EMPLOYMENT TRIBUNALS

Claimant: Mr Z Bedoui

Respondent: Greene King Retail Limited

HELD AT: Manchester **ON:** 13 February 2025

BEFORE: Employment Judge Eeley

REPRESENTATION:

Claimant: In person
Respondent: Miss A Smith, Counsel

JUDGMENT having been sent to the parties on 3 March 2025 and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided:

REASONS

1. This was an application by the respondent to strike out or alternatively make a deposit order in relation to the claimant's claims. The claimant makes claims of unfair dismissal and for unpaid wages in relation to sick pay. I have received submissions on behalf of both parties and have considered the relevant documents within a preliminary hearing bundle consisting of 156 pages. I also received printed copies of documents which the claimant brought to the tribunal on the day of the hearing. I considered those too.

2. The respondent made an application to strike out the claimant's case by email dated 7 August 2023 and the case was listed for today's hearing in order to consider whether the claimant's case should be struck out on the basis that it has no reasonable prospects of success. Alternatively, I was to consider whether to make a deposit order. The application also asked me to consider strike out on the basis that the claim had not been actively pursued and/or because of the manner in which the proceedings have been conducted by the claimant.

3. At the hearing, counsel for the respondent maintained the strike out application on the basis that the claims have no reasonable prospects of success and did not address me on the other two potential grounds for strike (not actively pursued, manner in which proceedings have been conducted.)

The applicable legal principles.

4. A claim can be struck out on the ground that it is scandalous or vexatious or has no reasonable prospect of success (rule 38(1)(a).) An employment tribunal can exercise its power to strike out a claim or response (or part of a claim or response) 'at any stage of the proceedings,' either on its own initiative or on the application of a party. The power must be exercised in accordance with reason, relevance, principle and justice, including the overriding objective.

5. A claim or response (or part of it) cannot be struck out unless the party in question has been given a reasonable opportunity to make representations (rule 38(2)). A party's representations can be made either in writing or, if requested by the party, at a hearing. If no request for a hearing is made, a tribunal can decide the application in the absence of the parties on the papers alone.

6. Where a tribunal is considering striking out a claim on the ground that it has no reasonable prospects of success, the claim should be 'taken at its highest.' The tribunal should avoid conducting a mini-trial of the issues. Where there is a crucial core of disputed facts, they will need to be determined by evaluating the evidence at a full hearing.

7. The tribunal should not be deterred from striking out a claim where it is appropriate to do so, but particular caution should be exercised if a case was badly pleaded, for example, by a litigant in person. (Mbuisa v Cygnet Healthcare Ltd UKEAT/0119/18/BA 19). (In Mbuisa it was considered that the appropriate way forward would be to record how the case was being put, ensure that the original pleading was formally amended so as to pin that case down, and, if it was then considered that the case had little reasonable prospect of success, make an appropriate deposit order.)

8. The striking out of the claim amounts to the summary determination of the case. It is a draconian step that should only be taken in exceptional cases. It would be wrong to make such an order where there is a dispute on the facts that needs to be determined at trial. The tribunal should consider whether less draconian alternatives are appropriate.

9. An exceptional case where strike out may be appropriate even when the facts are in dispute might be where it is instantly demonstrable that the central facts in the claim are untrue or there is no real substance in the factual assertions being made, but 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. (Ukegheson v London Borough of Haringey [2015] ICR 1285.)

10. Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English as, taking the case at its highest, the tribunal may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see Hasan v Tesco Stores Ltd UKEAT/0098/16.

11. In Cox v Adecco Group UK & Ireland and ors 2021 ICR 1307, EAT, the Employment Appeal Tribunal held that an employment tribunal had erred in striking out a litigant in person's claim that he suffered detriment for making protected disclosures (i.e. 'whistleblowing') without properly identifying the issues and analysing whether there was a reasonable prospect of success. HHJ Tayler provided guidance on how tribunals should approach strike-out applications against litigants in person:

    (i) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate.

    (ii) There has to be a reasonable attempt at identifying the claim and the issues before considering strike-out or making a deposit order. The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claim(s) and issues are: 'Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.'

    (iii) A fair assessment of the claim(s) and issues should be carried out on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.

    (iv) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person 'may become like a rabbit in the headlights' and fail to explain the case he or she has set out in writing.

    (v) In some cases, a proper analysis of the pleadings, and of any core documents in which the claimant seeks to identify the claim, may show that there really is no claim and therefore no issues to be identified. More often, however, a careful reading of the documents will show that there is a claim, even if it might require amendment

    (vi) Strike-out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success. Often it is argued that a claim is bound to fail because there is one issue that is hopeless. For example, in the whistleblowing context, it might be argued that the claimant will not be able to establish a reasonable belief in wrongdoing; however, it is generally not

possible to analyse the issue of wrongdoing without considering what information the claimant contends has been disclosed and what type of wrongdoing the claimant contends the information tended to show.

(vii) Respondents, particularly if legally represented, should, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, assist the tribunal in identifying the documents, and key passages of the documents, in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer, and should take particular care if a litigant in person has applied the wrong legal label to a factual claim that, if properly pleaded, would be arguable

(viii) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

(ix) Litigants in person also have responsibilities in this context. So far as they can, they should seek to explain their claims clearly, even though they may not know the correct legal terms, focusing on core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim

(x) The employment tribunal can only be expected to take reasonable steps to identify the claims and issues. But respondents, and tribunals, should remember that repeatedly asking for additional information and particularisation rarely assists a litigant in person to clarify the claim. Requests for additional information should be as limited and clearly focused as possible.

11. Establishing one of the specified grounds on which a claim or response can be struck out is not of itself determinative of a strike-out application. When considering whether to strike out a claim, a tribunal must first consider whether any of the grounds set out in rule 38(1)(a)–(e) have been established and then, having identified any established grounds, it must decide whether to exercise its discretion to order strike-out. There is a 'two-stage approach.' (Hasan v Tesco Stores Ltd EAT 0098/16.) In deciding whether to order strike-out, tribunals should have regard to the 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.

The claimant's case

12. When considering the application to strike out the claim I have to take the claimant's case at its highest. Where there is a dispute of fact, I have to assume that the claimant will be able to establish the facts that he relies upon in order to make his case. I have to consider how the claimant would put his case at a final hearing. I have considered both the documents and what the claimant has been able to say to me during the course of today's hearing.

13. Notwithstanding the fact that the claimant is a litigant in person the basis of his claim is clear. I have taken time to understand the way the claimant's case is put. I am satisfied that this not a pleading issue. I understand how the claimant puts his case and what he seeks to argue. The problem is that the undisputed facts of the case are such that it demonstrably lacks merit.

14. The claimant brings a claim of unfair dismissal arising out of his employment with the respondent as a kitchen porter. He also makes a claim of arrears of pay.

15. It is not disputed that the claimant suffered from longstanding back problems and pain which made standing for long periods of time difficult and interfered with his ability to do his job as a kitchen porter. It meant that he was unable to stand or walk for long periods. The claimant also developed foot pain and difficulties with his hip. The claimant's final period of sickness absence began on or about 20 June 2022. His employment was terminated on 13 October 2023.

16. I have applied the test in the tribunal rules to the claimant's case taking the claimant's case at its highest, and assuming that he will be able to prove everything he relies on as fact at a final hearing. In the unfair dismissal case there was no dispute that:

    a. The claimant was unwell. He had a hip problem, a back problem, and a foot problem.

    b. The claimant had been employed by the respondent for over thirteen years as a Kitchen Porter.

    c. He was previously employed by Chameleon but his employer later became Greene King.

    d. The claimant started a period of sick leave in June of 2022 and was off work continuously on sick leave for over twelve months until his dismissal on 13 October 2023.

e. The claimant had had more than 12 months off work on sick leave immediately prior to his dismissal.

f. The claimant accepts that he went through a process of attending meetings with his employer before the dismissal took place. The claimant had an opportunity to appeal. An appeal hearing took place.

g. During the course of the claimant's meetings with the respondent he was unable to say when he was going to be well enough to do the job that he was employed to do for the respondent. The claimant could not give an estimate to suggest that he would be coming back to work in that job role (in any form) in the reasonably near future.

h. The claimant did not suggest to the respondent during the meetings that there was treatment available which would cure him or render him fit for work. Surgery would not permanently resolve the problem and his condition would get worse again even after surgery. He made no suggestion that he would be well enough to return to work in a reasonably short time period. There was no real reason for the respondent to 'wait and see' rather than dismiss. There was no medical reason to delay dismissal to see if the claimant's condition would improve and, if so, when it would improve enough to allow him to return to work.

i. There was a discussion between the claimant and the respondent about whether there were alternative jobs that the claimant could do, even with his health problems. The parties discussed bar work. However, bar work would also require the claimant to stand for long periods of time and he wasn't well enough to do that. There were no other alternative job roles available that respondent could offer to the claimant.

17. There was a dispute in this case regarding the role of Occupational Health in the claimant's case. The claimant argued that he did not receive the Occupational Health phone calls. The respondent says he did not attend appointments with occupational health which had been arranged before the decision was taken to terminate the claimant's employment.

18. I assumed, for the purposes of this hearing, that the claimant would be able to prove (at a final hearing) that he did not receive the respondent's invitations for him to attend an occupational health appointment and assessment. I went on to consider whether the absence of occupational health evidence would make any difference to the outcome in the claimant's case and whether it would make the dismissal unfair. Was the respondent required to wait for occupational health evidence before dismissing the claimant?

19. The claimant did not provide any medical evidence of his own during the course of the respondent's dismissal procedure. Whilst the claimant could have volunteered his own medical evidence, I do not think it would have helped his case, given what he has said to me today. It is also extremely

unlikely that occupational health evidence commissioned by the respondent would have helped his case. This is because, even now, in February 2025, the claimant is not well enough to do his job with the respondent. He has not been well enough to do that job throughout the period since his dismissal. He would not have been able to get medical evidence at any stage to suggest that he was fit to return to work.

20. The claimant was not saying, during the dismissal meetings, that he needed an opportunity to get medical evidence or that the doctor would be able to show that he would be ready and willing to come back to work in a matter of weeks or months. Indeed, the claimant was asked if he was content to go ahead with the meeting and he didn't object to continuing with the meeting.

21. The claimant was not suggesting that the dismissal was for any other reason than capability or health reasons. He was not suggesting that there was another reason for the dismissal. The tribunal at a final hearing would therefore be deciding whether the dismissal was fair within the meaning of section 98(4) of the Employment Rights Act 1996. Was the dismissal within the range of reasonable responses?

22. I do not think, based on everything the claimant has said to me (together with the documents in the hearing bundle), that the claimant has a reasonable prospect of showing that the decision was outside the range of reasonable responses or that the process leading up to the dismissal was outside the range of reasonable responses. Unfortunately for the claimant, it appears that any further delay in the respondent's process in this case is likely to have been futile. Taking the claimant's case at its highest he does not have reasonable prospects of showing that there was no fair reason for dismissal. He has no reasonable prospects of showing that he was ever fit to return to work or that he was ever foreseeably likely to be fit to return to work. The claimant has no reasonable prospects of showing that the respondent was reasonably required to wait and get further medical evidence before dismissing him. This is not one of those cases where the respondent was obliged to wait for occupational health evidence before it was able to make a fair decision about the dismissal. All the information available to me indicates that any medical evidence provided at the relevant time would have confirmed that the claimant was still unable to return to work and was likely to remain unfit to return to work for the foreseeable future. There is nothing to suggest that medical evidence would have indicated that there was a prospect of a significant or sufficient improvement following treatment. Nor could such medical evidence has indicated that there was alternative work which he was fit to do and which was available to be offered to him at the relevant time. In short, if medical evidence had been obtained it would not have assisted the claimant or taken his case any further to avoid a dismissal. The claimant did not indicate to the respondent at the relevant time that he thought he was likely to be able to return to the job or that he could get medical evidence to suggest that he was fit to return to that job, or a suitable alternative. In such circumstances a tribunal is extremely unlikely to decide that the respondent was nevertheless obliged to obtain that medical evidence before being able to fairly dismiss the claimant. A tribunal would have to apply the 'range of reasonable responses' test and not substitute its own view for that of a

reasonable employer. I am satisfied that the claimant has no reasonable prospects of establishing that his dismissal was either procedurally or substantively unfair.

23. In short, the threshold is met in the unfair dismissal claim and I see no reason why the unfair dismissal case should proceed to a final hearing. The relevant ground for strike out has been established. It is appropriate to exercise my discretion to strike out the claim in line with the overriding objective. In particular, it would not be proportionate to allow the claim to continue further in all the circumstances. Nor is there anything reasonably to be gained by making a deposit order or amending the claim. The problems with the unfair dismissal case are fundamental and would not be assisted by that.

24. In terms of the wages claim (the sick pay claim) the claimant explained that he was seeking payment of sick pay for that period of absence from the respondent. That is apparently a claim in relation to statutory sick pay. The claimant's employment was previously with Chameleon before it was with Greene King. It appears there was a TUPE transfer.

25. The documents that the claimant provided show that with Chameleon his entitlement was to statutory sick pay (and nothing additional to this statutory entitlement.) There was no entitlement to a higher rate of contractual sick pay, just statutory sick pay. That also appears to be the claimant's entitlement with the respondent to this claim, Greene King.

26. I was directed by Miss Smith to a document at page 33 from the 27 May 2022 that showed that the claimant hadn't qualified for statutory sick pay at that point. (Entitlement to statutory sick pay is not something within the respondent's control, it is something that the government determines and administers.) I looked back again through the documents and I noticed that there is, in fact, a document in the bundle in relation to the claim to the government for statutory sick pay. (It wasn't attached to the email which I was referred to but it is in the bundle). It is a document that starts at page 37. On page 38 it says why the claimant cannot get statutory sick pay. The box is ticked next to: *"E- your average earnings before your illness or disability were not high enough."* If that was correct in May 2022 then it will have been correct throughout the relevant period of employment. On the face of the government documents, the claimant wouldn't have qualified for statutory sick pay.

27. Furthermore, the claimant would have exhausted any entitlement to statutory sick pay over the course of the twelve months leading up to dismissal in any event. This means that any such claim would also have been potentially presented to the tribunal out of time in any event (i.e. the last time that he would have been entitled to sick pay would have to have been more than three months before the claim form was submitted to the tribunal.)

28. Taking all of that into consideration I conclude that the claimant has no reasonable prospects of success in relation to the wages claim. It is appropriate to exercise my discretion to strike out this claim too. A less draconian alternative is not merited in this case.

29. As a result of the above, both of the claimant's claims are struck out on the basis that they have no reasonable prospects of success.

Approved by:
Employment Judge Eeley

2 May 2025

REASONS SENT TO THE PARTIES ON
30 May 2025

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FOR THE TRIBUNAL OFFICE