EMPLOYMENT TRIBUNALS

Heard at: London South Employment Tribunal

On: 25 May 2023

Claimant: (1) Mr A Tihomirov, (2) Ms K Jaroszewska

Respondent: Cognithan Limited

Before: Employment Judge Ramsden

Representation:

Claimant (1) In Person

Claimant (2) In Person

Respondent Mr Onibokun, solicitor

JUDGMENT ON PRELIMINARY ISSUES

1. The First Claimant's claims of:

   1.1 unlawful deductions from his wages regarding (i) his notice pay, (ii) a "deposit" and (iii) a coronavirus supplement;

   1.2 losses flowing from late payment of his wages; and

   1.3 breach of contract by the Respondent requiring him to perform duties outside of the its scope,

   are struck out.

2. The Second Claimant's claims of:

   2.1 unlawful deductions from her wages regarding (i) her notice pay, (ii) a coronavirus supplement and (iii) other unspecified deductions;

   2.2 losses flowing from late payment of her wages;

   2.3 constructive unfair dismissal;

   2.4 unlawful discrimination on the basis of nationality; and

2.5 any alleged unlawful discrimination on the basis of sex and/or age that relates to anything other than the incident of 13 March 2021,

are struck-out.

3. In order for the First Claimant to continue to pursue his claims of unlawful deduction from his wages in respect of:

5.1 accrued but untaken holiday; and

5.2 the hours he would have worked in January 2021 had the Respondent not erroneously suspended him,

he is required to pay a deposit of £100 in respect of each of them.

4. In order for the Second Claimant to continue to pursue her claims of unlawful deduction from her wages in respect of accrued but untaken holiday, she is required to pay a deposit of £50.

5. Each of the Claimant's remaining claims – subject to the payment of the requisite deposits where applicable - will proceed to a hearing on starting on **21 August 2023**.

REASONS

6. These written reasons are provided at the request of each Claimant following oral reasons given on the day of the hearing.

Background

7. The Respondent is a company that runs community residential and supported living sites.

8. Mr Tihomirov worked for the Respondent as a Support Worker/Cook from 23 October 2020 until his employment terminated by his resignation on 17 April 2021. Ms Jaroszewska worked for the Respondent as a Support Worker from 4 November 2020 until her employment terminated, apparently by her resignation, on 4 May 2021.

9. Each of the Claimants has brought various complaints against the Respondent, presented in claim forms dated 7 May 2021 (in the case of Mr Tihomirov) and 13 June 2021 (in the case of Ms Jaroszewska), and amended subsequently by each of them. Those claims were ordered, by EJ Corrigan on 17 January 2023, to be

heard together as they involve overlapping facts and issues and each Claimant intends to be a witness for the other.

10. It has been difficult to clarify what claims each Claimant is making, and several attempts to case manage the cases have been made on **4 November 2022**, **17 January 2023**, on **10 May 2023**, and again today. Each of those case management hearings has resulted in Case Management Orders.

11. What has emerged from those case management attempts is that:

    11.1 The First Claimant is claiming that:

    11.1.1 The Respondent is vicariously liable for the actions of one of its employees, Emmanuel, who on 13 March 2021 subjected the First Claimant to verbal abuse amounting to harassment related to his nationality;

    11.1.2 The Respondent has not paid him for all of his accrued but untaken holiday, which is characterised as an unlawful deduction from his wages;

    11.1.3 The Respondent failed to pay him in respect of the hours he would have worked in January 2021 had the Respondent not erroneously suspended him from work due to a mistaken belief that, as an EU national, he could not work at that time without documentary evidence that he had EU Settlement Status;

    11.1.4 The Respondent unlawfully deducted a coronavirus wage supplement promised to him;

    11.1.5 Whilst he did not work it, he should have been paid for his notice period, i.e., that there was an unlawful deduction from his wages in respect of pay he should have been paid for his notice period;

    11.1.6 The Respondent unlawfully deducted a sum from his wages which he refers to as a “deposit”;

    11.1.7 The Respondent was, on several occasions, late in paying his wages, which caused him to incur costs for which the Respondent should be liable by way of damages for breach of contract; and

    11.1.8 The Respondent breached his contract by requiring him to perform duties outside of its scope.

    11.2 The Second Claimant is claiming that:

    11.2.1 The Respondent is vicariously liable for the actions of one of its employees, who subjected her to verbal abuse amounting to harassment related to the Second Claimant’s sex, age and nationality. This complaint relates to the same 13 March 2021 incident about which the First Claimant complains;

11.2.2 She was the subject of other instances (not described) of unlawful discrimination on the basis of her sex, age and nationality;

11.2.3 (Like the First Claimant) The Respondent has not paid her for all of her accrued but untaken holiday, which is characterised as an unlawful deduction from her wages;

11.2.4 (Again, like the First Claimant) The Respondent unlawfully deducted a coronavirus wage supplement promised to her;

11.2.5 (Again, like the First Claimant) Whilst she did not work it, she should have been paid for her notice period, i.e., that there was an unlawful deduction from her wages in respect of pay she should have been paid for her notice period;

11.2.6 The Respondent unlawfully deducted other sums of money from her wages, which are unspecified;

11.2.7 (Again, like the First Claimant) The Respondent was, on several occasions, late in paying her wages, which caused her to incur costs for which the Respondent should be liable by way of damages for breach of contract; and

11.2.8 She was constructively unfairly dismissed by the Respondent.

12. The Respondent:

12.1 denies each of the notice pay and holiday pay claims;

12.2 denies that there was any unlawful deduction from the wages of either Claimant;

12.3 accepts that it was, on a few occasions, late paying the Claimants' wages, but has put them to proof of any loss they incurred in consequence of those late payments;

12.4 denies that it breached either of the Claimants' employment contracts;

12.5 says that the Second Claimant's employment terminated by reason of her resignation; and

12.6 denies that the behaviour of its-then other employee, Emmanuel, towards the Claimants amounted to unlawful discrimination of any kind.

13. The preliminary matters to be decided today are whether the Respondent's applications for:

13.1 An order to strike-out each of the Claimants' claims on the basis that:

13.1.1 they have no reasonable prospects of success under Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 (the **ET Rules**);

13.1.2 the manner in which the proceedings have been conducted by each of the Claimants has been scandalous, unreasonable or vexatious, engaging Rule 37(1)(b) of the ET Rules;

13.1.3 the Claimants have failed to comply with any of the case management orders made by the Tribunal on 17 January 2023 and on 10 May 2023, engaging Rule 37(1)(c) of the ET Rules; and/or

13.1.4 it is no longer possible to have a fair hearing, engaging Rule 37(1)(e) of the ET Rules;

or in the alternative:

13.2 An order that continuing with any of the Claimants' claims be subject to the payment of a deposit by the relevant Claimant, pursuant to Rule 39 of the ET Rules, on the basis that the claims have little reasonable prospects of success.

The hearing

14. The Respondent was represented in the hearing by Mr Onibokun. The Claimants presented their own cases, and used an interpreter provided by the Tribunal, Ms Parker, for translation purposes.
15. The Respondent served hearing bundle of 309 pages on the parties, in accordance with the case management order of EJ Ferguson, two days before the hearing.
16. The Claimants each gave evidence in support of their resistance of the Respondent's applications.

Law

Strike-out

17. Rule 37 of the ET Rules provides:

"*(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;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

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

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

18. The effect of a strike-out is to terminate the claim or the part of the claim that is the subject of the order. It is a draconian jurisdiction, and the relevant case authorities underlie its exceptional nature. This is particularly so where the substantive case features allegations of unlawful discrimination, as it is "a matter of high public interest" that such cases are heard (as per Lord Steyn in *Anyanwu v South Bank Students' Union* [2001] IRLR 305).

19. The application here is made under sub-categories (a), (b), (c) and (e) of Rule 37(1) of the ET Rules. There is some overlap between these categories.

(a) No reasonable prospect of success

20. In relation to the argument that the Claimants' claims have "*no reasonable prospect of success*", plainly, on the wording of the Rule, the threshold for the Respondent to meet is a high one. The EAT has cautioned against finding it met (in *Mbuisa v Cygnet Healthcare Ltd* EAT 0119/18) where the claimant is a litigant in person whose first language is not English, and who is not does not come from a background such that he is accustomed to articulating complex arguments in written form – these features apply to each of the Claimants here.

21. Furthermore, the cases of *Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330 and *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] IRLR 755 indicate that it would be wrong to make a strike-out order where there is a dispute on the facts that needs to be determined at trial.

22. As HHJ Eady put it in *Mbuisa* at [20]: "S*uch an exceptional case might arise where it is instantly demonstrable that the central facts in the claim are untrue or there is no real substance in the factual assertions being made, but* ***the ET should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents****, see* Ukegheson v London Borough of Haringey *[2015] ICR 1285 at para 21 per Langstaff J at para 4*" (my emphasis).

23. Mitting J summarised the law in *Mechkarov v Citibank NA* UKEAT/0041/16, [2016] ICR 1121 as follows at [14]:

    "*(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) 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 (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.*"

24. However, taking the claimant's case its highest does not mean that there is no burden on the claimant at this stage. Lord Justice Underhill in the Court of Appeal case of *Ahir v British Airways* [2017] EWCA Civ 1392 at [19] observed that "*where there is an ostensibly innocent sequence of events leading to the act complained*

of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it."

(b) The Claimants' conduct of proceedings has been scandalous, unreasonable or vexatious

25. The relevant authority for this ground for strike-out is *James v Blockbuster* [2006] EWCA Civ 684, where Lord Justice Sedley observed that the two conditions for the Tribunal's power to strike-out for the manner in which a party has been conducting its side of the proceedings are:

    "***<u>either</u>*** *that the* ***unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps****,* ***or*** *that* ***it has made a fair trial impossible****. If these conditions are fulfilled, it becomes necessary to consider whether, even so,* ***striking out is a proportionate response***" (my emphasis).

26. The key cases on the second limb, whether strike-out is a proportionate response, include the decisions of the Court of Appeal in *Arrow Nominees v Blackledge* [2000] 2 BCLC 167 and the decision of the EAT in *Weir Valves v Armitage* [2004] ICR 371. Both emphasise that, even where the jurisdiction to strike-out is engaged by one party's non-compliance with court orders, strike-out is not a punishment, but is rather a tool to be exercised with caution in furtherance of justice – to secure the fair trial of the action in accordance with the applicable rules.

27. In the case of *Armitage* (*Blackledge* was not an employment law case), Judge Richardson centred the question of what is a proportionate response on the overriding objective, set out in Rule 2 of the ET Rules. That provides:

    "*The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*

    (a) ensuring that the parties are on an equal footing;

    (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

    (c) avoiding unnecessary formality and seeking flexibility in the proceedings;

    (d) avoiding delay, so far as compatible with proper consideration of the issues; and

    (e) saving expense.

    A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their

representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

28. As Judge Richardson put it in *Armitage*: "*The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been cause and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience.*"

(c) Non-compliance with an order of the Tribunal

29. As for strike-out on ground (b) above, the key consideration here is the overriding objective, i.e., whether strike-out would further or hinder the Tribunal's objective to deal with cases fairly and justly, and whether strike-out is a proportionate response. In assessing this, the EAT in *Armitage* emphasised that the Tribunal should consider all relevant factors, which may on the facts include:

    29.1 the magnitude of the default;

    29.2 whether the default was the responsibility of the solicitor or the party;

    29.3 what disruption, unfairness or prejudice had been caused;

    29.4 whether a fair hearing was still possible; and

    29.5 whether striking out or some lesser remedy would be an appropriate response to the non-compliance.

(e) Whether it is possible to have a fair hearing

30. The reported decisions on this basis for strike-out generally concern cases which could not be progressed because of the claimant's ill health where there was no prognosis about when they would be well enough for the case to be pursued. The central applicable considerations are the balance of prejudice to the parties in the matter continuing or being struck-out.

<u>Deposit orders</u>

31. Rule 39 of the ET Rules provides:

"*(1) 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*" (my emphasis).

32. By contrast with strike-out, the effect of a deposit order is that the party subject to it is required to pay the deposit value by a specified date in order to continue to pursue their claim or response (or any allegation or argument in their claim or response). Consequently it is a less extreme measure, and (assuming the deposit amount is set appropriately) prompts the party who is the subject of the order to engage with the merits of that claim or response (or part of their claim or response) so as to decide whether to pay the deposit and maintain it, or to see it struck out (Rule 39(4)).

33. Any order to pay a deposit must be one that is capable of being complied with, and so the value of any order (not exceed £1,000) must be such that the party that is the subject of the order is able to pay it, and therefore Rule 39(2) requires the Tribunal to make reasonable enquiries into the paying party's ability to pay the deposit and have regard to that information when deciding the amount of the deposit.

34. That does not necessarily mean any deposit order should be for a nominal amount - it should also be high enough "to bring home... the limitations of the claim" (*O'Keefe v Cardiff and Vale University Local Health Board* ET Case No.1602248/15).

35. In addition to the "pause for thought before paying" effect of a deposit order, it has some consequences for the paying party if the deposit is paid and that claim/part of it is then decided against them at the substantive hearing. Rule 39(5) sets those out.

"*(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*

> *(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76 [When a costs order or a preparation time order may or shall be made], unless the contrary is shown; and*
>
> *(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),*
>
> *otherwise the deposit shall be refunded.*"

Application to the claims here

Context

36. The Tribunal has made three case management orders in this case:

    36.1 On 4 November 2022;

    36.2 On 17 January 2023; and

    36.3 On 10 May 2023.

37. On my calculation, though some of the orders repeat previous orders not complied with, the First Claimant has failed to comply with 16 out of 24 of the Tribunal's Case Management Orders, and the Second Claimant has failed to comply with 35 out 59 of them. Those that have been complied with are largely unclear (e.g., the amount of compensation sought may have been stipulated, but without providing any rationale for that sum). This is plainly frustrating for the Respondent (and Tribunal).

38. The overriding objective, in Rule 2, is that the Tribunal should deal with cases "fairly and justly". The Tribunal Judges have plainly attempted to ensure the Claimants understand what is required of them, and have provided information in three sets of Orders indicating, in each, resources the Claimants could turn to for assistance in preparing their claims and complying with the Tribunal's orders - still, the Claimants have failed to do so.

39. I understand from their oral evidence that the Claimants have telephoned two of the advice centres identified on the Orders, and were unable to get the assistance needed in the requisite time, but some of their failures are simply failures to articulate facts, which do not require legal knowledge or assistance, and the Claimants simply have not done that. One example is that the Claimants have failed to set out what the coronavirus supplement they say they were promised was, and why they should be paid for a notice period they didn't work after their resignation.

40. The failures in this case are persistent, and have involved considerable expenditure on the part of the Respondent to prepare for and attend three case management hearings – and still the vast majority of the orders have not been complied with.

41. The Claimants were aware that the last set of case management orders were their "final opportunity" to comply, because this was clearly spelled out in the case management orders of EJ Ferguson on 10 May 2023. They did not take that opportunity in most instances.

The discrimination claims

42. Some of the claims (one of the First Claimant's, and three of the Second Claimant's) are of unlawful discrimination, and so strike-out should only be ordered in exceptional circumstances, and caution should be exercised before making deposit orders in respect of them.

43. In the case of the Second Claimant's claims of unlawful discrimination, she has been ordered on two occasions to particularise those complaints. When she has done so, it is clear that she is describing a single event of 13 March 2021, involving a fellow employee of the Respondent named Emmanuel, and her description of that event centres on comments he made to her relating to her sex

and age. The Second Claimant has made no mention of any facts which relate to nationality discrimination.

44. Whilst the case of *Ahir v British Airways* concerned an ostensibly innocent sequence of events, which is certainly not the case here given Ms Jaroszewska has clearly described an allegation of sex and age discrimination, that case is authority for the fact that there must be some burden on the Second Claimant to describe how that incident amounted to unlawful discrimination on the basis of her nationality. Failing to do so prevents the Respondent from responding to that allegation (if it indeed it can be characterised as an allegation of unlawful discrimination on the basis of her nationality at all). The Second Claimant has failed to do so, despite ample opportunity, and therefore this claim has no reasonable prospect of success (i.e., satisfying the conditions of Rule 37(1)(a)), and should be struck-out in the interests of justice. The same applies to the Second Claimant's claims of unlawful sex and age discrimination in relation to anything other than the events of 13 March 2021.

45. Moreover, the Second Claimant was ordered, on both 17 January 2023 and 10 May 2023, to list all the incidents of discrimination that she complains about, and to explain why she considers that the things said to her by Emmanuel on 13 March 2021 were said because of her nationality. She failed to comply with those orders (in fact, by my calculation, she failed to comply with 30 Orders of the Tribunal in relation to her complaints of discrimination alone).

46. As regards the *James v Blockbuster* conditions for strike-out for non-compliance, the evidence before me is the Second Claimant's oral evidence that she attempted to comply, but was inhibited by language barriers and difficulties accessing free resources – including the ten different potential sources of support identified in each of the Case Management Orders - to enable her to understand what compliance required. If the first alternative condition (that her "unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps") has not been met, those failures have, in my view, "made a fair trial impossible" (i.e., satisfied the other alternative first condition), because I cannot see how the Respondent could answer those claims without understanding them, and I have no reason to believe that further case management orders on this subject would be complied with any more than the prior two.

47. This prompts the question of whether strike-out is a proportionate response, and I consider that it is given that there has been considerable delay already in bringing the events that are the subject of this dispute to a conclusion, which is disadvantageous to both parties, but which has involved cost to the Respondent. Furthermore, the Tribunal has gone to some efforts to ensure that the parties are on an equal footing, and has taken pains to explain to both Claimants on two occasions – and with the benefit of a translator - what needs to be done to bring this matter to final substantive hearing. As noted above, EJ Ferguson's 10 May

2023 Orders expressly noted that those Case Management Orders were the Claimants' case management orders were their "final opportunity" to comply – they did not (in the main) take it (and not in relation to these discrimination claims brought by the Second Claimant).

48. In my view, it is proportionate and firmly in the pursuit of the overriding objective that the Claimants' articulated discrimination claims be allowed to proceed, with those that have not being struck-out to enable that to happen – for the benefit of all three parties.

49. Therefore I consider it appropriate to strike-out the Second Claimant's claim of nationality discrimination, and her claims of sex and age discrimination in relation to anything other than the 13 March 2021 incident involving Emmanuel, under any of:

    49.1 Rule 37(1)(a), because those claims have no reasonable prospect of success;

    49.2 Rule 37(1)(b), because the failure to articulate these discrimination claims is unreasonable;

    49.3 Rule 37(1)(c), for non-compliance with orders of the Tribunal; or

    49.4 Rule 37(1)(e), because a fair trial is no longer possible because the discrimination claims have never been explained.

50. By contrast, both the First and Second Claimants have asserted that particular statements were made by Emmanuel to them individually on 13 March 2021 that contain clear implications of, in the First Claimant's case, nationality discrimination, and in the Second Claimant's case, sex and age discrimination. I do not consider it appropriate to strike-out those claims – as per *Ezsias*, they warrant evidence to be heard and explored in order to assess their merit. These claims also appear – from the Respondent's resistance of them - to concern disputed facts. Furthermore, the Claimants in this case are litigants-in-person, whose first language is not English, and who are not accustomed to making arguments of complex law in this forum. The application to strike-out those claims is refused.

51. Nor do I find that the First Claimant's claim of nationality discrimination, or the Second Claimant's claim of sex and age discrimination, each concerning the incident of 13 March 2021 involving Emmanuel, meets the threshold for a deposit order. While the relevant test to make a deposit order requires the Respondent to discharge a lesser burden – that the claims have "little reasonable prospect of success" as opposed to "no reasonable prospect of success" for strike-out - I cannot conclude that those claims have "little reasonable prospects of success". Each party's evidence about what happened needs to be heard, especially given the public interest in discrimination allegations being fully heard and examined. The application for a deposit order in respect of those claims is refused.

The holiday pay claims

52. The Claimants have now set out the amount of holiday pay which each considers they are entitled to be paid but have not been. Those provide alternative facts to those presented by the Respondent on that issue that are capable of being considered in the substantive hearing. I do not consider that the conditions for strike-out are met in respect of these claims, as they have some logic to them expressed by each of the Claimants (so I would judge they do not have "no reasonable prospect of success" for Rule 37(1)(a) purposes), there has now been compliance with Tribunal orders to express the basis for these claims (so Rule 37(1)(b) and (c) are not engaged), and a fair trial of these claims does appear possible given the Claimants' positions have now been clarified with base information on the Claimants' respective entitlements and payments available (so Rule 37(1)(e) is not engaged).

53. The Respondent has now provided copies of the Claimants' respective contracts of employment, and has stated that the First Claimant has insufficient service for the number of unpaid holiday days he has claimed, even if he took no holiday or were not paid any sum in respect of accrued but untaken holiday on termination of his employment. The Respondent was not provided with details of the Second Claimant's holiday entitlement claim (in breach of Rule 92), so the Respondent has not been given opportunity to respond to that, but a similar question is raised by the Second Claimant's holiday pay claim. (The First Claimant worked for the Respondent for less than seven months, and his contract indicates he would have accrued holiday of just under 17 days over that period, and yet he is claiming that he is owed holiday in respect of 22.4 days. The Second Claimant worked for the Respondent for six months, and her contract indicates she would have accrued holiday of 16 days over that period, and yet she is claiming that she is owed holiday in respect of 16.8 days.) On-the-face-of-it, therefore, the Claimants' holiday pay claims have "little reasonable prospects of success", and so a deposit order is appropriate.

54. The purpose of a deposit order is not to restrict access to justice but to further the overriding objective – in this instance, to deal with this case in a way which is proportionate to the importance of the issues, and to save expense.

55. After enquiring of the Claimants' respective means, I understand that the First Claimant is in employment with an irregular income, with (generally) a disposable income of around £200/month. I therefore consider a deposit order of £100 appropriate for the claim made by him of unlawful deductions in respect of holiday pay. Should the First Claimant wish to pursue that claim, he is required to pay a deposit of £100 (Deposit A).

56. The Second Claimant has been in employment until recently, and is expecting to commence new employment shortly. The Second Claimant's claim of unlawful deduction of holiday pay again appears to have little prospect of success in light of the contract of employment disclosed by the Respondent in the bundle

(beginning at the page numbered 283). Should the Second Claimant wish to pursue this claim, she is required to pay a deposit of £50 (Deposit C).

The First Claimant's unlawful deductions claim regarding wages in respect of January 2021

57. The First Claimant's claim of underpayment of his wages in January 2021 has been articulated, and so I do not consider the conditions for strike-out to be met given there appears to be a genuine dispute of fact between the parties as to what he should have been and was in fact paid (so I cannot be satisfied that the claim has "no reasonable prospect of success" – the claimed basis for use of Rule 37(1)(a), or that a fair trial of this issue is not possible – Rule 37(1)(e), and there has been some compliance with Case Management Orders in respect of this claim, therefore making use of Rule 37(1)(c) and (b) inappropriate). However, the evidence provided so far indicates that that claim has little prospect of success. That evidence is a payslip dated 31 March 2021, provided in the bundle for this hearing (at the page numbered 80), which includes a line item for payment (of £1,161 gross) for January 2021 working hours. A deposit order is appropriate given the weight of evidence against the First Claimant's in this respect.

58. To continue to pursue this claim, the First Claimant is required to pay a deposit of £100 (Deposit B).

59. Given this is to be the second deposit order made in respect of the First Claimant, it is appropriate for me to consider not only the propriety of each individual deposit order sought but also whether the total sum awarded is proportionate (*Wright v Nipponkoa Insurance (Europe) Ltd* EAT 0113/14). I consider deposit orders in aggregate of £200 in relation to claims brought by the First Claimant to be appropriate and proportionate to his means, the apparent weakness of these claims, and the trouble to which defending these apparently weak claims will put the Respondent.

The other unlawful deductions claims

60. Despite, in all cases, ample opportunity and numerous Case Management Orders instructing them to do so:

    60.1 neither Claimant has said what the coronavirus supplement that was promised to them by the Respondent was to be – the amount or basis for calculation, or the payment date;

    60.2 neither Claimant has said why they should be paid for notice periods which they agree they did not work;

    60.3 the First Respondent has entirely failed to set out the applicable facts relevant to his assertion that there were unlawful deductions from his wages in connection with a "deposit"; and

60.4 as regards the Second Claimant's unspecified claim for unlawful deduction from wages, she has failed to say what deductions were made.

61. It is appropriate to strike them out on the basis that:

    61.1 they have no reasonable prospect of success (Rule 37(1)(a));

    61.2 the failure to articulate these claims is unreasonable (Rule 37(1)(b)); and

    61.3 there has been non-compliance with the Tribunal orders (Rule 37(1)(c)), again rendering a fair trial of these issues impossible (Rule 37(1)(e));

    where I consider it proportionate to strike-out. Both Claimants gave the same explanation for non-compliance, and described making some effort to contact two law centres for assistance, summarised in paragraph 39 above.

Other claims

62. In the case of losses flowing from the late payment of wages, neither Claimant has pointed to any evidence of losses flowing to them from the late payments. The fact of the late payments is not disputed, but I cannot see how the Tribunal can decide on a claim for losses when there is no evidence whatsoever that any losses have been incurred, and no quantification of any such losses has been made by either Claimant.

63. Similarly, the First Claimant's claim for breach of contract is wholly unparticularised.

64. For the Second Claimant, I have no understanding of why she believes she is able to claim unfair dismissal given she had less than two years' service, despite her being ordered to provide this on several occasions by the Tribunal.

65. For the reasons set out in paragraph 61 above, strike-out of these claims is proportionate and appropriate, and pursues the overriding objective.

Conclusions

66. For all of the above reasons the Respondent's application succeeds as regards:

    66.1 Strike-out of the First Claimant's claims of unlawful deductions from his wages regarding each of his notice pay, a "deposit" and a coronavirus supplement, and losses flowing from late payment of his wages, and of his breach of contract claim;

    66.2 Strike-out of the Second Claimant's claims of unlawful deductions from her wages regarding her notice pay, a coronavirus supplement and unspecified unlawful deductions, losses flowing from late payment of her wages, constructive unfair dismissal, unlawful discrimination on the basis

of nationality, and any alleged unlawful discrimination on the basis of sex or age that relates to anything other than the incident of 13 March 2021;

66.3 Deposit orders, in the sum of £100 each, in respect of the First Claimant's claims for unlawful deduction of wages in respect of unpaid holiday pay and his January 2021 wages; and

66.4 A deposit order, in the sum of £50, in respect of the Second Claimant's claim for unlawful deduction of wages in respect of unpaid holiday pay.

The Respondent's application fails in all other respects.

Employment Judge Ramsden

Date 6 June 2023