

Neutral Citation Number: [2025] EAT 161

Case No: EA-2024-000789-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 August 2025

Before:

HIS HONOUR JUDGE BARKLEM

Between:

MS L O ORREGO

Appellant

- and -

CLEAN FREE LIMITED

Respondent

MS C MARCEL (Trade Union Representative) appeared on behalf of the **Appellant**
The **Respondent** was not represented

Hearing date: 12 August 2025

JUDGMENT

SUMMARY

Practice and Procedure

Summary

The ET made a deposit order against the claimant in relation to a particular head of claim which had been added. It erred in concluding that, fairly read, the Particulars of Claim made tolerably clear that the stated reason for dismissal included the taking of leave at short notice due to childcare needs. There was clearly some prospect of success of the claim.

The EAT concluded that there was no basis for the making of an order, which it revoked, there being no need to refer the matter back. It expressed the hope that the matter could be dealt with on the merits without further delay.

HIS HONOUR JUDGE BARKLEM:

1. In this judgment I shall refer to the parties as they were before the Employment Tribunal. It is an appeal from a decision of the Central London Employment Tribunal sent to the parties on 21 May 2024 when Employment Judge Nicolle ordered that the claimant's indirect discrimination claim should be subject to payment of a deposit on the ground that it had little reasonable prospect of success. The amount to be paid was £50.

2. The claimant had worked as a spa attendant since 2015 although there had been a TUPE transfer such that the actual employer at the time of the alleged constructive or actual dismissal was not the same as had been the case originally.

3. The claimant claims that she was dismissed as a result of having to take leave at very short notice on three occasions between March and October 2023, twice as a result of her own medical emergencies and once because her child fell ill with chicken pox. The particulars of claim set this all out and at paragraph 12 it was said that the claimant was told via WhatsApp messages that "she needed to look for a mother job".

4. Although the respondent applied for a deposit order, it has chosen not to appear at today's hearing, although I have considered the terms of the respondent's answer which was served on 17 July 2024 in advance both of the sift decision and the claimant's skeleton argument. It seeks to uphold the employment tribunal's decision. The stated reason for non-attendance was that it did not consider it proportionate in terms of costs to attend the appeal hearing.

5. As amended, paragraph 18 of the particulars of claim made a claim of indirect discrimination, contrary to section 19 of the Equality Act 2010. This was based on a claim that women are at a particular disadvantage compared to men as they are statistically more likely to bear greater childcare responsibilities.

6. The paragraph asserted a PCP in these terms:

“Having a zero tolerance approach to staff taking time off on short notice because of sickness and childcare responsibilities. This constituted a PCP within the meaning of section 19 of the Equality Act. The PCP applied to all staff, both men and women, but this PCP put women at a particular disadvantage because of the childcare disparity between me and women.”

Dobson v Cumbria Partnership NHS Trust was cited.

7. The proposed amendment was dated 11 April 2024 and was not opposed. On 30 April 2024 the respondent lodged a case management agenda which included an application that the indirect discrimination allegation added in the amendment set out above subject to the payment of a deposit. The application was heard two days later on 1 May.

8. Paragraph 11 of the tribunal’s reasons were stated in the pleaded case, as amended.

“It remains uncertain as to what were the triggering events behind the claimant’s actual or constructive dismissal. As such, given the paucity of the chronology and looseness of the wording in paragraph 18(a), which refers to both sickness and childcare responsibilities, I consider that this allegation has little prospect of success.”

9. The claimant appealed and the following grounds were advanced. (1) That the tribunal erred in failing to construe the particulars of claim as a whole, leading to an incorrect finding that the pleading did not assert that a short notice leave for childcare was a cause of dismissal; (2) in so far as the deposit order was based on the way the PCP was formulated, the appropriate course was to consider whether an amendment to that formulation would clarify or correct the deficiencies and to afford the claimant an opportunity to do so.

10. The appeal was considered at the sift by HHJ Auerbach in August 2024, who directed that the appeal should proceed to a full hearing. He gave the following succinct reasons.

“The appeal is arguable bearing in mind: (a) that it is arguable that the claimant did plead overall that the reaction to her request for emergency leave related to her child’s sickness contributed to the treatment in the WhatsApp messages which, she claimed, amounted to a decision to dismiss or conduct contributing to constructive dismissal; (b) that it is

arguable that it was the tribunal's finding specifically that the incident was not clearly a feature of her pleaded case in relation to the reasons for the WhatsApp messages, but led to the tribunal finding that the complainant had little reasonable prospect of success, as opposed to findings about the claimant's prospects of success in relation to other limbs of the requirement of an indirect discrimination complaint; and (c) that it would be sufficient to a complaint of unfair or constructive discriminatory dismissal were the tribunal to find that the treatment in relation to that absence was an act of indirect discrimination and did materially contribute to the reason for the conduct complained of said to amount to dismissal or causative of resignation."

11. The claimant is a member of the trade union United Voices of the World and was represented at the hearing below and before me by Ms Claire Marcel. In light of the respondent's reference in its notice to the claimant having been legally represented, I established from her that Ms Marcel has a law degree but is neither a qualified solicitor nor barrister. She acts as a trade union representative and from my experience of her today is highly competent. I am grateful to her for her helpful skeleton argument which cites a number of very helpful authorities, and for her succinct and impressive oral submissions.

12. Ms Marcel advances the following propositions of law. (1) Although the test for ordering payments of a deposit by a party is less rigorous than the test for a strike out, there must nevertheless be a proper basis for doubting the likelihood of the party being able to establish facts essential to the claim or 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. See **H v Ishmail & Anor** UKEAT/0021/16/DM per Simler P.

13. (2) When seeking to understand the claimant's case the tribunal's pleadings are to be construed as a whole. See **Boohene & Ors v the Royal Parks Ltd** [2024] EWCA Civ 583.

14. (3) Where there is difficulty identifying the claim on the pleadings, a deposit order is not to be used as a short-cut for proper case management such as ordering further particulars or requiring the claim to be amended. See **Tree v South East Coast Ambulance Service NHS Trust** UKEAT/0043/17/LA.

15. (4) In order to do justice between the parties in accordance with the overriding objective a tribunal would not normally strike out a claim or a response which has a reasonable prospect of success simply on the basis of the quality of the leading. It would normally consider the pleading and any written evidence or oral explanation provided by a party with a view to determining whether amendment would clarify or correct the pleaded case and render it realistic, and if so whether an amendment should be allowed. See **Twist DX Ltd & Ors v Armes & Ors** [2020] UKEAT/0030/20/JOJ per Linden J (albeit in the context of a strike out application rather than a deposit order).

16. Turning to the grounds of appeal, it seems to me that rather than seek to recast them in my own words, it is more convenient simply to set out in full the following paragraphs of Ms Marcel's skeleton argument which encapsulates the points which she makes.

“Ground 1 – Error in finding that the pleading did not assert that the short notice leave for child care was causative of dismissal

1. It is submitted that the claimant did plead, overall, that her request for emergency was a causative factor of her dismissal. The finding that she had not was perverse in light of:
 - i) Paragraph 4 of the PoCs which asserted that the Claimant had requested leave on three occasions including once when her daughter had chicken pox
 - ii) Paragraph 5 which asserted that the Claimant was told she was being dismissed because she did not give enough notice when she requested emergency leave
 - iii) Paragraph 10 which referred to a request for emergency leave to care for child who had chickenpox
 - iv) Paragraph 12 which refers to the Respondent telling the Claimant that she needed to look for “a mother job”

- v) The allegation in that the Respondent applied a zero-tolerance policy to short notice leave for child care reasons
 - vi) Paragraph 22 of the PoCs which asserted that “one of the reasons or the principal reason for [the Claimant’s] dismissal was that she had taken time off to care for her child”
2. Had the EJ read the particulars of claim as a whole, as per *Boohene v The Royal Parks*, he would have engaged with the points listed in paragraph 15 and found that the particulars of claim did assert that the short notice leave for childcare was causative of dismissal.
 3. It is submitted that the PCP in paragraph 18 should not be read in isolation. Rather, this paragraph should be construed in the context of the particular facts mentioned across the rest of the PoCs. When construed in that way, what A was saying is clear: that her dismissal was at least in part triggered by her short notice childcare related leave on 27 September 2023.
 4. Further, the ET itself had understood that the Claimant was asserting a causal link between her childcare related leave and her dismissal. This is apparent in the fact that it recorded in its case management Orders a complaint of automatic unfair dismissal for having taken leave for family reasons pursuant to section 99 of ERA 1996 [7].
 5. It is also clear from the Grounds of Resistance (“GoR”) that R had understood A’s case to be based on a series of requests for emergency leave. In their GoR, R accepts that the WhatsApp messages of 9 October 2023, which the Claimant says constituted a dismissal, were related to the cumulative effect of several instances of short notice leave: “a history of inconsiderate and unprofessional behavior related to last minute changes and cancellations of shift work by the claimant”. [48]

Ground 2 – Error in failing to consider requiring further and better particulars or an amendment to the claim

6. In his decision, EJ Nicholls identified difficulties arising from the ‘paucity of the chronology and the looseness of the wording’. It is submitted that the EJ should not have ordered A to pay a deposit based on the quality of the pleadings. As per *Twist DX Ltd and others v Armes*, in situations where the pleadings are defective, the appropriate approach is to order further and better particulars.
 7. The decision in *Twist DX* also established that it is particularly important to adopt a flexible approach in situations where the parties are not represented by professional lawyers, as in the present case.
 8. We accept that the PCP as worded in paragraph 18 of the amended PoCs [27] did not work on the facts. It is submitted that this could have been addressed by giving the Claimant an opportunity to amend her claim. The defect in the PoCs could have been corrected by amending the PCP to state: ‘The Respondent adopted a “three strikes and you’re out” approach to staff taking short notice leave’.
 9. In summary, had the ET construed the pleadings as a whole, it would have understood the Claimant’s case to assert a causal link between her childcare related short notice leave and her dismissal. Had it allowed the Claimant to amend her PoCs as described in paragraph 22, the Claimant would likely succeed in showing that R had a practice of adopting a “three strikes and you’re out” approach to staff taking emergency leave, which would tend to disadvantage women on the basis of childcare disparity. Thus, had the ET followed the correct approach, it would not have concluded that the indirect sex discrimination claim had little reasonable prospect of success.”
17. I make clear that it is not my role to consider whether PCP in the form or any other form suggested at paragraph 22 or 23 above should be permitted to be advanced. That is a matter for the tribunal to resolve. However, I am satisfied, having identified the “looseness of language” and paucity of chronology, the employment judge erred in law in failing to rectify such failures, particularly given that the claimant’s representative was not a trained lawyer.

18. That would be sufficient to deal with the appeal on the basis of ground 2 alone. However, I also consider that ground 1 has been made out. Looking at the amended particulars of claim as a whole, and that the repeated references to the childcare issue as one of the three emergency leave requests said to have given rise to the dismissal (to use a shorthand), it seems to me clear that the claimant was asserting that her childcare responsibilities as a mother were one of the causes of her dismissal.

19. I did wonder, on first reading the papers, whether the suggestion that she gets “a mother job” might have been a typographical error for “another job” but at this stage of the proceedings and before evidence is heard, it is a further ground for her assertion that there was indeed potential for an indirect discrimination finding in the amended particulars of claim.

20. I am satisfied that on the pleadings there is some prospect of success without qualifying that further. Accordingly, I allow this appeal and I revoke the deposit order based on the amended particulars of claim as they were before the employment judge. I do not order a re-hearing. If there is any further amendment sought, it is entirely a matter for the respondent whether it chooses to make any similar application. It might be thought that the better course would be simply to let the matter proceed as quickly as possible to a determination on the merits, but that is not my decision to make.