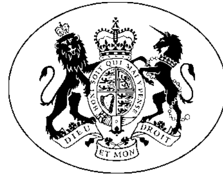

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr. N. El Masri	**v**	Care UK Community Partnerships Ltd

PRELIMINARY HEARING

Heard at: London Central (remote) **On: 13 June 2022**

Before: Employment Judge Goodman

Appearances
For the Claimant: in person
For the Respondent: Ms Yvette Genn, counsel

JUDGMENT

1. The claim of discrimination because of religion is dismissed on withdrawal by the claimant.

2. The claim of unlawful deductions from wages in respect of an alleged underpayment from December 2012 until dismissal is struck out because it discloses no reasonable prospect of success, alternatively, any application to amend does not succeed.

3. **Unless** by **19 July 2022** the claimant sends to the respondent and the tribunal a signed witness statement of his evidence, the claims of unfair dismissal, wrongful dismissal and detriment for protected disclosures, are struck out.

4. The final hearing is listed for **13-20 January 2023.**

REASONS

1. This is a claim of unfair dismissal, dismissal for making protected disclosures, and discrimination because of religion. The claimant worked for the respondent for many years until May 2021, when he was dismissed for gross misconduct.

2. The claims and issues were identified at a case management hearing on 22 November 2021 before Employment Judge Joffe, and recorded in the written summary with the orders made.

3. The claims were listed for final hearing for 6-14 June. That did not go ahead for lack of judicial resources. The parties were notified of this on 31 May. The respondent had already complained on 25 May that the claimant had not cooperated with preparation of the bundles, and then was not ready to exchange witness statements, and asked for an unless order for exchange of statements. They had also, when filing amended grounds of response in December 2021 asked for an order striking out the claim or for a deposit order, because the claim had little or no prospect of success, though it was not listed, as it was not referred to any judge at the time, and the respondent asked it be heard now.

4. On 1 June Regional Employment Judge Wade directed the case be listed for open preliminary hearing today to consider the applications to strike out, for failing to comply with orders, and on 9 June E J Joffe added as an issue for the hearing whether the religious belief discrimination claim should be dismissed as out of time.

Conduct of the Hearing

5. Today's hearing was by CVP. It was open the public, though no member of the public joined the hearing. The claimant could see and hear, but we could not see and hear him. He was then sent an audio link, so we could hear him, and he could see and hear the tribunal and respondent's counsel. There was a break while the claimant' made the audio connection, and another so the parties could look for documents.

6. I was provided with a written submission by the respondent, which the claimant confirmed he had read, and with a number of bundles: the respondent's preliminary hearing bundle of 112 pages, a final bundle of 108 pages, another bundle of 258 pages, and a "part 2" of 259-303.

7. The claimant speaks and writes reasonable English, as a second language. He has not had legal advice or representation. He said he had recently been in contact with several solicitors, but he has not yet had advice.

Compliance with Orders – Disclosure and Witness Statements

8. Disclosure has been troublesome. The respondent put together a bundle. The claimant objected that some of his documents had been omitted. The respondent then decided to include all the additional material, excluding duplicates. The claimant now objects to the order of documents in the inclusive bundle, saying it is misleading. He has filed what looks like a list of documents, but which develops into commentary on some documents, which he calls his" 29 points" document. Thus there is now a single bundle, which I understand includes all the documents exchanged: when I asked the claimant to tell me which documents had been left out, he did not mention any, only stating that the order in which they appeared was misleading.

9. The respondent is ready to exchange witness statements. The claimant is not. The respondent offered to disclose password protected statements, with the password to be provided when the claimant sent his, but the claimant does not agree. He says he does not have any witnesses because they will not cooperate: this is already known to the tribunal because he has sent all his correspondence with prospective witnesses. He stated he was not required to produce a statement

himself. I took him back to Employment Judge Joffe's case management summary of the preliminary hearing on 22 November 2021, where in paragraph 20 she explains that the claimant himself must produce a statement. The claimant then said that his 29 points document sets out his case. I explained that he must produce a written document which tells the whole story of the events he wants to rely on, starting with the first protected disclosure in February 2020 and continuing on through until the appeal hearing in the summer of 2021. He must tell the story as if explaining what happened to someone who was not present at any of the events.

10. As I was considering how long to allow the claimant prepare a witness statement, I asked if he was currently working, and he said he was not, because he had hurt his back some time around May 2021. When I indicated he would have a month to prepare a witness statement, he said he was taking medication which made him drowsy, and was also exploring with a number of solicitors whether they could take on his case. In the event I have made an order that his claim is struck out unless he prepares and signs a witness statement, and sends it to the tribunal and to the respondent no later than 19 July 2022. That gives him five weeks to write it, which should be enough time if he starts it now.

Religion and Belief Claim

11. Next I explained to the claimant that the respondent was asking the tribunal to strike out the claim for religious discrimination because it was brought out of time. I told him that the Equality Act requires a claim to be presented within three months of the act complained of, but that depending on the reasons he gave why it was presented late, I could allow it to proceed out of time.

12. On the claim form, the claimant had ticked the box for discrimination because of race and religion, but in the particulars said only: "my manager told before the claim that she reported either that I only employ Muslim." At the case management hearing, he said, he told Judge Joffe, when she asked about it, that this was an incident in February 2020, when he the manager Ms Shola told him she had had a complaint that he only hired Muslims. There was no other detail. This episode does not feature in the rest of the claim, and Ms Shola, was not involved in the investigation in October 2020 or the dismissal in May 2021. It was not followed up with him either.

13. This morning the claimant said that he had only explained this because the judge had asked about the box he had ticked,, and it was not what his claim to the employment tribunal was about. He did not want it to go ahead. I confirmed it would be treated as withdrawn.

Prospects of Success – Orders 37 and 39

14. Rule 39 of the Employment Tribunal Rules of Procedure 2013 concerns deposit orders. It states:

Where at a preliminary hearing (under rule 53) 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 paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

15. The amount of the deposit is set having regard to the party's ability to pay, and must not be so high as to bar access to justice; the real deterrent effect of a deposit order is the risk of paying costs. If at final hearing the claimant loses because of substantially the same weakness in his case as identified in the deposit order he is likely to have to pay the other party's costs.

16. Making a deposit order requires the tribunal to take the decision in two stages, firstly, to assess the prospects of success, secondly, to exercise its discretion on whether a deposit order is appropriate - see **Hasan v Tesco Stores Ltd UKEAT/ 0098/16** (which concerns strike out).

17. Applications for deposit orders are decided on the basis of the pleaded case and available documents, without taking oral evidence. The tribunal should consider the prospects of establishing the case on the basis of what is pleaded, and may also take into account the party's prospects of establishing the facts pleaded – **van Rensburg v Royal Borough of Kingston on Thames UKEAT/0095/07**.

18. A deposit order can have a chilling effect in what is largely a no-costs jurisdiction, and should not be done lightly, or bar access to justice in practice. The guidance to tribunals in **Hemdan v Ishmail (2017) IRLR 228** is:

> "the purpose of the 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 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".

19. More drastically, Rule 37 of the Employment Tribunal Rules Of Procedure provides that the tribunal can strike out a claim.

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a)that it is scandalous or vexatious or has no reasonable prospect of success;

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

20. Where the claim concerns an allegation of detriment or dismissal because of public interest disclosures, or discrimination, tribunals must exercise particular caution when considering the prospects of success, because such claims are often fact sensitive, especially as to the grounds for the belief and the claimant's belief that it was in the public interest to make it - **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126**. Because at this point a decision on whether the claimant has no reasonable prospect of success is made without hearing evidence from witnesses,

the tribunal must assume that the claimant will prove the case set out in his claim form, unless, for example, there is incontrovertible contrary evidence in a contemporary document. But claims can be struck out by tribunals at preliminary hearings 'if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context' **- Ahir v British Airways plc (2017) EWCA Civ 1392.**

21. As will be clear from paragraphs 7 and 8, I decided not to strike out the claim for failing to comply with orders as to disclosure of documents and exchange of witness statements, but instead to give the claimant last chance, by making an unless order. Given that the final hearing has now been postponed, there is more room to do justice by allowing the claimant a final opportunity to comply, rather than striking the claim out now.

22. In so doing I comment that I am puzzled that he should not understand that he had to produce his *own* witness statement, when Employment Judge Joffe explained that to him at the previous hearing. Nor was I encouraged when the claimant said that his “29 points” document was his witness statement, because it does *not* set out his account of what happened, and the tribunal reading it will be none the wiser. I was also unimpressed by the correspondence suggesting first that the respondents had left documents out, then indicating that the documents were in a misleading order. They paint a picture of not of someone who does not understand what has to be done to prepare evidence for a tribunal, but does not want to understand. Had the hearing been closer, I may well have decided that the only just result would be to strike out the claim for failure to comply with orders, because there could not have been a fair hearing.

23. That deals with the application to strike out for failure to comply with orders. I turn to reviewing the prospects of success, and whether the claimant has no (rule 37) reasonable prospect of success in his various claims. The application under rule 39 is discussed in a separate order.

24. On the public interest disclosures, they are, as identified in the previous hearing: a February 2020 discussion about whether an insurance claim made in 2016 was misleading, which on the claimant’s account had no follow-up consequences. Then, between June and September 2020, he made a number of disclosures, orally, about visitors to the care home not wearing masks. No direct consequences of this are mentioned.

25. Then, in August or September 2020, he complained about staff members being overpaid because they had not been working for all the time that they were “fobbed in”, i.e. recorded as having arrived for work. On reading the documents available, in a subsequent investigation the claimant admitted that he tried to deal with this problem, as he saw it, by altering the online roster to leave intact the fobbed-in time, but show the staff taking longer breaks than they had, so as to ensure that they were only paid for their roster time, and not their fobbed- in time. It seems from the respondents investigation documents the investigation started because the claimant’s line manager, Sinan, had noted he was overriding the system without authority, and changed it back. This very much suggests that any

disclosure about staff overpayments was not the cause of his dismissal, but the occasion of it. Without knowing the timeline in detail, it cannot be said at this point whether the claimant's disclosure followed Sinan's corrections or preceded them, but as the claimant readily admitted that he had altered staff time records, he may have difficulty in establishing that he was not dismissed for altering time records, but was dismissed because he had complained about staff being overpaid. The tribunal is likely to find that the right way to deal with staff not working when they have fobbed in is to investigate and if necessary discipline the staff, not unilaterally to change their working time records.

26. Without a detailed investigation with the respondent's witnesses as to why they made the decisions they did, and without having the claimant's witness evidence, it cannot be said that there is *no* reasonable prospect of the claimant establishing that his dismissal was because he exposed an overpayment scam, or because he had complained about the wearing of masks, or about an insurance claim four years earlier.

Deductions from Wages

27. There is possibly a separate claim for unlawful deductions, arising from an assertion by the claimant that he has been underpaid ever since 2012, when he says he was promoted. This does not feature on the claim form, but it was a brief handwritten entry on a Scot schedule the claimant produced for Employment Judge Joffe's hearing. There are no documents about this dispute. The claimant does not say that he complained at any point that he was underpaid for all this time. It appears from the case management summary that Employment judge Joffe identified this claim and directed the respondent to write by 6 December to say whether they objected to an amendment to add it. I cannot find in the hearing bundle or the tribunal record any such letter. But I do see the claimant's schedule of loss, dated 24 December 2021, which does not include this claim. Thus it is not clear to me whether an amendment was allowed, or whether it is for me to decide today. If it was allowed, subject to a number of difficulties, notably that it was presented well out of time, in November 2021, it is at present a bare assertion, unsupported by any explanation of circumstances or any documents, and as it relates to what did or did not happen in 2012, when the claimant says he was promoted, it may be difficult for either side to establish on the evidence, and particularly difficult for the respondent to investigate.

28. If I assume the amendment was allowed, I consider that this claim has no reasonable prospect of success. The claimant does not identify when or how he was told that he should be paid more in 2012, nor does he explain why he did not complain about this afterwards, or at any time until November 2021, six months after dismissal. The explanation that he had included a claim in draft on his computer but lost the information when applying it to the claim form is implausible. He did not, for example, raise it in the appeal meeting. It concerns a substantial sum of money, but is not included it on his schedule of loss. He does not rely on any document about the circumstances of promotion, or he wage rate applicable. There is scant evidence of the facts on which the claim is based, just an assertion.

29. In any case I consider he has little prospect of establishing that it was not reasonably practicable to bring this claim within three months of the last date that it

should have been paid (May 2021), as required by the Employment Rights Act 1996 or the Extension of Jurisdiction Order. Looking both at the merits and the time point I consider there is *no* reasonable prospect of success.

30. If I assume that there has been no order allowing amendment, and it is for me to decide, I do not allow an amendment. Having regard to the **Selkent** factors, first of all, it is not a relabelling of an existing matter on the claim form. There is no mention of it on the claim form. It is an entirely new claim. Second, it only came to light indirectly, in one sentence, at a case management hearing. There is still time for the respondent to obtain more information from the claimant and prepare a response, but only because the final hearing has been postponed. Thirdly, there is the problem of jurisdiction, as it was late. There is nothing to suggest it was not practicable to include it in the claim form. It is for a substantial sum of money, so unlikely to be overlooked if it was on his mind at the time. Stepping back and looking at the overall balance of prejudice in the light of these points, if the amendment is allowed, the respondent has to investigate a bare claim, without more information on why the claimant says it was agreed he should be paid more in 2012, without documents, and the claimant has not provided any details, or a plausible explanation of delay.

Conclusions - Summary

31. To conclude, the claim of past underpayment from 2012 to dismissal is dismissed because it has no reasonable prospect of success.

32. The claims of unfair dismissal, including dismissal for making protected disclosures, and wrongful dismissal (notice pay) are not struck out.

Final Hearing

33. If the claimant sends a witness statement in time, so is not struck out on 19 July, the final hearing will take place on **13, 16-20 January 2023**. A notice of hearing will be sent later. If that date is not convenient to the parties' witnesses, they are invited to apply for relisting, and should do so before 1 September 2023.

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Employment Judge Goodman

Date: 16th June 2022

JUDGMENT and SUMMARY SENT to the PARTIES ON

16/06/2022.

FOR THE TRIBUNAL OFFICE