# EMPLOYMENT TRIBUNALS

**SITTING AT:** **LONDON CENTRAL**

**BEFORE:** **EMPLOYMENT JUDGE F SPENCER BY CVP**

**CLAIMANT** **Mr B K Aboyade-Cole**

**RESPONDENT** **Chelsea and Westminster NHS**

**ON:** **11 October 2023**

**Appearances:**

**For the Claimant: In person**
**For the Respondent: Mr C Rix, counsel**

## RESERVED JUDGMENT

The Judgment of the Tribunal is that:

(i) The claim for unfair dismissal is struck out.
(ii) The claimant's claims at paragraphs 3.2, 3.4, 3.6, 3.7, 3.8 (first half), 3.10 and 3.25 of the amended list of issues are struck out as having no reasonable prospect of success.

The remaining claims may proceed- although see separate deposit order made in respect of some of those claims.

## REASONS

1. This preliminary hearing in public was listed, on the application of the Respondent by Employment Judge E Burns, following a case management hearing which took place on 4 August 2023. The purpose of today's preliminary hearing was to consider the Respondent's application

to strike out the Claimant's claims on the basis that they had no reasonable prospect of success or, in the alternative, for an order that the Respondent pay a deposit as a condition of continuing to advance any or all of his contentions.

History of the litigation and postponement application

2. The Claimant was employed by the Respondent as a Patient Care Coordinator from 19 November 2018 until his summary dismissal for gross misconduct on 19 January 2023. He is a black man.

3. The Claimant contacted ACAS on 12th April and presented a claim form on 13th May 2023. His claims are for unfair dismissal and direct sex and race discrimination.

4. At the Preliminary hearing in August 2023 with the assistance of the Claimant the issues were identified. In relation to the claim for direct discrimination because of race/sex there were 23 separate pleaded detriments. The parties were given until 25th August to email any corrections to the list of issues.

5. On 24th August, and again on 8th September, the Claimant asked for an extension of time to comment on the list of issues. In the 8th September email he said he had been suffering from a serious allergic reaction from contact with a neighbour's pet, was suffering from severe itchy eyes, watery eyes, sneezing, runny nose and sore and peeling skin. He said he would complete the amendments by 12 September 2023.

6. As of today's date the Claimant had not submitted any amendments to the issues. He had not complied with the Order to serve a witness statement setting out his means, as ordered at the last hearing.

7. On 9 October the Claimant applied for postponement of today's hearing. He said that he had been ill for some time and there had been unforeseen circumstances. EJ Glennie responded to that application to the effect that the Claimant would have to reapply for postponement at the start of the hearing as he had given insufficient information in his email.

8. At the start of today's hearing the Claimant applied for a postponement. He sent the Tribunal a photograph of various over-the-counter tablets for the relief of hay fever and other allergies. He told me that he had been suffering from allergic reactions, that looking at a screen caused migraines, that he was a litigant in person, had not understood some of the things that had been sent to him and had not been able to prepare for today's hearing and that he was not ready. It would be difficult for him to focus on the case.

9. On behalf of the Respondent Mr Rix objected to the postponement application. He referred to rule 30A(2) of the Employment Tribunals Rules of Procedure 2013. This provides that where a party has made an

application for postponement less than seven days before the date of the hearing the Tribunal could only order the postponement where (i) the parties consented, (ii) the application was necessitated by an act or omission of another part of the Tribunal or (iii) there were exceptional circumstances. None of these applied in this case. The Claimant had provided no real medical evidence and the hearing had been fixed with the agreement of the parties.

10. I refused the Claimant's application to postpone the hearing. There was no medical evidence before me to suggest that the Claimant had not been able to prepare for the hearing. While he may have had an allergic reaction this hearing had been listed on 4th August ,and I had no evidence to persuade me that the Claimant had not had time to prepare.

11. Once I gave my decision as to the postponement the Claimant became distressed. He said he needed to comment on the list of issues and that he had not read Mr Rix submissions. I therefore adjourned the hearing to allow the Claimant some time to recover and to read the submissions of Mr Rix.

12. When we reconvened the Claimant had recovered and was able to coherently comment on the list of issues. He said that they were wrong. We went through the list of issues one by one allowing the Claimant to comment (notwithstanding that the time period set out in EJ Burns order had expired). The Claimant asked for a number of, relatively small, amendments to be made to Paragraph 3- the pleaded detriments for his direct sex and race discrimination claim which I agreed to. Mr Rix then sent the amended list of detriments to the Claimant and the Tribunal during the lunch time adjournment. The amended list of detriments/acts of less favorable treatment appears in the schedule to this judgment.

13. Having agreed the issues we turned to the Respondent's applications for a strike out/deposit order.

<u>Undisputed facts</u>

14. The Claimant was employed by the Respondent as a Patient Care Coordinator from 19 November 2018 until his summary dismissal for gross misconduct on 19 January 2023. He is a black man.

15. As set out in the original case management order the Claimant was in a relationship with one of his colleagues, a white woman, DP. In August 2021 she told the Respondent that the Claimant had assaulted her. On 27th August the Claimant was telephoned by a Manager and asked not to attend work. In his particulars of claim the Claimant says he was suspended for 18 days without any explanation and that this suspension was not authorised in accordance with the Trusts disciplinary policy (16).

16. The assault was reported to the police. DP obtained a Non-Molestation Order (NMO) against the Claimant. This was ordered without notice and in the absence of the Claimant. The Claimant subsequently attended a court

hearing in relation to the NMO application and agreed to the terms of the NMO with no admission of guilt.

17. The Claimant was subsequently charged by the police with two counts of assault by beating. The Claimant told me during the hearing that DP had accused him of strangling her but that was not true, and her accounts were inconsistent.

18. In July 2022 he was convicted and given a suspended sentence of 26 weeks imprisonment for the first offence and 12 weeks custody for the second offence (to run concurrently). The court also ordered a 40-day program requirement, 35 days rehabilitation and 120 hours of unpaid work. A restraining order was granted with a single condition of noncontact with DP for five years.

19. During the criminal proceedings the Claimant had been suspended by the Respondent. The Respondent undertook its own investigation which was finalised in February 2022. The outcome of that investigation was that the Claimant had a case to answer and that on the balance of probabilities there was evidence to support a charge that the Claimant assaulted DP. There were witness interviews from a number of trust employees. At the request of the Claimant's solicitor, the disciplinary hearing was postponed until the conclusion of the Claimant's criminal proceedings.

20. On 13 January 2023 a disciplinary hearing took place. It was held in the Claimant's absence, following two earlier postponements at the request of the Claimant. The Respondent' case is that Occupational Health had assessed the Claimant as fit to attend the hearing. The allegations against the Claimant were :

    a. that on 27th August… DP was the victim of domestic abuse at home from DP's then partner Mr Aboyade-Cole
    b. breach of trust values and behaviours – PROUD.

21. The Claimant was dismissed for gross misconduct with effect from 19 January 2023. The Claimant attended an appeal hearing on 12 May 2023 but the decision to dismiss was upheld.

22. The Respondent's policy on disciplinary matters provides examples of gross misconduct which includes

    a. "acts of violence or aggression, including physical assault, verbal aggression or fighting,
    b. bringing the trust into serious disrepute, and
    c. any serious breach of the trust's code of conduct.

    It also provides "a criminal act that is committed outside of work of Trust premises will not automatically lead to disciplinary action dismissal stop the gravity and nature of the act, in any circumstances surrounding it will be carefully considered."

The Claimant's case.

23. Put broadly the Claimant's case is that he was set up. DP had lied and her allegations were false. It was DP that had attacked him rather than the other way round. The trust had believed DP because she was a white woman and had not believed him because he was a black man. When she made a report to the Respondent they supported her and encouraged her to report matters to the police. They acted at all times as if the allegations were true even though he had denied it.

24. In contrast, when he reported that DP had attacked him the Respondent did not support him and did not encourage him to report matters to the police. Instead he was suspended out with the trust's policies and kept away from work. DP had not been suspended and remained employed by the trust. She had been treated like a victim while he had been treated like a criminal.

25. The Respondent had supported DP to make false allegations and had given false evidence at his criminal trial including photos and text messages. They had taken photographs of DPs bruises which were false and not taken at the time of the alleged assault.

26. At the trial he did not have much evidence solicitor advocate didn't understand and wasn't fully prepared

27. The Respondent had not dealt with his grievance.

28. His dismissal was unfair. He was dismissed in his absence and while his sicknote was valid.

Submissions.

29. For the Respondent Mr Rix submitted that the Claimant's claim for unfair dismissal had no reasonable prospect of success. The Claimant had been convicted of a criminal offence.

30. Given the conviction no disciplinary body could have concluded other than that the Claimant was guilty of assault by beating. In terms of the reasonableness of the sanction, although the offence occurred out of work, the Respondent had a policy regarding conduct outside the workplace (77). Gross misconduct included acts of violence or aggression. The Claimant was in a patient facing role, worked with vulnerable people the victim was a colleague.

31. Although a dismissal could be unfair because of a defective process, in this case there had been full and fair process.

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other way round. The trust had believed DP because she was a white woman and had not believed him because he was a black man. When she made a report to the Respondent they supported her and encouraged her to report matters to the police. They acted at all times as if the allegations were true even though he had denied it.

33. In contrast, when he reported that DP had attacked him the Respondent did not support him and did not encourage him to report matters to the police. Instead he was suspended out with the trust's policies and kept away from work. DP had not been suspended and remained employed by the trust. She had been treated like a victim while he had been treated like a criminal.

34. The Respondent had supported DP to make false allegations. Individuals at the Respondent had fabricated and given false evidence at his criminal trial including photos and text messages. They had taken photographs of DPs bruises which were false and not taken at the time of the alleged assault. He could not prove this at his trial, at the time he didn't understand, the solicitor advocate acting for him wasn't fully prepared.

35. The Respondent had not dealt with his grievance. His dismissal was unfair. He was dismissed in his absence and while his sicknote was valid.

The law Strike out and deposits.

36. Rule 37 of Schedule 1 of the Employment Tribunal Rules of Procedure 2013, provides that at any stage of the proceedings a Tribunal may strike out all or part of a claim on the basis that it has no reasonable prospect of success (Rule 37(1)(a).

37. A strike out order is only appropriate in exceptional cases. It is an extremely high test and is particularly high where the complaint is one of discrimination. The power to strike out has been described by the Court of Appeal as draconian and not a power to exercise lightly: Blockbuster Entertainment Ltd v James [2006] IRLR 630.

38. The main principles relevant to the striking out of discrimination claims were summarized in Mechkarov v Citibank NA [2016] ICR 1121. They are:

    a) Only in the clearest case should a discrimination claim be struck out;

    b) Where there were core issues of fact that turned on oral evidence they should not be decided without hearing oral evidence;

    c) The claimant's case must ordinarily be taken at its highest;

    d) If the claimant's case was "conclusively disproved by" or was "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it could be struck out;

    e) the Tribunal should not conduct an impromptu mini trial of oral

evidence to so-called disputed facts.

39. The authorities make clear that Tribunals should avoid striking out discrimination claims where the facts of the case, including the reasons for the actions, are in dispute.

40. Notwithstanding the high threshold which applies to strike out of discrimination complaints it is clear that such complaints may be struck out in appropriate cases. In Anyanwu v South Bank Student Union (CRE intervening) [2001] ICR 391 Lord Hope stated at [39]: *"Nevertheless, I would have held that the claim should be struck out if I had been persuaded that it had not reasonable prospect of succeeding at trial. The time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail."*

41. In Ahir v British Airways [2017] EWCA Civ 1392 Underhill LJ stated

*"Employment tribunals should not be deterred from striking out claims. Including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context….. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success' …*

42. Deposit orders are addressed at Rule 39 of the 2013 Rules as follows:

> **"(**1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
>
> (2) The Tribunal shall 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.
>
> (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
>
> (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21."

43. The test for the ordering of a deposit is that the party has *little* reasonable prospect of success; as opposed to the test under Rule 37 for a strike-out (*no* reasonable prospect of success). Although that is a less rigorous test, the Tribunal must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim. . s stated in **Ahir** the test is not as rigorous as that which applies to strike out orders

and that an ET has a greater leeway when deciding whether to make a deposit order.

44. When determining whether to make a deposit order an Employment Tribunal is given a broad discretion. It is not restricted to considering purely legal questions. It is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case. Such orders can be made following a provisional assessment of the credibility of a party's case: Van Rensburg v Royal London Borough of Kingston-Upon-Thames UKEAT

Conclusions

45. I have concluded that the Claimant's claim for unfair dismissal should be struck out as having no reasonable prospect of success.

46. It is not contested that the Claimant was dismissed for misconduct. This is a potentially fair reason for dismissal.

47. The Claimant says however that it was unreasonable to dismiss him because he was innocent of the charges and had been set up by DP and the Respondent, who had lied and fabricated evidence.

48. The Respondent deferred any decision as to whether or not to dismiss the Claimant until after the outcome of the criminal trial was known. By the time of the Claimant's dismissal he had been convicted on the basis of a higher burden of proof that would apply in disciplinary proceedings.

49. During the hearing I asked Claimant what he knew at the time of his disciplinary hearing that he did not know at the time of the trial. The purpose of that question was to establish whether there would be additional facts or evidence before any disciplinary (or appeal) panel which would lead them to believe that the conviction was wrong or unsafe. The Claimant was unable to point any new facts or evidence - simply repeating that he was set up by the Respondent and he could not prove it at the criminal trial. He said he would point to inconsistencies in the evidence of DP, but there was nothing he knew at the time of the disciplinary hearing that he did not know at the time of his criminal trial.

50. Given the criminal conviction the chances that a Tribunal would find that the disciplinary panel did not genuinely believe on reasonable grounds that that the Claimant was guilty of assault by beating are vanishingly small.

51. The requirement to carry to a reasonable investigation is not an end in itself. It so that the employer arrives at his belief that the employee was guilty of misconduct on a fair basis. In a case where there has been a police investigation and a criminal conviction, the police investigation and conviction will be enough to establish that, in the absence of some obvious miscarriage of justice, such as new evidence coming to light, the employer arrived at their belief that the Claimant was guilty on reasonable grounds. The Claimant has not been able to point to any such miscarriage of Justice. The chances that the Tribunal would find that the Respondent did not arrive at their belief on reasonable grounds are equally small.

52. As to any procedural matters, if there had been any unfairness in the Respondent holding the disciplinary hearing in his absence such unfairness would have been remedied on appeal. The Claimant attended the appeal had an opportunity to say anything that he wanted to. His claim, essentially that he had been set up, was rejected.

The Claimant's claim for discrimination

53. During the hearing we went through the 25 separate acts alleged by the Claimant to be less favourable treatment because he was a man/black. Many of these involved allegations that the Respondent had fabricated and given false evidence against him. (see 3.2, 3.4, 3.6, 3.7, 3.8 (first half), 3.10 and 3.25.)

54. I agree with Mr Rix, that the chances of persuading a Tribunal that the criminal courts were wrong, had supported DP in her "false allegations" and set him up by fabricating the evidence against him has no reasonable prospect of success, given that a criminal court had found the allegations were not false and that the evidence established his guilt beyond reasonable doubt. It may not be wholly "impossible", but I am satisfied that the chances can be no more than fanciful i.e., that they have no "reasonable chance" of success and these claims are struck out.

55. In Ahir v British Airways 2017 EWCA 1393 the Court of Appeal said that "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment*".*

56. It benefits no-one, least of all the Claimant, proceed with claims that have no reasonable prospect of success.

57. The allegations at 3.19, 3.20, 3.21 and 3.24 all relate to the Claimant's dismissal.

58. I note that the Employment Appeal Tribunal has said that Tribunals should not strike out claims where the facts "including the reasons for the acts complained of" are in dispute. In this case while the principal reason for the Claimant's dismissal was conduct the Claimant asserts the disciplinary/appeal panel would have treated him differently if he was not black or male.

59. At present this appears to be no more than a bare assertion and I was initially of the view that the claims that Claimant's race or sex influenced the dismissal had no reasonable prospect of success.

60. However mindful of the repeated views of the appellate courts as to the dangers of striking out such claims, I decline to do so but find that the Claimant's chances of showing that a woman and or a white person who

had been convicted of the offences for which the Claimant had been convicted (or any conviction involving physical assault) would not also have been dismissed have little reasonable prospect of success.

61. Allegations 3.8 (second half) 3.11, 3.12, 3.13, 3.14, 3.15, 3.17 and 3.23 are allegations that the Respondent had discriminated against him because of his sex and/or race when it failed to deal with his complaints/grievances. It is the Respondent's case that is standard practice to defer looking at a grievance while the disciplinary process is ongoing. Nonetheless these allegations do not rely on the conviction. I cannot say that those allegations have no reasonable prospect of success without the evidence being tested. On the other hand, I do consider that they have little reasonable prospect of success. I am therefore ordering the Claimant to pay a deposit if he wants to continue those claims.

62. Issues 3.1, 3.3 and 3.5 relate to the Claimant's suspension. He says that the Respondent discriminated against him when it suspended him, (and maintained that suspension) notwithstanding his allegation that he had been attacked by DP and not the other way round. I cannot say that the Claimant has no reasonable prospect of establishing that his suspension was less favourable treatment in comparison to that of DP (it having taken place well before the charges against the Claimant were brought) I consider it has little reasonable prospect of success and I order that the Claimant pay a further £200 as a condition of advancing those contentions.

63. The remaining issues are 3.9, 3.16, 3.18, and 3.22. I have insufficient material before me to conclude that those allegations have little reasonable prospect of success. Mr Rix says that the Claimant has no reasonable chance of showing any causative link even if his case is taken at its highest. I think it is too early to make any such determination.

Employment Judge Spencer
17/11/2023

JUDGMENT SENT TO THE PARTIES ON

17/11/2023

FOR THE TRIBUNAL OFFICE

List of detriments

3.1. On 27 August 2021 asking him to refrain from attending work without giving him an adequate explanation;

3.2. Supporting DP to make false allegations against him in the family court, to the police and in criminal proceedings;

3.3. On 9 September 2021 deciding to suspend the claimant without speaking to him first and on 13 September 2021 implementing that decision notwithstanding that the claimant alleged that he had been attacked by DP and not the other way around;

3.4. Setting the Claimant up to face criminal charges.

3.5. Between 21 September 2021 and a date around 16 June 2022, maintaining the suspension despite it not being a requirement of the non-molestation order. The claimant alleges that the respondent could at the very least have considered redeploying him rather than continuing his suspension;

3.6. Leigh Chislett including fabricated information in the risk assessment he conducted on 5 October 2021;

3.7. James Hardie conducting a biased investigation and creating an investigation report which was false, designed to incriminate the claimant, and which the police relied on. Also, Jamie Hardie creating two different versions of the same report, one for the Claimant and the other for the Respondent.

3.8. The claimant also complains that the pre-investigation checklist contained fabrications and was not signed and that his complaints about this made in June 2022 were not addressed;

3.9. not ensuring the claimant was allocated a non-partial 3rd party during the investigation as required by the respondent's disciplinary policy;

3.10. DP, Leigh Chislett and Debbie Mina providing James Hardie with false information during the investigation process;

3.11. in May and early June 2022, Cynthia Ukwanwa failing to address the claimant's complaints about his ongoing suspension and did not want to receive evidence that DP attached the Claimant.

3.12. Cynthia Ukwanwa's conduct in the meeting with the claimant on 16 June 2021. The Claimant claims that she was biased against him, did not properly consider the points he made, and refused to provide answers the Claimant was entitled to;

3.13. failing to deal with the correspondence from and the complaints made by the claimant made on 5 July 2021 to Vivienne Heaslip and on 8 and 12 July 2021 to Samson Dealyn;

3.14. failing to open a grievance case on receipt of the OH report in July 2022;

3.15. failing to treat the claimant's email of 30 August 2021 as a grievance;

3.16. on or around 12 September 2022, the respondent reporting the claimant to the police for stealing works property;

3.17. Alex Harvey' and Vivien Heaslip's failure to treat the claimant's email of 3 October 2022 as a grievance, despite this being the third time Vivien Heaslip had received such an email;

3.18. not responding properly to the Claimant's subject access request, but instead cherry-picking the information provided to him in response to it;

3.19. conducting the disciplinary hearing in the Claimant's absence whilst he was off sick and provided a sick note;

3.20. dismissing him;

3.21. Vivienne Heaslip failing to address the claimant's complaints of discrimination before making the decision to dismiss the claimant;

3.22. taking steps to prevent the claimant from working with vulnerable adults before and after his dismissal;

3.23. Chris Higgs failing to consult the Claimant in connection with the investigation into his complaints of discrimination (report dated 9 May 2023) and not upholding his complaints, and general failure to follow the Respondent's grievance policy;

3.24. failing to uphold the Claimant's appeal against his dismissal, including ignoring his evidence, and not accurately reflecting what the Claimant said, making the appeal outcome letter misleading.

3.25. Representing to the Claimant that the Respondent were independent from the police but were actually in collaboration with them supporting DP against the Claimant.