EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr. B. Williams	v	**Kirmell Limited**

Heard at: **Birmingham via CVP** **On:** **12 September 2022**

Before: **Employment Judge Wedderspoon**

Representation:

Claimant: **Mr. Morrison, Lay representative**

Respondents: **Mr. Jackson, solicitor**

JUDGMENT

1. The claim of direct race discrimination has little reasonable prospect of success.
2. The tribunal makes a deposit order in the sum of £400 as a condition of the claimant continuing to proceed with the direct race discrimination complaint.
3. The claim for holiday pay for the May 2020 bank holiday at a rate of £111.70 has no reasonable prospects of success and is dismissed.
4. The tribunal has no jurisdiction to deal with the claim for breach of contract for a failure to increase salary; it has no reasonable prospect of success and it is dismissed.
5. The claim for unlawful deduction of wages namely a shortfall of furlough pay for 22 May 2020 and 29 May 2020 has no reasonable prospect of success and is dismissed.
6. The claim for unlawful deduction of wages namely a shortfall of 5 days holiday pay has no reasonable prospect of success and is dismissed.
7. The claim for payment of machinery has no reasonable prospects of success and is dismissed.
8. The claim for a shareholding has no reasonable prospects of success and is dismissed.

REASONS

9. By claim form dated 3 August 2020 the claimant brought claims of race discrimination, a holiday, unlawful deductions for failure to pay for furlough, breach of contract and a claim for “payment for machinery and dividend shareholding”.
10. The Tribunal was provided with an electronic bundle of 80 pages and a statement of case from the claimant. At the commencement of the hearing Mr. Morrison for the claimant stated that the claimant’s second claim 1303570/2021 had been re-instated following a strike out for failure to comply with an unless order. The respondent had no knowledge of this. The Employment Judge put the case back to enquire with the Tribunal office about this. The Tribunal had no

record that the claim had been re-instated and the Employment Judge was informed the case remained struck out since 18 March 2022. On this basis the hearing proceeded on the case before it only.

11. The Tribunal requested that Mr. Morrison clarify the claimant's case and he was also provided with an additional 30 minutes during the hearing to speak with the claimant to take further instructions. The Tribunal provided the claimant with the opportunity to clarify his case before determining the strike out or deposit order because the claimant is a litigant in person and represented by a lay representative and the ETBB indicates at paragraph 26 page 19 that litigants in persons have difficulties in putting the salient points into their statement of case. Further in accordance with the case of **Malik v Birmingham City Council** the Tribunal should carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding there is nothing of substance behind it; the Tribunal deems it appropriate to clarify the claimant's case before considering striking it out. The respondent did not object to this course and only at the end of the case when judgment was given permitting the race claim to proceed did the respondent contend that the Tribunal had allowed the claimant to clarify his case and the Tribunal had failed to take account only of the claim form. The Tribunal explained that it had permitted the claimant to articulate the case so to know what exactly it was striking out or if that was appropriate and further made the points set out above concerning the ETBB. The claimant gave evidence by telephone as to his means.

12. Mr. Morrison clarified that the claimant brought a claim of direct race discrimination. The claimant is an African Caribbean male. His case is that he was placed on sick leave in July 2020 and not furloughed which financially penalised him. He believes this was an act of direct race discrimination. He remained off sick from work until he was dismissed on 3 December 2021. He does not have an actual comparator and relies upon a hypothetical one.

13. In respect of his holiday claim, he alleges that he was not paid £111.70 due for the early bank holiday in May 2020.

14. In respect of breach of contract claim, he contended that he was promised an increased salary. He did not have anything in writing from the respondent but he was not paid the agreed pay increase. He relied upon a discussion when he was appointed a director in 2004 at a rate of £33,000. It was agreed he would be considered to be a director at a rate of £20,000 and his pay would increase for £1 per hour so to arrive at a salary of £33,000 eventually.

15. On 22 and 29 May 2020 the claimant was furloughed but there was a shortfall in pay of some £506.46.

16. He also alleged in his claim form he was owed furlough pay for 10 days £1,116.96. On taking further instructions from the claimant during the hearing, Mr. Morrison contended that there was a shortfall of holiday pay for 5 days. He could not state which dates but stated in the period between January 2021 and May 2021 (this is after he lodged his claim form in August 2020).

17. In respect of the claims for machinery costs, Mr. Morrison stated that the claimant brought his own turning machines into the building; he took a loan for this and paid it back. The machines were incorporated into the business. In respect of a shareholding/dividend the claimant stated that he was no longer a director but was a director at some point. Mr. Morrison said the claimant was a director in the previous company known Kinmell Turn Parts Limited (company number 05241783).
18. The respondent contended that the claimant's pleaded claims had no reasonable prospect of success and could not be properly responded to. The claimant was not a shareholder or a director. Companies house for the present company sued by the claimant, namely Kinmell Limited, does not show the claimant as a director. The other company mentioned, Kinmell Turn Parts Limited was dissolved on 2 November 2010.

19. Further the respondent submitted pursuant to Rule 12 of the 2013 rules, the race claim cannot be responded to. The claimant does not set out the "something more" (other than the difference of race) required to establish a prima facie case of direct race discrimination. The respondent also submitted that the claimant was on sick leave from March 2020 before the furlough scheme came into play (see page 59). He continued to be sick until early May 2020 when he requested to be placed on furlough. He was placed on furlough and paid £192.02 (see page 75); this was a similar amount to other employees. No employee has a right to go on furlough if on sick leave. There is no clarity how the claimant alleges he is owed £506 or £1116.96 claimed.

20. Further, the respondent disputed there was any breach of contract claim. At the time of the claimant lodging his ET1 in August 2020 he remained an employee. A breach of contract claim can only be brought following the ending of the employment relationship in the tribunal. Also, the claimant is relying upon a conversation in 2004 with the previous owner of the business Mr. Keen who passed away on 15 January 2018. A contract was provided to the claimant on 11 February 2020 which identified him as an employee only (it was unsigned). Clause 41 stated that this document was an entire agreement. However, the schedule of principal terms was signed by the claimant dated 25 February 2020. The claim that the claimant was a shareholder/director has no merit.

21. There was clear evidence that the claimant was paid for the May bank holiday; see page 69. His wage slip showed this.

22. As for the claim for machines this is not properly understood; there is a lack of clarity and no reasonable prospect of success.

23. In reply, Mr. Morrison for the claimant stated that the claimant was a director of Kinmell Turns Part Limited 05241784 and there must have been a TUPE transfer and the claimant had continuous employment since 2004; he thought he was employed by the same company.

24. The claimant gave evidence that he lives in a property with his partner and child. The property is mortgage free but he is unsure as to its value. He is now retied and receives just over £800 per month. He no longer works. His partner

works part time. He has house and life insurance amounting to £36 per month and he pays £150 per month off a credit card loan of £3000.

The Law

25. Pursuant rule 37 of 2013 rules, a tribunal has a discretion to strike out a case 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 a number of grounds including that the case has no reasonable prospect of success.

26. Rule 39 of the 2013 Rules deals with deposit orders. Where a Tribunal considers that any specific allegation or argument in the claim or response has little reasonable prospect of success it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
27. Rule 34 (2) states that enquiries should be made into a party's means before the order is made. Rule 34 (5) addresses the position where the sum is paid in compliance with a deposit order and the allegation or argument does not succeed at the merits hearing for substantially the reasons given in the deposit order. The paying party is treated as having acted unreasonably for the purposes of costs consequences unless the contrary is shown and the deposit is paid to the other party/parties. If this scenario does not eventuate then the deposit is refunded to the paying party.

28. In the case of the **Garcia v the Leadership Factor Limited (2022) EAT 19** it was stated that deposit orders (paragraph 36) have a valuable role to play in discouraging claims or defences that have little reasonable prospects of success without adopting the far more draconian sanction of dismissing the claim or response altogether. The deposit order affords a paying party the opportunity for reflection.

29. In the case of ***Hemdan v Ishmail & Al-Megraby (UKEAT/0021/16)*** it was stated 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. Further it was stated that claims or defences with little prospect, cause costs to be incurred and time to be spend by the opposite 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 resources of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit. Mrs. Justice Simler stated
"The purpose is emphatically not in our view ..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..Likewise the cap of £1000 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.."

30. Evaluating the likelihood of success for these purposes entails a summary assessment intended to avoid cost and delay and a mini trial of the facts to be avoided (see paragraph 13 of **Hemdan**). If the tribunal considers that an allegation has little reasonable prospects of success the making of a deposit

order does not follow automatically but involves discretion which is to be exercised in accordance with the overriding objective having regard to all the circumstances of the particular case.

31. The extent to which the tribunal may have regard to the likelihood of disputed facts being established at the full merits hearing has been considered by the EAT in **Jansen Van Rensburg v Royal Borough of Kingston Upon Thames UKEAT/0096/07;** the assessment by the Tribunal is a broad one and there is no justification to limit matters to be determined to purely legal ones. In **North Galmorgan NHS Trust v Ezsias (2007) IRLR 603**it was held that *"a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."*

32. In the case of **Anyanwu v South Bank Student Union (2001) ICR 391** it was stated by Lord Steyn at paragraph 24 *"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process*

33. The approach to be adopted by the Tribunal in a strike out application is to take the claimant's case at its highest.

34. In the case of **Mechkarov v Citibank NA (2016) ICR 1121** the proper approach to a strike out application is that (a)only in the clearest case should a discrimination claim be struck out (b)where there are core issues of fact that turn to any extent on oral evidence they should not be decided without hearing oral evidence (c)the claimant's case must ordinarily be taken at its highest (d)if the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents it may be struck out and (e)a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

35. In the case of **Madarassy v Nomura International Plc (2007) EWCA Civ 33** it was held that there is a need for something more than just a difference in status and a difference in treatment.

36. In the case of **Malik v Birmingham City Council (UKEAT/0027/19)**. The President stated that the Tribunal should carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding there is nothing of substance behind it. Insofar as it concludes that there is nothing of substance behind it, it should in accordance with the obligation to adequately explain its reasoning set why it concludes that there is nothing in the claim.

Conclusions

37. The claimant asserts that the decision not to place him on furlough was because of his race. The respondent asserts that it was more likely to be that the claimant was off sick. The clamant does not rely upon an actual comparator but relies upon a hypothetical one. The claimant has not suggested anything today that would satisfy the something more other than the protected

characteristic which is required to establish discriminatory treatment. However, the Tribunal has not heard any evidence in this case. Whether the claimant is able to establish his case will depend on the evidence the findings of primary facts made by the tribunal and any inferences that can be drawn from those primary facts (see paragraph 54 of the **Malik** judgment). The Tribunal is not permitted to undertake a mini trial. The Tribunal concludes taking into account the legal authorities and cautious approach to be exercised before striking out such a discrimination claim that is fact specific that it cannot be said this claim has no reasonable prospect of success but it can be said to have little reasonable prospect of success. The Tribunal reach this conclusion because the claimant's representative had been unable to identify the something more required in establishing a prima facie case (although this might be established upon hearing all the evidence). From the evidence of the claimant about his outgoings each month, he has about £600 left. The Tribunal determines it would be proportionate that he pay £400 to pursue this allegation. This sum is significant enough to warn the claimant that his claim has little reasonable prospect of succeeding on the present material provided but not so disproportionate in amount that it prevents him running the claim if he so wishes.

38. The breach of contract claim brought by the claimant is based upon his allegation that he received an oral promise that from 27 November 2018 he would receive an increase in pay of £1 per hour. The Tribunal determines that this claim has no reasonable prospect of success. A breach of contract claim can only be brought pursuant to the rules at the termination of employment. At the time of the claimant bringing this his claim in August 2020 he was an employee. Further, the claimant has no evidence in writing to support this wage increase promise; he was provided and does not challenge with a contract in February 2020 which is specifically stated to be the whole of the agreement which makes no mention of this increase in salary. This claim is dismissed.

39. The claimant's claim for a shortfall of furlough payments amounting to £506.46 has no reasonable prospect of success. The claimant has been unable today to particularise how this amount is reached for the two days he was furloughed on 22 May 2020 and 29 May 2020. The evidence provided by the respondent is that the claimant did receive a furlough payment and this was the same as other colleagues (pages 74 and 74 of the bundle). This has no reasonable prospect of success and is dismissed.

40. Despite being given further time during an adjournment in the hearing today to clarify the claim of £1,116.96 for furlough pay Mr. Morrison stated it was not in fact for furlough pay at all. He stated it was actually for 5 days holiday spanning sometime from 18 January 2021 to March 2021. The claim was brought in August 2020 so that this claim for unpaid holiday cannot be part of this claim. It has no reasonable prospect of success and is dismissed.

41. In respect of the non-payment for the early bank holiday in May 2020 of £111.70, the evidence provided by the respondent in a wage slip shows that the claimant was so paid. The documentation directly contradicts the claim pursued

by the claimant. This claim has no reasonable prospect of success and is dismissed.

42. In respect of payment for machines, there was no material evidence before the tribunal as to this claim. It was an unusual claim but appeared to the tribunal to be a further breach of contract claim. Such a claim could not pursued in this claim form whilst the claimant was still employed. In any event the contract dated February 2020 (the schedule of terms signed by the claimant on 25 February 2020) which indicates the entirety of the agreement does not refer to this at all. It has no reasonable prospect and is dismissed.

43. Furthermore, the dividend payment claimed has no reasonable prospect of success. This is a further breach of contract claim which can not be pursued in this claim form whilst the claimant was still employed. In any event the contract dated February 2020 (schedule of terms signed by the claimant on 25 February 2020) which indicates the entirely to the agreement does not refer to this at all. It has no reasonable prospect and is dismissed.
44. The case is listed for final hearing to determine the direct race discrimination claim only.

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Employment Judge Wedderspoon

14th September 2022

Sent to the parties on:

…14th September 2022….

For the Tribunal:

…Eamonn Murphy…

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