EMPLOYMENT TRIBUNALS

Claimant:	**Mr L Parkin**
Respondent:	**Heron Foods Limited**
On:	**11 October 2022** **19 October 2022 (in Chambers)**
Before:	**Employment Judge McAvoy Newns**
Heard at:	**Leeds Employment Tribunal (via telephone)**

Appearances:

For the Claimant:	**In person**
For the Respondent:	**Mrs M Walker, Solicitor**

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal has no reasonable prospects of success and is **STRUCK OUT.**

2. The Claimant's claim for direct disability discrimination contrary to section 13 of the Equality Act 2010 (the "EA") concerning his dismissal has no reasonable prospects of success and is **STRUCK OUT.**

3. The Claimant's claim for discrimination arising from disability contrary to section 15 of the EA concerning his dismissal has little reasonable prospects of succeeding. The Claimant is **ORDERED** to pay a deposit of **£100** not later than **14 days** from the date this Order is sent to the parties as a condition of being permitted to continue to advance this claim. I have had regard to all information available as to the Claimant's ability to comply with the order in determining the amount of the deposit.

WRITTEN REASONS

Background

4. The purpose of this hearing was set out in the Tribunal's letter dated 18 August 2022, namely:

   4.1 To determine whether any or all of the Claimant's claims should be struck out on the grounds that they have no reasonable prospects of success; and/or

   4.2 To determine whether any of the Claimant's claims have little reasonable prospects of success and, if so, whether deposit order(s) should be issued.

Form of hearing

5. This was a remote hearing which was not objected to by the parties. The hearing took place via telephone.

Discussion about the claims and consideration of the documents

6. No oral evidence was given during this hearing and therefore the below is taken from the information given by the parties during the hearing as well as the documents which were provided to me during and shortly after the hearing. No findings of fact have been made and the Tribunal conducting the final hearing (should the case proceed accordingly) is free to reach different conclusions on the documents to those set out below.

7. The Claimant commenced employment with the Respondent on 21 March 2022. He accepted during this hearing that his employment was subject to a nine-month probationary period. He was employed as a Warehouse Operative. The Respondent says he was dismissed due to the failure of his probationary period on 17 May 2022. The reason that the Respondent gave in their submissions, for failing his probationary period, was his allegedly erratic attendance and reliability. The Claimant accepted that he did not have two years' continuous service when he was dismissed.

8. The Claimant contends that he is disabled. This is disputed by the Respondent. The disability relied upon was confirmed during this hearing as being 'mental health and anxiety'. He explained that he had received a medical diagnosis and had this condition for over two years. He says he told the Respondent about this disability on numerous occasions.

9. The basis of the Claimant's claim for disability discrimination was unclear from the Claim Form. The only discernible claim for disability discrimination from the Claim Form was that the Claimant was dismissed because of matters arising as a consequence of his disability, namely his absence. At a stretch, the Claim Form could be interpreted as a claim for discrimination because of the existence of the disability as well. There was no application for permission to amend the claim.

10. During the hearing, the Claimant explained:

    10.1 He believed that he was dismissed because he had requested a transfer, because of his absences and for raising a grievance;

10.2 One of his complaints was that his return-to-work interviews took place in public, on what the Claimant referred to as a podium. This heightened his anxiety;

10.3 One of the matters raised in his grievance was that a colleague had allegedly told him that his hairstyle was like John Travolta's hairstyle. He accepted that this comment did not relate to his alleged disability. However, he said that this caused his colleagues to laugh which heightened his anxiety;

10.4 He also alleged that a colleague, Mr Morton, had laughed at him because of his mental health and said that his absences were nothing to do with his mental health;

10.5 As well as believing that he had been dismissed, in part, for raising a grievance, the Claimant alleged that he had been treated badly for raising a grievance. In this regard the Claimant said that Mr Morton had spoken to him in an aggressive manner; and

10.6 Another employee, Mr Madden, was being relied upon as a comparator. The Claimant said that he had had 6 or 7 absences for mental health related reasons but he was not called into meetings, like the Claimant was, nor was he dismissed.

11. The Claimant accepted that his absences on 4 April 2022, 7 and 8 April 2022, 10, 11 and 12 April 2022 and 14 April 2022 were not in any way connected to his alleged disability. He contends that his absences between 18 and 20 April 2022 were linked to his disability because at this time he was forced to leave his matrimonial home which caused him to feel depressed. He acknowledged that he did not refer to this absence as being disability related in his return-to-work interview but stated that this was because, as explained above, such interviews took place in public. He said that if this interview took place in a private room, he would have answered this question differently. The return-to-work notes do however show that the Claimant stated that he was having suicidal thoughts.

12. A performance review meeting took place on 29 April 2022 and I have read the notes of this hearing. I have not however heard evidence from the Claimant about what was said by whom during this meeting and therefore make no findings of fact about it save that, it is common ground between the parties that the meeting was arranged to consider some concerns that the Respondent appeared to have regarding the Claimant's absences and his conduct towards a colleague.

13. Another performance review meeting took place on 17 May 2022 and I have read the notes of this hearing. I have not however heard evidence from the Claimant about what was said by whom during this meeting and therefore make no findings of fact about it save that, it is common ground between the parties that the meeting was arranged to consider some concerns that the Respondent appeared to have regarding the Claimant's absences.

14. On 19 May 2022, the Respondent wrote the Claimant and stated: *"During this time your performance standards of the role have been assessed and it is with regret that I have decided that you are not suitable for the position of*

Warehouse Operative. This is due to concerns with your absence levels since joining the company".

15. In terms of his grievance, the Claimant confirmed that he raised this during a meeting which took place with Mr Morton on 10 May 2022 and in an email that he sent to Ms Clark and Ms Carrick on 12 May 2022. Both of these documents were sent to me by the Respondent's representative after today's hearing and I have read them carefully.

16. The notes of the 10 May 2022 do not disclose any clear statements from the Claimant that the Equality Act 2010 had been breached. He alleged bias, that Mr Morton had issues with him and that he was penalised for asking questions. However, he did not connect any of these points to any protected characteristic. Mr Morton referred to the Respondent's Dignity at Work policy but this was in respect to an accusation being considered against the Claimant as opposed to an accusation that the Claimant raised.

17. Equally, the email that the Claimant sent on 12 May 2022 does not disclose any clear statements from the Claimant that the Equality Act 2010 had been breached. The Claimant alleged that the Respondent had damaged his health but did not clearly allege that he had been discriminated against.

Discussion about means

18. In regard to means, the Claimant explained (by way of submissions, rather than in evidence) that he left the Respondent on 17 May 2022. He earned around £2,220 between then and starting a new permanent job on 15 September 2022. This new job is part-time, working 16 hours per week plus 8 hours of overtime. His hourly rate for all work is £10.72. His outgoings are around £750 per month and he currently has no savings.

The Law

Strike out

19. An Employment Judge has the power under Rule 37(1)(a) of the Tribunal Rules of Procedure, 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.

20. 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..."

21. 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."

22. In Cox v Adecco and ors 2021 ICR 1307, the EAT stated that, if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate. The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claim(s) 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'. Thus, there has to be a reasonable attempt at identifying the claim and the issues before considering strike-out or making a deposit order.

23. 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.

24. In Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, the then House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.

25. In Ezsias v North Glamorgan NHS Trust 2007 ICR 1126, the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases. The Court stressed that it will only be in an exceptional case that an application 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 claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

26. In Mechkarov v. Citibank N A UKEAT/0041/16, the EAT set out the approach to be followed including:-

    26.1 Ordinarily, the Claimant's case should be taken at its highest.

26.2 Strike out is available in the clearest cases – where it is plain and obvious.

26.3 Strike out is available if the Claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

Deposit Orders

27. Under Rule 39(1) of Tribunal Rules of Procedure, an Employment Judge is permitted to make a deposit order as a less draconian alternative to strike-out where a claim or response (or part) has 'little reasonable prospect of success'.

28. A deposit order can be made in respect of any specific allegation or argument of up to £1,000 per allegation or argument.

29. The Tribunal is obliged, under Rule 39(2) to make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

30. In H v. Ishmail [2017] IRLR 228, Simler J, pointed out that the purpose of a deposit order *'is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails'* (para 10), she stated that the purpose *'is emphatically not to make it difficult to access justice or to effect a strike out through the back door'* (para 11).

31. The threshold for making a deposit order, 'little reasonable prospect of success', is lower than that for striking out a claim, but the Tribunal must have a proper basis for doubting the likelihood of the party being able to establish the essential facts. The Tribunal is entitled to take into account not only the purely legal issues, but also the likelihood of the party being able to establish the facts essential to his or her case, and in doing so, to reach a provisional view as to the credibility of the assertions being put forward: see: Van Rensburg v Royal Borough of Kingston-upon-Thames UKEAT/0095/07.

Dismissal

32. Section 94 of the Employment Rights Act 1996 (the "ERA") states:

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

33. Section 108 of the ERA states:

(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

(2) Subsection (1) does not apply if—

(aa) subsection (1) of section 98B (read with subsection (2) of that section) applies

(b) subsection (1) of section 99 (read with any regulations made under that section) applies

(c) subsection (1) of section 100 (read with subsections (2) and (3) of that section applies

(d) subsection (1) of section 101 (read with subsection (2) of that section) or subsection (3) of that section applies

(da) subsection (2) of section 101ZA applies (read with subsection (3) of that section) or subsection (4) of that section applies

(dd) section 101A applies

(e) section 102 applies

(f) section 103 applies

(ff) section 103A applies

(g) subsection (1) of section 104 (read with subsections (2) and (3) of that section) applies

(gg) subsection (1) of section 104A (read with subsection (2) of that section) applies

(gh) subsection (1) of section 104B (read with subsection (2) of that section) applies

(gi) section 104C applies

(gj) subsection (1) of section 104D (read with subsection (2) of that section) applies

(gk) section 104E applies

(gl) subsection (1) of section 104F (read with subsection (2) of that section) applies

(gm) section 104G applies

(h) section 105 applies

(hh) paragraph (3) or (6) of regulation 28 of the Transnational Information and Consultation of Employees Regulations 1999 (read with paragraphs (4) and (7) of that regulation) applies

(i) paragraph (1) of regulation 7 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 applies

(j) paragraph (1) of regulation 6 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 applies

(k) paragraph (3) or (6) of regulation 42 of the European Public Limited-Liability Company Regulations 2004 applies

(l) paragraph (3) or (6) of regulation 30 of the Information and Consultation of Employees Regulations 2004 (read with paragraphs (4) and (7) of that regulation) applies

(m) paragraph 5(3) or (5) of the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (read with paragraph 5(6) of that Schedule) applies

(o) paragraph (3) or (6) of regulation 31 of the European Cooperative Society (Involvement of Employees) Regulations 2006 (read with paragraphs (4) and (7) of that regulation) applies

(q) paragraph (1)(a) or (b) of regulation 29 of the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009 (S.I. 2009/2401) applies

(r) paragraph (1) of regulation 17 of the Agency Workers Regulations 2010 applies

(4) Subsection (1) does not apply if the reason (or, if more than one, the principal reason) for the dismissal is, or relates to, the employee's political opinions or affiliation.

(5) Subsection (1) does not apply if the reason (or, if more than one, the principal reason) for the dismissal is, or is connected with, the employee's membership of a reserve force (as defined in section 374 of the Armed Forces Act 2006).

Disability

34. Section 6 of the Equality Act 2010 (the "EA") states:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

Direct disability discrimination

35. Section 13 of the EA states:

> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
>
> *(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

Discrimination arising from disability

36. Section 15 of the EA states:

> *(1) A person (A) discriminates against a disabled person (B) if—*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

Victimisation

37. Section 27(2) of the EA states that each of the following is a protected act—

> *(c) doing any other thing for the purposes of or in connection with this Act;*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

38. In Beneviste v Kingston University EAT 0393/05: B claimed that she had been victimised because she had raised various grievances. She admitted that she had not at the time complained that her treatment was on the grounds of sex or race but thought this did not matter. The EAT upheld the tribunal's decision that the grievances could not amount to protected acts, saying that a claim does not identify a protected act in the true legal sense 'merely by making a reference to a criticism, grievance or complaint without suggesting that the criticism, grievance or complaint was in some sense an allegation of discrimination or otherwise a contravention of the legislation'.

Submissions

39. Both parties provided oral submissions. The Respondent also provided written submissions. These submissions are not set out in detail in these reasons but both parties can be assured that I have considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

40. Only in the most exceptional cases, is strike out appropriate. As the cases mentioned above make clear, there must be no reasonable prospect of success. The threshold is a high one. It is a draconian step. It does not require me to decide whether, on the balance of probabilities, the Claimant is likely or not to succeed. I have to ask my question, "is there any reasonable prospect of her succeeding?" If there is any such reasonable prospect, strike out is inappropriate.

41. When considering whether to make a deposit order, I have to be mindful that their purpose is emphatically not to make it difficult to access justice or to affect a strike out through the back door but instead to highlight claims that I decide have little reasonable prospects of success, so that the Claimant can make a more informed decision about whether it is worth pursuing them to hearing, based on the information presented to me.

Unfair dismissal

42. The Claimant does not have the right to pursue a claim for ordinary unfair dismissal, namely a claim pursued pursuant to sections 94-98 of the ERA. The Claimant accepts that he did not have two years' service so this point is not in dispute.

43. The Claimant has not pleaded, nor did he intimate during today's hearing, that any of the exceptions under 108(2), (4) or (5) applied. He does say that his dismissal was discriminatory but this is not one of these exceptions and is considered further below.

44. Consequently, his claim for unfair dismissal has no reasonable prospect of success and is struck out.

Disability discrimination

45. Although unclear, a reasonable Tribunal can discern from the Claim Form that the Claimant may be pursuing a claim for discrimination arising from disability, and possibly direct discrimination, with the act of discrimination being the dismissal.

46. Although no medical evidence has been adduced so far, the Claimant explained that he has a mental impairment which has lasted at least two years. The condition is not which is excluded from protection under the EA. I have seen documents showing that he made the Respondent aware of this condition. I make no findings of fact regarding whether the Claimant is likely to be considered to be a disabled person or whether the Respondent had the requisite knowledge of the same; however, there is no basis upon which I can say that he has no reasonable prospects of successfully being able to do so.

47. In respect to the claim for direct disability discrimination, this has no reasonable prospects of success. The Claimant himself says he was dismissed because he requested a transfer, because of his absences and for raising a grievance. He did not say that he was dismissed because of his disability itself. He does not say so in clear terms in his claim form. The Respondent says he was dismissed, in part, because of his absence during his probationary period and the Claimant accepts that he had a number of

absences during his relatively short period of employment with the Respondent. Further, the Claimant compares himself to another individual who the Claimant says had a similar disability who was not dismissed. The initial burden of proof is on the Claimant to show that there are facts from which the Tribunal could infer that his disability itself was the cause of his dismissal and I do not consider there to be any reasonable prospect of the Claimant being able to satisfy this burden.

48. The Claimant's claim for discrimination arising from disability appears to be very weak but, putting the claim at its highest, cannot be said to have no reasonable prospects of success. There are some prospects of success meaning it would be inappropriate for me to strike it out. I have however concluded that it has little prospects of success.

49. This is because the Claimant gives a number of other reasons, unconnected with his absence, as the reason for his dismissal, such as the fact he requested a transfer and because he raised a grievance. Additionally, the Claimant accepts that the majority of his absences were non disability related.

50. However, the Claimant does state that his absences were part of the reason for his dismissal and believes his latter absence to be disability related. Although he accepts that he did not specify this during the return-to-work meeting, he said that this meeting took place in public and he did not feel comfortable doing so. The Respondent also accepts that it dismissed the Claimant for his absence, which was the only reason given in the dismissal letter which I quoted from earlier.

51. The evidence of the parties needs testing before this claim can be properly determined, and the following questions in particular need to be considered:

    51.1 Is the Claimant a disabled person?

    51.2 Did the Respondent have knowledge of the disability?

    51.3 Was the latter absence disability related – what was the connection between the absence and the disability?

    51.4 To what extent was this latter absence a focal point in the Respondent's decision to dismiss?

    51.5 How does the Respondent seek to objectively justify the dismissal?

52. As a result of the above, I have considered whether it is appropriate to issue a deposit order for this claim.

53. The purpose of deposit orders are to give a party pause for thought about pursuing a particular complaint, in circumstances where an Employment Judge has indicated that they appear to have little reasonable prospect of success. With this in mind, I have concluded that it is appropriate for me to issue a deposit order regarding this specific claim.

54. The Claimant provided information regarding his means, although I did not ask him to do so under oath as this hearing was taking place by telephone and I consider it to be undesirable to hear evidence by telephone.

55. Between 17 May 2022 and 15 September 2022, the Claimant's income of approximately £550 per month (on average bearing in mind he earned £2,220 in total during this time) would have been less than his outgoings of £750 per month. He is now earning between approximately £745 and £1,115 per month, depending upon his overtime. This is gross and I expect the Claimant may be required to pay tax and/or national insurance contributions on this sum.

56. Taking those matters into account I consider that a deposit order of £100 is a sum that the Claimant has a realistic prospect of being able to pay, but which will have the necessary effect of giving pause for thought about pursuing this complaint, in circumstances where an Employment Judge has indicated that they appear to have little reasonable prospect of success.

57. The Claimant must note that if he pays the deposit and loses the claim for the reasons I have identified in this order, not only will he lose the deposit, but more importantly he is at much greater risk of having to pay some or all of the Respondents' legal costs.

Other potential claims

58. At present there is no discernible victimisation claim from the contents of the Claim Form. However, I have made reference to this claim here as the Claimant said, on numerous occasions during the hearing, that he believed he was being dismissed for raising a grievance. Although I am not inviting or advising the Claimant to do so, if the Claimant wishes to pursue such a claim, he will need to either lodge a new claim or make an application for permission to amend his claim. That should be made in writing and the Respondent should be given an opportunity to respond. That application may be dealt with on the papers or at a further hearing. Although I make no findings of fact in this regard, in order to assist the Claimant with his decision making in this regard, it does not appear to me that he has made a protected act during the meeting or in the email that he relies upon. If he has not made a protected act, he cannot pursue a claim for victimisation.

59. The same applies for any claim which the Claimant may wish to pursue in respect to the allegation regarding it being said that his hairstyle is the same as to John Travolta's hairstyle and Mr Morton allegedly laughing at him because of his mental health.

Employment Judge McAvoy
Newns

19 October 2022