Case Number: 3315443/2022

EMPLOYMENT TRIBUNALS

Claimant: AA

Respondent: Coca-Cola Europacific Partners Great Britain Limited

Heard at: Reading (in public: by C.V.P.) **On:** 1 April 2025

Before: Employment Judge George

Representation
Claimant: Mr J McKeown, counsel
Respondent: Ms L Amartey, counsel

RESERVED JUDGMENT

The respondent's application for the direct disability discrimination complaint to be struck out is dismissed.

REASONS

1. This hearing was listed to consider, among other things, the respondent's application to strike out the direct disability discrimination complaint or for an order to be made requiring the claimant to pay a deposit as a condition of being permitted to pursue any particular complaint or allegation. I have had the benefit of an agreed hearing file of 231 pages. Page numbers in these reasons refer to that file.

2. Both parties' counsel prepared written submissions and the authorities relied upon in them. They supplemented their written submissions in oral argument. The hearing was also listed to consider the claimant's application to amend her claim and other case management. I gave my decisions on the other contested matters orally with reasons at the hearing and they are recorded in my Record of Preliminary Hearing. Having heard argument on the outstanding applications under rule 38 and rule 40, I reserved my judgment on them and this is my judgment and reasons because there was insufficient time remaining for me to deliver oral judgment with reasons.

3. A separate order is sent in relation to the application for a deposit order.

Relevant Law

4. The Employment Tribunals Procedure Rules 2024 rules 38 and 40 provide as follows:

"**38.— Striking out**

(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply 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) for 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.

…

40.— Deposit orders

(1) Where at a preliminary hearing the Tribunal considers that any specific allegation or argument in a claim or response 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 shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party 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.
…

(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, 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 shall be refunded.

(8) If a deposit has been paid to a party under paragraph (7)(b) and a costs 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."

5. The power to strike out a claim on the ground that it has no reasonable prospect of success is a power to be exercised sparingly, particularly where there are allegations of discrimination and unlawful detriment on grounds such as protected disclosure or health and safety grounds.

6. In the case of Anyanwu v South Bank University [2001] IRLR 305 HL, the House of Lords emphasised that in discrimination claims the power should only be used in the plainest and most obvious of cases. It is generally not appropriate to strike out a claim where the central facts are in dispute because discrimination cases are so fact sensitive. The same point was made by the Court of Appeal in the protected disclosure case of Ezsias v N Glamorgan NHS Trust [2007] I.C.R. 1126 CA where Maurice Kay LJ said this at paragraph 29

"It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words "no reasonable prospect of success". It would only be in an exceptional case that an application to an employment tribunal 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 claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

7. Furthermore, there is a public interest in ensuring that allegations of discrimination are heard and determined after appropriate investigation of the circumstances because of the great scourge that discrimination, whether on grounds of race or other protected characteristic, represents to society. It is relevant to bear in mind that s.136 of the Equality Act 2010 provides for a shifting burden of proof. Therefore at this preliminary stage the question is whether the claimant has no reasonable prospect of establishing the essential elements of her claim, taking into account the burden of proof in respect of each of those elements and bearing in mind the danger of reaching such a conclusion where the full evidence has not been heard and explore: see Underhill LJ in Ahir v British Airways Plc [2017] EWCA Civ 1392 para.16.

8. A tribunal hearing a strike out application should consider the claimant's case at its highest. For that, Ms Amartey has cited Robinson v Royal Surrey County Hospital NHS Foundation Trust UKEAT/0311/14. I also note para.26 of the judgment in Robinson where HH Judge Eady QC (as she then was) referred to Romanowska v Aspirations Care Ltd UKEAT/0015/14 in which a former President of the EAT had said it would be wrong to strike out a case where it was necessary for the ET to assess what was in the employer's mind because that could not be determined without hearing evidence from the employer. That is not a substituted for the test in the rule, however it illustrates how careful an employment judge should be where the central facts

are in dispute: the central facts can include whether the employer's reasons for their actions were as the respondent alleges and facts from which those reasons may or may not be inferred at final hearing. It has also been said that, where the central facts are in dispute, a claim should be struck out only in an exceptional case (Ezsias) and that it is not for the tribunal to conduct an mini-trial of the facts (Tayside v Public Transport Company v Reilly [2021] IRLR 755.

9. The test under rule 38 has rightly been described as a high test: it is not whether the claimant is likely to succeed or if particular facts are likely to be established but whether there are no reasonable prospects that she will succeed taking the facts alleged on the pleadings at their highest: Balls v Downham Market High School [2011] IRLR 217.

10. That said, where it is plain that a discrimination claim has no reasonable prospects of success (interpreting that high hurdle in a way that is generous to the claimant), then the tribunal does have and, in a plain and obvious case, may use the power to strike out the claim so that the respondent and the tribunal system are not required to spend any more resources on a claim which is bound to fail: Anyanwu para.39 per Lord Hope. Such an example is given in the quotation from Ezsias.

11. The test under rule 38 contrasts with that under rule 40 of "little reasonable prospects of success". This has been described as being less rigorous than that for a strike out under rule 38 but "there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence." (Hemdan v Ismail [2017] I.C.R. 486 EAT para 13). In doing so, the Employment Judge may take into account more than simply the legal issues but may take into account the likelihood of a party establishing the facts essential to their case: Arthur v Hertforshire Partnership University NHS Trust (UKEAT/0121/19). Before making such an order the Employment Judge must take reasonable steps to find out whether the party will be able to satisfy a deposit order and take account of that information when exercising the discretion whether or not to make the order.

Discussion and conclusions

12. The allegations of direct disability discrimination, contrary to s.13 Equality Act 2010 (hereafter the EQA), are found in the list of issues in the Case Summary of Employment Judge Findlay following the hearing conducted by her on 7 January 2025. The list starts at page 105 and the issues arising in respect of the direct disability discrimination complaint start at para.6. Broadly speaking, allegations are made against the respondent in relation to the investigation, suspension, disciplining and dismissal of the claimant in July and August 2022.

13. The claimant alleges that, in February 2021, she discovered that her husband, from whom she was separated, had attempted suicide and that she was told by paramedics that he had died. She informed the respondent of this. She states that this was while Covid restrictions were operating and that it was not

until approximately one month later that she discovered that he had not, in fact, died. That would have been in March 2021. She alleges for various reasons related to PTSD, she was unable to inform the respondent of the true situation.

14. The claimant's troubled and tragic background is set out in Mr McKeown's submissions (CSUB) at para.14. It includes a family history of death by suicide and she has explained why the events concerning her husband so powerfully affected her – even more than would naturally be the case for someone without that family history.

15. The respondent's case is that the claimant was disciplined and dismissed for "continued and deliberate dishonesty" in relation to what she told them about her husband's death and benefits she received from them as a result of what she told them.

16. Against that background, the claimant brings complains that the investigation and disciplinary procedure followed by the respondent was unreasonable, unfair and discriminatory in a number of ways such as continuing with or not postponing meetings when she was unwell and/or unfit to participate, failing to keep accurate and complete minutes, failing to obtain medical or occupational health advice, and in concluding that she had been wilfully dishonest because he failed to take account of the impact of PTSD on the claimant's cognition and decision making. This is a broad summary of the 14 separate allegations which include complaints that dismissal was an act of direct disability discrimination.

17. The respondent's application was made by email on 4 February 2025 (page 115). The basis of the argument that the direct discrimination complaint has no reasonable prospects of success was the assertion that their internal investigation concluded on the evidence before them that the claimant should face disciplinary hearing into her (from their perspective) claim that her husband was dead when she knew he was alive. They state that the disciplinary manager genuinely believed that the claimant had told the respondent that her husband had died when she knew he had not and continued to lie to the respondent about that over an extensive period of time. The factual reason for the decision to dismiss, according to the respondent, is not only that she did not take opportunities to correct what they concluded was an initial lie but "compounded it with further lies" about matters such as the funeral arrangements, discussions with family members, a police inquest and a life insurance policy. They also state that the disciplinary manager believed the claimant to have benefitted from time off work on full pay as a result of what she had said and that she had caused considerable upset to supportive colleagues. In essence, they argue that there are no reasonable grounds to think this would not be accepted as the genuine reason or that a hypothetical comparator would have been treated any differently in materially the same circumstances.

18. The written application was expanded on orally particularly relying on the following:

    a. It was argued that there was nothing more than a bare assertion of discrimination without a pleaded basis for an inference of less

favourable treatment on grounds of disability. It was said that the pleaded case was no more than an assertion of difference of treatment and a differences of protected characteristic: Law Society v Bahl [2003] IRLR 640 EAT (approved in the Court of Appeal) said that unreasonable or unfair conduct together with a difference in status was not sufficient by itself to trigger the transfer of the burden of proof.

b. In particular, it was said there were no reasonable prospects of the claimant proving the core facts amounting to LOI 6.1.1 which is an allegation that she was required to attend a meeting on 28 July 2022 and the investigator failed to end the meeting when she was obviously unfit to continue. In this they relied upon the invitation which they assert invited the claimant to confirm her attendance or suggest an alternative date.

c. It is further argued that she has no reasonable prospects of proving that the notes of the meeting on 28 July 2022 were inaccurate.

d. Recognising that at the preliminary stage the tribunal needs to avoid a mini-trial, it was argued that I was permitted to consider the undisputed facts which – Ms Amartey argued – made the bare assertion of direct discrimination unsustainable.

e. As to LOI 6.1.5 it was argued that the minutes of the formal meeting on 16 August 2022 record that the manager who decided to dismiss considered, when deciding to proceed with the disciplinary hearing (page 205), that the claimant had stated she was not able to attend but wanted to put forward her case. There was no reasonable prospect of a finding that the reason for proceeding was other than set out in the contemporaneous minutes, namely that the claimant had been able to respond in detail in writing to the allegations. There was, argued Ms Amartey, only a bare assertion that the disciplinary manager decided to continue when he would not have done for a non-disabled employee.

f. As to the allegation of insufficient time to respond, page 218 and 219 demonstrate that, contrary to the allegation, the claimant was asked particular questions on 16 August 2022 and given until 17.00 on 18 August to respond. It was argued this was an illustration of the undisputed contemporaneous documentation meaning there were no reasonable prospects of the claimant making out the core underlying facts which make up the allegation.

g. It was unsustainable for the claimant to argue that, in the light of her admitted conduct in withholding information, the respondent would have behaved differently to a hypothetical comparator who had behaved in materially the same way. Page 222 is the dismissal letter in which Mr Halpern records that the claimant found out that her husband was still alive at the end of March 2021 but continued to provide the business with details of his death, funeral arrangements, life insurance claims, inquest updates and details of the impact on her and her family. It is those which the respondent argues are undisputed facts about the alleged misconduct.

19. I accept the claimant's arguments that there are better than no reasonable prospects of success because:

    a. The argument that there are no reasonable prospects of proving the underlying facts of LOI 6.1.1. focuses solely on one part of the allegation. In relation to the second part – the allegation that the investigator failed to end the meeting - it depends on the presumption that the notetaker competently and conscientiously recorded the meeting of 28 July 2022, including the non-verbal elements. That is precisely the dispute. The claimant alleges that there is CCTV footage which shows the events to be as she described in her pleadings including the investigator continuing when she was inaudible to the notetaker.

    b. I should be wary of deciding a strike out when there is yet to be full disclosure of documents. It is not that it is premature to make such an application, but that where there are disputed areas of fact, I should be wary of deciding at a preliminary stage that the partial disclosure within the preliminary hearing file supports a conclusion that there are no reasonable prospects of the facts being found one way or another. The fact that when considering an application I have to take the claimant's allegations at their height means that I should not be drawn into seeking to resolve conflicts between factual accounts.

    c. Not only does the factual dispute about the virtual meeting on 28 July 2022 go to the respondent's argument that the facts underpinning LOI 6.1.1. are unlikely to be made out but, if the claimant is correct and serious breaches of good HR practice are demonstrated by her CCTV footage taken inside her room during the virtual meeting, then it supports her argument that continuing in those circumstances was so obviously likely to cause her distress and to be unfair that it should be regarded as a deliberate decision. Her pleaded case is that, because of spasmodic dysphonia, she was unable to speak properly but that the investigator's approach was to telephone her to ask her to speak on the phone. She states that he then repeated her words to the notetaker because she could not hear the claimant through the video platform. She alleges that at one point she was in tears, had a complete breakdown and was curled in a ball on the floor and can be heard begging God to let her die.

    d. Ms Amartey correctly cites Law Society v Bahl as authority for the proposition that difference in protected characteristic and unreasonable treatment is insufficient to lead to an inference of discrimination. However, we are at a preliminary stage. Unreasonable treatment may require explanation and if the explanation is rejected or not forthcoming that unexplained unreasonable treatment together with a protected characteristic might be sufficient to cause the burden of proof to transfer to the respondent.

    e. I reject the argument that the complaint of discrimination is based on a bare assertion. On the claimant's account there appear to be allegations about the way she was treated which, if true, call for explanation. On a strike out application I take the claimant's case at its

highest, presuming that she will prove at final hearing the facts she asserts; that includes her account of the meeting of 28 July 2022, the alleged inaccuracy of the minutes, her account of her state of health during the disciplinary process and the respondent's knowledge of it, her complaint of an unreasonable failure to seek medical advice about proceeding with the process in those circumstances and an unreasonable decision to proceed with the final hearing.

f. The pleaded case on how the actions were on grounds of disability, appears to be that the respondent deliberately avoided obtaining medical evidence in order to avoid knowledge of a disability which "would have restricted their ability to dismiss me".

g. The respondent's pleaded case is not that the disciplinary manager made the decision to dismiss based on the undisputed facts but that he made the decision to dismiss based on what the claimant had done after March 2021. He made findings about what she had done and rejected some of her explanations in doing so. This is a situation where the tribunal at final hearing is going to have to assess what was in his mind when deciding to dismiss. It will have to assess what was in the investigating manager's mind on 28 July 2022 and in the mind of the person who decided to suspend. That may have been the same individual but it is not clear from the pleadings or the documentation provided to me.

h. In summary, there are areas of contested fact about how the disciplinary process was started and handled by the respondent which are not only relevant to the unfair dismissal complaint but, if the claimant's allegations are proven, potentially call for explanation from the respondent. I am not satisfied that there is no reasonable prospect of the burden of proof transferring to the respondent in those circumstances. That, and the prospect that evidence will then be needed from the respondent about their reasons, cause me to conclude that there are better than no reasonable prospects of the direct disability discrimination complaint succeeding.

20. The respondent's application for an order striking out the direct disability discrimination complaint under rule 38 is dismissed.

Approved by:

Employment Judge George

30 May 2025

JUDGMENT SENT TO THE PARTIES ON

30/052/025

FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/