



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms E Dye

**Respondent:** Chelsea and Westminster Hospital NHS Foundation Trust

## RECORD OF AN OPEN PRELIMINARY HEARING

**Heard at:** London Central (by video)

**On:** 28 April 2023

**Before:** Employment Judge Emery

### Appearances

For the claimant: In person

For the respondent: Mr B Jones (counsel)

## PRELIMINARY HEARING JUDGMENT

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

### The Issues

1. The hearing was listed to consider the respondent's applications:
  - 1.1 to strike out the claims on the basis that it has no reasonable prospects of success; or
  - 1.2 to require the claimant to pay a deposit on the basis the claims have little reasonable prospects of success, and
  - 1.3 to consider case management of the claim, if applicable.
2. Mr Jones provided a bundle and made submissions; the claimant also made submissions.

### The applications

3. The claimant argues she was unfairly dismissed from her role as Patient Administrator with the respondent a role she held for over 6 years at the date of dismissal. The respondent argues she was dismissed for gross misconduct, that the evidence is 'open and shut' and there is no way that she can succeed in her

claim. The respondent says that the claimant was dismissed for theft of a colleague's bag, and there is no suggestion by the claimant that her dismissal was for any other 'hidden' or 'ulterior' reason.

4. The respondent says it will rely on cctv footage. It invited me to consider this evidence, which it says shows that the claimant cannot succeed in her claim.
5. The footage is a fixed cctv camera showing a corridor with a door opposite the camera. The door is the staff entrance to the staff-side of a reception area. The cctv shows items hanging from a coat stand or similar through the opaque glass pane of this door.
6. The footage shows that the claimant enters the room at 15.04.25 hours on 24 November 2021 and takes an item off the coat hook. During the 1.45 hours when the bag could have been taken, the claimant is the only person entering this door. The claimant walks out and down the corridor, holding something beneath her fleece. The respondent says that this is the colleagues' bag, the claimant says it is medication in her own bag which she has taken off the hook, and she did not want anyone to see the medication. The claimant entered another door down the corridor, which contains staff lockers and a wash area. She exits several minutes later: the respondent says it is clear there is nothing under her fleece; the claimant says she had the bag in the same place under her fleece, but she had discarded the medical item. The claimant is seen later that day on cctv entering the same locker area with what the respondent says is an empty holdall. She leaves several minutes later with the same holdall; the respondent says it is obviously much bulkier. The claimant denies it is bulkier.
7. The respondent argues that it had a reasonable belief after a thorough investigation and disciplinary process that the claimant had committed an act of gross misconduct. It interviewed the claimant and others; there was an appeal process. The respondent reasonably believed that the claimant was the only employee who had the opportunity to take this bag during the 1.45-hour period, the cctv shows her with an object under her fleece and subsequently exiting with another object in a holdall. It says that the claimant's account was not believed for justifiable reasons.
8. The claimant's account is that another member of staff had taken their coat and left earlier, and the bag could have been taken at this time. Not all the cctv had been viewed. She argues the footage has been "edited", as other people had left through the same door. The respondent says that no one moved the coat or bag during the time from when its owner left the bag to when it was noted to be missing, there is unequivocal evidence that this is the case.

## **The Law**

9. *The Employment Tribunals Rules of Procedure 2013: Rule 37(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;

...

10. Case law

- 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 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 is “totally and inexplicably inconsistent” with undisputed contemporaneous documents, it may be struck out; and
  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 on the law and submissions

- 11. The legal test at a full-merits hearing is the 'Burchell' test: whether the employer acted reasonably throughout the investigation process, including considering all evidence reasonably available; considering the claimant's explanations; undertaking any other reasonable investigation; whether the respondent's conclusion was reasonable on this evidence; whether the claimant's dismissal was within the range of reasonable responses.
- 12. The respondent's case is that it is inevitable that it will succeed at a full-merits hearing. I accepted that there is (per *Ahir*) a straightforward and well documented explanation for the respondent's case, that a staff member's bag went missing, the cctv footage showed the claimant as the only person who entered from that door, and the claimant's movements strongly suggested she had taken the bag.
- 13. I accepted that I must take the claimant's case at its highest, she is arguing that someone else could have taken the bag. But there is no 'crucial core' of disputed fact, there is no one else, says the respondent, who could have taken the bag, as shown by the cctv, it clearly had a reasonable belief that the claimant had committed an act of gross misconduct.

14. I accepted that the respondent's evidence would show that the respondent had a genuine belief in the claimant's misconduct, that it will be able to show that it had good reasons – a reasonable belief – in this misconduct, by:
  1. The timing of the cctv footage
  2. The footage shows that the claimant is the only employee who moved items from the hook
  3. The manner in which the claimant then left with a bulky item under her fleece, the fact that her holdall is bulkier later that evening, and the claimant said she kept nothing. In her locker
15. I accept that the respondent will be able to show it undertook a reasonable investigation process, that it considered the claimant's explanation, and that it acted reasonably in dismissing this explanation and deciding that the claimant had committed an act of misconduct. I considered that this is one of those exceptional circumstances, that there is no prospect of the claimant being able to show her dismissal was procedurally unfair, or that her dismissal was outside of the range of reasonable responses.
16. I therefore struck-out the claim. Any hearing listed is now vacated.

28 April 2023

Sent to the parties on:

02/05/2023

For the Tribunal Office: