Case No: 2217777/2024

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Sullivan**

Respondent: **RTC Education Limited**

Heard at: London Central by CVP

Before: Employment Judge Millns

Appearances:

For the Claimant: in person

For the Respondent: Mr Mizan-ur Rahman (Deputy Director of People)

JUDGMENT AT AN OPEN PRELIMINARY HEARING

1. The Claimant's application to have the respondent's Response struck out pursuant to Rule 37(1)(a) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is refused. The Response is not struck out.

REASONS

1. At the end of the hearing following summary oral reasons, the Claimant made an application for full written reasons; these are those reasons.

2. By application dated 7 June 2024 the Claimant made an application to strike out the Response as having no reasonable prospects of success. Before considering that application, it is necessary to set out some of the procedural background.

3. The first preliminary hearing took place on 26 September 2024 before Employment Judge J Bromige. The parties who attended that hearing were also present at this hearing. Paragraph 17 & 18 of Employment Judge J Bromige's order ('the Order') stated as follows:

   17.Having confirmed the issues in the case, I made the following directions working towards an open preliminary hearing.

   a. By **30th September 2024**, the Respondent is to provide to the Claimant copies of all emails sent by the Claimant to the Respondent's HR Department between 15th and 19th January 2024. This direction for specific disclosure is to allow the parties to consider what the Claimant may or may not have said in respect of the s.104 ERA 1996 claim.
   b. By **10th October 2024**, the Claimant is to provide to the Respondent and the Tribunal in writing:
      i. Confirmation of the basis of the s.104 ERA 1996;
      ii. Whether he is pursuing any additional complaints of victimisation. If so, he must set out what the detriment is, who the alleged perpetrator is, and when this occurred;
      iii. Whether he is pursuing any additional complaints of less favourable treatment (direct discrimination). If so, he must confirm what the less favourable treatment is, which protected characteristic he relies upon, who the alleged perpetrator is and when this occurred;
      iv. An application to amend, which must cover the direct belief discrimination claim, as well as any further allegations of less favourable treatment or victimisation detriment beyond the pleaded dismissal.

   c. By **24th October 2024**, the Respondent is to provide any comments on the application to amend to both the Tribunal and the Claimant.

   18.There will then be a 1 day open preliminary hearing via CVP on 29th November 2024. The purpose of the preliminary hearing will be:

   a. To consider the Claimant's application for strike out;
   b. To consider, on the Tribunal's own volition, striking out the Claimant's s.104 ERA 1996 claim (this depends on whether the Claimant continues to pursue this

claim, and the clarification he provides as to the nature of the assertion of statutory right);
c. Any application to amend the Claimant's claim;
d. Further case management for preparation of the final hearing

4. The Respondent complied with paragraph 17a. of the Order. The Claimant did not comply with paragraph 17b. of the Order and confirmed the same in a written response to an order of Employment Judge Woodhead (dated 21 November 2021) which asked the parties for an update on compliance with the Order.

5. At today's hearing the Claimant made an application for an extension of time to comply with paragraph 17b. of the Order. That application was granted.

6. At today's hearing the Claimant withdrew his complaint under s.104 ERA 1996 and I have issued an order dismissing that claim upon withdrawal by the Claimant.

7. The parties were reminded that the application to strike out the Response could only consider the case as currently pleaded. The Claimant explained that he intends to apply to amend his claim to include a claim that the Respondent dismissed him because of a perception that he was non-supportive of the Conservative and Unionist Party (a perception of a political belief). I noted that the claims as currently pleaded are that the dismissal was a wrongful dismissal (i.e. in breach of contract) and/or that the claimant was dismissed as an act of direct race discrimination and/or victimisation.

8. The Claimant's application to strike out the Response was helpfully set out in a one-page skeleton argument with extracts from Harvey on Industrial Relations and Employment Law (on striking out a case for having not reasonable prospect of success where the claim involves a crucial core of disputed facts). The Claimant also provided a copy of his letter of termination of employment dated 18 January 2024 and a pay slip dated 31 January 2024. I heard oral submissions from the Claimant and from Mr Rahman for the respondent. I also gave the Claimant the opportunity to respond to Mr Rahman's submissions.

9. The Claimant was critical of the Respondent for not providing a written response to his application to strike out the Response and suggested that this failure was an attempt to deliberately surprise the Claimant by making oral submissions today.

10. I note that no order was made for the Respondent to provide a response to the application. During his brief submissions, nothing was said by Mr Rahman which caused any significant prejudice to the Claimant. I gave the Claimant an opportunity to reply to what Mr Rahman said, which he took. Further, it was not suggested by the Claimant that his application could not continue in light of

anything said by Mr Rahman. I bear in mind the Claimant's submission that he would have preferred a response to his application to have been set out in writing and that had he seen such a response he would have relied on further documentation. I reminded the parties that whilst documentation may be relevant to determine strike out applications, the tribunal must be mindful not to conduct a mini trial on the evidence.

The relevant legal principles

11. Striking out
37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds— (a) that it is scandalous or vexatious or has no reasonable prospect of success;....

12. The threshold for striking out a claim or response for having no reasonable prospects of success is high. In ***Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330,*** the Court of Appeal 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. It upheld the EAT's decision that tribunals should not be overzealous in striking out a case as having no reasonable prospect of success, unless the facts as alleged by the claimant disclosed no arguable case in law.

13. 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 employment tribunal's file. In Balls, the EAT stressed that, "no reasonable prospects of success" does not mean the claimant's claim is likely to fail, or it is possible the claim will fail, and it is not a test that can be determined by considering whether the other party's version of disputed events is more likely to be believed. <u>It is a high test: there must be no reasonable prospects of success.</u>

14. The authorities on strike out of unfair dismissal claims were reviewed by the Inner House of the Court of Session in ***Tayside Public Transport Company Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755 (CS)***, which found that:

"In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts (ED & F Mann Liquid Products Ltd v Patel [2002] EWCA Civ 1550). There may be

cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (Mann Liquid Products v Patel; Ezsias v North Glamorgan NHS Trust)."

15. In ***Romanowska v Aspirations Care Ltd UKEAT/0015/14*** the EAT (Langstaff, P) observed that:
"Sometimes it may be obvious that, taking the facts at their highest in favour of the claimant, as they would have to be if no evidence were to be heard, the claim simply could not succeed on the legal basis on which it has been put forward. Where, however, there is a dispute of fact, then unless there are good reasons, indeed powerful ones, for supposing that the claimant's view of the facts is simply unsustainable, it is difficult to see how justice can be done between the parties without hearing the evidence in order to resolve the conflict of fact which has arisen." (Paragraph 1.)

16. When considering whether to strike out a tribunal must approach the matter on a two-stage basis. Firstly, consider whether any of the grounds set out in rule 37(1)(a) to (e) have been established. Secondly, having identified any established ground(s), the tribunal must then decide whether to exercise its discretion to strike out, given the permissive nature of the rule.

Decision

17. The Claimant's application is made under Rule 37(1)(a) on the grounds that the Response has no reasonable prospect of success. I bear in mind that the first part of the two-stage test is to consider whether the Response has no reasonable prospect of success.

18. The basis of the Claimant's application is that paragraph 8 of the Response states that the Respondent dismissed the Claimant because of an absence on Sunday 14 January 2024 when in fact the Respondent accepted that the Claimant worked on Sunday 14 January 2024 because it paid him for that day. In short, the Claimant says the factual assertion in the Response that he did not work on that day is wrong.

19. Paragraph 8 of the Response states as follows:

8. The Claimant was a law lecturer. His usual working week was Monday, Tuesday, Wednesday, Saturday and Sunday, with Thursday and Friday classified as days off. The Claimant attended a funeral on Tuesday 9 January 2024, for which he booked annual leave in advance and was approved by the Respondent. He then failed to work, attend urgent meetings, make meaningful contact, or log onto

MS Teams on Wednesday, 10 January, Saturday, 13 January, Sunday 14 January, Monday, 15 January and Tuesday, 16 January.

20. In trying to establish as a fact that the Claimant did not work on Sunday 14 January 2024, the Claimant submits that the Respondent's position is totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The Claimant further submitted that as this fact must be resolved in his favour it shows that a central pleaded fact of the Response is untrue. The Claimant further stated that paragraph 8 of the Response shows that Respondent dismissed him for absence on 14 January 2024.

21. I asked the Claimant to explain, assuming it was clear that he in fact worked on 14 January 2024, how it would necessarily follow that the Respondent's Response would have no reasonable prospects of success. The Claimant's response this this question was that he was 'not sure.'

22. Mr Rahman submitted that the Respondent did not dispute that the Claimant worked for part of the day on Sunday 14 January 2024 and did not dispute that the Respondent paid the Claimant for that day. When clarifying what was meant by paragraph 8 of the Response, Mr Rahman said that on 14 January 2024 the Claimant failed to contact the Respondent or attend urgent meetings about marking work, but it was accepted he did do some work (online teaching). Mr Rahman further stated that the decision to dismiss involved 4 other dates as set out in paragraph 8 of the Response.

23. The Claimant is therefore correct that the Respondent accepted at the time (as Mr Rahman accepted today) that the Claimant worked on Sunday 14 January 2024 and that he was paid for that work by the Respondent. Whilst paragraph 8 does not clearly reflect what Mr Rahman said in submissions today (i.e. that the Claimant did work that day) I do not agree with the Claimant's submission that paragraph 8 of the Response specifically and clearly identifies that part of the reason for his dismissal was the Claimant's absence on 14 January 2023. The Response is not clear on the point; it does not explicitly set out what specific absences/misconduct the Respondent took into account when coming to the decision to dismiss. In its Response the Respondent quotes the dismissal letter dated 18 January 2024, which I note refers to the Claimant having sent an email on 16 January 2024 to the Respondent confirming that he had been working and teaching online on Sunday 14 January 2023. However, neither the Response nor the dismissal letter go on to say how the Respondent viewed that explanation in terms of the decision to dismiss. I also note that the dismissal letter refers to 4 other dates when the Claimant was absent which form part of the disciplinary charges.

24. I keep in mind that it is only in exceptional circumstances that strike out is warranted. I appreciate that the Claimant believes that the 'central facts' in the Respondent's pleaded case must be found to be untrue. In so far as paragraph 8 of the Response asserts that the Claimant did not work at all on 14 January 2023, this is not in fact the Respondent's case, as confirmed by Mr Rahman. However, I do not see that this is such a central fact as to be determinative of the claim of a whole to warrant strike out of the Response.

25. The claim as currently pleaded and clarified is that the Claimant was dismissed wrongfully and/or because of a perception that he was Irish or Northern Irish and/or was an act of victimisation. The fact that the Claimant worked on 14 January 2024 and was paid for that date is not the end of the story i.e. it does not mean that the Response has no reasonable prospects of success in defending those claims. The Claimant was unable to say how that (now conceded) fact means that the Response has no reasonable prospects.

26. The burden of proof in discrimination complaints means that the initial burden rests on the Claimant to prove facts that give rise to an inference of discrimination or that discrimination has occurred in the absence of any other explanation. Even if the Tribunal rejects the Respondent's reasons for dismissal (misconduct) that does not necessarily mean that the Claimant will be able to discharge that burden. This is not an open and shut case which turns on this finding of fact. This is not an exceptional case warranting striking out the Response.

Employment Judge Millns

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Date: 2 December 2024

JUDGMENT SENT TO THE PARTIES ON

……6 December 2024……

AND ENTERED IN THE REGISTER

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FOR THE TRIBUNAL OFFICE