



EMPLOYMENT TRIBUNALS

Claimant: Ms K Daysh as personal representative of Mr Roland Holmes (deceased)

Respondent: Travis Perkins Trading Co Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: Watford by video **On:** 14 February 2023

Before: Employment Judge Emery

Appearances

For the claimant: Mr Raffell (employment adviser)

For the respondent: Ms Randall (HR Representative)

PRELIMINARY HEARING JUDGMENT

All claims are struck-out on the basis that they have no reasonable prospects of success.

The Issues

1. This hearing was listed to determine the following issues:
 - a. Whether the Tribunal may hear any claim as the claim appears to have been made outside of the applicable time limits
 - b. Whether claims should be struck out because they have no reasonable prospects of success
 - c. Whether the claims should be subject to a deposit order because they have little reasonable prospects of success
 - d. Case management orders, if appropriate.

2. I heard evidence taken under oath from Ms Daysh. Both representatives made submissions at the end of the evidence. As it was a two-hour hearing I was not able to provide a decision at the hearing and this is a reserved decision.

The claims

3. Mr Holmes was dismissed; the respondent says for gross misconduct. It says the reasons for dismissal were (i) a failure to have paperwork completed before leaving the branch with materials; (ii) he did not ensure his vehicle load was checked by a manager before leaving the branch. It says that both were mandatory rules for all its drivers.
4. The respondent points to clause 17 of Mr Holmes contract of employment – Security Rules – which states that goods can only leave a branch with specified paperwork, that “no employee” can vary this procedure. This was required says the respondent to ensure there was an accurate log of goods leaving the branch and to minimise theft.
5. The respondent says that the manager vehicle check was a health and safety requirement on which all of the respondent’s drivers had recently been given specific instructions to comply with during a health and safety ‘stand-down’. The stand-down took place following an incident involving a respondent vehicle which did not have its load properly secured.
6. The initial allegations were investigated by Mr Dan Beresford who, says the respondent, concluded that there was a disciplinary case to answer. Mr Holmes was provided with the disciplinary papers in advance, and on his request the meeting date was changed to allow his union rep to be present. The dismissal hearing was chaired by Mr Paul Simms who met with Mr Holmes on 8 and 11 November 2022, considered CCTV evidence including alongside Mr Holmes for him to provide comment, he conducted interviews with staff members.
7. Mr Simms concluded, says the respondent, that the claimant had breached company H&S policy by failing to get his vehicle checked before leaving the branch and that the paperwork had not been signed-off; that this amounted to acts of gross misconduct which merited dismissal. The claimant did not appeal his dismissal.
8. The respondent argues that it is clearly the case that the dismissal was procedurally fair, that a thorough process was undertaken. It argues that it had a reasonable belief following a reasonable investigation that the claimant had committed acts of gross misconduct. Dismissal was a sanction within the range of reasonable responses.
9. Ms Daysh’s evidence is that Mr Holmes had often picked up goods without the relevant paperwork. She argues that Mr Holmes was told on this occasion to make the delivery and that the paperwork would be sorted later, that this was common practice. She says that Mr Holmes produced evidence to this effect at the disciplinary hearing. She argues that statements provided by employees at the branch showed that they did not have any concerns with the method the claimant used to take the goods.
10. Ms Daysh also argues that the vehicle check was done by a manager at the yard who gave Mr Holmes a ‘thumbs-up’.

11. In his claim, Mr Holmes argues also that other staff members were not dismissed for similar-type incidents.
12. The claimant also argues that he complained to his managers about incidents of racist language and bullying conduct towards him by another member of staff including one incident when a fork-lift truck was driven at him. He claims victimisation, that his dismissal was because of the complaint that he made. I heard no evidence on this issue and for the purposes of this hearing I accepted that the claimant had made a protected act.
13. The respondent argues that the claimant's evidence at the disciplinary related to him picking up unwanted items from a customer. The respondent accepts that signed paperwork is not required when picking up customer returns, the claimant's contract refers to this being required with material leaving the company premises – clause 17(1). The claimant was disciplined says the respondent because he removed material from a branch without the proper paperwork, which was specifically prohibited.
14. On the claim of victimisation, the respondent says that the claimant's allegations of racist language and bullying relate to incidents in 2019 which were investigated and dealt with in November 2019. The respondent says that the employee in question (MR) resigned at this time, and the managers had all left the branch or the respondent's employment by the time of the claimant's disciplinary in 2021. It argues there can be no correlation between his 2019 complaints and his dismissal in 2021.
15. The PH bundle contains HR documents showing the narrative of events. MR resigned before a disciplinary process, but the evidence shows that the respondent accepted that MR engaged in potential acts of gross misconduct, including the use of racially discriminatory language. The respondent concluded at this time in November 2019 that the claimant's conduct in some of the exchanges and the language he used to MR amounted to misconduct and he was disciplined, receiving a final written warning.
16. The claimant raised further issues about his treatment in 2019 in social media posts in 2021: this is acknowledged by the respondent who say Mr Beresford looked into these complaints. The respondent says that it was around the same time as he was looking into this that Mr Beresford became aware of and started his investigation into the issues which led to the claimant's dismissal.
17. The respondent accepts that the claimant raised allegations in November 2021 that he and a colleague "A" had recently been intimidated by a forklift driver, the respondent says that this issue was investigated during the disciplinary process, Mr Simms reviewed the CCTV footage and interviewed the claimant and A. The respondent says that the CCTV footage and the evidence of A was that there was no altercation or intimidatory conduct as alleged by Mr Holmes.

Time

18. The claimant's date of dismissal was 12 November 2021. Early conciliation started on 8 February 2022; the ACAS Certificate was issued on 25 February 2022. The applicable time limited is extended by one month after the ACAS Certificate, hence the deadline for to submit a claim was 25 March 2022. The claim was submitted on 5 April 2022.
19. Ms Daysh accepts that the claim was out of time. She relies on two issues, Mr Holmes ill-health in the period following his dismissal, also confusion because Mr Holmes contacted ACAS twice and there were two ACAS certificates. Mr Holmes sought legal advice and provided the 'wrong' certificate to his advisers, it was only when ACAS were contacted by his advisers that Mr Holmes realised the issue, and a claim was issued immediately.
20. I accepted Ms Daysh's account of the ill-health of Mr Holmes. She says he was clearly not well; he had severe headaches and was confused. I accepted that Mr Holmes was potentially suffering symptoms following his dismissal that led to his death on 12 April 2022 from a burst aneurysm. I also noted that Mr Holmes had started a new job after his dismissal and was able to continue with this until shortly before his death. I saw no medical evidence which suggested that Mr Holmes was medically unable to contact and instruct advisers to bring his claim during this period – in fact he did so.
21. I accept that Mr Holmes health was a factor which contributed to his failing to seek advice about time limits. I accept that also Mr Raffell's submission to the Tribunal, that Mr Holmes was confused about the time limits and did not understand the EC rules.

The Law

22. Rule 37(1)(a) – a claim or response that is scandalous or vexatious or has no reasonable prospect of success
 - a. *Balls v Downham Market High School and College UKEAT/0343/10*: The process to be adopted:

“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 word “no” because it shows that 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 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.”
 - b. *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] CSIH 46*: The power to strike out on the ground that it has no reasonable

prospect of success must only be exercised in rare circumstances, and should not, as a general principle, be struck out on this ground when the central facts are in dispute

- c. *Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330*: where there is 'a crucial core of disputed facts' that was 'not susceptible to determination otherwise than by hearing and evaluating the evidence', the case should not be struck out, because at a strike out hearing the tribunal is in no position to properly weigh competing evidence: it will be an exceptional case where it is justified to strike out as having no reasonable prospect of success.
- d. *Mechkarov v Citibank NA UKEAT/0041/16*: The EAT formulated the following test:
 - (1) only in the clearest case should a discrimination claim be struck out;
 - (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
 - (3) the Claimant's case must ordinarily be taken at its highest;
 - (4) if the Claimant's case is "conclusively disproved by" or "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and
 - (5) (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."
- e. *Romanowska v Aspirations Care Ltd UKEAT/0015/14*: If there is a dispute about the 'reasons why' a decision maker acted as they did, and the parties have competing assertions on those reason, *there is a crucial core of disputed fact in a case, and 'it will be very rare indeed that that dispute can be resolved without hearing from the parties who actually made the decision'*.
- f. *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] CSIH 46*: Almost every decision in an unfair dismissal case is fact-sensitive, so that where the central facts are in dispute a claim should be struck out only in the most exceptional circumstances, in this case because it was *"instantly demonstrable that the central facts in the claim are untrue"*
- g. *Hawkins v Atex Group Ltd [2012] IRLR 807*: discrimination claims can be struck out – *"Judges should not be shy of making robust decisions in a case where there is realistically only one possible outcome even if the issue is formally one of fact"*.
- h. *Ahir v British Airways plc [2017] EWCA Civ 1392*: If a case is so inherently implausible, it is legitimate for the tribunal to conclude that it had no reasonable prospect of success.

"...where there is on the face of it a straightforward and well documented explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so. The employment judge cannot be

criticised for deciding the application to strike out on the basis of the actual case being advanced."

Conclusions

Prospects of success

23. The first issue I considered was the claim of race discrimination. The claims are:
- victimisation – the decision to dismiss after was, or what the respondent believed to be, a protected act
 - direct discrimination – the failure to investigate his grievance

Victimisation

24. The test is whether this claim has no reasonable prospects of success. I accept that the claimant would want to test issues such as the mental processes of Mr Beresford and Mr Simms, what was in their minds when they made key decisions. I accepted that where there are such disputes it would normally be unsuitable for resolution at a preliminary hearing. Issues such as credibility of decision makers and inferences to be drawn from behaviour are all issues of evidence.
25. However, there are the following undisputed facts:
- a. Mr Holmes did not have the paperwork which his employment contract required him to have when he took materials from the branch. His contract of employment is clear that there are no exceptions allowed to the requirement for relevant paperwork
 - b. The evidence shows that other drivers were sacked for this offence. While Mr Holmes has asserted in his claim that other drivers "routinely" took materials in the same way and were not dismissed, there is no evidence available that this is the case.
 - c. During the disciplinary process Mr Holmes saw CCTV footage, which showed his load was not checked and he was unable to identify who he says checked the load
 - d. The protected act had taken place in 2019 and was investigated. All personnel involved in this incident no longer worked at the branch or had left the business
 - e. The claimant's dismissal took place two years after his protected act.
26. At its highest, the claim is that Mr Beresford and Mr Simms were in some way motivated by Mr Holmes protected act to dismiss him. I accept that a dispute about mental processes of a decision maker would normally be addressed at a hearing with evidence. But this is an assertion only, and there is overwhelming

evidence that the reason why Mr Holmes was dismissed was for misconduct – that he was found to have breached important and known rules, where others had been dismissed for similar misconduct.

27. I concluded that this is a case where it cannot be realistically said there is any connection between Mr Holmes protected act and his dismissal: the protected act had been two years earlier. The only conclusion that can be drawn from the known facts was that the respondent's decision makers genuinely believed Mr Holmes had committed acts of misconduct for which other staff had been dismissed previously. I concluded that this was the only possible outcome based on the undisputed facts set out above.
28. For these reasons the claim of victimisation is struck-out.
29. In saying this, I accept the respondent knew in 2019 and 2021 that Mr Holmes had been racially abused in 2019 and a forklift truck had been driven at him. I also noted that the claimant was also blamed by the respondent for some of the incidents in 2019 involving MR. I noted with concern that some of the discriminatory language appears to have been characterised by the respondent as banter. I also accept that the respondent characterised MR's words and actions as conduct not to be tolerated and worthy of a disciplinary sanction.
30. That these incidents occurred are issues of significant concern. I accept that Mr Holmes was troubled by these incidents and he discussed them with Ms Daysh, that they had a continuing impact on him. I also accept that Mr Holmes may not have been given appropriate support by his employer – while Mr Holmes may have been at fault for some of the incidents in 2019, he had been racially abused and physically threatened, and from what I heard it appears that no appropriate support such as medical support or counselling or assistance in the workplace was offered to him.

Direct discrimination

31. Mr Holmes case is that a grievance he submitted on 8 November 2021 was not considered, that this is an act of direct race discrimination. This grievance was submitted towards the end of the disciplinary process, 4 days before he was dismissed.
32. Mr Raffell's Skeleton says that Ms Daysh will be able to provide documents showing the grievance was not progressed. The respondent says that the grievance was considered, and it concluded that the allegations were not substantiated.
33. I accept that there is a potential conflict of evidence – the respondent says it investigated and the claimant says that it was not. Taking Mr Holmes case at its highest, that his grievance was not investigated, he has provided no argument to suggest that he was treated any differently than any other employee in a comparable situation, i.e. an employee who put in a grievance just before the end of a disciplinary investigation, or that this was treatment on grounds of his race. There needs to be more than an assertion that this amounts to different

treatment on grounds of race, and there is nothing to suggest from any of the material including Ms Daysh's evidence that Mr Holmes was able to identify any employee who was treated differently in a comparable situation. This is a speculative claim.

34. For these reasons the claim of direct race discrimination is struck-out.

Time

35. If I had not reached this conclusion, instead finding that there were prospects of success of the direct race discrimination and victimisation claims, I would have allowed them to the claim of discrimination to proceed on that basis that it was just and equitable to extend time. Mr Holmes was clearly ill from his dismissal onwards and Ms Daysh refers to the effect that his dismissal had on his mental and physical health and the confusion he suffered. Mr Holmes had a mistaken belief based on the 2nd ACAS Certificate that he had longer to submit his claim. He sought legal advice and immediately acted to rectify his error when it was discovered. There is no prejudice to the respondent because the claim was issued a few days out of time.

Unfair dismissal

36. I noted the legal principles, that unfair dismissal cases are often fact sensitive. Mr Holmes only argument in the claim form on the process adopted is that the dismissal process was 'fast-tracked' and a statement was not taken from him during the disciplinary process. But he was interviewed, he provided a pre-prepared statement, he was taken through the CCTV footage. He accepts in his claim that statements from other employees were taken including from employees supportive of his position.
37. Mr Holmes unfair dismissal case is based on motivation – he asserts that the reason for dismissal was “disingenuous” – paragraph 43 claim. As above, I conclude that the only realistic outcome at a full hearing is that the respondent can show that the nature and seriousness of Mr Holmes actions were the only reason for dismissal, that there is no link between his 2019 protected act and the disciplinary. The overwhelming prospect given the nature and seriousness of the claimant's actions is the respondent's motivation was addressing issues of misconduct.
38. I concluded that there was overwhelming evidence that the respondent would prove that it held a genuine belief that Mr Holmes had committed misconduct, for the evidential reasons above – the contractual requirement for proper paperwork leaving the depot, the H&S instructions on load checking, and the evidence that both were breached by him. Given the clear evidence on the nature of the investigation, the respondent will be able to show that Mr Holmes received a procedurally fair process.
39. For these reasons the claim has no reasonable prospects of success and is struck-out.

40. The claim was brought out of time, for the reasons set out above. I concluded that the facts of Mr Holmes ill-health as set out by Ms Daysh meant that it was not reasonably practicable for him to submit his claim within the appropriate time limit. His health was poor, he was suffering from confusion and depression, and he was caught out by a mix-up with the ACAS certificates. He initially gave wrong instructions to his advisers based on his mistaken belief on the certificate. I concluded that the combination of ill-health and mental confusion caused by physical ill-health and depression and his mistaken belief all played a part.
41. In the circumstances it was not reasonably practicable for Mr Holmes to bring his claim before its date of submission and time is extended under s.111(2)(b) Employment Rights Act 1996 to extend time to this date.

21 April 2023

Sent to the parties on:

27.4.2023

For the Tribunal Office:

GDJ