



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Ndovie

**Respondent:** Cygnet Hospital Bury

**Heard at:** Manchester

**On:** 20 February 2020

**Before:** Employment Judge Ainscough

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Ms L Gould (Counsel)

## JUDGMENT

The claimant's claim of unlawful deduction from wages is struck out because it has no reasonable prospects of success.

## REASONS

1. The claimant sought to bring a claim for unlawful deduction from wages under section 13 of the Employment Rights Act 1996 by way of a claim form dated 31 July 2019. It was the claimant's case that he should have received full pay during his sickness absence of 26 November 2018 – 11 February 2019 because he had sustained an injury at work. Instead the claimant received full pay for four weeks and statutory sick pay for the remainder of his absence from work.

2. The respondent denied that the claimant had been subject to any unlawful deduction from wages. It was the respondent's case that the claimant was only ever entitled to company sick pay for a period of 9 days and statutory sick pay thereafter. The payment of full pay for the period of 4 weeks was made at the discretion of the respondent.

3. The matter was listed for a Preliminary Hearing on 20 February 2020 to determine whether:

- (i) the claim had been presented in time;

- (ii) the claim should be struck out under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the basis that it had no reasonable prospects of success;
- (iii) it was appropriate to make a deposit order under Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the basis that it has little reasonable prospect of success.

### Relevant Legal Principles

4. The power to strike out arises under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Rule 37 provides as follows:

“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...”

5. As far as “no reasonable prospect of success” is concerned, a helpful summary of the proper legal approach to an application to strike-out is found in paragraph 30 of **Tayside Public Transport Co Ltd v Reilly** [2012] CSIH 46, a decision of the Inner House of the Court of Session:

“Counsel are agreed that the power conferred by Rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (*Balls v Downham Market High School and College* [2011] IRLR 217, at para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts (*ED & F Mann Liquid Products Ltd v Patel* [2003] CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (*ED & F Mann Liquid Products Ltd v Patel*, supra; *Ezsias v North Glamorgan NHS Trust* [[2007] ICR 1126]). But in the normal case where there is a “crucial core of disputed facts,” it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out (*Ezsias v North Glamorgan NHS Trust*, supra, Maurice Kay LJ, at para 29).”

6. The Employment Appeals Tribunal has warned Tribunals to be cautious in striking out the claim of a Litigant in Person. In **Mbuisa v Cygnet Healthcare Ltd EAT 0119/18** the EAT overturned a decision to strike out a claim of a Litigant in Person where the case had been poorly pleaded. The EAT determined that a strike out was a draconian step that should only be taken in exceptional circumstances.

7. The EAT also cautioned against strike out of claims when there is a dispute of crucial facts and there has been no opportunity to hear evidence. In **Mechkarov v Citibank NA 2016 ICR 1121 EAT**, the EAT observed that when the evidence demonstrated that the central facts of the claim were untrue, it may be appropriate to strike out. The EAT suggested that it would require conclusive disproving of the case in contemporaneous documents to make any strike out appropriate. However, when the central facts of the case remain in dispute, despite disclosure of evidence, it would be an error of law to strike out the claim.

8. The EAT in **Chandok v Tirkey** [2015] IRLR 195 determined that the exercise of a discretion to strike-out should be sparing and cautious:

“... Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a Tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision.”

### Discussion and Conclusions

9. This was an application made by the respondent for a strike out of the claim on the grounds that it has no reasonable prospects of success in accordance with Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

10. Section 13 of the Employment Rights Act 1996 requires the claimant to prove that he has suffered a deduction of wages.

11. Section 27 of the Employment Rights Act 1996 defines wages as

“sums payable to a worker in connection with his employment including — (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise”.

12. The Court of Appeal in **New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA** established that whilst the claimant may not have a contractual entitlement to payment he must have a legal entitlement to payment to meet the definition of wages within the legislation. The Court of Appeal went on to say that a non-contractual discretionary payment will not meet the definition of wages if there is no legal entitlement for it to be paid.

13. I have looked at page 30 of the bundle which is the contract of employment. The contract provides for, at the very least, payment of statutory sick pay when the claimant is off sick, and payment of company sick pay at the discretion of the respondent. It is not clear, and obviously I have not heard evidence on this issue, as to whether the three company sick days that an employee can accrue each year form part of any discretionary payment that is made. Notwithstanding this point, the claimant is only contractually entitled to statutory sick pay, and as I understand it he received statutory sick pay during his three-month absence from work.

14. The contract of employment also states the sickness absence rules are contained within the employee handbook. I have looked further at the employment contract and at page 34 the claimant signed to say that he had received a copy of the statement, received a copy of the electronic company handbook, confirmed he had read and understood and accepted the terms and conditions of employment in this statement, which together with his offer letter and employee handbook formed his written contract of employment. The employee handbook and the provisions therein form part of the written contract of employment.

15. Page 38 paragraph 6 of the handbook, deals with industrial injuries and accidents at work. Sick pay in such circumstances can, at the discretion of the

respondent, be extended for up to four weeks. The respondent exercised that discretion and paid the claimant full pay for the first four-week period.

16. The contract and handbook do not provide for anything else. The claimant has received all the wages properly payable to him under his contract of employment and discretionary full pay for a period of four weeks. There is no express or implied term in the contract that the claimant is entitled to more.

17. I am conscious that the claimant is a Litigant in Person. However, the claimant's case would not have better prospects if it were pleaded differently or if he was legally represented. The contemporaneous documents disprove the claim brought by the claimant. There is no outstanding dispute of fact to be determined. The claimant's claim for unlawful deduction from wages has no reasonable prospects of success and therefore will be struck out.

Employment Judge Ainscough

Date: 4 March 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

5 March 2020

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