



EMPLOYMENT TRIBUNALS

Claimant: Mr Sandor Pal

Respondent: Tech Mahindra Limited

Heard at: Manchester (in private; by CVP)

On: 27 August 2024

Before: Employment Judge McDonald (sitting alone)

Representatives

For the claimant: In person

For the respondent: Miss R Owusu-Agyei (Counsel)

JUDGMENT

1. The respondent's application to strike out the claimant's complaints under Employment Tribunal Rule 37(1)(a) because they have no reasonable prospect of success is refused.
2. The respondent's application to strike out the claimant's complaint that the respondent made unauthorised deductions from his commission payments under Employment Tribunal Rule 37(1)(c) because the claimant has not complied with the Tribunal Rules or a Tribunal order is refused.

REASONS

Introduction

1. On 27 August 2024 I conducted a public preliminary hearing in this case. It was conducted remotely by CVP. At that hearing I heard the claimant's application to amend his claim to add a victimisation claim under s.27 of the Equality Act 2010. I also heard the respondent's application to strike out or for deposit orders in relation to all or some of the claimant's complaints.

2. I have decided to refuse the respondent's strike-out applications. I explain my reasons below. I have decided to make deposit orders in relation to 2 of the claimant's complaints. I have set out my reasons for doing so in the deposit order. The judgment, deposit order and case management order should be read together. In my case management order I made an unless order in relation to the claimant's complaint about deductions being made from his commission payments.

Summary of the Case and complaints brought

3. The claimant was employed by the respondent from 12 December 2022 as a Sales Executive. His employment was subject to a six-month probationary period. The claimant was absent from work for a period of 9 weeks from midlate June 2023. His probationary period was extended. The respondent's case is that the probation was extended on 1 August 2023 until 2 October 2023.
4. It is agreed that the claimant was off sick from work from 21 September 2023 until 16 October 2023 when he was dismissed. The respondent says that the dismissal was for serious misconduct because the claimant had said he was off sick but had told colleagues in messages in a team meeting that he was flying to Los Angeles in relation to a new job or business venture.

The automatically unfair dismissal complaint

5. The claimant says that the real reason for his dismissal was that he had applied for and on 20 September 2023 been granted a request to take paternity leave in March 2024 when his wife was due to give birth to their son. The respondent disputes that that application for paternity leave had been made by the claimant. At the previous preliminary hearing conducted by Employment Judge Ross, that complaint was identified as one that the respondent had automatically unfairly dismissed the claimant in breach of section 99 of the Employment Rights Act 1996 for a reason connected with his requesting paternity leave.

The unauthorised deduction complaints

6. The claimant also brings two complaints of unauthorised deductions from his wages.

Unauthorised deduction of commission

7. The first is that the claimant says that the respondent made unauthorised deductions from his commission throughout the period of his employment with it.
8. By a letter dated 4 March 2024 the Tribunal directed that the claimant provide a breakdown of the monies he said were owed to him. At the case management preliminary hearing on 16 April 2024 the claimant was ordered

by Employment Judge Ross to provide a breakdown of the commission he says was payable and the amount he was actually paid, identifying the shortfall. He was to do that by 30 April 2024. The claimant accepted at this hearing that he had not done so. The claimant said that the reason he had not done so was that he did not have access to his payslips. As Miss OwusuAgyei pointed out, he did not raise that matter at the previous preliminary hearing. The result of the claimant not providing that information (and not requesting the payslips from the respondent to enable him to do so) is that the respondent still does not know what amounts the claimant says he should have been paid by way of commission and what amount he was actually paid so that the alleged unauthorised deduction can be identified.

Unauthorised deduction from October 2023 pay

9. The second unauthorised deductions complaint relates to a deduction from the claimant's final wages of £2,275. The respondent accepts that there is a deduction of that amount on the claimant's October payslip. It is referred to as "loss of earnings". The respondent's case is that the deduction was a correction of the claimant's wages to take into account the fact that he should have been paid statutory sick pay only from 21 September 2023 until 16 October 2023. It says that the deduction was necessary because it had paid the claimant his full pay for September 2023. The respondent does accept that it deducted too much from the claimant's pay for October 2023. The respondent accepts that it deducted 37 days and the claimant was absent sick for 26 days. The respondent says that in addition to deducting too much full pay, the claimant was overpaid sick pay because he was paid for 37 sick days. The respondent says it should have deducted £1604.98 to account for the difference between the full pay the claimant received in September and the amount he would have received in October by way of full pay. It spotted this error after the event and in January 2024 it paid the claimant the difference which it calculated as £210.87. That calculation was set out at page 83 of the preliminary hearing bundle.
10. At the hearing, Miss Owusu-Agyei accepted that the respondent had made an unauthorised deduction from the claimant's wages in October 2023 by over-deducting the amount due. It had, however, paid the claimant the difference in January 2024. In the circumstances I indicated that it seemed to me open to a Tribunal to make a declaration that there had been an unauthorised deduction from the October 2023 wages. If the respondent's case was correct that it had repaid the amount of the deduction in January 2024, however, then no order for payment would be made because the conditions in section 25(3) of the Employment Rights Act 1996 were satisfied, i.e. the respondent had re-paid the claimant the amount it had deducted.
11. The claimant disputed the respondent's explanation for the deduction of £2,275. Although he accepted that his entitlement to pay was to sick pay only from 21 September 2023 until 16 October 2023, the claimant suggested that the amount deducted also included an amount of commission deducted.

Proposed amendment to add a claim of victimisation

12. At the preliminary hearing I considered an application by the claimant to add a claim of victimisation under section 27 of the Equality Act 2010. I rejected that application to amend. That means that the only complaints forming part of the claimant's claim (subject to payment of the relevant deposits) are the complaints of automatically unfair dismissal and the two complaints of unauthorised deductions.

The Hearing and Evidence

13. The respondent had prepared a preliminary hearing bundle of 96 pages. Both parties produced written submissions. The claimant initially objected to the inclusion in the bundle of some evidential documents. The respondent had included those documents in support of its application to strike out some or all of the claimant's complaints on the basis that they had no reasonable prospect of success.
14. I explained to the claimant that the case law authorities confirm that one example of when a case may be struck out as having no reasonable prospect of success is where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The respondent is allowed to include the evidential documents to try and show that inconsistency.
15. I adjourned the hearing for an hour to allow the claimant to read the documents in the bundle. Having done so, the claimant confirmed that he was able to proceed with the hearing. Having heard the claimant's evidence in support of his application to amend I then heard Miss Owusu-Agyei's submissions objecting to that application to amend. I then heard her submissions in support of the application for strike out or for deposit orders. After the lunch break I heard the claimant's submissions on the application to amend and the strike out and/or deposit applications. I heard unchallenged information from the claimant about his financial circumstances which I would need to take into account if I decided to make a deposit order.
16. By that time, there was no time to give my decision and so I reserved that decision. Because the final hearing in the case is listed for 2-4 November 2024 Employment Judge Ross had made Case Management Orders. As I explain in the case management order, I varied some of those orders to allow time for the claimant to respond to any deposit order that I made.
17. One feature of the claimant's submissions which Miss Owusu-Agyei pointed out in her reply was the inconsistency in the way he put forward his own case. The claimant in his submissions in response to the strike out and deposit order applications made various assertions, including that the decision maker who decided to dismiss him and the respondent's solicitor were "malicious". After I explained to him the seriousness of that allegation in relation to the respondent's solicitor, the claimant withdrew it.

Relevant Law

18. Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 ("the ET Rules") gives the Tribunal the power to strike out all or part of a claim on the grounds it has no reasonable prospect of success.
19. Rule 37(2) says that a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
20. Caselaw provides guidance on the exercise of this power:
 - a. It will only be in an exceptional case that a complaint will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation (**Ezsias v North Glamorgan NHS Trust [2007] I.C.R. 1122, Court of Appeal**).
 - b. A Tribunal should not be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person (**Mbuisa v Cygnet Healthcare Ltd UKEAT/0119/18/BA EAT**).
 - c. The Tribunal should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents (**Mbuisa**).
21. In **Ahir v British Airways Plc [2017] EWCA Civ 1392**, Lord Justice Underhill gave guidance as to the correct approach in cases where a Tribunal is deciding whether to strike out a claim:
 - a. An Employment Tribunal 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.
 - b. Whether the necessary test is met in a particular case depends on an exercise of judgment. It may not be assisted by attempting to gloss the language of the rule by reference to other phrases found in the authorities such as 'exceptional' and 'most exceptional'
 - c. However, 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'.

- d. Where there is an ostensibly innocent sequence of events “there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she was or at least may have been the real story, albeit that they are not yet in a position to prove it”.

22. When it comes to striking out for non-compliance with a Tribunal order under Employment Tribunal Rule 37(1)(c), in **Weir Valves and Controls (UK) Ltd v Armitage (2004) ICR 371** the Employment Appeal Tribunal held that:

"it does not follow that a striking-out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties.

The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience.'

Repeated non-compliance is to be deprecated, and it may give rise to a view that if further indulgence is granted, the same will simply happen again: see Harris at paragraph 26."

23. In assessing the prospects of success, it is necessary to consider what the claimant will have to prove for his complaints to succeed:

- a. In relation to the unfair dismissal case where, as in the claimant's case, an employee has not completed sufficient service to claim "ordinary" unfair dismissal (currently two years), the claimant has the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason: **Smith v Hayle Town Council 1978 ICR 996 CA**.
- b. In order for a complaint of unauthorised deduction from wages to succeed, a worker has to show an actual legal, although not necessarily contractual, entitlement to the payment in question in order for it to fall within the definition of "wages" in s.27 of the Employment Rights Act 1996 (**New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA**).

The strike out applications

24. The respondent applies to strike out all the claimant's complaints. I deal with each complaint in turn.

The complaint of automatically unfair dismissal

25. For this claim to succeed the claimant will need to show that his request for paternity leave was the reason or principal reason for dismissal. The respondent says that there is no reasonable prospect of him doing so.
26. First, it says the claimant's assertion that the claimant made a request for paternity leave which was granted by Mr P Duffy (Operations Manager) on 20 September 2023 is inconsistent with the documentary evidence. At pp.9296 of the preliminary hearing bundle it included screenshots of search results from its AMS leave request system and its PACE HR system, neither of which showed a request for paternity leave from the claimant. Miss Owusu-Agyei also submitted that no such request for paternity leave would have been granted because it was inconsistent with the respondent's paternity leave policy. The MATB1 confirming the claimant's wife's due date (p.77) was not provided until 21 November 2023 (dated 21 November 2024, but it must have meant 2023). She submitted that paternity leave would not have been granted without it.
27. It is the case that the AMS and PACE search results do not show the claimant's paternity leave request. It was not clear on their face whether the "date range" searched (which ended on 16 October 2023) referred to the date of the request or the date when the leave was due to be taken. The paternity leave was in March 2024 so outside the date range searched if the latter was the case. It is the respondent's case that the date range searched referred to the date of request but by the nature of this hearing, there was no evidence to confirm that. I do note that the search results do not appear to show all the claimant's absences during his period of employment, because they do not show the claimant's sickness absence from 21 September 2023-16 October 2023. When it comes to this part of his case (unlike others) the claimant's allegation is specific. He names the person who he says authorised the leave and the specific date it was authorised. That specificity adds plausibility to his assertion.
28. When it comes to Miss Owusu-Agyei's submission about the MATB1 not being available when leave was requested, the extract from the respondent's policy does not on its face categorically require provision of the MATB1 as a pre-condition of being granted paternity leave. It says the respondent "at its own discretion may ask the associate to submit the medical certificate as proof". Even assuming that refers to the provision of a MATB1, it does not on its face mean paternity leave would not be granted without a MATB1 but rather refers to a discretion to request that form.
29. The position then is that there is a factual dispute as to whether the paternity leave was requested and granted and I have to take the claimant's case at its highest. Because of my doubts as to the conclusive nature of the search results, I cannot say that the claimant's assertion to have sought and been granted paternity leave is totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

30. The second challenge by the respondent is to the link between the granting of any paternity leave and the decision to dismiss. For the unfair dismissal complaint to succeed, the claimant will have to show that his request for paternity leave was the reason or principal reason for dismissal. A key element of that is showing that the decision maker who decided to dismiss him was aware of the paternity leave request. In his grievance correspondence with Nisha Akhtar who made that decision, the claimant appeared to accept that Misha Akhtar did not know about the paternity leave (see page 80 of the bundle). The claimant at one point in this hearing suggested that that document setting out his grievance in the bundle had somehow been doctored or misrepresented. It is his own document and I do not find that suggestion plausible. It does seem to me that as at November 2023 that document suggests the claimant accepted that Nisha Akhtar may not have knowledge of his request for paternity leave. At this hearing the claimant changed position. He said that the request for paternity leave would have been known to Nisha Akhtar because he is a senior HR person and would therefore have been well aware of the request. The claimant did not suggest that he was aware of documentary evidence which would substantiate that.
31. I do accept it is plausible that when conducting a probationary review and deciding whether to dismiss an employee the dismissing manager (especially an HR manager) would have access to the claimant's HR file which could be expected to include any approved paternity leave request. Whether Mr Akhtar actually knew of the request (assuming there was one) is not something which is established by the documentation before me. I have to take the claimant's case at its highest even if the documentation to establish his assertions are not before me.
32. In assessing the prospects of success I also need to take into account the reason put forward by the respondent for the claimant's dismissal, which is that he had misled the employer as to the reason for his absence from 21 September 2023. Having told the respondent that he was off sick the respondent said the claimant messaged a colleague to say that he was actually going to Los Angeles on business in relation to a new job and would be getting a sick note to explain his absence. There were no copies of the relevant Teams messages in the bundle although they are quoted in the respondent's response. The claimant did not accept that he had sent those messages and in their absence from the bundle that is a fact which remains in dispute.
33. Although it seems to me that this is a very borderline case I have ultimately decided that I cannot say there is no reasonable prospect of the claimant establishing that his dismissal was for a reason or principal reason connected with his taking paternity leave. The respondent's evidence that no request was made is not conclusive because of the doubts I have mentioned. I cannot say there is no reasonable prospect of the claimant establishing the link between any paternity request and his dismissal. Given the high hurdle to be

surmounted before strike out on the prospects is justified, I find the application to strike out this complaint fails.

34. I have, however, made a deposit order in relation to this complaint.

The unauthorised deductions from the commission the claimant says he was payable

35. I had very little information or evidence before me about how the commission scheme worked, what the claimant had been paid and what he was entitled to. That was partly because the claimant has not provided the further information about this complaint which he has been ordered to. It is partly because the respondent's preliminary hearing bundle did not include the claimant's contract of employment nor any other documentation about the commission/incentive scheme. There was at page 52 of the bundle an email from the respondent to the claimant saying that the commission was discretionary and explaining that when an employee was off sick there would be deductions from their commission. The email was somewhat cryptic, referring to "P1" being a 50% deduction and "P2" being a 100% deduction. The claimant's case was that "P1" stood for penalty. Miss Owusu-Agyei did not have instructions on that point. The claimant also asserted that this contract of employment guaranteed a minimum salary of £35,000 per annum made up of basic pay and incentives.

36. In the absence of evidence about what the claimant's contract says and how the commission scheme worked, I cannot say that there is no reasonable prospect of the claimant establishing that there was an unauthorised deduction from wages. The strike out application under Employment Tribunal Rule 37(1)(a) is refused. Even if the scheme is ostensibly discretionary, it will be subject to implied terms of reasonableness. There is simply not enough information to hand for me to assess the prospects of success with enough certainty as to justify making a strike out order. For the same reason I cannot with certainty say there is little reasonable prospect of success and I do not make a deposit order in relation to this complaint. To be clear, that is not because I have assessed the complaint as having more than "little reasonable prospect of success" – I simply do not have the information and evidence to carry out the assessment.

37. Miss Owusu-Agyei submitted there would also be grounds for striking out this complaint because the claimant had failed to comply with Employment Judge Ross' order to provide details of his commission complaint. The claimant accepted that he had failed to do so. He only at this hearing put forward the explanation that he did not have the payslips he needed in order to carry out the calculations. I have considered whether the claimant's failure justifies striking out the claimant's complaint. The case law tells me that in order to strike out a complaint for non-compliance I must be satisfied not only that there has been non-compliance with a Tribunal order (which I do find in this case) but also that a fair hearing of that complaint is not possible and that striking out would be proportionate.

38. In this case I have decided that a fair hearing is still possible if the claimant provides the information required before witness statements are due to be exchanged. I refuse the application for a strike out of this complaint under rule 37(1)(c). I have, however, in my Case Management Order made an unless order ordering that the claimant provide a breakdown of the amount he is claiming. I have explained why in my case management order. I have also ordered the respondent provide him with copies of his payslips. If the claimant does not comply by the date ordered, his complaint of unauthorised deduction relating to his commission will be dismissed without further order.

The unauthorised deduction of £2,275 from the claimant's October pay

39. I have explained the respondent's explanation for this deduction in my case summary. It says it merely reflected the respondent recouping full pay paid to the claimant which he should not have received because he should have been on statutory sick pay.
40. I considered carefully whether to strike out this part of the claimant's complaint. As I have said, the respondent accepts it deducted more than it should have. In one sense, the claimant's complaint has prospects of success because there was an over-deduction. There are good prospects of a deduction to that effect being made. However, the respondent says that overdeduction is of £210.81. The complaint's case is that there has been an unauthorised deduction of £2275. It seems to me that I am assessing the prospects of the claimant's allegation that there was an unauthorised deduction of that amount.
41. The claimant's contract of employment was not in the preliminary hearing bundle, so I do not know what his terms of employment were nor in what circumstances the respondent was allowed to make deductions. The respondent's explanation for its deduction is plausible and the calculation included in the preliminary hearing bundle seems on the face of it to make sense. The claimant accepts that he was only entitled to be paid statutory sick pay for the period 21 September to 16 October 2023.
42. On the other hand, as the claimant pointed out, the bundle did not include a September 2023 payslip. I therefore had no way of knowing how much the claimant had been paid in September 2023. That means I am unable to assess whether the "corrected" deduction of £1604.98 reflected any overpayment in September. The most I can see is that it seems about right.
43. In the absence of the contract of employment and the September 2023 payslip I do not find that I can say there is no reasonable prospect of the claimant succeeding with his complaint that the deduction of £2275 was an unauthorised deduction. I have, however, made a deposit order in relation to this complaint.
44. In those circumstances I also reject the application to strike out this complaint.

Employment Judge McDonald

Date: 2 September 2024

JUDGMENT AND REASONS
SENT TO THE PARTIES ON

3 September 2024

FOR THE TRIBUNAL OFFICE