



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Deen

**Respondent:** Derby Homes Limited

**Heard at:** Tribunals Hearing Centre, 50 Carrington Street, Nottingham,  
NG1 7FG  
Hybrid Hearing

**On:** 20 June and 12 August 2024

**Before:** Employment Judge McTigue (sitting alone)

## Representation

**For the claimant:** On 20 June 2024 - Mr Deen, supported by Mr Kosa Ali  
On 12 August 2024 – Did not attend and was not represented

**For the respondent:** Mr Bheemah of Counsel (on both dates)

**Official Interpreter:** Ms Khanum via CVP

# JUDGMENT

1. The complaint of unfair dismissal is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success.

# REASONS

## Introduction

1. This was the second preliminary hearing. It had been listed to by EJ Clark on 2 May 2024 in order:
  1. To finalise the issues in the claim.
  2. To consider whether to grant permission to amend the claimant's claim where necessary.
  3. To consider whether any part of the claim has little reasonable prospect of success and if so, whether a deposit should be imposed as a condition of the claim being permitted to continue.

4. To consider whether the claim has no reasonable prospect of success and if so, whether it should be struck out.
  5. To make further case management orders
2. The matter was initially listed for a 3-hour public preliminary hearing on 20 June 2024. The claimant attended on that date and was assisted by his cousin, Mr Kosa Ali. He was also assisted by an official interpreter. It was confirmed at the outset of that hearing that the claimant and interpreter could understand one another. Despite the best efforts of all involved, that hearing went part heard. That was partly due to the additional time need to enable a fair and accurate translation to take part for the benefit of all in attendance.
  3. The part heard matter was listed again for 12 August 2024. That date was set with the agreement of all those in attendance at the hearing on 20 June 2024. The claimant did not attend on 12 August 2024. He contacted the Tribunal just after 9am on that date seeking a postponement on medical grounds. No medical evidence was attached. In the absence of medical evidence, I refused the claimant's application and warned him via email that his claim could be dismissed or the matter could proceed in his absence. The claimant was also informed that the hearing would proceed as normal.
  4. As there was no sign of the claimant at the time the hearing was due to commence, my clerk telephoned him. He confirmed to her that he was not attending. I decided to proceed in the claimant's absence.
  5. For completeness, I should record that prior to today the claimant has contacted the Tribunal on a number of occasions seeking to have today's hearing postponed. His application was based on the fact that his cousin, Mr Kosa Ali, was on holiday today and he wished to have Mr Ali in attendance. That application was refused by EJ V Butler on 2 August 2023.

## **Issue**

6. The respondent did not seek either a strike out or deposit order application in respect of any of the claimant's other complaints. Consequently, the essential issue that this judgment relates to is consider whether the complaint of unfair has no reasonable prospect of success and if so, whether it should be struck out.

## **Procedure and documents**

7. The bundle of documents had been updated to include additional documentation from both parties. The effect of this is that today, I had before me a respondent's bundle of documents running to approximately 282 pages, plus a claimant's bundle of documents running to approximately 101 pages.
8. The respondent made an application to strike out the claimant's complaint of unfair dismissal on the grounds that it has no reasonable prospect of success. In the alternative, if that failed, the respondent made an application that a deposit be imposed as a condition of the unfair dismissal claim

being permitted to continue on the grounds that it has little reasonable prospect of success.

9. I heard the respondent's application during the hearing on 20 June 2024. The claimant responded in part but was intended to address me more fully on this matter on 12 August 2024. As he was not present on that date, I carefully considered the papers he had submitted together with the points he had made at the earlier hearing on 20 June 2024 reaching a decision.

## **Law**

10. A tribunal may strike out all or part of a claim or response on the grounds that (inter alia) it has no reasonable prospect of success (Rule 37(1)(a) Employment Tribunal Rules of Procedure 2013 (ET Rules)).
11. When considering whether to strike out an argument, a tribunal must apply a two-stage test and consider: (1) whether any of the grounds set out in rule 37(1)(a) to (e) have been established; and (2) whether to exercise its discretion to strike out (see **Hasan v Tesco Stores Ltd UKEAT/0098/16**).
12. The threshold for striking out a claim for having no reasonable prospects of success is high. In **Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330**, the CA held that where there are facts in dispute, it would only be "very exceptionally" that a case should be struck out without the evidence being tested. In **Balls v Downham Market High School & College UKEAT/0343/10**, the EAT held that it is a power that should be exercised only after a careful consideration of all the available material, including the evidence put forward by the parties and the documentation on the Tribunal's file. However, neither of these statements is to be taken as amounting to a fetter on the tribunal's discretion, per **Jaffrey v Department of the Environment, Transport and the Regions [2002] IRLR 688** at paragraph 41, EAT).
13. In **Ahir v British Airways plc 2017 EWCA Civ 1392**, the CA stated that tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of success, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored.
14. The EAT issued guidance on how tribunals should deal with litigants in person and strike out applications in **Cox v Adecco and others EAT/0339/19**. It was stated that litigants in person should not be expected to explain their case and take the judge to relevant materials, rather the onus is on the judge to consider the pleadings and other core documents that explain the case. The tribunal must take reasonable steps to identify the claims and issues; it is not possible to decide whether a claim has reasonable prospects of success if the tribunal does not know what the claim is. The parties' roles were clarified: legally represented respondents are required to assist the tribunal in identifying documents which set the claim out and claimants should attempt to explain their claims clearly and focus on core claims rather than trying to argue every conceivable point.

15. In respect of unfair dismissal complaints, it is the employer who must show that misconduct was the reason for dismissal. According to the EAT in **British Home Stores Ltd v Burchell 1980 ICR 303, EAT**, a three-fold test applies. The employer must show that:
1. it believed the employee guilty of misconduct
  2. it had in mind reasonable grounds upon which to sustain that belief, and
  3. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

This means that the employer need not have conclusive direct proof of the employee's misconduct — only a genuine and reasonable belief.

## **Conclusions**

16. The claimant was dismissed for gross misconduct by the Respondent on 26 May 2023. A copy of his dismissal letter appears at page 235 of the respondent's bundle. That letter outlines the 4 allegations of misconduct against the claimant. The letter also contains a summary of the reasons why each allegation was upheld. Allegation 1 related to the claimant taking 19 days of unauthorised leave when he travelled to Bangladesh in September 2022. Allegation 2 related to the claimant allowing family members including a young child, to access restricted areas within the respondent's premises. Allegation 3 related to the claimant allowing his family members to access the respondent's CCTV system. Allegation 4 related to the claimant taking unauthorised breaks and inaccurately recording his working time and failing to fulfil his contractual working hours. The letter demonstrates that over the course of 7 days the claimant allegedly took 23 hours and 40 minutes of unauthorised breaks and recorded his time inaccurately on the respondent's software computing system.
17. The letter also provides the specific dates in relation to the allegations contained at allegation 4 and summarises the reasons the claimant gave for taking such breaks. Those reasons were found by the respondent not to be believable or credible. The letter also outlines a further serious issue which came to light in respect of the claimant's conduct, at page 243 of the respondent's bundle, namely that he left his cleaning trolley unsupervised for 2 hours whilst working at the respondent's premises. On his cleaning trolley were dangerous chemicals which in the respondent's opinion could cause harm or damage to its vulnerable service users. I should at this point make clear that the claimant works at the respondent's Milestone House site. The Milestone House site houses vulnerable single homeless people and provides support services until suitable move on options are available for those individuals. The residents of Milestone House include individuals with very complex needs who can demonstrate extremely volatile and violent behaviour. Individuals residing at Milestone House also often have drug and alcohol addictions or mental health issues.
18. The claimant's dismissal letter clearly set out, at page 244 of the respondent's bundle, that the claimant had a right of appeal and clearly set out what the claimant had to do in order to exercise that right. Of note is the claimant's letter that he wrote to Mrs Murphy of the respondent on 19 June 2023. In that letter he sets out the reasons why he wishes to appeal against his dismissal and states that he believes his dismissal was mainly due to

domestic violence he had experienced at that point in time and the fact that his “performance was not as it should have been”. That letter appears in the respondent’s bundle at page 248. The claimant’s letter of 19 June 2023 is quite telling as the claimant clearly accepts in his letter that his performance was not as it should have been around the time of his dismissal.

19. However, setting the letter of 19 June 2023 aside, how did the respondent form their belief that the claimant was guilty of misconduct? To address this, I turn to the minutes of the disciplinary meeting which the Claimant attended on 25 May 2023. Those minutes start at page 207 of the respondent’s bundle. At that meeting, the claimant was present, there was also a translator present for the claimant and a union representative in attendance. The allegations against the claimant were clearly outlined and explained to the claimant at that meeting. From page 209, it is apparent that the allegations in respect of unauthorised annual leave were explained to the claimant. It was also put to the claimant that upon his return from Bangladesh he had admitted to a member of staff that despite what he had earlier asserted, there was no family emergency and he travelled at that point in time because of cheap flights. The claimant said this was merely a joke at the disciplinary hearing. At the hearing, the respondent explained to the claimant that although it was decided to retrospectively grant him annual leave, that did not detract from the fact that he was on unpaid and unauthorised absence between 18 September to 7 October. It was also explained to him that he had failed to comply with reasonable management instructions, failed to follow the correct process for requesting leave and failed to ensure that the respondent was able to comply with the necessary levels of health and safety in the cleaning of the building. The respondent also outlined the policies breached by the claimant. This is documented at page 217 of the respondent’s bundle.
20. On page 218 of the respondent’s bundle, it is apparent that the respondent clearly explained the allegation in respect of the claimant allowing family members to access a secure and restricted area in Milestone House. It was explained to the claimant that this could have resulted in a serious breach of GDPR. The family members consisted of the claimant’s wife, the sister of the claimant’s wife, that sister’s husband and their 3-year-old child. The minutes of the hearing also demonstrate that the claimant admitted to bringing his family into the administration office at Milestone House, which was a restricted area. The respondent deemed the presence of the 3 year old child to be particularly problematic given that the building housed individuals with complex needs and vulnerabilities. On page 222 of the respondent’s bundle, the claimant admitted that he did not realise the amount of problems this would cause but if he had realised, he would not have done it. This is a clear admission of guilt by the claimant.
21. The 3<sup>rd</sup> allegation was then discussed with the claimant, that being that he accessed the CCTV system at Milestone House which should only be accessed by employees in line with the respondent’s Policies and Procedures. He also showed associated CCTV images to his family. This occurred whilst his family members were in the restricted area of Milestone House. On page 225 of the minutes in the respondent’s bundle, the claimant admitted that his family fully saw the CCTV screens in question. Also within the minutes, at page 225, the claimant described his actions as a mistake and stated that he wanted to get a lawyer as it was getting too serious now.

On page 226, he described his actions as "*my accident and mistake*". Again, this is a clear admission of guilt by the claimant.

22. In relation to Allegation 4, that being that the claimant took unauthorised breaks and inaccurately recorded his time, this is dealt with and outlined to the Claimant from page 228 of the respondent's bundle onwards. The respondent clearly explained to the claimant that they had obtained reports regarding his leave from KMS, a company who maintain the door entry system at Milestone House. That door entry system indicates when doors open or close by means of use of key fob. At the hearing, the claimant was taken through the report from KMS which showed that he had been taking lengthy breaks and not recording them appropriately on his timesheets. The claimant gave an explanation for such breaks including the fact that he stated he was completing E-Learning courses. The respondent noted that the E-Learning courses that the claimant was undertaking were not relevant to his job. The respondent found the claimant's explanation to be not credible.
23. There was then a short break after which the claimant was informed that each of the 4 allegations against him had been upheld and that he was to be summarily dismissed.
24. I now turn to the question of whether the respondent had carried out as much investigation into the matter as was reasonable in the circumstances. A comprehensive investigation report was compiled by the respondent, it starts at page 139 of the respondent's bundle and contains 12 appendices. It set out the background to all the allegations against the claimant and the methodology used. It ultimately concluded that the matter should proceed to a disciplinary hearing. Dealing with a number of the appendices to this report, Appendix 2 is a statement from Frankie Baker of the respondent regarding the claimant's unauthorised annual leave. Appendix 3 at pages 155 to 161 of the respondent's bundle, contain a series of WhatsApp messages received from the claimant regarding his unauthorised annual leave.
25. Appendix 4 at page 164 of the respondent's bundle contains a letter to the claimant advising him of the allegations against him, which at that point in time were constrained to 3 allegations, and invited the claimant to an investigation meeting which was to be held on 7 November 2022. The fourth allegation in respect of the claimant's conduct only came to light during the investigation itself and that explains why it is absent from this letter. The claimant was informed in this letter that he was urged to seek support from a trade union representative or that he could seek support from a workplace colleague. He was also informed that he could access the respondent's Employee Assistance Scheme and informed that if he had any particular health issue which he thought the respondent should be aware of, he should inform the respondent as soon as possible.
26. Appendix 5, which starts at page 164 of the respondent's bundle, contains the minutes of the investigation meeting which took place on 7 November 2022. It is apparent from those minutes that the claimant had an interpreter present and that the, then, 3 allegations were clearly outlined and explained to him in full.
27. Appendix 6, which appears at page 170 of the respondent's bundle, contains an email from Dave King of the Respondent who provided a

statement regarding the incident when the claimant's family entered unauthorised areas of the respondent's premises and the claimant accessed the CCTV system.

28. Appendix 7, which appears at page 171 of the respondent's bundle, outline the statements provided by 3 members of staff of the respondent in relation to the Claimant allowing his family member to access unauthorised areas of the respondent's premises and also the claimant's unauthorised use of CCTV. Statements were obtained from Dave King, James Peel and Paul Birch.
29. Appendix 8 is an email from Frankie Baker, of the respondent who had emailed their manager to inform that manager that the claimant had allowed his family to enter a restricted area.
30. Appendix 9, which appears at page 175 of the respondent's bundle, contains the minutes of a further investigation meeting which took place with the claimant on 27 January 2023. This investigation meeting was to deal with the new allegation which had now come to light i.e. that the claimant was taking unauthorised breaks and falsifying his time records.
31. Appendix 10, at pages 186 to 193 of the respondent's bundle, contains the key fob data which demonstrates when the claimant was accessing specific rooms within the respondent's premises.
32. Appendix 11 is a letter which invites the claimant to a further investigation meeting in respect of Allegation 4. Appendix 11 appears at page 194 of the respondent's bundle and the claimant is again informed in that letter that he could be accompanied by a trade union representative or fellow employee. The claimant is also informed that disciplinary proceedings may follow pending the outcome of the investigation. In addition, he is asked to let the respondent know if he requires any reasonable adjustments and he is again informed of the respondent's Employee Assistance Scheme.
33. There was then a delay in moving from the second investigation meeting, which took place on 27 January 2023, to the disciplinary meeting, which took place on 25 May 2023. This was due to the fact that the claimant was in Bangladesh between 2 February 2023 until 17 March 2023.
34. Returning to the claimant's dismissal, the claimant did indicate he would appeal his dismissal in a letter. That letter of 19 June 2023, which was discussed earlier, can be found at page 248 of the respondent's bundle. In his letter he states that he was suffering from domestic violence and that therefore his performance was not as it should have been. In light of that, the claimant was invited to set out the grounds for his appeal in writing by means of an email from Maria Murphy of the respondent dated 21 June 2023 (page 250 of the respondent's bundle). Although the claimant's appeal had been received by the respondent outside of the prescribed time frame, Ms Murphy extended the deadline for the claimant to provide additional information. That deadline was extended until Monday 26 June 2023. Despite sending two additional emails, the claimant failed to outline his grounds of appeal with any clarity, with the effect that Miss Murphy informed the claimant on 26 June that as he had not provided the grounds of dismissal that he wished to appeal or the additional information on which he wished to base his appeal, that she was not able to arrange an appeal

hearing. A copy of that email appears at page 253 of the respondent's bundle.

- 35. I am mindful that the Tribunal's role at a preliminary hearing is not to conduct a mini-trial and that like the case of **Niedzielska v Faccenda Foods Ltd EAT 0140/20, EAT** the Claimant here also requires the use of an interpreter. Even taking those factors into account I am satisfied that one of the grounds set out in Rule 37(1)(a) had been established, i.e. that the complaint of unfair dismissal has no reasonable prospect of success.
- 36. In respect of the unfair dismissal complaint, the burden rests with the employer to show:
  - 1. it believed Mr Deen was guilty of misconduct
  - 2. it had in mind reasonable grounds upon which to sustain that belief, and
  - 3. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

I am satisfied that the respondent will be able to establish all three limbs of the **Burchell** test if the matter were to proceed to a final hearing. I make that conclusion even after taking the claimant's unfair dismissal complaint at its highest. The claimant's case is severely undermined due to the admissions he made during the disciplinary meeting held on 25 May 2023, It is also undermined by the acknowledgement in his letter of 19 June 2023 where he freely admitted his performance was not as it should have been. It appears the respondent had an honest belief, based on reasonable grounds and that it had carried out a reasonable investigation. The respondent also appears to have met its obligations under the ACAS code. The claimant's complaint therefore has no reasonable prospect of success.

- 37. As the respondent has demonstrated that one of the grounds set out in Rule 37(1)(a) had been established, I now consider whether to exercise my discretion to strike out the complaint of unfair dismissal. Taking into account the overriding objective, I am satisfied that the complaint of unfair dismissal should be struck out. As the complaint has no reasonable prospect of success, striking out the case now would save both parties time and expense. The complaint of unfair dismissal is therefore struck out.

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Employment Judge McTigue

Date: 12 August 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....23 August 2024.....

.....  
FOR THE TRIBUNAL OFFICE



**Notes**

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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