EMPLOYMENT TRIBUNALS

Claimant **Ms A Douglas** v Respondent **Jean Bristow**

OPEN PRELIMINARY HEARING

Heard at: London South by CVP **On: 13 December 2022**

Before: Employment Judge Truscott KC

Appearances:

For the Claimant: **In person**
For the Respondent: **Ms D Ajibade consultant**

JUDGMENT on PRELIMINARY HEARING

1. The claim was presented with an Early Conciliation certificate against the respondent who has no personal liability for the claim. The claim against the respondent is struck out under Rule 37(1) as it has no reasonable prospect of success.
2. The claim for unpaid wages was presented outside the primary time limit contained in section 23(2) of the Employment Rights Act 1996 and it was reasonably practicable for the claim to be presented within the primary time limit, the claim for unpaid wages is struck out under Rule 37(1) as it has no reasonable prospect of success.
3. The claims for disability discrimination, falsifying evidence, stress and defamation of character are dismissed on withdrawal by the claimant

REASONS

Preliminary

1. This preliminary hearing was fixed to address the issue of whether the claims had a reasonable prospect of success.

2. There was a bundle of documents and additional documents to which reference will be made where necessary.

3. The claimant set out her position and the respondent made submissions.

Findings

4. The claimant was employed by Always and Forever Limited. There is a dispute about the start date, the claimant says 30 May 2018 and the respondent says 28 January 2020. It was not necessary to decide the issue.

5. The claimant resigned from her employment which ended on 27 June 2020 [97].

6. The claimant alleges unpaid wages for the June 2019. The amount alleged to be due is estimated to be in the region of £200.

7. The EC certificate was issued on 14 January 2021 with Jean Bristow named as the respondent [3].

8. The claim was made to the Tribunal on 8 February 2021 [1].

Law

Early conciliation

9. Section 18A of the Employment Tribunals Act 1996 provides that claims before the Employment Tribunal are all subject to the early conciliation provisions.

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

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

Unauthorised deductions from wages

11. Section 13 contains the deduction from wages provisions.

> **13 Right not to suffer unauthorised deductions**
> (1) An employer shall not make a deduction from wages of a worker employed by him unless—

None of the exclusions apply in this case.

12. Section 23 sets out the time for making a claim to the Tribunal.

> **23 Complaints to employment tribunals**
> (1) A worker may present a complaint to an employment tribunal—
> (*a*) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),
> (2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
> (*a*) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(*b*) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

Reasonably practicable

13. A Tribunal may only extend time for presenting a claim where it is satisfied of the following:

"It was "not reasonably practicable" for the complaint to be presented in time. The claim was nevertheless presented "within such further period as the Tribunal considers reasonable" (Section 23(4) ERA 1996.)

STRIKING OUT

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

Striking out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

15. An employment judge has power under Rule 37(1)(a), at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the ground that it has no reasonable prospect of success. In **Hack v. St Christopher's Fellowship** [2016] ICR 411 EAT, the then President of the Employment Appeal Tribunal said, at paragraph 54:

Rule 37 of the Employment Tribunal Rules 2013 provides materially:-

"(i) At any stage in the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds – (a) Where it is scandalous or vexatious or has no reasonable prospect of success…"

55. The words are "no reasonable prospect". Some prospect may exist, but be insufficient. The standard is a high one. As Lady Smith explained in **Balls v Downham Market High School and College** [2011] IRLR 217, EAT (paragraph 6):

"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding

> disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"
>
> 56. In **Romanowska v. Aspirations Care Limited** [2014] (UKEAT/015/14) the Appeal Tribunal expressed the view that where the reason for dismissal was the central dispute between the parties, it would be very rare indeed for such a dispute to be resolved without hearing from the parties who actually made the decision. It did not however exclude the possibility entirely.

16. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. See also **Hassan v. Tesco Stores** UKEAT/0098/19/BA at paragraph 17 the EAT observed:

> "There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of *Dolby* the test for striking out under the *Employment Appeal Tribunal Rules 1993* was interpreted as requiring a two stage approach."

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17. 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.

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

> (i) Ordinarily, the claimant's case should be taken at its highest.
>
> (ii) Strike out is available in the clearest cases – where it is plain and obvious.
>
> (iii) Strike out is available if the claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

DISCUSSION and DECISION

19. Section 18A (1) of the Employment Tribunals Act 1996 provides that "Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter." One of the pieces of information that is required is the name of the respondent. The claimant ought to have identified Always and Forever Limited as the respondent for her claim and obtained an ACAS Certificate against that company and commenced Tribunal proceedings against that company. The present respondent was a director of the

company and the claimant deliberately made the claim against her rather than her employer. By her email of 19 February 2022, the claimant confirmed as follows:

> "I can confirm that I was hired at the time by Always and Forever Ltd however everything from payments, shifts, emails and firing of staff is done through the owner Jean Bristow. Everything I receive and do is communicated through the owner Jean Bristow to which I have people who can testify on my behalf."

20. The claim is lodged substantially out of time. The Early Conciliation extension of time provisions are not relevant as the certificate was issue out of time. The claimant said she had lodged it when she complained to HMRC about the same issue [28] which was shortly after the issue arose. She did not make the claim to the Tribunal at that time and could have done. It was reasonably practicable to make the claim in time.

21. The only extant dispute was about whether the sum sought for wages was due and the Tribunal would have fixed a hearing on this matter were it not for the fundamental issues of the EC certificate and being out of time.

Balance of prejudice

22. The Tribunal considered the position of the wages claim and, in relation to prejudice generally, the respondent will have the prejudice of having to defend a claim for which she is not liable, which is still not specified in sufficient detail and which is well out of time. The Tribunal decided to strike out the claim for these reasons.

23. The claimant accepted that her claims of falsifying evidence, stress and defamation of character were not within the jurisdiction of the Tribunal and withdrew them.

24. The claimant appeared to claim disability discrimination by ticking the box on the ET1. The respondent requested medical evidence, to determine whether the claimant was a disabled person in line with section 6 of the Equality Act 2010. The Claimant's impact statement of 19 February 2021 states in particular:

> "I am still able to function properly if not even better than other staff…So I am still within the mild range and this does not affect my ability to carry out day to day activities…To clarify the respondent statement Is false I ashanti Douglas did not call myself disabled I usually refer to my condition. As a disorder which hardly effects me."

25. The claimant explained that she had ticked the box in error and never intended to claim disability discrimination. She withdrew this claim.

Employment Judge Truscott KC

Date 14 December 2022