



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms L Jones

**Respondent:** Out of this World Kids Club Limited

## RECORD OF A PRELIMINARY HEARING

**Heard at:** Liverpool (in public; by CVP)

**On:** 7<sup>th</sup> June 2024

**Before:** Employment Judge Anderson

### Appearances

For the claimant: No Attendance

For the respondent: Mr Clarke (Consultant)

## JUDGMENT

1. The applications for strike out and deposit orders in respect of the claims of constructive unfair dismissal, direct disability discrimination and disability related harassment are refused..

## REASONS

### Introduction

1. This was a public preliminary hearing to consider strike out and/or deposit orders in respect of the following claims made by the Claimant:
  - a. Constructive unfair dismissal.
  - b. Direct disability discrimination.
  - c. Disability related harassment.
2. The above matters were listed of Judge Benson's own volition in respect of deposit orders. The strike out application was then subsequently made by the Respondent.

3. The strike out application does reference 'all claims' but does not provide any basis for a strike out in respect of the wages claim and Judge Benson expressly excluded the wages claim from her order in respect of potential deposit orders.

### **Procedural Matters**

4. The Claimant did not attend before me today. There was a late application for a postponement that was very brief in nature, provided no explanation for the timing of the application given that notification of this hearing was sent in April, provided no explanation or supporting evidence and was not copied into the Respondent. This application to postpone was refused by Judge Cookson.
5. The Claimant has provided no telephone number on her ET 1 so the Tribunal clerk was unable to call her at 10.00 when she did not appear online today.
6. I considered it appropriate to proceed. Judge Cookson's order stood and in any event I could see no reason to postpone given the basic lack of information as to why the hearing could not go ahead.
7. I record that I did not have any witness statements placed before me. There was a previous bundle amounting to 193 pages when combined.

### **Strike Out/Deposit**

8. It is fair to say that there were problems with the way the application was put, for example the inconsistency between the written application and the list of issues or identifying the factors relied upon by the Respondent beyond the bold assertion of vexatious. I provide more detail in respect of this below. This in no way detracts from the fact that I am critical of the Claimant for not attending today.

### **The Law**

9. The Respondent applied to strike out each of the Claimant's claims as having no reasonable prospect of success as provided for by Rule 37(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.
10. It is settled law that for the purposes of strike out, I take the Claimant's case at its' highest. Strike out is a high bar.
11. Rule 39(1) of the Employment Tribunals Rules of Procedure 2013 permits the Tribunal to require a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance an allegation or argument in proceedings before the Tribunal where it considers that any such allegation or argument has little reasonable prospect of success.
12. The following principles apply when considering whether or not to make a deposit order:
  - a. The purpose of a deposit order is "to identify at an early stage claims with little prospect of success and 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". It is not the purpose of deposit orders "to make it difficult to access justice or to effect a strike out through the back door": **Hemdan v. Ishmail [2017] IRLR 228** per Simler J at paras 10-11.

- b. Because of the access to justice implications, tribunals should take particular care before making a deposit order, and give sufficient reasons before deciding that an allegation or argument has little reasonable prospect, particularly where core facts are in dispute: **Sami v. Avellan [2022] EAT 72.**
- c. It is legitimate to have regard to the claimant's prospects of successfully proving the facts that are essential to the case. This may include forming a provisional view as to the credibility of the assertions being put forward: **Van Rensburg v. Royal Borough of Kingston-upon-Thames UKEAT 0095/07.**
- d. The tribunal must engage with, and make a reasonable attempt to understand, the basis of the claim before assessing its prospects of success: **Wright v. Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14.**

13. In respect of time limits and the Equality Act 2010, Section 123 provides:

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

## **Conclusion**

14. I deliberately do not set out the background facts in detail as evidence has yet to be heard. Rather, I will set out my analysis of the applications and my decisions as a result.
15. In respect of the complaints of a) direct disability discrimination and b) disability related harassment, the Respondent contended that:
  - a. They were out of time.
  - b. The Claimant did not raise a grievance at the time and therefore it is not credible.
16. In terms of the time point, this was not a preliminary hearing to determine time. Rather this was a hearing in respect of strike out/deposit in which the factor relied upon was time.
17. On the face of it, the discrimination claims were out of time, though I was not entirely clear whether it was said that the discrimination complaints were linked to the constructive dismissal and the non-attendance of the Claimant today did not help as I could not clarify the point.
18. Proceeding on the Respondents basis in light of the non attendance of the Claimant that these matters were out of time, there was still the issue of a potential just and equitable extension of time.
19. In favour of such an extension:
  - a. The more liberal regime of 'just and equitable'
  - b. The Claimant's stated disability, though further information would be needed.
  - c. The fact that the Tribunal would be covering this time period in any event in respect of the constructive dismissal
  - d. No forensic prejudice to the Respondent was identified to me
  - e. The prejudice to the Claimant in not pursuing her chosen discrimination complaints
20. Against such an extension:
  - a. It is the Claimant's burden of proof to prove the facts for an extension.
  - b. There is no right to such an extension.
  - c. The length of the extension sought – on the face of it, June (expiry of limitation) to October.
  - d. The Claimant obtained new employment shortly after her resignation and therefore there is an inference she was capable of conducting matters.

21. When weighing the above matters up, it is clear that an extension is not a strong possibility, but at the same time I can't say it has 'little reasonable prospects'. It is possible that a Tribunal properly directing itself does extend time.
22. In terms of whether a grievance was raised at the time, I did not have anything before me which would give me relatively comfort as to what the basic facts of the case were. I would not make a deposit order because of this fact alone, even if were proven. The Respondent also referred to the Claimants claims as being vexatious and similar, but I regarded this as hyperbole and needed a more forensic approach.
23. A Tribunal considering a just and equitable extension is entitled to hear evidence and to consider all of the evidence when exercising its discretion as to whether or not to extend time. This is not sufficiently clear without that evidence and therefore the application for strike out or deposit order is refused.
24. In respect of the constructive unfair dismissal, the Respondent contended:
  - a. That the breaches were out of time.
  - b. That the Claimant has been convicted of assault in relation to someone within the Respondent.
25. In relation to the time point, in respect of constructive dismissal, time runs from the effective date of termination, not the alleged breaches. The claim is in time and there is no possible basis on which that I could order a strike out or deposit in respect of this. Even if I were to interpret this as a submission regarding affirmation then **Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833** (para 55 in particular) highlights the difficulties in this respect and in any event would be fact sensitive and suitable for trial.
26. The Respondent's application for strike out refers to an entirely different last straw and set of circumstances than is set out in the list of issues. The application uses the phrase "The Respondent contends that..." Yet, it is for the Claimant to identify the breaches.
27. Therefore, on the face of it, using the list of issues, the Claimant does not rely upon her suspension or facts related to her assaulting someone as part of her constructive dismissal case.
28. All I have before me is very limited information and a list of factual contentions of poor things that the Claimant says happened to her at work. No particular weakness in relation to these contentions was submitted.
29. If it had been the case that a) the Respondent could prove the fact of the conviction (and thus establish that these events had been found to have occurred to the criminal standard) and b) the Claimant was relying on events surrounding that as part of her case then this would have led to me making a deposit order. But this is not what the list of issues says.
30. Where the conviction does potentially alter the Claimant's case is in relation to remedy and the basic award. The Tribunal will need to decide the extent to which the assault is capable of reducing the basic award. I say 'extent' because an

assault is serious and likely to lead to a significant reduction. The question is whether it contributed to the dismissal. I consider that to be a trial point once evidence has been heard.

31. In terms of the compensatory award, if the Claimant was said to have been constructively dismissed, then she appears to be claiming three weeks loss. Assaulting someone is likely to bring your employment to an end within a short period. This is likely to have been the same period in respect of which if the Respondent had dismissed the Claimant then a short period of weeks would have been needed to finalise that process. In turn however, this figure could also be reduced by contributory fault.

### **Postscript**

32. Reasons were not requested however, given the non-attendance of the Claimant and the unusual circumstances of my order, I decided that I would provide written reasons for my decision of my own volition.

33. I recognise that I have refused an application in respect of a case whereby a) the Claimant has not attended before me and b) appears to have been convicted of an offence in relation to someone at the Respondent. I hope these reasons assist any future Judge to understand why no such order was made today and why this matter proceeded to trial. I emphasise in the strongest terms that the Claimant should not take any particular comfort from this Judgment, I have not said that she has a good case or has acted reasonably. The fact of the assault and the fact of her non-attendance are cause for real concern. The result today is no more than there were problems with the applications today and I have refused the applications, applying the relevant tests.

34. No other case management orders were sought.

Employment Judge Anderson  
7<sup>th</sup> June 2024

JUDGMENT SENT TO THE PARTIES ON  
21 June 2024

FOR THE TRIBUNAL OFFICE

Notes

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