Case Number: 2501278/2024

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Sangare**

Respondent: **Nomad Digital Limited**

Heard at: **Newcastle Employment Tribunal**
On: **13 March 2025**

Before: **Employment Judge Gowland**

Appearances
For the claimant: in person
For the respondent: Mr G Vials, solicitor

JUDGMENT

(Strike out and deposit order)

1. **The Claimants claim relating to constructive dismissal is struck out.**

2. The Claimant is ordered to pay a deposit in accordance with the separate deposit order of the same date.

Application for Rule 38 strike out and deposit order

1. The Respondent submits that there are no reasonable prospects of success generally, based upon what the Claimant said in the hearing, and that the Claimant cannot bring a claim purely for unfairness in relation to discrimination. They also submit that the manner in which the claim for constructive dismissal has been brought is not for dismissal under the Equality Act but as a standard constructive dismissal claim linked to the extension of the probationary period, and as such the Claimant does not have the required two years' service.

2. The Respondent relies upon the resignation email from the Claimant and referred to the paragraph as follows:

3. " *The basis of this decision is multifaceted and grounded in what I perceive and experience as constructive dismissal. Despite an explicit understanding that my probationary period was to conclude on 9th January 2024, my status was unilaterally and unjustly extended. This action contravenes our agreed employment*

terms and disregards the substantial contributions and efforts I have made, particularly noting that only minor challenges were encountered, which were not unique to my involvement but reflective of the inherent complexities of our projects"

4. The Claimant submitted that he did not require two years' service to bring a constructive dismissal claim.

5. It is for me to determine whether there are no reasonable prospects of success and then exercise my discretion as to whether the claims should be struck out having regard to the overriding objective of dealing with cases 'fairly and justly'.

6. In the alternative, the Respondent asks me to consider a deposit order relying upon their submissions relating to strike out and additionally that the Claimant will have little reasonable prospects of success.

7. The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation. There must be a proper basis for doubting the likelihood of the Claimant being able to establish facts essential to this claim.

8. It will be for me to determine whether the Claimant has little reasonable prospects of success in relation to each of the claims taking into account the arguments submitted in relation to deposit orders and those reasons submitted in relation to strike out.

The legal principles

Strike Out

9. Under Rule 38 a claim or part of a claim can be struck out on a number of grounds, as set out below. A claim cannot be struck out unless the party has been given a reasonable opportunity to make representations either in writing or, if requested by the party, at a hearing.

Rule 38 of The Employment Tribunal Procedure Rules 2024

Striking out

38.

(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;

(b) that the manner in which the proceedings have been conducted by or on behalf of

the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) or non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) 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.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 22.

10 . Operation of rule 38(1)(a) requires a two-stage test. Firstly, has the strike out ground been established on the facts.

11. If so, secondly is it just to proceed to a strike out in all the circumstances (which will include considering whether other lesser, measures might suffice).

12. When assessing whether a claim has no reasonable prospect of success the Tribunal must be satisfied that the claim or allegation has no such prospect, not just that success is thought to be unlikely **(Balls v Downham Market High School and College [2011] IRLR 217).** The Tribunal must take the allegations in the claimant's case at their highest. If there remain disputed facts, there should not be a strike out unless the allegations can be conclusively disproved as demonstrably untrue, or the claim is fanciful or inherently implausible **(Ukegheson v Haringey London Borough Council [2015] ICR 1285; Merchkarov v Citibank NA [2016] ICR 1121).** In other words, a strike out application must be approached assuming, for the purposes of the application, that the facts are as pleaded by the claimant. The determination of a strike out application does not require evidence or actual findings of fact.

13. In **Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330** the Court of Appeal held, as a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute. On a striking-out application (as opposed to a hearing on the merits), the Tribunal is in no position to conduct a mini-trial, with the result that it is only in an exceptional case that it will be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence. Such an exception might be where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents or, as it was put in **Ezsias**, where the facts sought to be established by the claimant were 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation' (para 29, per Maurice Kay LJ).

14. A strike out application succeeds where it is found that, even if all the facts were as

pleaded by the claimant, the complaint would have no reasonable prospect of success. It was said by Underhill LJ in **Ahir v British Airways [2017] EWCA Civ 1392** 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… Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for making a deposit order, which is that there should be "little reasonable prospect of success."

15. There is a special need for caution in strike out discrimination cases because they are generally fact sensitive, because of the public interest in examining the merits at a final hearing, and because of the shifting burden of proof.

16. Where a litigant in person is involved, the tribunal should not simply ask the question orally to be taken to the relevant material in support of the claim but should also carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding there is nothing of substance behind it; **Cox v Adecco Group UK [2021] 1CR 1307.**

17. If a strike out application fails, the argument about the overall merit of the claim is not decided in the claimant's favour. Both the claimant and the respondent argue their positions on the merits in full and afresh at the full hearing.

18. The EAT, in the case of **Mechkarov v Citibank NA [2016] ICR 1121**, summarised the approach to be followed by a Tribunal when faced with an application to strike out a discrimination claim as follows:

a) Only in the clearest case should a discrimination claim be struck out.
b) Where there are core issues of fact that turn to any extent 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 is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out.
e) A Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

Deposit Order

53. The power to make a deposit order is provided by rule 40 of the ET Rules, as follows:

19.— (1) Where at a preliminary hearing the Tribunal considers that any specific allegation or argument in a claim, response or reply has little reasonable prospect of success, it may make an order requiring a party ("the depositor") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument

("a deposit order").

(2) The Tribunal must make reasonable enquiries into the depositor'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 must be provided with the order and the depositor must be notified about the potential consequences of the order.

(4) If the depositor fails to pay the deposit by the date specified by the deposit order, the Tribunal must strike out the specific allegation or argument to which the deposit order relates.

(5) Where a response is struck out under paragraph (4), the effect is as if no response had been presented, as set out in rule 22 (effect of non-presentation or rejection of response, or case not contested).

(6) Where a reply is struck out under paragraph (4), the effect is as if no reply had been presented, as set out in rule 22, as modified by rule 26(2) (replying to an employer's contract claim).

(7) If the Tribunal following the making of a deposit order decides the specific allegation or argument against the depositor for substantially the reasons given in the deposit order—

(a)the depositor must be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 74 (when a costs order or a preparation time order may or must be made), unless the contrary is shown, and

(b)the deposit must be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit must be refunded.

(8) If a deposit has been paid to a party under paragraph (7)(b) and a costs order or preparation time order has been made against the depositor in favour of the party who received the deposit, the amount of the deposit must count towards the settlement of that order.

20. The test for the ordering of a deposit is therefore that the party has little reasonable prospect success. It was said by the Employment Appeal Tribunal in **Hemdan v Ishmail [2017] IRLR 228** that the purpose of a deposit order is "To identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs, ultimately, if the claim fails" and it is" emphatically not…to make it difficult to access justice or effect a strike out through the back door." A deposit order should be capable of being complied with and a party should not be ordered to pay a sum which he or she is unlikely to be able to raise.

21. As for the approach the Tribunal should take, in **Wright v Nipponkoa Insurance [2014] UKEAT/0113/14 and Van Rensburg v Royal Borough of Kingston-Upon Thames and others [2007] UKEAT/0095/07** it was said, a Tribunal is not restricted to a consideration of purely legal issues; it is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. That said there is a balance to be struck as to how far such an analysis can go.

22. It was also made clear in **Hemdan** that a mini trial of the facts is to be avoided. If there is a core factual conflict it should properly be resolved at a full merit hearing where evidence is heard and tested.

23. The Respondent pursues the application as an alternative to their strike out application. The test is therefore one of “little reasonable prospect of success” as opposed to “no reasonable prospect of success” for a strike out application.

24. Rule 40 allows a tribunal to use a deposit order as a less draconian alternative to strike-out where a claim or response (or part) is perceived to be weak but could not necessarily be described as having no reasonable prospect of success.

25. In **Jansen van Rensberg v Royal London Borough of Kingston-uponThames UKEAT/0096/07**, the EAT observed:

“…the test of little prospect of success … is plainly not as rigorous as the test that the claim has no reasonable prospect of success … It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.”

26. A deposit order application has a broader scope compared to a strike out application and gives the Tribunal a wide discretion not restricted to considering purely legal questions. The Tribunal can have regard to the likelihood of the party establishing the facts essential to their claim, not just the legal argument that would need to underpin it.

27. In a case where a Tribunal concludes that a claim or allegation has little reasonable prospect of success, it does not mean that a deposit order must be made. The Tribunal retains a discretion in the matter and the power to make such a deposit order must be exercised in accordance with the overriding objective and with having regard to all of the circumstances of the particular case.

Conclusions

28. I will now deal with the application to strike out under Rule 38.

29. I bore mind that a tribunal must first consider whether any of the grounds set out in rule 38(1) have been established; and then, if any ground is established, exercise discretion as to whether or not to order strike-out. The requirement for a two-stage approach was confirmed in **Hasan v Tesco Stores Ltd EAT 0098/16**.

30. I had regard to overriding objective of dealing with cases ‘fairly and justly’, set out in rule 3 of the Tribunal Rules 2024. This includes, among other things, ensuring so far as practicable that the parties are on an equal footing, dealing with cases in ways that are proportionate to their complexity and importance, and avoiding delay.

31. I am also assisted by the cases set out above and in particular the following cases of:

Mechkarov v Citibank NA [2016] ICR 1121.

32. This summarised the approach to be followed by a Tribunal when faced with an application to strike out a discrimination claim as follows:

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

b) Where there are core issues of fact that turn to any extent 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 is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out.

e) A Tribunal should not conduct an impromptu mini trial of oral evidence to " resolve core disputed facts."

33. It was said in, **Wright v Nipponkoa Insurance [2014] UKEAT/0113/14 and Van Rensburg v Royal Borough of Kingston-UponThames and others [2007] UKEAT/0095/07**, that a Tribunal is not restricted to a consideration of purely legal issues; it is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. That said there is a balance to be struck as to how far such an analysis can go. It was also made clear in **Hemdan v Ishmail [2017] IRLR 228** that a mini trial of the facts is to be avoided. If there is a core factual conflict it should properly be resolved at a full merit hearing where evidence is heard and tested.

34. With regard to the constructive dismissal claim, due to the manner in which the claim is pleaded by the Claimant and the wording of the resignation email, I accept the submissions made by the respondent that this is a standard constructive dismissal claim and not a constructive dismissal claim on the basis of discrimination under the Equality Act.

I therefore do find that this aspect has no prospects of success due to the fact that the Clamant does not have the required two years of continuous service with the Respondent, that would entitle him to bring this type of claim. In addition, when exercising my discretion, I do find that in the interests of justice and in order to give effect to the overriding objective, this claim should be struck out in relation to constructive dismissal. This is because the Tribunal has no jurisdiction to hear a claim of this type without the requisite two-year period of employment.

In relation to the remaining claims, I do not find that they have no reasonable prospects of success and that they are matters that require an explanation and the facts that need to be determined before a decision can be reached by way of witness evidence. The Respondents application for strike out on the remaining claims therefore fails.

Deposit Order

35. I now turn to the application in relation to a deposit order.

36. The test I need to apply is, does the Claimant have little reasonable prospect of success in relation to the specific individual allegations. There must be a proper basis for doubting the likelihood of the Claimant being able to establish facts essential to this claim.

37. The Claimants case is set out as 13 separate complaints, however the Respondent accepts that this is made up of 6 types of claims and seeks a deposit order on the six areas as set out below:

a) direct discrimination on grounds of sex and/or race;
b) harassment on grounds of sex and/or race;
c) victimisation;
d) unlawful deductions from wages;
e) breach of contract; and
f) wrongful dismissal.

38. In relation to whether the Claimant has little prospect reasonable prospect of success in proving these claims, I make the following findings.

39. In relation to direct discrimination, harassment and victimisation, I note that the Claimant did not raise any of these matters in his grievance that was submitted on the 23rd of February 2024 nor in his resignation email. The Claimant did raise alleged race discrimination at his grievance meeting on the 6th of March 2024. He referred to a colleague Ms Julia Frick saying she had been “Hicham’d” when referring to her manager who has the protected characteristic of race. The Claimant contends that this was said in a manner which was racist, which is denied by the Respondent.

40. The Claimant says that his probation period was extended twice due to his race. The Respondent submits that the documentation shows that the periods were extended due to performance and that the Respondent did not want to “get rid” of the Claimant and was actively considering other roles for him.

41. The Claimant further contends that he was subjected to race discrimination by various colleagues by them being condescending, shouting at him and ignoring requests when contacted by him. The Respondent denies these matters and states that if they did happen, they were not due to the protected characteristic of race.

42. In relation to sex discrimination the Claimant says that Ms. Frick was treated more favourably in relation to alleged comments made than he was when he made an error at work. The Respondent says that this is not the case and refers to the allegation by the Claimant that another colleague Mr. Haegeman allegedly made comments that were not addressed by the Respondent. They submit that this undermines the Claimants case that any treatment was on the basis of sex.

43. The Claimant further contends that the behaviour of colleagues towards him as alleged amounts to harassment.

44. In relation to victimisation the Claimant alleges that he raised concerns with the CEO which amounted to a protected act within the meaning of section 27(2) of the Equality Act 2010 and that his complaint was ignored and that this amounted to victimisation. The Claimant also says that the way that his complaint and grievance were handled and the decision to extend his probationary period, flow from this protected act.

45. The Respondent denies that the complaint amounted to a protected act and that any of the matters following this complaint were as a result of any alleged protected act.

46. In relation to the claims relating to discrimination, harassment and victimisation, when considering the information available and taking account of what the Claimant will need to prove at a final hearing, I consider that due to the evidence that is before me today of language used and behaviour towards the Claimant, that the Claimant has little prospect of success in these allegations. This is because on the face of the evidence at this stage it is not clear whether the matters said and done were in a way designed to discriminate, harass or victimise and the Claimant will need to convince the Tribunal of the context of the comments and actions. The Claimant is therefore ordered to pay a deposit in relation to these 3 areas of his claim.

47. I have considered the information available to me in regard to means to pay and note the impact of making a deposit order. I have also considered whether in all the circumstances it is fair and just to order the Claimant to pay a deposit order. I have also taken into account the overriding objective. The Claimant is therefore ordered to pay a deposit of £160 in relation to the claims relating to discrimination, harassment and victimisation, making a total of £480.

48. In relation to the claims for breach of contract, deduction from wages and wrongful dismissal, the Respondent denies breaching the contract and asserts that they were allowed to extend the probationary period.

49. The Claimant says that the extension was in breach of normal procedure and that when he passed the date of the end of his probationary period, he assumed that he was at that stage a permanent employee.

50. The Respondent refers to the contract which states that they have discretion to extend the probationary period by up to 3 months and that once the probationary period is successfully completed, that this will be confirmed by HR in writing. No such letter was sent to the Claimant.

51. It is agreed that the first probationary period was extended one day after the end of the initial period and that the second probationary period was extended 12 days after

the end of the second probationary period.

52. There is a clear dispute as to the reason for the extension and whether the extensions followed the correct procedures. This area therefore requires determination of the facts before a decision can be reached. This matter will involve consideration of witness and documentary evidence regarding the reason and power to extend. On the information before me, I cannot say at this stage there is little reasonable prospects of success. The Respondents application for a deposit order in relation to these areas of claim therefore fails.

Approved by:

Employment Judge Gowland

20 May 2025