EMPLOYMENT TRIBUNALS

Claimant: Mr L Chapman

v

Respondent: Leicestershire Partnerships NHS Trust

Heard at: Nottingham (via CVP) **On:** 25 November 2022

Before: Employment Judge Fredericks

Appearances
For the claimant: In Person
For the respondent: Mr S Gittins (Counsel)

STRIKE OUT AT OPEN PRELIMINARY HEARING

1. The claimant's claim in respect of unlawful deduction from wages (holiday pay) is struck out because it has no reasonable prospect of success.

2. The claimant's alternative claim for breach of contract in relation to the application of holiday and sick pay is struck out for want of jurisdiction because the claimant remains employed by the respondent.

WRITTEN REASONS

Background

1. In his claim form, the claimant advanced a claim for unlawful deduction from wages in respect of holiday pay. In the narrative to his claim, he explained that his claim was in respect of a 31 hours reduction to *'holiday entitlement'* during a period of phased return to work from a sickness absence. In response, the respondent submitted that the claimant has suffered no deduction from wages in that he has

always been paid his full time rate. It says it is entitled to apply holiday entitlement to cover a period of phased return to work under its policies. The claimant remains employed by the respondent.

2. On 13 September 2022, the respondent made an application to strike out the claim under *Rule 37(1)(a) Employment Tribunal Rules of Procedure 2013*, submitting that the claim had no reasonable prospects of success because the claimant has suffered no unlawful deduction of *"wages"* following the application of holiday entitlement during his phased return to work. That application was refused on the papers on 4 October 2022 and was refreshed again with clarification on 6 October 2022. On 31 October 2022, Employment Judge Adkinson directed that the respondent's strike out application should be heard today, which was already set as the final hearing of the claimant's claim.

3. The application therefore came before me to determine prior to the final hearing continuing. The parties had prepared for the final hearing in the event that the respondent's strike out application did not succeed. The claimant represented himself. The respondent was represented by Mr Gittins of Counsel. The parties provided a bundle of documents which ran to around 208 pages and witness statements from the claimant and from Ms Taylor of the respondent.

4. At the start of the hearing, the claimant told me that he had sent additional documentation to be considered as part of the hearing. These were a 'buying and selling leave' policy from the respondent, and a weekly round-up e-mail from the respondent dated 18 November 2022. In his e-mail attaching the documents, the claimant submitted that the documents refuted the respondent's position in relation to the application of annual leave. He asked for the response to be struck out on the basis of this because, he says, it shows that the respondent has acted unreasonably or vexatiously in the litigation.

5. The grounds for the claimant's application to strike out did not concern the issues to be determined in relation to whether or not he had been deducted wages. I directed that that application would be considered after hearing the respondent's application, if the claim was not struck out. Having considered the documents and the application, I would not have struck out the application if presented orally because I do not consider that the claimant could have established any unreasonable or vexatious conduct from the respondent which would have made it appropriate or proportionate to strike out the response.

The claimant's claim and submissions on strike out

6. The claimant explained to me that he had been away from work for an extended period, initially under a suspension and then on sick leave to cover an operation. He returned to work under a phased return, at which point the respondent decided to pay him from his holiday entitlement. In the claimant's view, he should have been paid sick pay. He accepted that his pay slips showed that he had been paid all of his salaried requirement. He did not accept that there had been 'no deductions made', and submitted that he would have been paid more if he had been paid for sick pay during that period and then had the opportunity to sell that annual leave according to the respondent's policy. He accepts that 31 hours is less than one week's pay.

7. In his submissions, the claimant accepted that he had not been paid less than the salary required by his contract. He also accepted that any shortfall in payment for holiday as he claimed, or any correction to his holiday entitlement (if appropriate) would not be due to be paid until his employment ended, if it was not used prior to that. The claimant accepted that his claim could appropriately be characterised as a breach of contract claim. His complaint is that the respondent was not entitled to apply holiday pay to cover the period of return to work, and these are matters governed by the claimant's employment contract. He did not accept that his claim should be struck out.

8. Mr Gittins directed me to *Rogers v Dorothy Barley School UKEAT/0013/12/LA [2012]*. In that case, the claimant's appeal against the first instance decision that there was no jurisdiction to hear his claim was dismissed. Mr Rogers' claim was in respect of a liability incurred which was properly payable by his employer. That is a different claim to the one before me, but Mr Gittins relied on the principle from the case that an unlawful deduction from wages requires there to be *a deduction* and that, further, the employment tribunal has no jurisdiction to hear a claim for breach of employment contract from someone who remains employed by their employer. The respondent's overall position was that, should I properly consider *Section 27 Employment Rights Act 1996* and *Rogers*, I would conclude that the claimant's claim should be struck out because it has no reasonable prospects of success; I would conclude I have no jurisdiction to hear the claim.

Relevant law – strike out under Rule 37(1)(a)

9. When approaching any application, and during the course of proceedings, the tribunal must give effect to the overriding objective found at *Rule 2 Employment Tribunals Rules of Procedure 2013*. This says:

> *"2 - 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."*

10. The power to strike out a claim or response is found at *Rule 37*. That provides that:

"37(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).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."

11. I recognise that striking out a claim is a serious and significant action which should not be done lightly. I am required to take the claimant's case at its highest when considering whether to strike out on the grounds that the claim has no real prospects of success, and this involves ascertaining what the claimant's claim actually is – particularly as he is unrepresented – prior to deciding whether application of a strike out is appropriate in the case (*Cox v Adecco UKEAT/0339/29 [2021]*).

Relevant law – the claimant's claim

12. An employer is unable to deduct from the wages of a worker employed unless this is authorised by statute or contract, or where the worker has previously agreed to the deduction in writing (*section 13(1) Employment Rights Act 1996)*. Wages must be 'properly payable' to count as a deduction where there is one (*section 13(3)*). The definition of 'wages' is found at *s.27 ERA 1996*. In short, it provides that wages are a payment or emolument which arise from the work carried out by the employee/worker under a contract for services. *S.27(5) ERA 1996* sets out items which are *not* to be counted as 'wages'. This says: *"any monetary value attaching to any payment or benefit in kind furnished to a worker by his employer shall not be treated as wages of the worker except of any voucher, stamp or similar item…"* (which is then described as having a fixed value which can be exchanged for money, goods or services).

13. As outlined above, *Rogers* confirms that there can be no successful unlawful deductions from wages claim where there has been no deduction from wages due to the employee.

14. *Order 3 Industrial Tribunals Extension of Jurisdiction (England and Wales) Order 1994* extends the jurisdiction of the Employment Tribunals to hear breach of employment contract claims. However, *Order 3(c)* limits this jurisdiction so that only claims arising out of or existing at the termination of the employment contract can be heard. There is no jurisdiction to hear breach of contract claims from employees who remain employed by their employer when the claim is issued.

Conclusions

15. The claimant has suffered no deduction to amounts in his pay slips and he accepts this. ***Rogers*** and the line of cases following direct me to conclude that there can be no unlawful deduction from wages claim in such a circumstance. I am bound by the decisions of the Employment Appeal Tribunal. The claimant's argument that the holiday entitlement has some other value is undermined by the application of *s.27 ERA 1996*. Holiday entitlement is not a voucher or the like which can be exchanged for money. I consider that the holiday entitlement, contractually provided, is a benefit in kind and as such does not count as wages either. Although the claimant notes he can sell his holiday entitlement, this is not the same as holding a document which is directly akin to its monetary value because conferring a value is its purpose. As a result, I conclude that the benefit the claimant is trying to claim is not 'wages' and that there has been no deduction of any payment due in any event.

16. When coming to this conclusion, I have explored the claimant's claim with him and have accepted his case about the facts. The respondent admits all of the relevant facts upon which the claimant relies, but argues as a point of law that those facts do not give rise to an unlawful deductions claim. I concur. The claimant's unlawful deduction claim has no reasonable prospect of success. It is not in keeping with the overriding objective to allow a claim to continue. Accordingly, I consider it appropriate to exercise my discretion and strike out this part of the claimant's claim.

17. This leaves the now advanced claim for breach of contract which, whilst not explicitly pleaded, is the only other interpretation of the claimant's claim as he has described it in these proceedings. The claimant is unable to bring a breach of contract claim whilst his employment is on-going. This alternative position that the respondent breached his employment contract is not one which the Employment Tribunal has jurisdiction to hear. Such a claim can only be considered in the County Court if the employment is on-going, or by the Employment Tribunal after the employment has ended. It follows that this aspect of the claim must be struck out because the Employment Tribunal has no jurisdiction to hear it.

18. No claim advanced in these proceedings has a reasonable prospect of success. Consequently, his claim is struck out in its entirety.

Employment Judge Fredericks

25 November 2022

Sent to the parties on:

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For the Tribunal Office:

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