 does not mean that the Claimant is entitled to be paid in the gap between the contracts being signed and the date agreed that the employment would commence and that he would start work.

43 As regards his wages claim therefore it proceeds save in respect of the claim for 6 days pay prior to 1st January 2020 which is struck out.

Indirect discrimination on the basis of marital status (second allegation only)

44 Clause 9 of the contract (page 140) applied to the employee's 'family' and prohibited other employment by them outside the Respondent and required them to 'focus' on being a volunteer at the Respondent; it was slightly ambiguous as to whether the clause was requiring volunteering or just saying that if a family member wanted to work at all, that is what they were allowed to do. The term family when it came to working could encompass any adult coming to the UK to join the employee, whether a spouse, an unmarried different sex partner, a same sex partner or civil partner or another relative able to obtain immigration permission to join the employee in the UK and allowed to work.

45 The clause was slightly bizarre as it apparently imposed an indirect obligation on a family member in a contract to which it was not a party, to work for the Respondent for free, if they wanted to work at all. It is not directly contractually enforceable as against the family member or likely to be contractually enforceable against the employee. It also seems to

potentially involve a breach of requirements to pay the national minimum wage as it requires any work to be done on a volunteering basis only ie it is predicated on the assumption that if wanting to work at all it must be unpaid, and is not just a volunteering option open to the family member if they are interested in it.

46 I find that the clause does not put a married person at a particular disadvantage because it applied to all family members whether in a relationship or not and whether married (or in a civil partnership) or not. The claim therefore suffers from the major structural problem that the Claimant cannot say that the clause puts the Claimant (and his wife) at a particular disadvantage when compared to someone who is not married (or in a civil partnership) because the clause applies equally to them. Whether married (or in a civil partnership) or not, the employee would be indirectly disadvantaged to the same extent, even if it is accepted that it is the employee who is disadvantaged (rather than the spouse/partner who in reality is the one more substantially disadvantaged).

47 The Claimant's real issue with this clause is the fact that his predecessor was married and this clause was not applied to him. Whilst he might think that is unfair it does not follow that it meets the very specific test of indirect discrimination.

48 The indirect discrimination claim brought by the Claimant was not fact sensitive, it was about the operation of a particular clause in his contract and in particular whether he could show the particular disadvantage required to be shown under s19(2)(b) Equality Act 2010, taking into account what that clause in fact said. This was not a case of a poorly pleaded (ie drafted) case by a claimant who is not legally represented, but a case with a structural flaw, central to being able to show that the constituent elements of an indirect discrimination claim are present.

49 I therefore conclude that the Claimant has no reasonable prospects of showing that this clause and its application amounted to indirect discrimination on the grounds of marital status. This claim therefore does not proceed and is struck out.

50 Even if I had allowed the amendment application in relation to the first allegation it would also have been struck out for these reasons.

Deposit order (see enclosed Order)

51 Taking into account the above findings I make a deposit order as regards the Claimant's allegation that the reason or principal reason for his dismissal was because of asserting a statutory right. This is because even though the Claimant may be able to show he asserted a statutory right before his employment terminated, there were two other major things going on before his employment terminated: firstly very serious allegations by S which came to the Respondent's attention at the end of May 2020 and set out in a detailed witness statement from S dated 16th June 2020 (page 187) being investigated by the Respondent; secondly the Claimant had left the UK shortly after the issues were raised with him. This means that even if the Tribunal finds he was unfairly treated in relation to these two matters by the Respondent (and he challenges S's account at page 223), it is step further to say that one or both of these factors was not the reason or principal reason for dismissal at the time of dismissal. I have taken into account that the burden is on the Claimant to show that the reason given by the Respondent is not the real reason ie it is for the Claimant to show that it was the real reason/principal reason and it is not for the Respondent to show that it

was not.

52 The Claimant did not attend to give evidence about his ability to pay a deposit and provided no documents about his current finances. I asked Dr Narayan generally about the Claimant's current working situation and was informed that he is working in a third country (ie not the UK or India), a new job which he started on 1st June 2022, not having been able to find other work until then. His schedule of loss (page 357, December 2020) said he had been unable at that point to find other work because of the pandemic.

53 There was an absence of evidence of the Claimant's ability to pay (whether by way of attendance at this hearing to give evidence about his means or by the provision of documents eg bank statements or details of his pay from his new job), despite knowing it was important for the deposit order application from the preliminary hearing on 10th February 2022 (page 389 para 2). I therefore have limited information about the Claimant's ability to pay a deposit but he has had the opportunity to provide it and has been aware of that since February 2022.

54 I therefore set the deposit at £500 taking into account he is now employed. In practice this means he cannot proceed with his (automatic) unfair dismissal claim unless he pays the deposit; showing the reason/principal reason he claims to be the real reason is the only way he can bring the unfair dismissal claim, given he does not have two years continuous employment for an ordinary unfair dismissal claim.

Employment Judge Reid
Dated: 16th June 2022