EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mr I Howat	AND	R T Keedwell Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (by telephone in public) **ON** 23 June 2022

EMPLOYMENT JUDGE J Bax

Representation
For the Claimant: Mr I Howat (in person)
For the Respondent: Mr A Dark (solicitor)

JUDGMENT

The judgment of the tribunal is that the Respondent's applications to strike out the claim or for a deposit order in the alternative are dismissed.

REASONS

1. This is the Judgment following a preliminary hearing to determine the Respondent's application that the claimant's claims should be struck out on the grounds that they have no reasonable prospects of success or a deposit order should be made in the alternative

Background

2. By a claim form dated 21 July 2021 the Claimant brought claims of unfair dismissal and wrongful dismissal/breach of contract in respect of notice. The Claimant was dismissed from his role as an LGV driver on 28 April 2021.

3. The claim form detailed that on 20 April 2021 the Claimant was involved in verbal altercation with Tom Keedwell when the Claimant was sitting in his cab. The Claimant said he swore at Mr Keedwell, who then tried to pull his door open and pulled off bits of trim. The Claimant then said, “I would like to stab you”, to which Mr Keedwell said, “get out of the cab and let’s have it”, following which he left. The Claimant refused to leave the cab when Mr Parry asked him to do so and the police were called. The Claimant was arrested for threatening to stab Mr Keedwell. The police told the Claimant that they had a description of the knife, but despite a search could not find one. On 21 April 2021 the Claimant e-mailed Dee Keedwell and asked if he had been dismissed or suspended. The response asked him to attend a meeting on 22 April at which he gave an account and was suspended. The Claimant attended a disciplinary meeting on 28 April 2021 which was chaired by Paul Phillips, director. It was said Mr Phillips was unfriendly and at times antagonistic and was trying to twist what the Claimant said. The Claimant said that the Keedwells were aware that Tom Keedwell, one of the family, had made up things said to the police. He was then dismissed for gross misconduct. He did not believe action was taken against Tom Keedwell.

4. The response accepts that the Claimant and Tom Keedwell were involved in an argument. During the investigation Mr Keedwell accepted that he had tried to open the door. Mr Keedwell reported to Mr Parry that the Claimant threatened to stab him with a knife and described it as being in a black sheath. In the disciplinary meeting the Claimant accepted that he had said he wanted to stab Mr Keedwell. Prior to sending the e-mail inviting the Claimant to an investigatory meeting it was clarified whether the Claimant was resigning. In the investigation meeting the Claimant accepted he had said “I’d like to stab you.” At the start of the disciplinary hearing it was said the allegation was that the Claimant had threatened to stab a colleague, the Claimant said he did not threaten to stab anyone. The Claimant was dismissed for gross misconduct. Mr Keedwell attended a disciplinary meeting and showed contrition and was disciplined.

5. On 3 September 2021, the Respondent applied for the claim to be struck out or a deposit order made in the alternative.

6. Before the application was considered it was necessary to clarify the issues. The Claimant clarified that he was saying the dismissal was unfair because: (1) Mr Parry told him he was being dismissed when he was in lorry, when Mr Parry said it was going to end badly for him, (2) there were lies that he had produced a sheath knife, (3) he was treated differently to Tom Keedwell, who was also involved in the altercation and was a member of the family who own the Respondent, (4) the Claimant did not accept that Mr Keedwell was disciplined.

7. I considered the grounds of application and the response submitted by the parties. I considered the documentary evidence which is proposed will be adduced at the main hearing. I listened to the factual and legal submissions made by and on behalf of the respective parties. I have not heard any oral evidence, and I do not make findings of fact as such, but my conclusions based on my consideration of the above are as follows.

Documentary evidence

8. In the investigatory meeting minutes, the Claimant said he had said to Mr Keedwell, "who the fuck are you to talk to me like that", he then puffed his chest out and said, "I'm Tom Keedwell". The Claimant said "Well you can fuck off you fat c**t." Mr Keedwell said something threatening and started retching (sic) on the door breaking off chrome trim. The Claimant then said "I'd like to stab you" which made him more angry and then he wandered off. He said when he was arrested he was told that it had been reported he had threated Mr Keedwell with a large sheath knife. He said he did not have such a knife and the search found nothing.

9. Statements were taken from Mr Legge, Mr Keedwell and Mr Parry. Mr Keedwell said that the Claimant called him a fat cunt and asked if he wanted t make something of it. he then said 'happily' and tried to open the door. The Claimant then pulled out a knife and said how about this and waved it a few times.

10. The disciplinary meeting notes record that the Claimant disputed that he threatened to stab anyone. He said "There was not a threat, I said I wanted to stab him not I was going to stab him. It was not suggested to him that he had waved a knife around. Mr Philips asked, "This situation has eroded the trust between Keedwells and yourself, how can we trust you around customers and other employees", to which the Claimant said, "How can I trust Keedwells not to upset me." The Claimant disputed that this was accurate during submissions and said the question was, 'how can I trust you' and he responded, 'how can I trust Keedwells'.

11. I was provided with the dismissal letter dated 28 April 2021.

12. There was a letter dated 4 May 2021 inviting Mr Keedwell to a disciplinary meeting. I was provided with a letter dated 10 May 2021 issuing a written warning to Mr Keedwell, noting that he had apologised and he should have known better.

Respondent's submissions

13. The Respondent relied upon the Claimant admitting in his claim form and in the investigatory and disciplinary meetings that he said, "I'd like to stab you". He did not accept in his disciplinary meeting that it amounted to a

threat

14. There was a challenge to the fairness on the basis that he should have been told immediately that he was suspended, but it was not accepted it was relevant.

15. In terms of it being said things had been blown out of proportion, it was said that the reference to stabbing escalated matters. It was not blown out of proportion because it was checked whether the Claimant resigned and then followed a disciplinary process.

16. It was submitted that there was no core of disputed facts. I did not accept that this was completely accurate as there was a dispute as to whether a knife was waved around.

17. In relation to being treated differently to other employees, it was submitted that Mr Keedwell was not truly in the same situation as the Claimant on the basis that he made no reference to stabbing. He apologised in the disciplinary hearing and accepted he should have known better. Whereas the Claimant did not show contrition, by his reference to saying how can I trust Keedwells. Mr Keedwell was given a written warning. It was submitted that there was a difference between name calling and Mr Keedwell trying to access the cab and the reference to stabbing escalated the situation and was more serious. It was submitted there was an ongoing threat and it had not been retracted.

Claimant's submissions

18. The Claimant submitted that he admitted saying "I would like to stab you" following a threat of violence from Mr Keedwell but said it was a statement of how he felt rather than a threat. The comment was blown out of proportion. He did not accept that Mr Keedwell was disciplined and made the point that the Keedwells treated employees in a certain way, namely there was a lot of shouting at them.

19. The Claimant is currently not working, and he is looking after his wife who is seriously ill and undergoing treatment. He has no income, and they are living from savings amounting to a few thousand pounds. Their outgoings are about £1,500 to £1,600 per month and their savings are expected to run out within the next few months.

The Law

20. The Employment Tribunal Rules of Procedure 2013 are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and are referred to in this judgment as "the Rules". Rule 37(1) provides that 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 the grounds that it is scandalous, or vexatious, or has no reasonable prospect of success. Rule 39 provides that 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. Under Rule 39(2) the Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

Strike out

21. Under rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, a tribunal can strike a claim out if it appears to have no reasonable prospect of success. It is a two stage process; even if the test under the rules is met, a judge also has to be satisfied that his/her discretion ought to be exercised in favour of applying such a sanction. Striking out a claim is a draconian step and numerous cases have reiterated the need to reserve such a step for the most clear and exceptional of cases (for example, Mbuisa-v-Cygnet Healthcare Ltd UKEAT/0119/18).

22. The importance of not striking out discrimination cases save in only the clearest situations has been reinforced in a number of cases, particularly Anyanwu-v-South Bank Students Union [2001] UKHL 14 and, more recently, in Balls-v-Downham Market School [2011] IRLR, Lady Justice Smith made it clear that "no" in rule 37 means "no". It is a high test.

23. In Ezsias-v-North Glamorgan NHS Trust [2007] EWCA Civ 330 the Court of Appeal stated that it would only be in exceptional cases that a claim might be struck out on this ground where there was a dispute between the parties on the central facts. Sometimes it may be appropriate to resolve key factual dispute by hearing evidence even at a preliminary hearing (as in Eastman-v-Tesco Stores [2012] All ER (D) 264).

24. In Cox v Adecco & Others UKEAT/0339/10/AT, HHJ Taylor after a review authorities summarised the general propositions for a strike out application at paragraph 28 as:

    (1) No-one gains by truly hopeless cases being pursued to a hearing;
    (2) …
    (3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

(4) The Claimant's case must ordinarily be taken at its highest;
(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;
(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require 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;
(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;
(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;
(9) …

25. There has to be a reasonable attempt at identifying the claims and issues before considering a strike out or making a deposit order. There may be a claim, even it requires an amendment. Identifying the claims and issues is a pre-requisite to considering the allegation. Respondents seeking a strike out should not see it as a way of avoiding having to get to grips with a claim and they need to assist the Tribunal in identifying what, on a fair reading of the pleadings and other key documents in which the claimant sets out the case, the claims and issues are. Respondent's, particularly if legally represented, in compliance with the overriding objective and not to take procedural advantage of a litigant in person, should assist by identifying key passages in documents and take particular care if a litigant in person has applied a wrong legal label.

Deposit

26. Where a tribunal considers that any specific allegation, argument or claim has little reasonable prospect of success it may make a deposit order (rule 39). If there is a serious conflict on the facts disclosed on the face of the claim and response forms, it may be difficult to judge what the prospects of success truly are (Sharma-v-New College Nottingham [2011] UKEAT/0287/11/LA). Nevertheless the tribunal can take into account the likely credibility of the facts asserted and the likelihood that they might be established at a hearing (Spring-v-First Capital East Ltd [2011] UKEAT/0567/11/LA). It is important that the Tribunal engages with and

understands the basis for the Claimant's claim before concluding it has little reasonable prospects of success (Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14).

27. I was referred to Hemdan v Ishmail [2017] IRLR 228 and was assisted by paragraphs 12, 13 and 15. The test is less rigorous than the test for a strike out, 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 defence. "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 on 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… If there is a core factual conflict it should be properly resolved at a full merits hearing where evidence is heard and tested." "Once a tribunal concludes that a claim or allegation has little reasonable prospects 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.

Unfair dismissal

28. The Respondent said that reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").

29. I considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

30. In cases involving dismissals for reasons relating to an employee's conduct, the tribunal has to consider the three stage test in BHS-v-Burchell [1980] ICR 303 (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer genuinely believed that the employee was guilty of the misconduct alleged; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much

investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss. It is not for the tribunal to decide whether the employee actually committed the act complained of.

31. A Tribunal is not permitted to impose its own view of the appropriate sanction. Rather, it has to decide whether it fell somewhere within the band of responses available to a reasonable employer in the circumstances (Foley-v-Post Office, HSBC-v-Madden [2000] ICR 1283).

32. Inconsistency in the way employees are treated can result in a dismissal being unfair. In Procter v British Gypsum Ltd [1992] IRLR 7, the EAT cited Waterhouse J in Hadjioannouu v Coral Casinos Ltd [1981] IRLR 352 in which it was said, "It is only in the limited circumstances we have indicated that the argument is likely to be relevant and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar or sufficiently similar to afford an adequate basis for the argument." If an employer makes a distinction between 2 employees the Tribunal must be satisfied that distinction is irrational in order to say that it falls outside of the band of reasonable responses (e.g. Harrow London Borough v Cunningham [1996] IRLR 256)

Breach of contract/wrongful dismissal

33. An employer is entitled to dismiss an employee without notice in circumstances of gross misconduct

Conclusions

34. The Respondent was correct in that there are a large number of facts which are not in dispute. The Claimant accepts that he said, "I'd like to stab you". It is also not in dispute that there was a verbal altercation. The Claimant will be hard pressed to establish that such matters are not capable of constituting gross misconduct or that what was said could not be interpreted as a threat. However the Claimant's case must be taken at its highest and the test to be applied is not only whether the Respondent had reasonable grounds on which to base the belief, but also whether the decision to dismiss was within the band of reasonable responses.

35. It was significant that the Claimant was one of two people involved in the altercation. The other participant was a member of the family which owns the Respondent. It was said Mr Keedwell was invited to a disciplinary hearing after the dismissal of the Claimant and was given a written warning for his involvement, which was not accepted by the Claimant. I accepted

that when considering disparity between treatment of employees the circumstances must be truly similar, however this was a case in which two employees in the same incident were treated differently. This is not a case where different employees have been treated differently for separate incidents, two men were involved in serious altercation, in which physical aggression appears to have been shown by Mr Keedwell and he received a lesser sanction. The Respondent relies upon Mr Keedwell's contrition and that he did not threaten to stab the Claimant, however it is accepted that he tried to open the door before the Claimant mentioned stabbing. With unfair dismissal cases it is necessary to take into account all of the circumstances of the case and the involvement of Mr Keedwell is relevant. Taking the Claimant's case at its highest there appeared to be an act aggression or a physical threat from Mr Keedwell first, which provoked the situation. It was relevant that Mr Keedwell is a family member and it raises a question of whether there was favouritism towards him or whether he was disciplined by the Respondent. There is a serious issue to be considered and a finding of fact will need to be made as to the rationale of the Respondent for treating the two men differently. Cases should not be struck put except in the clearest cases. In the present circumstances, taking the Claimant's case at its highest it is not possible to say there is no reasonable prospect of success in him persuading a tribunal the decision in relation to the difference in the way he and Mr Keedwell were treated was irrational. I was not therefore satisfied that there were no reasonable prospects of success in the claim.

36. Further it is not appropriate to conduct a mini-trial on the issue, there is a significant issue in relation to the whether the sanction fell within the band of reasonable responses, which can only be determined after hearing evidence. The Claimant disputes what was said at the disciplinary hearing in relation to the comments upon which the Respondent relies in relation to a lack of contrition. The Respondent relied upon a difference between name calling and trying to open a door and threatening to stab and there is a reasonable argument in that respect, however those circumstances also appear to suggest that the initial physical aggression came from Mr Keedwell and the Claimant suggests he made the 'stab' reference in response. There is a question to be determined as to whether Mr Keedwell was disciplined and the family context is significant and the Claimant suggested that Keedwells generally shouted at employees and he doubted anything was said at all. Even on the Respondent's case the actions of Mr Keedwell were highly inappropriate. I considered that the Claimant did have an argument that there was a difference in treatment and that it was irrational. This was an incident where two employees were involved in an altercation and they were treated differently for what appear to be serious misconduct on both sides. In the circumstances, although the Claimant's argument is not strong, I was not satisfied that there were little reasonable prospects of success. In any event there is a factual issue which requires

determination in terms of the rationale for the differing treatment and it was not in the interests of justice to impose a deposit order, which could effectively shut out the Claimant from bringing a claim when his finances are significantly stretched. In the circumstances I would not have exercised my discretion to make a deposit order in any event.

37. Accordingly the applications to strike out and for a deposit order were dismissed.

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Employment Judge J Bax
Dated 23 June 2022

Judgment sent to Parties on
06 July 2022 By Mr J McCormick

For the Tribunal Office