**Case Number: 2301180/2022**

# EMPLOYMENT TRIBUNALS

**Claimant: Kamoru Adeleke**

**Respondent**: **Mitie Limited**

**Heard at: London South Employment Tribunal (by Video/CVP) On: 22 July 2022**

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

**Representation**
**Claimant: In person (by CVP)**
**Respondents: Mr Alexander Rozycki, Counsel (by CVP).**

# JUDGMENT

1. The Respondent's Application for this claim to be struck out pursuant to rule 37(1)(a) of the Employment Tribunals Rules of Procedure is refused.
2. The Respondent's Application for a Deposit Order pursuant to rule 39 of the Employment Tribunals Rules of Procedure is also refused.
3. This matter shall proceed to a full merits hearing.

**REASONS (WITH RESPECT TO THE RESPONDENT'S APPLICATION)**

***Background***

1. This matter concerns an Application by the Respondent which is pursued on alternative grounds:
    a. First, an Application to strike out the Claimant's claim on the grounds (pursuant to rule 37(1)(a) of the Employment Tribunals Rules of Procedure that it is either "*scandalous or vexatious or has no reasonable prospect of success.*" The Application is pursued on the basis of both alternatives, although, sensibly, Mr Rozycki, for the Respondent, indicates that the primary focus is on the prospects of success ground;
    b. Second, and alternatively, an Application for a deposit order (pursuant to rule 39 of the Employment Tribunals Rules of Procedure) on the ground that the claim has "*little reasonable prospect of success*."
2. The Application appears from the Tribunal file to have been made in writing on 7 June 2022.
3. The Claimant's claim by ET1 Claim Form received on 6 April 2022 is for unfair dismissal. It appears to be common ground that the Claimant was employed by the Respondent as a porter between 7 May 2013 and 10 December 2021 and that his place of work was University College London Hospital ("*ULCH*"). On 10 December 2021 the Claimant was summarily dismissed from that employment and it is the Respondent's case that this was on grounds of gross misconduct. The conduct at the centre of this claim appears to have occurred on 29 September 2021 when there was an incident between the Claimant and a member of the UCLH security staff as the Claimant entered the hospital building without wearing a facemask (a precaution related to the coronavirus pandemic). It is said that this was not only a breach of policy with respect to the Claimant's access to the building, but also that his reaction to challenge by the security staff member constituted a breach of the Respondent's disciplinary policy.
4. The claim of unfair dismissal is contested and an ET3 Response Form with detailed grounds of resistance has been filed. Among other matters, the Respondent relies

on the following post-dismissal chronology: after the September 2021 incident, the Claimant was suspended while an investigation took place; there was a disciplinary hearing on 3 December 2021 following which, on 10 December 2021, the Claimant was summarily dismissed; the Claimant appealed this decision on 7 February 2022 and the dismissal was upheld on 22 February 2022; there was then a second appeal by the Claimant which was dismissed on 28 February 2022.

5. Today's hearing date was originally reserved for a full merits hearing of this matter (by CVP) with a one (1) day time estimate. The Respondent's position was that – with a likely minimum four (4) witnesses to give evidence at this Hearing – a 1 day time estimate was obviously inadequate and that three (3) days would be a more realistic estimate. On 18 May 2022, the Respondent applied to extend the time estimate to 3 days and this application was chased/renewed in correspondence with the Tribunal on 6 June 2022 and 23 June 2022. On 29 June 2022 EJ Dyal made an Order extending the time estimate for the Full Merits Hearing to 3 days and also directing that today's hearing date should deal with the Respondent's Application in a 3 hour time slot and that this hearing should take place by CVP. EJ Dyal indicated that any necessary further case management should also be dealt with at this Hearing.
6. I have been provided by the parties with the following documents for the purposes of this Application Hearing:
    a. An indexed and paginated Bundle of documents running to 109 electronic pages prepared by the Respondent;
    b. CCTV footage of the incident on 29 September 2021 to which I have referred, also served by the Respondent which I have viewed (I have been provided with three pieces of footage – one of the pieces is an enlarged version of what can be seen in some of the other footage);
    c. A Bundle of documents prepared by the Claimant running to 135 pages, together with some additional correspondence.
7. I should record that, subsequent to the Claim Form which is the subject of this Application Hearing, the Claimant appears to have submitted a second ET1 Claim

Form for unfair dismissal which has been given Case No 2301552/2022. The Respondent contends in correspondence on file that this second Claim is out of time pursuant to section 111(2)(a) of the Employment Rights Act 1996 and it appears that a Preliminary Hearing will take place by CVP on 8 December 2022 to determine whether this second claim should be permitted to proceed. I asked both parties about this in opening and I understand that Mr Rozycski, Counsel, who appears for the Respondent has no instructions in this regard. However, as I have indicated, the present Application relates to the first claim of unfair dismissal under case number 2301180/2022. In the circumstances, I say no more about the second claim.

***Legal framework***

8. The starting point for this Application can clearly be found in the Employment Tribunal Rules of Procedure.
9. Rule 37 is sub-headed, "*Striking out*" and provides, among other things, as follows: "*(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*."
10. Rule 39 is sub-headed "*Deposit orders*" and provides as follows:

> "*(1) Where at a preliminary hearing (under rule 53) the tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. (2) The tribunal shall make reasonable inquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit. (3) The tribunal's reasons for making the deposit order shall be*

*provided with the order and the paying party must be notified about the potential consequences of the order. (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21. (5) If the tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order— (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the tribunal orders), otherwise the deposit shall be refunded*."

11. As to striking out orders, these are accurately to be described as permissive, rather than mandatory in character. It is well established that the making of such orders involves a two-stage process in which the Tribunal will first ask whether a ground for striking out (of the kind found in rule 37) has been made out and, second, whether it is just to proceed to strike out the claim (or, as the case may be, part of the same) in all the circumstances. For the purposes of rule 37, the absence of a reasonable prospect of success means that there is no such prospect and not merely that success is thought unlikely (see, ***Balls v Downham Market*** [2011] IRLR 217 (EAT)). The allegations on which the Claimant relies should be taken at their highest in the Tribunal's consideration of a striking out application and, in the event that facts are disputed, there should ordinarily be no striking out order unless the Claimant's allegations are demonstrably untrue (see, ***Eszias v North Glamorgan*** [2007] ICR 1126 (CA)). The legal framework for an application under rule 37 is conveniently summarised by reference to the authorities in the judgment of Eady J in ***Arthur v Hertfordshire Partnership NHS Trust*** [2019] 8 WLUK 223 (EAT) and I have taken account of this in my approach to the Respondent's Application.

12. As to deposit orders (and, indeed, their relationship to the other species of summary application at issue in this case, namely, striking out), useful guidance can be found in the judgment of Simler J (as she then was) in ***H v Ishmail*** [2017] ICR 486 (EAT) where the following can be found in the course of judgment (at paras 12 – 16 of the same):

> "*The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strikeout which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is 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 the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis. 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 it is to be avoided on a strikeout application, because it defeats the object of the exercise. Where, for example as in this case, the preliminary hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict, it should properly be resolved at a full merits hearing where evidence is heard and tested*. … *Once a 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 of the circumstances of the particular case.*

*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 limited 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. If a tribunal decides that a deposit order should be made in exercise of the discretion pursuant to rule 39, paragraph (2) requires the tribunal to make reasonable inquiries into the paying party's ability to pay any deposit ordered and further requires the tribunal to have regard to that information when deciding the amount of the deposit order. Those, accordingly, are mandatory relevant considerations. The fact that they are mandatory considerations makes the exercise different to that carried out when deciding whether or not to consider means and ability to pay at the stage of making a cost order. The difference is significant and explained, in our view, by timing. Deposit orders are necessarily made before the claim has been considered on its merits and in most cases at a relatively early stage in proceedings. Such orders have the potential to restrict rights of access to a fair trial. Although a case is assessed as having little prospects of success, it may nevertheless succeed at trial, and the mere fact that a deposit order is considered appropriate or justified does not necessarily or inevitably mean that the party will fail at trial. Accordingly, it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued."*

***Discussion and conclusions***

13. Mr Rozcycki's submissions for the Respondent on the primary limb of rule 37(1)(a) and, alternatively, rule 39 (ie. prospects of success) focus (i) on what he submits is unequivocal CCTV footage which is said to show the Claimant physically pushing the security guard; (ii) the Respondent's disciplinary policy which adopts a "*zero tolerance*" approach to aggressive and violent conduct (see, for example, pp 87.9 and 87.17 of the Bundle) and, in the light of this, (iii) what he submits was a reasonable and thorough investigatory and disciplinary process running through a hearing and no fewer than two appeals. In the same regard, and with respect to the proposition (rule 37(1)(a)) that the Claimant's claim is scandalous and vexatious, Mr Rozcycki's submissions focus on what he suggests are changes in the narrative account provided at various times by the Claimant through the initial disciplinary hearing and, thereafter, through the two appeals. Mr Rozcycki prays in aid the well-known ***Burchell*** formula and the necessary focus, as he puts it, on the reasonableness or otherwise of a disciplinary process resulting in dismissal in which the Tribunal will be careful not to substitute its own views for that of the dismissing employer/its officers.
14. The Claimant's submissions focussed on the incident itself (for which he provided a further narrative account to me) and the involvement of his then Union representative in the conduct of the disciplinary hearing.
15. I am not able to conclude that the Claimant's claim has either no reasonable prospect of success or such limited prospect of success that might justify the making of a deposit order under rule 39. Equally, I do not accept that the shifts in the position apparently adopted by the Claimant, short, as Mr Rozcycki sensibly concedes, of any express admission that he pushed the security guard, amount to scandalous or vexatious conduct.
16. Focus at an FMH on the reasonableness or otherwise of the disciplinary processes and the appeal will not take place in a vacuum or on the basis of documentary material only. Instead, it will be looked at in context and the critical context here is the CCTV footage and the evidence of the witnesses: the Claimant and the three witnesses on whom the Respondent proposes to rely. Insofar as it is necessary for

me to express a view at this stage, and in response to the submissions made by Mr Rozcycki, the CCTV footage does not seem to me as unequivocal as has been suggested. It requires interpretation and evidence. It therefore seems to me likely that there will need to be evidence about this and what it reliably shows at the FMH. The conclusions to be deduced from the CCTV footage are very heavily contested. I do not find that the Claimant admitted in terms – during the course of the disciplinary hearing – that he pushed the security guard. There is very likely to be contested factual evidence about the conduct of the disciplinary process and as to the reasonableness of its outcome (given that there was a contest about what had actually taken place in the material incident and as to the investigation which followed this). These are all matters that sit very uneasily within the framework of summary applications of this kind and I am not – absent testing of evidence in the conventional way (including, critically, as to the reasonableness of procedure) – able to reach appropriately conclusive findings about these contested factual issues. This is not a mini-Trial. I am not persuaded therefore, either that there should be a striking out or that the less draconian remedy of a deposit order should be ordered in this case.

17. Instead, I will – in accordance with EJ Dyal's order – give case management directions for a FMH.
18. This concludes the judgment of the Tribunal on the Respondent's Applications.

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Employment Judge Chapman QC

Date 22 July 2022

**Note**
Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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