EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000760/2024

Held in Glasgow via Cloud Video Platform (CVP) on 17 February 2025
Deliberations – 26 March 2025

Employment Judge D Hoey

Mr S Ryder	**Claimant** **In Person**
Orbital Express Launch Limited	**Respondent** **Represented by:** **Mr S Hoyle -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The unfair dismissal complaint is dismissed having been withdrawn by the claimant (as he had less than 2 years' service).

2. The respondent's application for strike out which failing a deposit order is refused.

3. The claim will now proceed to a one day final hearing before an Employment Judge sitting alone on a date to be fixed with a case management order being issued along with this Judgment.

REASONS

Background

1. On 3 June 2024 the claimant presented an ET1 stating that he had worked for the respondent for a few months and ticked the boxes claiming unfair dismissal and disability discrimination. In a few short paragraphs he explained that he believed once his disability had been disclosed the respondent's

approach to him changed and he felt the respondent wanted "the problem" to go away.

2. The respondent in their response said the claimant had gone sick without a fit note being submitted and his probation was not confirmed and his employment was terminated. As the claimant did not have sufficient service to claim unfair dismissal it was assumed that complaint was not proceeding and there was no information as to the precise basis of any other complaint.

3. The claimant was ordered to provide information as to his complaints and said that "as the case revolves around my employers reaction to my being involved in an accident at work and discrimination based on health condition (cptsd etc) and prescriptions the 2 year limit should not apply. I am unsure if this should be a discrimination or unfair dismissal case as it touches on both".

4. This hearing was fixed to determine whether the unfair dismissal complaint had any reasonable prospects of success or whether it should be struck out. A hearing in November had been postponed due to the claimant's ill health.

Claimant fails to engage

5. On 25 October 2024 the respondent's agent advised the claimant that he had still not submitted his agenda and the respondent was being put to additional expense despite not knowing the proper basis of the complaints. The claimant said he had health issues and was seeking another job.

6. At a preliminary hearing on 7 November 2024 the claimant explained he believed he had been unfairly dismissed and discriminated against. There appeared to be no legal basis to claim unfair dismissal given his length of service but he was given time to consider if that was the position.

7. The claimant was to prepare an impact statement with a view to showing the respondent the basis upon which he asserted he was a disabled person at the relevant times.

8. The discrimination complaint appeared to be that the claimant believed the end of his employment was an act of direct disability discrimination. If he

wished to argue other complaints, such as a failure to comply with the duty to make reasonable adjustments, the claimant was required to provide written notice of the basis for such complaints.

9. The claimant failed to provide further information and by letter dated 3 December 2024 the claimant was told that there was a risk his claim could be struck out because he had not actively engaged in pursuing it. The unfair dismissal complaint would be struck out and the claimant was advised there was a risk of expenses being awarded if he failed to engage.

10. On 9 December 2024 the claimant apologised said he was not feeling well but would progress matters. On 12 December 2024 the claimant was told that a strike out hearing would be convened to determine whether or not the claim should proceed or not given the claimant's conduct.

11. On 19 December 2024 the respondent's agent noted the claimant had still failed to provide any information as to his disability status or complaints and sought strike out.

12. On 7 February 2025 the claimant said he had further health issues which had impacted upon him together with family issues. He had asked matters be postponed until things had settled. The claimant was advised to secure a medical note to support any application he made to postpone.

Respondent seeks strike out which failing deposit order

13. On 13 February 2025 the respondent's agent noted that the reason given by the claimant on this occasion differed from previous reasons and there was no explanation as to why the information that had been directed had not been provided. Strike out, which failing a deposit order, was again sought.

Claimant's mental health improves

14. On 14 February 2025 the claimant said mental health issues can impact upon an ability to seek information and that he was "happy to provide information when able".

The hearing

15. The hearing convened on 17 February 2025 to consider whether or not the claim should be struck out, or a deposit order made. The claimant explained that his claim was that he believed he had been dismissed because of his disability. He maintained that the only reason for his dismissal was his disability (which he said the respondent had known about).

16. The claimant said he had not felt fit enough to engage in the Tribunal process. He felt his mental health had impacted upon his ability to engage with people and the process. There were occasions in December 2024 and January 2025 where he said he felt unable to function. The claimant said his mental health had improved and he now felt able to engage in the process and progress his claim.

17. In terms of funds with regard to any deposit order, the claimant said he had around £20 savings and lived on (and from) statutory benefits. He said he owned no assets and had no access to funds.

The respondent's application for strike out which failing a deposit order

18. The respondent's agent noted that the claimant's health issues were discussed at the hearing and it had been agreed that medical evidence was needed given the nature of the impairments. The respondent's agent had suggested a period of 5 to 6 weeks be given to allow the claimant to seek the information from the claimant's GP. A 3 day hearing had been fixed (which was supposed to start at the date of this hearing). The claimant had agreed with the timescales and the Judge's Note had explained why it was important to be clear as to the basis of the claim. He was also reminded that if he was unable to comply with the orders, he should seek more time.

19. With regard to the substance of the claim, the solicitor with whom the claimant had spoken was an employee of the respondent and was said to have told the claimant that the respondent would need to be alerted to the medical issues that had been disclosed as a result of safety concerns that arose which had caused the solicitor concern. The claimant had then gone off work by reason of illness and never returned to work, failing to provide fit notes and

not engaging with the respondent. There was no basis to say the claimant had been dismissed because of any disability.

20. On 22 October 2024 the respondent had written to the Tribunal outlining its concerns as to the claimant's failure to comply with the Tribunal's Orders. The claimant had asked for a postponement of the hearing on 7 November which was refused. On 25 October 2024 the respondent argued a deposit order should be issued, even for a nominal sum of £1 to ensure the risk of expenses was properly identified.

21. On 25 October 2024 the claimant had said health issues had affected him albeit he had been well enough to engage with a new employer. The respondent's agent argued this showed the claimant was clearly able to deal with the proceedings. On 22 November 2024 the respondent set out its concerns and raised the lack of progress as an issue. The claimant had replied that day apologising undertaking to progress matters.

22. The respondent's agent noted that there was no evidence the claimant had in fact sought the medical information he said he already sought and the original time limit of 5 to 6 weeks had been ignored.

23. The claimant had set out health issues he had encountered and sought time to progress matters. The respondent's agent noted reference had been made to a seizure but no evidence had been provided in support of this.

24. On 3 December 2024 the claimant had been told of the importance to set out his position in writing. The respondent's agent argued the email from the claimant on 9 December 2024 contradicted earlier communications from the claimant since it appeared to show the claimant had been capable of progressing matters. The respondent's agent had noted no extension of time for compliance had been sought by the claimant and no medical evidence had been provided.

25. The respondent's agent wrote to the Tribunal on 19 December 2024 noting the claimant had still failed to provide the medical information and believed

the claimant may not in fact have sought the information (contrary to what he had told the respondent and the Tribunal).

26. The claimant had been given time to provide the medical information but had failed to do so. He had been well enough to engage but had failed to do so. It was argued the claimant ought not to be given further opportunity to progress given his conduct to date. Time had been wasted. The claim was said to be still unclear. The persons involved were not clear and the issue of disability and knowledge was still in dispute. The claimant ought to have applied for his medical information after 28 November 2024 and he has failed to actively pursue his claim. The respondent's agent said he had a concern the claimant would continue to delay thereby cause the respondent prejudice. Strike out was sought which failing a deposit order as a result of the claimant's conduct.

The claimant's response to the application

27. The claimant said that he had been "massively overwhelmed" and had not been to his doctor to get the medical information. He said he had been unable to work. He accepted he had dealt with other things in his life but his mental health affected his ability to deal with the Tribunal. His other employment had not been maintained because of his health. The claimant accepted that the respondent had been placed at a disadvantage because of his failure to advance matters.

28. With regard to the individuals involved, the claimant said he had told the HR officer, Samantha and the solicitor about his impairment which is relied upon as a disability. The claimant said he discussed the issue with Samantha from HR on or around 15 September 2023 (which was within 2 weeks of his starting the job). He had met her and discussed the difficulties he had moving and personal issues. The claimant said he told Samantha at induction about his CPSD and personal anxiety caused by issues in his life. He recalled that Samantha had a note pad with her and may have taken notes.

29. He said he told the lawyer about his disability around 16 November 2023. He said he had asked if he could discuss settlement and during that discussion

raised his disability. The claimant said he had been previously prescribed a substance and he said he discussed why it had been prescribed.

30. The claimant said he had also told his manager about the issues, whom he thinks was called "Frederick Locatel". He had met his manager with Samantha and told them about his anxiety and ptsd but would not have said anything about the substance. He believed he had been dismissed because of disability which was the claim he wanted to advance.

Next steps

31. The respondent's agent sought strike out which failing which a deposit order be reserved until the medical evidence was produced given the claimant had agreed to seek the information. It was agreed that a third party order be issued to the GP to procure the relevant records and a decision would then be taken on the respondent's strike out and deposit applications.

32. The parties confirmed that the basis for the claim was now clear and it was understood who was involved. If the claim was to proceed, the parties agreed a 1 day hearing would be convened by CVP to deal with the claim and case management orders could be issued. It would be an Employment Judge sitting alone. There were no unsuitable dates suggested by the parties in the period May to August.

Claimant's response with records

33. On around 4 March 2025 the claimant received 37 pages of medical records. He was asked to direct the Tribunal to the relevant passages in support of his position. On 17 March 2025 the claimant responded saying that the entry from 28 October 2024 evidenced the seizure/stroke. He said the evidence showed he "was not doing well at keeping up with anything and did even get my meds on time". He said he had undergone a "very troubled time".

Respondent's response and application

34. The respondent's agent set out a detailed written submission going through the medical information and arguing that there was no medical basis to

support what the claimant had said. The medical records could be said to contradict what the claimant had said since the claimant had been able to engage in other matters. There was no clear basis to support the claimant's asserted position with regard to his impairments. It was said that there was nothing within the disclosed records that explained the claimant's failure to adequately advance his claim and comply with the orders issued in this case.

35. There was no medical evidence that showed the formal diagnosis of the claimed disability, and no evidence that showed that the failure to comply with any and all orders between 5 July 2024 and the last Preliminary Hearing on 17 February 2025 was as a result of illness or infirmity which could be supported by any medical evidence.

36. The respondent's agent submitted that "Quite simply, there is no medical evidence because the claimant has misrepresented his claimed disability, and has simply thumbed his nose at the authority of the Tribunal whilst maintaining an unacceptable, adversarial mode of litigation conduct towards the respondent in correspondence to distract from the inevitable conclusion that he has simply set out to "chance it" and see what he can get away with, and to harass the respondent into settlement to avoid a continuation of proceedings."

37. The submission continued that: "To claim that there is a medical reason, both unsupported and indeed contradicted by the eventual disclosure of medical records of the claimant's choice to disclose has to be conduct that can be objectively viewed as vexatious, scandalous, and if not, then unreasonable, and consequently the arguments relied upon to justify disobeying the Tribunal have no reasonable prospect of success".

38. It was said that "Given that there is no formal diagnosis of the claimant's claim of C-PTSD recorded anywhere in his GP notes by a qualified psychiatrist or psychologist whom must make such a diagnosis, then taken at its highest, the claimant's claim for being dismissed because of this disability has no reasonable prospect of success. It is clear that a report regarding his mental health does exist for the purposes of other litigation as recorded in the GP

notes and the request by the claimant's firm of solicitors, and the comments in return by the GP that the questions can only be answered by someone properly qualified. Therefore, the most appropriate way of responding to the respondent's application is to strike the claim out rather than the lesser sanction of a deposit order as the issues shall remain the same – no medical evidence of the claimed disability."

39. The submission concluded that: "The Tribunal can now be wholly satisfied that it is clear that there is no evidenced medical reason why the claimant could not have complied with the orders and directions of the Tribunal when required to do so on each occasion, that there is no good reason why the claimant could no have obtained a MED3 FIT note on each occasion he says his health interfered with his ability to comply with orders, including orders that he produce a MED3 FIT note, and further there is no good reason why the claim could not have been heard when it was listed on the 17th to 19th February 2025. The Tribunal is reminded that it need only look to the GP records between 14th February 2024 and 14th February 2025 to be absolutely certain of the position in relation to there being no evidenced health reason as to why the claimant failed to comply, repeatedly, with orders causing a 3 day hearing to be abandoned."

The claimant's response

40. On 17 March 2025 the claimant made a number of points in response. He said the respondent refused to accept his doctor's evidence of CPTSD and the psychological report confirming the diagnosis. He argued that the respondent was on record dismissing medical evidence in an extremely discriminatory manner and that the representative was not qualified to assess his health issues. He also said "health is variable and just because someone improved 2 years a go doesn't mean they are doing well now. The respondent's entire response basically shows a lack of understanding for health conditions and humans in general".

The law on strike out

41. A Tribunal is required when addressing matters such as the present to have regard to the overriding objective, which is found in the Employment Tribunal Procedure Rules 2024, rule 3 of which states as follows:

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing,

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues,

(c) avoiding unnecessary formality and seeking flexibility in the proceedings,

(d) avoiding delay, so far as compatible with proper consideration of the issues, and

(e) saving expense.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules, or

(b) interprets any rule or practice direction.

(4) The parties and their representatives must—

(a) assist the Tribunal to further the overriding objective, and

(b) co-operate generally with each other and with the Tribunal.

Rule 38 deals with strike out and provides as follows:

(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, response or reply (or the part to be struck out).

(2) A claim, response or reply may not be struck out unless the party advancing it 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 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).

(4) Where a reply is struck out, 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).

42. The position in the 2024 Rules has not materially changed from the position under the previous rules (which were in 2013). The law under the 2013 Rules remains relevant. The Employment Appeal Tribunal held that the striking out process requires a two-stage test in **HM Prison Service v Dolby [2003] IRLR 694**, and in **Hassan v Tesco Stores Ltd UKEAT/0098/16**. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In **Hassan** Lady Wise

stated that the second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit' (paragraph 19).

43. Striking out is not automatic and care is needed given the draconian nature. In **Hassan** the Employment Appeal Tribunal held that relevant factors in the exercise of that discretion that might have weighed heavily included the early stage of the proceedings, the ability to direct that further and better particulars of each claim be specified and the absence of any application on the part of the respondent for striking out.

44. With regard to striking out where there are no reasonable prospects of success the claimant's case must be taken at its highest and the Tribunal must be able to conclude from the information before it that there are no reasonable prospects of success. If central facts remain in dispute it will only be in an exceptional case that a case is struck out on the grounds that there is no reasonable prospect of success. The court in **North Glamorgan NHS Trust v Ezsias [2007] IRLR 603** observed that in whistleblowing (and discrimination) cases in particular it would be rare to strike such claims out before hearing evidence and they should generally only be decided after hearing evidence, because of the particular public interest in examining such claims on their merits rather than striking them out at a preliminary stage.

45. In **Cox v Adecco (UKEAT/0339/19/AT)** the Employment Appeal Tribunal set out general principles the Tribunal should apply in this area. It was noted that if a case has no reasonable prospect of success, it ought to be struck out. The Tribunal's time should not be taken up by having to hear evidence in cases that are bound to fail. No one gains by truly hopeless cases being pursued to a hearing. It is necessary to consider, in reasonable detail, what the claims and issues are. Strike out is not a way of avoiding rolling up one's sleeves and identifying in reasonable detail the claims and issues; an employment judge cannot decide whether a claim has a reasonable prospect of success if they do not know what the claim is or do not really understand it. There must be a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.

46. In the case of a non legally qualified party, the claim should not be ascertained only by requiring the claimant to explain it during a stressful hearing; this runs the risk of the litigant becoming 'like a rabbit in the headlights' and failing to explain what they have set out in writing. Reasonable care must be taken to read the pleadings, any additional information and key documents which set out the claimant's case. Requesting additional information from a litigant in person who has pleaded a case poorly can simply lead to a document which 'makes up for in quantity what it lacks in clarity' potentially creating a strike out claim that is even less clear than it was before. Requests for additional information should be as limited and clearly focussed as possible.

47. If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment.

48. In considering failure to comply with orders, the Tribunal should ensure the decision is proportionate. Hence in **Ridsdill v D Smith and Nephew Medical UKEAT/0704/05** it was held to be disproportionate to have struck out a claim for failure to provide witness statements and schedules of loss where a less drastic means of dealing with the non-compliance was available, such as unless orders and costs orders.

49. The guiding consideration, when deciding whether to strike out for non-compliance with an order, is the overriding objective (**Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371** which requires the tribunal to consider all the circumstances, including '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 possible' (see paragraph [17]. The tribunal must consider the matter objectively and weigh the factors in the balance on an assessment of fairness. A sanction short of strike out may be appropriate.

50. In **Harris v Academies Enterprise Trust [2015] IRLR 208**, the Employment Appeal Tribunal (at [26]) referred to the fact that 'A failure to comply with orders of a tribunal over some period of time, repeatedly, may give rise to a view that if further indulgence is granted, the same will simply happen again.

Tribunals must be cautious to avoid that', but the Employment Appeal Tribunal noted that if the failure was an 'aberration' and unlikely to re-occur, that would weigh against a strike out. At [33] the Employment Appeal Tribunal described another relevant principle as 'each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court. If a case drags on for weeks, the consequence is that other cases, which also deserve to be heard quickly and without due cost, are adjourned or simply are not allotted a date for hearing'.

51. Consideration of a striking out order) must include consideration of whether a fair hearing is still possible. Proportionality, and consideration of whether there are alternative orders to a strike out that would better address the breach of Rules or orders, will be a necessary consideration before the power under r 37(1)(c) is exercised by a Tribunal.

52. If the whole of a claim is struck out, that will bring proceedings to an end. Where part of a claim is struck out, the claimant will no longer be entitled to pursue those elements of it (but may of course proceed in relation to the remainder). An order striking out either all or part of a claim under Rule 37 will constitute a 'judgment' as defined under Rule 1.

Discussion and decision on strike out

53. I considered the respondent's application carefully in light of the authorities and from the information provided. The respondent's agent argued that there is no medical reason justifying the claimant's failures to comply with the Tribunal's orders or to actively engage his claim (both matters not being in dispute). He argued the claimant had not been truthful and the medical evidence contradicted what the claimant had said. It was argued that the claimant's conduct was objectively viewed as vexatious, scandalous or unreasonable such that the arguments relied upon to justify disobeying the Tribunal have no reasonable prospect of success. It was said there is no medical evidence to support the claimant's position or his mental health and the claim should be struck out.

54. I am satisfied the claimant had failed to comply with the orders and that he had failed to actively progress his claim. At the hearing the claimant accepted his fitness to do so had been impeded. While the medical information now produced does not evidence that position, I can see no reason not to accept what the claimant had said. His position was that he had been unable to engage because of matters affecting his health and his life. Critically, he said those matters had now changed and he was now in a position to advance his claim. While there is ambiguity in terms of the medical evidence, that does not necessarily mean the claimant was not truthful in his position. His mental health and family situation led to the claimant failing to engage in the process.

55. The claimant's approach to the advancement of his claim prior to this Hearing has been poor. A party is required to properly engage with the Tribunal and the claim and fully advance their position. A failure to do so could result in serious consequences, including potentially dismissal of the claim.

56. While I am satisfied the claimant's conduct was objectively viewed as unreasonable, but explicable, I must consider whether to exercise my discretion to strike out the claim. Strike out is not automatic and the full context should be considered.

57. I have considerable sympathy for the respondent given the time this has taken and the costs and delays incurred. It is regrettable that the claimant had not engaged in the process, focused the claim and progressed matters. He had chosen to adopt a confrontational approach in dealings with the respondent and their agent. That did not assist and is expected to stop. It is important to note that the claimant confirmed he is now able to progress his claim and has supported that by complying with the order I granted and engaged with the claim. The claimant has confirmed the precise basis of his complaint and the respondent understands it. Matters have become clearly focussed.

58. I have carefully considered the claimant's conduct throughout this case and his approach to advancing his claim and his failure to engage and his reasons for that conduct. I have carefully considered each of the points made by the respondent's agent. The points made by the respondent's agent have merit

but it is necessary to consider the full circumstances and take account of the overriding objective.

59. I do not consider that it would be in the interests of justice to strike the claim out. The respondent has already indicated that it reserves its position with regard to expenses in light of the expenses incurred in dealing with the claimant's actions (which the respondent argues could have been avoided). That is a matter that can be considered if an application is made in due course. It would be disproportionate and unfair to strike the claim out given the surrounding circumstances given what the claimant has said about his health, taking account of the medical information and surrounding factors.

60. A fair hearing is still possible in this case. The respondent is able to respond to the key points now made. While time has passed, it is clear that the respondent is able to deal with the issues arising.

61. Taking a step back, while the claimant's conduct in the pursuit of this claim has been unreasonable, it is not in the interests of justice to strike out the claim. A fair hearing is still possible despite the claimant's unreasonable conduct, which is explained, in part by his mental health. Any impact the claimant's unreasonable conduct had upon the respondent could, potentially, be remedied by an award of expenses, if expenses were incurred as a result of the claimant's unreasonable behaviour (bearing in mind that the threshold for expenses in the Employment Tribunal is a high one).

62. It is not in the interests of justice to strike the claim out and the application is refused.

Law on deposit order

63. The Tribunal has the power to make a deposit order under Rule 40:

> *(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.

64. Thus if an Employment Judge considers that any specific allegation or argument in a claim or response has 'little reasonable prospect of success', the Judge can make an order requiring the party to pay a deposit to the Tribunal, as a condition of being permitted to continue to advance that allegation or argument.

65. In **H M Prison Service v Dolby** [2003] IRLR 694, at paragraph 14, a Deposit Order is the "yellow card" option, with Strike Out being described by counsel as the 'red card.' The test for a Deposit Order is not as rigorous as the 'no reasonable prospect of success' strike out test.

66. This was confirmed by the then President of the Employment Appeal Tribunal, Mr Justice Elias, in **Van Rensburg v Royal Borough of Kingston upon Thames** [2007] UKEAT/0096/07, who concluded it followed that 'a Tribunal has a greater leeway when considering whether or not to order a deposit' than when deciding whether or not to strike out.

67. Where a Tribunal considers that a specific allegation or argument has little reasonable prospect of success, it may order a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

68. A Tribunal can use a Deposit Order as a less draconian alternative to Strike Out where a claim (or part) is perceived to be weak but could not necessarily be described by a Tribunal as having no reasonable prospect of success. The test of 'little prospect of success' is plainly not as rigorous as the test of 'no reasonable prospect'. It follows that a Tribunal accordingly has a greater leeway when considering whether or not to order a deposit. But it must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim – **Van Rensburg.**

69. Prior to making any decision relating to the Deposit Order, the Tribunal must make reasonable enquiries into the paying party's ability to pay the deposit, and it must take this into account in fixing the level of the deposit.

70. Finally, in **Tree v South East Coastal Ambulance Service NHS Foundation Trust** [2017] UKEAT/0043/17, referring to **Hemdan v Ishmail** [2017] ICR 486 Judge Eady held that, when making a Deposit Order, an Employment Tribunal needs to have a proper basis for doubting the likelihood of a claimant being able to establish the facts essential to make good their claim.

71. **Hemdan** is also of interest because the learned Employment Appeal Tribunal President, at paragraph 10, characterised a Deposit Order as being 'rather like a sword of Damocles hanging over the paying party', and she then observed, at paragraph 16, that: 'Such orders have the potential to restrict rights of access to a fair trial.'

72. Mrs Justice Simler's judgment in **Hemdan**, at paragraphs 10 to 15, addresses the legal principles about Deposit Orders and it is useful to reproduce:

> *'10. A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds 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. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals*

that would otherwise be available to other litigants and do so for limited purpose or benefit.

11. The purpose is emphatically not, in our view, and as both parties agree, to make it difficult to access justice or to effect a strike out through the back door. The requirement to consider a party's means in determining the amount of a deposit order is inconsistent with that being the purpose, as Mr Milsom submitted. Likewise, the cap of £1,000 is also inconsistent with any view that the object of a deposit order is to make it difficult for a party to pursue a claim to a Full Hearing and thereby access justice. There are many litigants, albeit not the majority, who are unlikely to find it difficult to raise £1,000 by way of a deposit order in our collective experience.

12. The approach to making a deposit order is also not in dispute on this appeal save in some small respects. 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, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless 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. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.

13. The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise. Where, for example as in this case, the

Preliminary Hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested.

14. We also consider that in evaluating the prospects of a particular allegation, tribunals should be alive to the possibility of communication difficulties that might affect or compromise understanding of the allegation or claim. For example where, as here, a party communicates through an interpreter, there may be misunderstandings based on badly expressed or translated expressions. We say that having regard in particular to the fact that in this case the wording of the three allegations in the claim form, drafted by the claimant acting in person, was scrutinised by reference to extracts from the several thousand pages of transcript of the earlier criminal trials to which we have referred, where the claimant was giving evidence through an interpreter. Whilst on a literal reading of the three allegations there were inconsistencies between those allegations and the evidence she gave, minor amendments to the wording of the allegations may well have addressed the inconsistencies without significantly altering their substance. In those circumstances, we would have expected some leeway to have been afforded, and unless there was good reason not to do so, the allegation in slightly amended form should have been considered when assessing the prospects of success.

15. Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved, and the case is likely

to be allocated a fair share of limited tribunal resources, are also relevant factors. It may also be relevant in a particular case to consider the importance of the case in the context of the wider public interest.'

Decision

73. I considered the respondent's application carefully in light of the authorities. I am not satisfied that the claimant's claim (or any part of it) has little reasonable prospects of success from the information before me.

74. The first issue will be the determination as to whether or not the claimant is a disabled person. That is not a medical question and will be determined from the evidence brought by the claimant. It is not possible to say that the claimant has little reasonable prospects of successfully establishing that his impairments would not meet the threshold to be considered a disability in terms of section 6 of the Equality Act 2010.Whilt the medical information is weak and lacking in detail, the Tribunal hearing this matter would consider the evidence from the claimant as to his impairments and its impact upon his day to day activities. That will be a matter for the Tribunal to assess from the evidence the claimant brings. That may amount to the claimant's oral evidence with the GP file.

75. There is no proper basis for me to assess the credibility of the claimant or what he is likely to say. While there is a lack of medical evidence, that does not impact upon what the oral evidence may disclose nor its credibility which would be assessed in the normal way at a Hearing. While the claimant may still fail to establish that he was a disabled person at the Hearing, that is not necessarily the case.

76. The second issue in this case is the reason for the claimant's dismissal. The claimant argues that it was his disability. The respondent says his dismissal was solely because he had failed to engage with the respondent. That is a matter that requires evidence. It is also said that the respondent did not know of his disability but whether or not the claimant was dismissed because of his disability is something that can only be determined by hearing from the dismissing officer. Clearly if the dismissing officer did not know of the

disability, it is unlikely that the dismissal was for such a reason but that is all a matter of evidence.

77. In all the circumstances I am not satisfied that there are little reasonable prospects of success from the information before me. I took a step back in light of the information before me to consider, applying the law, whether a deposit order should be issued. I decided that I would exercise my discretion not to do so. I did not consider that there was any argument that had little reasonable prospects of success at this stage. The claim, being clearly focused, requires now to be determined at a final Hearing.

Next steps

78. The claim will now proceed to a 1 day CVP hearing (on terms agreed by the parties) which will determine firstly whether or not the claimant is a disabled person and secondly whether the claimant was dismissed because of his disability. A separate case management note is issued with this judgment.

Employment Judge: D Hoey
Date of Judgment: 28 March 2025
Date Sent to Parties: 28 March 2025