EMPLOYMENT TRIBUNALS

Claimant: Mr S A Sullivan

Respondent: Kepak Group Limited

Heard at: Cardiff **On:** 25 March 2024

Before: Employment Judge R Russell

Representation
Claimant: In person
Respondent: Mr M Mensah, Counsel

JUDGMENT having been sent to the parties on 26 March 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claim was presented on 02 October 2023. The face of the claim form shows three date stamps: 30 Sep 2023, 02 Sep 2023, and 02 Oct 2023. The date stamps of 30 Sep 2023 and 02 Sep 2023 have been scored out. The parties agreed that the Claim was presented on 02 October 2023. ACAS early conciliation began on 23 May 2023 and ended on 15 June 2023.

2. The Claimant is representing himself in this Claim. He has had access to limited legal advice in the past. The Claimant had presented Claims on 26 June 2023 and 21 July 2023 (both under case number 1601205/2023). These are not proceeding.

3. A Case Management Preliminary Hearing was held on 18 December 2023 before Employment Judge R Evans. He recorded that the Claimant was complaining of the following:

    a. Direct disability discrimination
    b. Failure to make reasonable adjustments
    c. Detriment on the ground that he has made a protected disclosure
    d. A failure to pay holiday pay in respect of accrued but untaken holiday

4. EJ Evans ordered that the Claimant must, by 12 January 2024, send to the Tribunal and Respondent further and better particulars of his Claim and set out, under various headings, what information should be provided.

5. At that Case Management Preliminary Hearing of 18 December 2023, the Respondent argued that the complaints had been brought outside the relevant time limits. It argued that the complaints are collectively without merit and should be struck out. EJ Evans ordered that a preliminary hearing should be held

> '*to determine any applications from the Respondent which are likely to include one or all of the following:*
> *19.1 any or all of the Claimant's claims are time-barred or whether the time limit for each claim should be extended; and*
> *19.2 the Claimant's claims should be struck out for having no reasonable prospects of success'.*

6. On 11 January 2024 the Claimant wrote to the Respondent and Tribunal with further and better particulars of his Claim ("FBPs").

7. On 26 January 2024 the Respondent applied to strike out the Claim under rule 37 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "Rules") on the basis that it has no reasonable prospect of success, that the manner in which the Claimant has conducted proceedings has been unreasonable, and/or that the Claimant has failed to comply with the order made on 18 November to provide further and better particulars of his Claim. It further argued that the Claim has been brought outside the relevant statutory time limits. In the alternative, it argued that the Claim has little reasonable prospect of success and that the Claimant should be ordered under rule 39 to pay a deposit as a condition of continuing to advance his claim.

8. In writing these reasons I have referred to the Notice of Hearing. I have appreciated that there is a possible defect in that rule 54 provides that the notice '*shall specify the preliminary issues that are to be, or may be, decided at the hearing*'. The Notice of Hearing does not specifically mention determining whether a deposit order should be made, or determining whether to strike out pursuant to rules 37(1)(b) and (c) in respect of the manner in which proceedings have been conducted and a failure to comply with an order of the Tribunal. I do not criticise the Respondent in this regard but note the possible defect in the Tribunal's Notice of Hearing.

9. I had a bundle called 'Claimant's documents' of 122 pages. This appeared to contain transcripts of recorded conversations between the Claimant and others. Neither party referred to this bundle during the hearing. I had a separate bundle called 'Pleadings Bundle' of 97 pages. This was referred to during the hearing. I was assisted by the oral submissions from both parties. Judgment was given orally.

Identifying the Claim

10. In *Cox v Adecco* [2021] ICR 1307 the EAT held that before considering strike out, the Tribunal should make reasonable efforts to identify the claims and the issues to be decided having regard to the pleadings and any core documents that set out the Claimant's case.

11. In this respect, I carefully considered the Claim form and attached document titled '2022 part 8.2 ET1' and the FBPs provided by the Claimant on 11 January 2024. I also considered the Response and attached Grounds of Resistance.

12. The FBPs contain a lot of narrative information. This is no criticism of the Claimant who is not legally qualified and is now representing himself. However, the Respondent and Tribunal need to understand what amounts to background information and what is a direct allegation against the Respondent. In respect of those allegations, it also needs to understand the correct label or legal claim that is being attached to it. What was necessary in the FBPs was a clear statement of what the Respondent is alleged to have said or done in respect of each of the legal claims the Claimant is arguing. In the FBPs, the Claimant has attached legal labels to certain allegations but there then follows a month-by-month account of events. The document also contains the Claimant's understanding of the relevant law and details of the compensation sought.

13. I clarified at the outset of the hearing the complaints that the Claimant intends to bring. During the hearing, as the Claimant was giving evidence in respect of the question of time, it became necessary to seek further clarification of the Claim, particularly for protected disclosure detriment. He initially suggested that the disclosure was first made on 26 June 2023 when he presented his first claim but resiled from that position and clarified that the first disclosure was in January 2023.

14. A List of Issues, based on the clarification given at the hearing, has been set out in a separate Case Summary.

15. The Claimant's case is that there was direct disability discrimination in that adverse comments were made about him by management and senior colleagues after he told the Respondent in January 2023 that he has De Quervains Disease. He says that he was ignored and neglected, although no details were given of when this happened and by whom. He says that on 22 May 2023 he was denied annual leave while on sick leave and that the failure to be paid for holidays while on sick leave continued throughout 2023. He further relies on a misuse of his confidential information shared with Amanda Davies, and his length of service being used against him.

16. The failure to make reasonable adjustments complaint relies on the fact that he says that he was told by Lawrence Murphy (trainer), a week or two before commencing sick leave on 10 January 2023, not to seek an Occupational Health referral in respect of De Quervains Disease. He claims that the Respondent has a provision, criterion, or practice ("PCP") of not referring employees to Occupational Health when requested and of not paying holiday pay when on sick leave. He says that these put him at a substantial disadvantage since he is on long-term sick leave. His claim for holiday pay

arises out of the same factual circumstances in that he says the Respondent continues to refuse to pay him holiday pay while he is on sick leave.

17. His claim for protected disclosure detriment relies on being ignored from January 2023 onwards. The Claimant says that in January 2023 in an oral conversation with Lawrence Murphy and Marcin Andrzejewski (line manager) he disclosed that health and safety measures were being ignored and particularly that there were risks of contamination due to unsanitary conditions. He further alleges that on 29 March 2023 he disclosed concerns to someone (he could not remember who) following a conversation with Angela Davies, HR, about his contract of employment not recording his correct length of service. He considers that his length of service is longer than what the Respondent has recorded although it says that he was previously engaged via an agency. He says that these disclosures were also contained in his earlier claim form presented on 26 June 2023.

18. Having identified the case as above, I considered whether or not the complaints could be said to have no reasonable prospect of success.

Submissions

19. The Respondent argued that the Claimant had blatantly failed to comply with the orders made by EJ Evans. Its position was that it was no further on in understanding the case that it had to meet. The Respondent maintained that this was a case that was clearly bound to fail. It argued that even if the Claimant had properly set out his case, any acts before 02 June 2023 would be out of time and discretion should not be exercised to extend time. This was the third claim that the Claimant had brought. He was therefore aware of the process and relevant time limits. He had received some advice at an earlier stage in proceedings.

20. The Respondent argued that an 'unless order' would be inappropriately generous in the circumstances. The Claimant had been given an opportunity on 18 December 2023 to clearly and fully particularise his case.

21. In the alternative, the Respondent argued that the making of a deposit order would be appropriate.

22. The Claimant argued that the further and better particulars he had provided had been completed to the best of his abilities. I was also addressed briefly on the Claimant's financial means.

Law

23. The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances. It is draconian in nature. The test imposes a very high threshold: there must be no reasonable prospect of success. The Tribunal must consider whether on a careful consideration of all available material it can properly conclude that the claim has no reasonable prospect of success. If the central facts are in dispute, it would be exceptional to strike out a claim (*Eszias v North Glamorgan NHS Trust* [2007] ICR 1126, CA).

24. The test is not whether the Claimant's claim is likely to fail or whether it is possible that the claim will fail. It is not a test which can be satisfied by considering what is put forward by the Respondent 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 a high test (*Balls v Downham Market High School and College* [2011] IRLR 217, EAT).

25. Tribunals should be cautious in exercising the power to strike out, particularly in cases such as discrimination claims where there is a public interest in them being heard and because they are likely to be fact sensitive. The Claimant's case should be taken at its highest unless conclusively disproved by (or totally and inexplicably inconsistent with) undisputed contemporaneous documents (*Ahir v British Airways* [2017] EWCA Civ 1392; *Mechkarov v Citibank NA* [2016] ICR 1121, EAT).

26. In addition to strike out on the merits, the Respondent applies to strike out the Claim due to non-compliance with EJ Evans' order and on the basis of what it says is the Claimant's unreasonable conduct. The decision about whether to strike out for conduct is a two-stage process. First, what is the conduct in question and does it meet the required threshold? Second, should the Tribunal exercise its discretion to strike out? This involves considering whether a fair trial is still possible or whether a less draconian sanction would be appropriate.

27. *Bolch v Chipman* [2004] IRLR 140, EAT, set out the matters to be addressed when determining the issue of conduct. These include: (1) Have the proceedings (rather than just the party's behaviour) been conducted unreasonably? (2) Even so, is a fair trial still possible? (3) If not, what remedy is appropriate?

28. An application for a deposit under rule 39 is a less draconian alternative to strike out. It requires the Tribunal to consider whether the case has <u>little</u> (rather than no) reasonable prospects of success. If it determines that is the case, it has discretion to consider whether to make a deposit order having regard to the overriding objective to deal with cases fairly and justly.

<u>Conclusions</u>

29. I deal briefly with the arguments that the Claimant has failed to comply with the orders of EJ Evans of 18 November 2023 and that his conduct of proceedings has been unreasonable.

30. While the Claimant has had some advice at an early stage in these proceedings, he is now representing himself. He is not legally qualified. He has actively participated in proceedings to date. He was ordered to provide further and better particulars by 12 January 2024. On 11 January 2024 he provided a 17-page document setting out what he regarded as further and better particulars of the Claim. Lengthy, narrative documents are often not helpful for the other party in understanding the case it must meet. While EJ Evans had set out the information that was required to be given under each heading, the Claimant had used those headings but the allegations were not altogether clear. This is why it was necessary to spend time during the hearing identifying the complaints. The provided information could have been

clearer and more concise but it cannot reasonably be said that there has been a failure to comply with an order of the Tribunal or that the Claimant's conduct has been unreasonable.

31. Dealing with the argument that this Claim has no reasonable prospect of success, I reminded myself of the high threshold to be applied, the fact that the Claimant's case must be taken at its highest, and that discrimination and protected disclosure cases will require identification of the reasons for any detrimental treatment, which turns on direct evidence and the inferences that may be drawn from it (*Kuzel v Roche Products Limited* [2008] ICR 799, CA).

32. The Claimant claims detriment on the grounds of having made a protected disclosure. Whether the Claimant did make a protected disclosure is a matter on which a Tribunal will need to hear evidence and make findings of fact. Whilst on the limited evidence before me it seems that the protected disclosure complaint insofar as the complaint about his contract is weak (the Tribunal will need to be satisfied that such a disclosure was in the public interest), it could not be concluded that it has no reasonable prospect of success. It may be that at a final hearing the Claimant can point to evidence of what was disclosed to show that it meets the statutory requirement of being in the public interest.

33. Taking the Claimant's direct disability discrimination complaint at its highest, he says that he was less favourably treated by the Respondent in a number of respects following his disclosure of a De Quervains Disease diagnosis. He does not rely on a named comparator. To the extent that he seeks to rely on his treatment pre and post disclosure of his diagnosis, this is something about which the Tribunal will need to hear evidence. Whether he has been ignored or had comments made against him are matters on which evidence is needed to determine the issue and make findings of fact. What was in the mind of those who allegedly made comments or ignored the Claimant is relevant and matters from which inferences might permissibly be drawn.

34. A worker retains his right to annual leave while on sick leave. Evidence will be needed on whether that right has been afforded to the Claimant.

35. The reasonable adjustment complaint stems from two alleged practices of the Respondent. The Claimant will need to first establish that these practices (or PCPs) exist and that these put him at a substantial disadvantage. Based on the evidence before me, it was not clear whether these are PCPs. However, taking the Claimant's case at its highest, as the Tribunal must do, it could not be said that this complaint has no reasonable prospects of success.

36. I have also considered the Respondent's application in the alternative that the Claimant be ordered to pay a deposit under rule 39. This requires me to be satisfied that an argument or allegation in the Claim has little reasonable prospects of success. This is a lower threshold than having 'no' reasonable prospects of success. I considered *Arthur v Hertfordshire Partnership University NHS Foundation Trust* EAT 0121/19 and the likelihood of the Claimant being able to establish facts essential to his case.

37. I am not satisfied that this is a case in which it can reasonably be said that the Claimant has little reasonable prospects of success. There are key facts in

this case that are in dispute making it difficult to make an assessment of the Claimant's case without hearing evidence, having that evidence cross-examined, and making findings of fact. The Claimant seeks to rely on conversations with his line manager and his trainer as both protected disclosures and in respect of allegations that adverse comments were made that he says amount to disability discrimination. The Respondent denies that these conversations took place. I have considered the likelihood of the Claimant establishing facts essential to his case. Whether these conversations took place and, if so, what was said are matters on which evidence will need to be heard. If the Claimant is able to establish these facts essential to his complaints and can show the relevant causal links between his treatment and the alleged disclosure, his protected disclosure detriment complaint is arguable. If he can show that adverse comments were made and satisfies the Tribunal that these amount to less favourable treatment because of disability, the case is arguable. It cannot therefore be said that these complaints have little reasonable prospects of success. Whether the Respondent's actions amount to direct discrimination or a detriment on grounds of the Claimant having made a protected disclosure are matters about which evidence will need to be heard and findings of fact made.

38. The allegation of being denied the right to take paid annual leave during sick leave cannot be said to have little reasonable prospects of success on the evidence before me. The Respondent denies this complaint in its entirety. This is a complaint where the key facts are in dispute. Clearly evidence will be needed about whether the Claimant was denied the right to take annual leave. Similarly, evidence will be needed on the alleged PCPs, whether these put the Claimant to a substantial disadvantage, and whether there was a failure to make reasonable adjustments.

39. I have considered the Claimant's allegations against the Respondent's contentions. There are clear disputes on factual issues that are central to the Claim. These cannot be resolved without hearing evidence and making careful findings on fact. If the Claimant is able to prove these factual issues, his case may be said to be reasonably arguable. For this reason, it cannot be said on the evidence before me that the case has little reasonable prospects of success.

40. The Respondent's applications for strike out and deposit fail and are dismissed.

41. The Respondent had also applied for the Claim to be struck out on the basis that it had been brought outside the statutory time limit and that discretion should not be exercised to extend time.

42. In his oral account to the Tribunal the Claimant explained that he was aware of the relevant time limits and had access to legal advice at an early stage in proceedings. He had previously brought two Claims (neither of which are continuing) so is aware of the process. He had been able to correspond with the Respondent during the relevant time period, and so it appears unlikely that his conditions would have prevented him from presenting a Claim within the relevant deadlines.

43. The key issue for me to determine with respect of the argument on time bar is when did the alleged acts occur? On the face of it, not all complaints appear to have been presented within the primary time limit. However, the Claimant appears to rely on there being a continuing course of conduct. While I was satisfied that I had been able to understand the complaints sufficiently to enable me to determine whether they could be said to have no or little prospect of success taking them at their highest, I was not satisfied that I had before me sufficient evidence to determine the question of whether there had been a continuing course of conduct. I considered *Caterham School Limited v Rose* EAT 0149/19 and that a determination of whether there has been a continuing act cannot be reached at a preliminary hearing based solely on whether there is a prima facie case on the pleadings. Given the fact-sensitive nature of discrimination claims, evidence and cross examination with clear findings of fact will be needed to make a definitive determination of this issue. This was particularly the case in respect of allegations that the Claimant had been, and was continuing to be, ignored by the Respondent on grounds of having made a protected disclosure, and as less favourable treatment because of disability. The failure to pay holiday pay was also said to be continuing throughout 2023. The question of the time limit for a failure to make reasonable adjustments differs in the sense that the Claimant says he has made repeated requests for adjustments to be made. The Tribunal will therefore need to determine when it would be reasonable for the employer to alleviate the substantial disadvantage to which the Claimant says he has been put and when, if the Claimant has made repeated requests, it might be reasonable for the Claimant to conclude that the Respondent will not make the adjustment.

44. Given the lack of precision around the dates in question and the Claimant's position that events continued throughout 2023, I concluded that I could not be clear on the evidence before me that the Claim was out of time or that there had not been a continuing course of conduct. I was mindful of the order made by EJ Evans and that the question of time bar was a matter for this preliminary hearing. I reminded myself of *Serco Limited v Wells* 2016 ICR 768 and that rule 29 permits an order to be varied where it is necessary in the interests of justice, which must be interpreted narrowly and can include whether there has been a material change in circumstances. I considered that the failure of the Claimant to provide further and better particulars with clear and relevant information on dates despite his efforts to do so was a material change in circumstances. The question of whether the Claim has been brought in time therefore remains a live issue to be determined.

45. I have made further orders in this case, which are set out separately in Case Management Orders dated 25 March 2024 and sent to the parties on 26 March 2024.

Employment Judge R Russell

Date 23 April 2024

REASONS SENT TO THE PARTIES ON 25 April 2024

FOR THE TRIBUNAL OFFICE Mr N Roche