Case Number: 2301834/2023

EMPLOYMENT TRIBUNALS

Claimant:	**Mr S Bose**
Respondent:	**Enable Infrastructure Limited**
On:	**5 June 2024**
Before:	**Employment Judge McAvoy Newns**
Heard at:	**London South Employment Tribunal (by CVP)**

Appearances:

For the Claimant:	**In person**
For the Respondent:	**Miss Leonard (Counsel)**

RESERVED JUDGMENT

1. I have decided that the following of the Claimant's allegations or arguments set out in Employment Judge Lang's orders dated 29 November 2023, following the case management preliminary hearing which took place on 28 November 2023 ("Lang Orders"), have **no reasonable prospect of success** and are therefore **STRUCK OUT**.

    1.1 Breach of contract: 4.2.1;

    1.2 Breach of contract: 4.2.2;

    1.3 Breach of contract: 4.2.4 (incorporating 4.2.4.1, 4.2.4.2 and 4.2.4.3); and

    1.4 Breach of contract: 4.2.5.1.

2. I have decided that the following of the Claimant's allegations or arguments set out in Lang Orders have **little reasonable prospect of success** and therefore **DEPOSIT ORDERS** have been made regarding them. A separate deposit order, which is a case management order rather than a judgment,

has been sent to the parties but the reasons for this decision are explained below:

2.1 Direct age discrimination: 2.2.4;

2.2 Direct race discrimination: 2.2.4;

2.3 Direct age discrimination: 2.2.5;

2.4 Direct race discrimination: 2.2.5;

2.5 Direct age discrimination: 2.2.6;

2.6 Direct race discrimination: 2.2.6;

2.7 Direct age discrimination: 2.2.7;

2.8 Direct race discrimination: 2.2.7;

2.9 Direct age discrimination: 2.2.10;

2.10 Direct race discrimination: 2.2.10;

2.11 Breach of contract: 4.2.5.2; and

2.12 Breach of contract: 4.2.5.3.

3. The Claimant withdrew the claims at paragraphs 2.2.9 and 2.2.11 of the Lang Orders during this hearing. These are dismissed.

4. All other claims will proceed to the final hearing which remains listed before an Employment Judge sitting with members in person at the Employment Tribunal at Croydon, Montague Court, 101 London Road, West Croydon, London CR0 2RF on **30 and 31 July 2024 and 1 and 2 August 2024.**

WRITTEN REASONS

Background

5. The background to this case is summarised at paragraphs 69-72 of the Lang Orders. Following this, between pages 10-15 of the Lang Orders, is a detailed list of issues. The Claimant confirmed during today's hearing that all of the allegations contained therein were still being pursued although he acknowledged that his application to amend, to include three additional allegations of unwanted conduct for the purposes of his harassment claim, had been refused. Therefore, whilst these were referred to in italics at page 13 of the Lang Orders, it was agreed that these did not form part of his claim.

6. The thrust of the claim concerns the fact that, on 16 August 2022, the Claimant was invited to a disciplinary meeting in relation to an allegation that he had breached railway safety standards on 6 and 7 August 2022. Specifically, it was alleged that the Claimant had changed the agreed works plan without formal notification which extended the working hours of the

employees on site and allegedly caused a safety breach. On 23 August 2022, however, the Respondent informed the Claimant that no further action would be taken. The Claimant's complaint largely concerns the fact that he was immediately invited to a formal disciplinary hearing without the matter being considered informally. He says this is in breach of contract and is also inconsistent with how the Respondent treated two, in particular, White/British and older employees who he relies upon as actual comparators. He also relies upon hypothetical comparators.

7. The Claimant commenced a period of sick leave on 23 August 2022 and did not return to work again. He resigned on 23 December 2022. During this time he raised a grievance and the outcome was delivered after his employment had terminated.

8. Although a constructive unfair dismissal claim was pursued, it was struck out due to the Claimant's lack of continuous service. His remaining legal claims are for direct age discrimination, direct race discrimination, age related harassment, race related harassment and breach of contract.

9. Today's hearing had originally been listed to determine the Respondent's deposit order dated 12 February 2024. However, in the notice of hearing dated 1 May 2024, it was explained that the Judge would consider the Respondent's applications for a deposit order and strike out and their application to amend their grounds of resistance.

10. The Respondent confirmed that they had not made an application for strike out but that I was free to strike out any claims that I considered to have no reasonable prospects of succeeding, on my own initiative. The Claimant had had notice that the Tribunal would be considering the strike out of his claims at this hearing and this hearing was a public preliminary hearing, rather than a private case management hearing. I noted that the Claimant had prepared a written response to a strike out application, in advance of the hearing, and was not therefore prejudiced by me doing so.

11. For completeness, it was confirmed that the Respondent was not seeking permission to amend its grounds of resistance and, therefore, this was not a matter that I needed to deal with during this hearing.

Form of hearing

12. This was a remote hearing which was not objected to by the parties. The hearing took place via CVP, the Tribunal's video conferencing platform.

The Law

Strike out

13. 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.

14. 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...”

15. 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.”

16. 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.

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 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.

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

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

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

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

Deposit Orders

20. 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'.

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

22. 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.

23. 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).

24. 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.

Submissions

25. Both parties provided oral 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

Introduction

26. 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 him succeeding?" If there is any such reasonable prospect, strike out is inappropriate. I must take the Claimant's claims at their highest and only strike out claims where it is clear, plain and obvious that the claim has no reasonable prospect of succeeding. I should also apply the two-stage test that the case law mentions; because I conclude that a claim has no reasonable prospects of success, it does not automatically follow that I must strike the claim out.

27. 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.

Discrimination claims – general

28. The Claimant brings several claims of direct discrimination and harassment, as summarised below. In respect to all, the protected characteristics relied upon are the Claimant's race (Indian ethnic background) and his age (29). He compares himself to White/British individuals who are aged 40 or over.

29. In respect of the age discrimination claim, the Respondent says that an assertion that the Respondent would distinguish between groups so narrowly divided (e.g. 11 years) is implausible. The Claimant's response to this is that "age is age".

30. I agree that it would be peculiar for an employer to discriminate against one such group but not the other. But this is a point that requires testing on the evidence. Whilst this is a matter that the Respondent can address in submissions at the final hearing, this potential lack of plausibility is insufficient to conclude that the age discrimination claims have no or little reasonable prospects of success at a preliminary hearing.

Discrimination claims – time limits

31. The Claimant's discrimination claims relate to acts which allegedly occurred from 16 August 2022 to 12 January 2023.

32. As the Claimant started the ACAS early conciliation process ("EC process") on 12 February 2023, which concluded on 24 March 2023, and he lodged his claim on 21 April 2023, all claims regarding acts which allegedly took place prior to 13 November 2022 are out of time.

33. The Claimant relies upon there being a continuing act of discrimination. However, for him to succeed with this, the allegations of discrimination regarding the matters are paragraphs 2.2.9, 2.2.10, 2.2.11, 2.2.12, 2.2.13, 2.2.14 and 2.2.15 of the Lang Orders would need to be upheld. These concern the alleged failure to pay sick pay, the alleged failure to make employer pension contributions and the conduct of the grievance process.

34. The Respondent has observed that the alleged acts of discrimination post November 2022 were taken by different individuals to those alleged to be involved in the pre-November 2022 matters.

35. I have explained later the challenges the Claimant may have with some of these claims. However, given a significant part of his claim concerns the alleged conduct of Jonathan Nelson and his alleged involvement in some of these matters, it cannot be said that the Claimant has no or little reasonable prospects of establishing a continuing act of discrimination, where the last upheld act of discrimination is in time, once witness evidence has been heard and challenged.

36. However, importantly, the Claimant also seeks to persuade the Tribunal that it would be just and equitable for time to be extended. In this regard, he explained to me that he started the EC process when he did because he was attempting to resolve the issues internally with the Respondent. He also explained that the issues he was having during his employment with the Respondent at the time had affected his health and caused him to feel stressed and lose sleep. I note in this regard that he was absent from work due to ill health for much of this period.

37. The Respondent has asked me to take into consideration the fact that the Claimant was able to raise a grievance in September 2022 and participate in a grievance process prior to November 2022. Therefore, the Respondent says he ought to have been able to start the ACAS process and lodge his claim at this time. I have taken this into account.

38. Whilst I recognise the Respondent's position, this is clearly a matter that requires consideration at a final hearing once all of the evidence has been considered. The case law surrounding just and equitable extensions is different to that surrounding reasonable practicability and the Tribunal may, in this case, exercise discretion to determine some of these out of time claims. It would be premature at this stage to conclude that the Claimant has no or little reasonable prospects of successfully persuading the Tribunal that his out of time claims should be allowed to be determined.

Discrimination claims – disciplinary process

39. Although there are eight individual allegations of each type of discrimination being pursued, the thrust of this complaint is that Jonathan Nelson and Tolu Babawale from HR allegedly subjected the Claimant to a disciplinary policy that was contrary to the Respondent's policies and, in doing so, he was subjected to direct age and direct race discrimination. This section of these Written Reasons should be read in conjunction with paragraphs 2.2.1 through to 2.2.8 of the Lang Orders.

40. The Claimant relies upon Garry King and Steve Conway as actual comparators. He says both are White British and in their 40s.

41. I asked the Claimant about his perception of the connection between these allegations of less favourable treatment and the fact that he is of Indian ethnicity and aged 29. I also asked him why he felt he may be treated differently if he was White/British and/or over 40.

42. The Claimant initially said, “I don’t know how they would have approached it differently if I was 40 or over”. However, he explained that his comparators were over 40, White British and made numerous mistakes which he considered to amount to more serious breaches of railway standards yet they were safeguarded from the internal processes that he was subjected to.

43. In regard to Mr King, I understand the Claimant’s position is that Mr King repeatedly failed to update the Weekend Works Tracker in the Respondent’s “Yellow Card Policy”. Rather than be disciplined, Mr Nelson stated: “Luckily I have taken on the On Call manager role this week as anyone else would have happily escalate that 1573 has a missing entry....again.”

44. I have read Mr Nelson’s position regarding this in his statement.

45. In regard to Mr Conway, I understand the Claimant’s position is that Mr Conway admitted to making a mistake which could have endangered the lives of seven railway workers. Yet, Mr Conway was not invited to a disciplinary hearing and was, instead, asked to undertake further training.

46. I note that the Respondent’s position is that Mr Conway is a contractor, not an employee, of a different seniority to the Claimant and that a detailed investigation was undertaken during which Mr Conway was stood down, without pay, and that he was required to undertake training and mentorship before being able to return to his role.

47. I have noted the following conclusion reached in respect of the Claimant’s grievance concerning this: “Having reviewed all the evidence, I do consider that there was a miscommunication here between Operations and HR in respect of what was required from the investigation process. In hindsight, perhaps some further investigation could have taken place between you and your line manager before moving to the disciplinary hearing, although I understand why it did given the seriousness of the incident”.

48. However, the Claimant had alleged and the Respondent had acknowledged in the grievance outcome letter that there was: “an extensive record of incidents or similar of greater sensitivity that have been allowed to pass without formal action, investigation or without the concerned individuals being subject to any Disciplinary Procedures”. The Claimant has referred to some of these today, with specific examples. He has said, in his witness statement, that these were referred specifically to the grievance investigator. Yet, these were not addressed specifically in the outcome letter. Instead, the response was: “I have reviewed the evidence in relation to this allegation and accept that there may be different outcomes and processes followed towards different incidents that take place, depending on the nature of the incident or issue at hand and also on the client, who may have their own process requirements. <u>The context of each of them are different and without then investigating each one further, it is hard to determine whether or not similar actions should be taken</u>” (my emphasis added). A conclusion was then reached that: “<u>There is no evidence that the conduct here was discriminatory in terms of your race, colour or age</u>” (my emphasis added).

49. Without a careful analysis of the Claimant’s treatment together with the treatment of these two comparators, it is impossible for an employer to adequately conclude that there has been no discrimination (be it conscious or unconscious) at play.

50. After considering all of the evidence, the Tribunal may well conclude that the decisions reached by the Respondent were legitimate and non-discriminatory. I note that the disconnect between Ms Babawale and Mr Nelson could have arisen out of Ms Babawale's own inexperience. I have also seen that Mr Nelson's evidence is that he had not instructed that this letter be sent, expecting the meeting would be for fact finding. I also note that in an email dated 10 August 2022 (page 5 of the Claimant's bundle), Mr Nelson did say that "formal action" and a need to "record this formally" was required which Ms Babawale, who was copied into this email, could have interpreted as being the need to hold a disciplinary meeting. The Tribunal may also be persuaded by the evidence being given by Mr Nelson in respect of the Respondent's treatment of Scott Stratford, who I am told is of a similar age to the Claimant, when considering the Claimant's age discrimination claim.

51. However, based on the information I have seen and what I have heard, and the high bar mentioned above, I do not conclude that those allegations concerning the Respondent's move towards formal rather than informal action, have little or no reasonable prospects of succeeding. An examination of the mental processes of those involved is needed before any fair assessment of the merits of these claims can be undertaken. All of these allegations will proceed to the final hearing where they will be determined by the Tribunal.

52. However, in respect of some of the allegations in this section of the Lang Orders, I cannot see how the Claimant would be able to establish a prima facie case of either direct age or race discrimination. When discussing the connection between his allegations and his race/age, he focused solely on the matters outlined above which I have agreed should proceed to a final hearing.

53. The allegations that I am referring to are:

    53.1 Lang Orders: 2.2.4 (concerning the failure to share minutes), I am not persuaded that that Claimant will be able to demonstrate any link between this and either his age or his race. He has not referred to any comparator cases where a valid comparator had received minutes in this situation nor has he suggested that a hypothetical comparator would have done so. Furthermore, even if the Claimant can shift the burden in this regard, the Respondent's reasons for acting as it did appear to be non-discriminatory;

    53.2 Lang Orders: 2.2.5 (concerning the Respondent having a preconceived outcome to the disciplinary process that the Claimant would receive a final written warning), again, I am not persuaded that that Claimant will be able to demonstrate any link between this and either his age or his race. As the Respondent has pointed out, this letter stated that a possible consequence of the meeting might be a final written warning which is a requirement of the ACAS Code. It used the term "consequence" in the plural and said that this "might be" a final written warning; and

    53.3 Lang Orders: 2.2.6 and 2.2.7 (concerning the Respondent failing to provide the outcome within 5 days, despite the Claimant's request),

again, I am not persuaded that the Claimant will be able to demonstrate any link between this and either his age or his race. He has not referred to any comparator cases where a valid comparator has received their outcome in this period of time or suggested that a hypothetical comparator would have done so. Furthermore, even if the Claimant can shift the burden in this regard, the Respondent's reasons for acting as it did appear to be non-discriminatory.

54. Consequently, two deposit orders for each of these allegations (bearing in mind these are being pursued as allegations of direct age and direct race discrimination) have been made. I have stepped away from strike out in these cases as I appreciate that this would be a draconian step only appropriate in the clearest and most obvious cases. In this regard, although based on what I have read and heard I do not understand what this might be, I recognise that the Claimant may have more to say about the connection between the allegations and his age/race than he shared today. If he wishes to pay the deposit to continue pursuing these allegations, he can address this further at the final hearing.

Discrimination claims – sick pay

55. The Claimant alleges that Mr Nelson failed to pay his full statutory sick pay between 22 September and 23 December 2022. This allegation is at 2.2.10 of the Lang Orders.

56. The Claimant relies upon a hypothetical comparator for this part of his claim.

57. I asked the Claimant about his perception of the connection between this allegation of less favourable treatment and the fact that he is of Indian ethnicity and aged 29. He said it was a continuation of Mr Nelson's discriminatory treatment towards him. Particularly he said that Mr Nelson had played a key role in lying to the Claimant and HR yet safeguarded his White/British colleagues who were over 40.

58. Within my analysis of the breach of contract claim, considered later, I have concluded that the Respondent's decision to pay the Claimant SSP for this period of time was in line with the written contractual documents. The Claimant has not pointed to any individuals who he says were paid normal pay during sickness absence beyond four weeks, who were White/British and/or over 40.

59. It is also relevant to note that the Claimant had also previously alleged that Mr Nelson and Ms Babawale had failed to pay his full pay between 22 September and 23 December 2022, without reviewing the reduction to sick pay in line with paragraph 14 of his contract of employment, and that this was discriminatory. The Claimant withdrew this claim during today's hearing and the same has been dismissed.

60. I cannot see a connection between this allegation and the Claimant's age or race nor, based on what I have heard and read, do I consider the Claimant to be able to establish such a connection at a final hearing. Nevertheless, I have decided not to strike out this claim. As stated earlier, strike out is only appropriate for the most clear and obvious cases and it may be that the Claimant wishes to say more about this connection at the final hearing. I have however made two deposit orders regarding it.

Discrimination claims – grievance

61. The Claimant also raises a number of discrimination complaints concerning the grievance process. These are at paragraphs 2.2.12 and 2.2.15 of the Lang Orders.

62. The Claimant relies upon a hypothetical comparator for this part of his claim.

63. I asked the Claimant about his perception of the connection between these allegations of less favourable treatment and the fact that he is of Indian ethnicity and aged 29. He said it was a continuation of Mr Nelson's discriminatory treatment towards him. Although the outward decision makers were Ms Fox and Mr Wiscombe (and I am aware that Ms Fox was external), the Claimant felt that Mr Nelson was orchestrating the decisions behind the scenes. Examples given to support this were Ms Fox allegedly taking Mr Nelson's word at face value and Mr Wiscombe intentionally deciding not to consider the Claimant's evidence and engage in the contents of the full investigation report. The Claimant also stated, in his written objection to the deposit order: "aged white staff were safeguarded by [the Respondent] not completing the grievance investigation".

64. I have concluded that Mr Nelson's involvement (or lack thereof) in the grievance process is likely to be relevant to the success of this claim. If he is found to have acted in a discriminatory matter during the disciplinary process and he has been involved inappropriately in the grievance process, the discrimination allegations regarding the grievance process may have some merit. I cannot fairly draw any conclusions regarding this. It would not be appropriate for these claims to be struck out or for deposit orders to be made in respect of them.

Harassment claim

65. For this claim, the Claimant alleges that Mr Nelson and Tolu Babawale from HR subjected him to a disciplinary policy that was contrary to the Respondent's policies. This is a similar allegation to one of the Claimant's allegations of direct discrimination and the points cited above relevant to this apply here. It would not be appropriate for this claim to be struck out or for a deposit order to be made. An evaluation of the evidence and particular the comparator cases that the Claimant refers to is required.

66. The Respondent has asked me to take into consideration the fact that the Claimant's witness statement does not make any mention of harassment. Whilst this is technically the case, his witness statement does refer to this process being discriminatory. The Claimant is a litigant in person and he may seek permission to amend his witness statement to include evidence relevant to this allegation at that point. I cannot pre-empt what the Tribunal will decide in this regard.

Breach of contract claim – time limits

67. There are no issues with time limits regarding the breach of contract claim, the claim having been presented to the Tribunal within 3 months of the effective date of termination of employment, subject to extensions arising from the EC Process.

Breach of contract claim – Sick Pay

68. The Claimant alleged that the Respondent breached his contract of employment by paying him SSP, rather than full pay, during his sickness absence between 22 September 2022 and 23 December 2022. This was despite the contents of paragraph 14 of his contract of employment and the Respondent's own sickness absence procedure. These allegations are at paragraphs 4.2.1 and 4.2.2 of the Lang Orders.

69. I asked the Claimant to direct me to the part of the contract of employment that stated that he was entitled to be paid normal pay during his sickness absence.

70. He directed me to the Respondent's Sickness Absence Management Policy which states: "This policy does not form part of any employee's contract of employment and may be amended from time to time. We may also vary the procedures set out in this policy, including any time limits, as appropriate in any case".

71. I have reviewed this during my deliberations and have noted that, under section 8 (Sick Pay), it is clearly stated that employees will only receive SSP.

72. He also directed me to page 91 of the Respondent's bundle. This is the clause concerning the Respondent's right to make deductions from the Claimant's wages. This states: "If these deductions would cause hardship, arrangements may be made for the overpayment to be recovered over a longer period at our discretion".

73. Although this is not strictly how the claim is being put, my understanding from what has been said today is that the Claimant is saying that the Respondent breached his contract of employment by doing the following, in addition to not giving him his full pay during this period:

    73.1 Not giving him sufficient notice of the fact that his salary would be reduced from normal pay to SSP; and

    73.2 Making deductions from the SSP to recover an overpayment rather than using the above mentioned clause to ensure the recoupment of the overpayment was spread out.

74. During my deliberations I also noted that, at pages 93-94 of the main bundle, the contract of employment states:

    "You shall be entitled to, on the 4th day, receive Statutory Sick Pay (SSP), at whatever rate paid at the time. SSP is subject to PAYE and National Insurance, and these deductions shall be made accordingly. Provided that you comply with the notification procedures set out in The Sickness Absence Management Policy, you are entitled, in any period of twelve rolling months, to receive sick pay after taking into account all state benefit:

    > During probation period SSP only; Should probation be extended, the period of SSP will also extend until probation is passed.
    >
    > <u>Thereafter 4 weeks' full pay</u> (should sickness occur during probation, this period will be taken into consideration when calculating eligibility for contractual pay)" (my emphasis added).

75. I understand that the Claimant received sick pay for these four weeks, hence his claim is for normal pay during the period: 22 September 2022 and 23 December 2022.

76. I have considered the Claimant's position and note there is no contractual entitlement for the Claimant to receive normal pay beyond this four week period. Although the extract from the contract that the Claimant refers to (quoted above) allows the Respondent a discretion to recover overpayments over a longer period, it does not mandate the Respondent to do so. The Claimant has not pointed to any contractual document that requires the Respondent to give particular notice before moving from full pay to SSP but, in any event, the Claimant was on notice of the Respondent's entitlement to do so as a result of the above mentioned part of his contract of employment.

77. Consequently, based on what I have seen, this claim has no reasonable prospects of succeeding. The Claimant has no written contractual entitlement to sick pay beyond this four week period and he is not arguing that such entitlement ought to be implied. The other matters do not give rise to valid breach of contract claims. In exercising my discretion to strike out this claim I have been conscious that a requirement for the parties to advance and defend this claim at a final hearing will increase the time duration of the hearing. In circumstances where, when the Claimant's claim is put at its highest, this claim has no reasonable prospects of success, this would not be proportionate. The claim is struck out.

Breach of contract claim – pension

78. The Claimant alleges that the Respondent breached his contract of employment by failing to pay him the pension contributions due for the period of 22 September and 23 December 2022. There is a factual dispute regarding whether these contributions were paid. It is not my role during this hearing to resolve that factual dispute and I have not been directed to any evidence to enable me to do so in any event. Consequently, it would not be appropriate for me to strike out this claim or make a deposit order. This will be determined at the final hearing.

Breach of contract claim – ACAS Code

79. The Claimant alleged that the Respondent breached the Claimant's contract of employment by failing to adhere to the ACAS Code of Practice on Disciplinary and Grievance Procedures ("ACAS Code") in various respects. These allegations are at paragraphs 4.2.4.1-4.2.4.3 and the Lang Orders.

80. The Claimant accepted during today's hearing that ACAS Code is not contractually binding between him and the Respondent. Additionally, the Claimant has previously stated that he has not claimed breach of contract as a result of a breach of the ACAS Code.

81. Consequently, any claim for breach of contract concerning the Respondent's compliance with the ACAS Code has no reasonable prospects of succeeding and is struck out. This is a clear and obvious case of the Claimant not being able to pursue a breach of contract claim regarding these matters. In exercising my discretion to strike out, I have been mindful of the fact that no

further evidence or submissions regarding this claim, at a final hearing, will result in this claim succeeding.

82. However, for the Claimant's benefit, bearing in mind he is a litigation in person, evidence regarding the Respondent's compliance or otherwise with the ACAS Code may have some relevance to remedy, should the Claimant's claim succeed, and this is already addressed in 5.8 of the Lang Orders.

Breach of contract claim – Disciplinary Procedure

83. The Claimant alleged that the Respondent breached his contract of employment by not adhering to the Respondent's disciplinary policy in various respects. These allegations are at paragraphs 4.2.5.1-4.2.5.3 and the Lang Orders.

84. The Claimant alleged that the disciplinary policy was contractual.

85. He directed me to page 89 of the main bundle which states: "This Agreement should be read in conjunction with your Offer Letter and the Employee Handbook as they collectively form your Contract and the Terms and Conditions of Employment with the Company" (my emphasis added).

86. I also noted, during my deliberations, that page 101 states, above the place where the employee is asked to sign the contract of employment: "I have read, understood and accept the Terms and Conditions of Employment, as laid out in this Contract and the documents referred to" (my emphasis added).

87. There is therefore a valid argument that the contents of the Employee Handbook are contractual.

88. He then directed me to page 124-125 which contained the Respondent's disciplinary procedure. This is within the Employee Handbook which begins at page 102. He says this contains the various aspects of the procedure which the Respondent breached which he considers amounts to a breach of contract. Whilst this does encourage informal action before formal action is taken, it does not state that the outcome of the disciplinary hearing should be given within five days. It does however refer readers to the Respondent's Disciplinary Policy (considered below).

89. The Respondent referred me to the Respondent's Disciplinary Policy, a document which I understand is not within the above mentioned Employee Handbook, and begins at page 147 of the main bundle. This does state, at 2.4: "This procedure does not form part of any employee's contract of employment and it may be amended at any time. We may also vary this procedure, including any time limits, as appropriate in any case".

90. The Claimant has attempted to say that, because the contract of employment renders the disciplinary procedure as contractual (because the disciplinary procedure is in the Employee Handbook) and because the disciplinary procedure signposts readers to the disciplinary policy, the disciplinary policy must therefore be contractual. I do not see any strength behind this argument, given what is stated at 2.4, as quoted above.

91. Additionally, a more relevant point from the Respondent is that the Claimant has failed to identify loss or damage resulting from a breach of the disciplinary procedure.

92. It's important to take a step back and note this is a claim pursuant to The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("Order"). Article 3 of the Order allows the Tribunal to consider claims for the recovery of damages or any other sum which arises or is outstanding on the termination of the employee's employment and is not excluded by Article 5. Although the Claimant's claim has not been excluded by Article 5, he has not identified any damages or sum arising as a consequence of this alleged breach.

93. I have been minded to conclude that all of these allegations have no reasonable prospects of success. The Disciplinary Policy (not procedure) that the Claimant relies upon is clearly expressed to be non-contractual. It will also be difficult for him to establish loss or damage arising from any such breach.

94. However, I am conscious that strike out is a draconian step and the Claimant's case must be put at its highest. The Claimant is arguing that the Employee Handbook is contractual by virtue of the above mentioned provision. The disciplinary procedure, within the Employee Handbook, does encourage informal action before formal action. He may assert that his loss of pay between 22 September 2022 and 23 December 2022 amounts to losses arising from a breach of the disciplinary procedure.

95. Subject to the below, whilst I don't consider these arguments to be compelling, I do not conclude that they have no reasonable prospects of success. They certainly, in my view, have little reasonable prospects of success and deposit orders regarding them are made. I have therefore made deposit orders regarding the allegations at 4.2.5.2 and 4.2.5.3 of the Lang Orders.

96. The position regarding 4.2.5.1 is different. The Respondent was not contractually obliged to give the disciplinary outcome within 5 days. Even if it was, this does not give rise to any damages or other sum that the Claimant can make a claim for pursuant to the Order. This claim has no reasonable prospects of success. In exercising my discretion to strike out this claim, I have considered that no other evidence or submissions from the Claimant would change this conclusion and, therefore, it would not be proportionate for this claim to be determined at a final hearing.

97. Finally, I have addressed the Claimant's claim at 4.2.6 namely that the Respondent breached section 22 of the Claimant's contract of employment by breaching the disciplinary policy.

98. Section 22 of the contract states (with my emphasis added):

> "The Company has Disciplinary and Grievance Policies and Procedures in place, details of which are available in the Employee Handbook, on IMS and on our SharePoint page. <u>For safety-related cases a yellow card warning system is in operation.</u> Two yellow cards within a 12- month period and you could be immediately suspended followed by the disciplinary process, which may lead to a formal action: investigation, hearing and followed by warning, performance improvement plan or even dismissal. Should the unsafe act deemed to be Gross Misconduct then you will be dismissed forthwith. The

Company reserves the right to impose demotion (with a commensurate reduction in salary) as a disciplinary sanction as an alternative to dismissal. Once an outcome has been confirmed, you will be notified of who you can make an appeal to, should you wish to do so. The full disciplinary and grievance procedures do not apply to probationary employees. However, in cases of dismissal or gross misconduct the minimum requirements set out in the Disciplinary and Grievance policies apply".

99. I understand the Claimant to be saying that in not applying the yellow card warning system to him, which he believes ought to have been applied given the incident was safety related, the Respondent breached this clause and was, therefore, in breach of contract. The consequent loss or damage may be the pay that he did not receive as he was absent from work receiving SSP. This is a provision in the Claimant's contract of employment. The previous points regarding the contractual statuses of disciplinary policies and procedures do not apply. I am not concluding that this claim has good prospects of success but there is not enough material before me to conclude that it has no or little reasonable prospects. It is a claim that requires further exploration at a final hearing.

Financial means

100. The Claimant gave representations regarding his means. He told me that he is employed on a full time and permanent contract and his gross annual salary is around £57,750. I note from his claim form that he started work soon after leaving the Respondent. However, I am told that his disposable income is presently around £1,000 per month (not taking into consideration savings) as he is paying for surgery that his wife has recently undergone.

101. Taking those matters into account I consider that deposits of £75 per allegation are sums 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 these complaints, in circumstances where an Employment Judge has indicated that they appear to have little reasonable prospect of success. To assist the Claimant, bearing in mind he is a litigant in person, he may decide to pay only some of the deposits and allow those that he does not pay deposits for to be struck out. However, he should note that if he pays the deposits and loses the claims for the reasons I have identified, not only will he lose the deposits, but more importantly he is at much greater risk of having to pay some or all of the Respondent's legal costs.

102. Finally, for completeness, I highlight for the benefit of the Claimant that, when he gave submissions, he addressed me on objective justification. I wrongly informed him that this was irrelevant as there were no indirect discrimination claims being pursued. Whilst this latter point is correct, objective justification is relevant to the direct age discrimination claim (not the direct race discrimination claim) and therefore this is a valid matter for the Claimant to raise again at the final hearing when dealing with this claim.

Employment Judge McAvoy Newns

14 June 2024