



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr O Oke

**Respondent:** Global Banking School Limited

**Heard: via CVP**                      **On:** 17 November 2023

**Before:** Employment Judge Ayre, sitting alone

## Representation

**Claimant:** In person

**Respondent:** Mr M Delaney, solicitor

# JUDGMENT AT PRELIMINARY HEARING

1. The respondent's application for strike out of the claim fails. The claim will not be struck out.
2. The claim has little reasonable prospect of success. The claimant is ordered to pay a Deposit of £750 as a condition of being permitted to continue to advance the claim.

## REASONS

1. The background to this claim is set out in the Record of the Preliminary Hearing on 17 November 2023 and I do not propose to repeat it here.
2. During the course of the Preliminary Hearing I considered the respondent's application for strike out of the claim. I also considered whether to order a Deposit

as a condition of the claimant being permitted to continue to advance the claim.

3. There was no bundle of documents for use at today's hearing so I have considered the documents on the Tribunal file, and two documents sent in by the claimant on the morning of the hearing. The claimant gave evidence under oath and was cross examined by Mr Delaney. Both parties made submissions.

## Findings of fact

4. The claimant is currently working as a teacher and earns an average of £1,800 net each month. He started work within a few weeks of leaving the respondent and has been working ever since.
5. The claimant lives in rented accommodation and pays £800 a month in rent. He lives with his wife and four children. His wife works as a nurse, earning approximately £1,500 net a month. He shares household bills with his wife.
6. The claimant has £1,015 in his bank account, has a credit card of £250 and a loan of approximately £14,000 that he and his wife are paying each month.
7. The claimant has a car. After household bills and childcare, he has approximately £400 left each month.

## The Law

### Strike out

8. Rule 37 of the Rules provides that:

*“(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 respondent (as the case may be) has been scandalous, unreasonable or vexatious; ...*
- (e) That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response...”*

9. Strike out is a draconian sanction and not one that should be applied lightly. Tribunals should be particularly cautious about exercising their power to strike out badly pleaded claims brought by litigants in person who are not familiar with articulating complex arguments in written form on the ground that they have no reasonable prospect of success (***Mbuisa v Cygnet Healthcare Ltd EAT 0119/18***).

10. The Employment Appeal Tribunal, in ***Abertawe Bro Morgannwg University Health Board v Ferguson [2013] ICR 1108*** commented that whilst in some cases strike out may save time, expense and anxiety, in cases that are fact sensitive the circumstances in which a claim is likely to be struck out are rare.
11. In ***Cox v Adecco and ors [2021] ICR 1307*** the Employment Appeal Tribunal gave guidance to Tribunals dealing with strike-out applications against litigants in person. It held that when considering strike out of claims brought against litigants in person, the claimant's case should be taken at its highest and the Tribunal must consider, in reasonable detail, what the claims and issues are. A Tribunal should not strike out a claim where it does not know what the claim is. There should, therefore, be a reasonable attempt at identifying the claim and the issues before considering strike out. The EAT also said that, if the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual tests that apply to amendments.
12. In ***Anyanwu and anor v South Bank Student Union and anor [2001] ICR 391*** the House of Lords stressed the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and can only be determined after evidence has been heard.
13. This approach was adopted also in ***Kwele-Siakam v Co-Operative Group Ltd EAT 0039/17*** in which the EAT found that an Employment Judge was wrong to strike out claims for race discrimination and victimisation when the central issue in the case was the reason for the respondent's behaviour towards the claimant, which would require a Tribunal to make findings of fact after a full hearing.

### Deposit Orders

14. The power to make Deposit Orders is contained in Rules 39 of the ET Rules:

*“(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.*

*(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...”*

## **Conclusions**

### Strike out

15. The respondent applies for strike out of the claim on three grounds, namely that the:

1. Claim has no reasonable prospects of success;
2. Claimant has failed to comply with the Case Management Orders; and
3. Claim is not being actively pursued.

16. Having considered the claim and response, and the submissions of both parties, I find that it cannot be said that there are no reasonable prospects of the claim succeeding. There are clear disputes of fact on key issues, including the following:

1. Was the claimant an employee or a worker;
2. Whether the respondent provided the claimant with pay slips showing all payments made to him or not;
3. Whether the delay in providing breakdowns of pay and itemised pay slips was due to the claimant not submitting timesheets on time;
4. Whether work was removed from the claimant; and
5. Whether the claimant resigned in response to alleged breaches of his contract or for other reasons (such as obtaining alternative work)?

17. Those issues cannot in my view be resolved without the hearing of evidence. In determining the application for strike out I have to take the claimant's case at its highest. In light of this I cannot say that the claim has **no** reasonable prospects of success.

18. In his submissions on the question of strike out, Mr Delaney referred to the fact that the claimant may have little if any financial remedy were he to win his claim of unfair dismissal. That is not in my view a relevant factor to be taken into account when determining whether to strike out a claim. A claimant is entitled to a finding of unfair dismissal, if indeed he has been unfairly dismissed.

19. I have then gone on to consider whether to strike out the claim for non-compliance with Case Management Orders. In deciding this question, I have had regard to the overriding objective of dealing with cases fairly and justly, which includes considering:

1. The magnitude of the claimant's non-compliance with the orders;
2. What disruption, unfairness or prejudice has been caused;
3. Whether a fair hearing is still possible; and
4. Whether strike out or some lesser remedy would be an appropriate sanction for the non-compliance (***Weir Values and Controls (UK) Ltd v Armitage [2004] ICR 371***).

20. I am concerned that the claimant has taken no steps whatsoever to comply with the Case Management Orders made previously and that it has not been possible for the final hearing that was listed today to proceed. I have come close to striking

out the claim on this basis. It is my view however that a fair hearing is still possible in this case and that some lesser remedy, namely the risk of a costs award against the claimant in the future, may be appropriate. That risk flows from the Deposit Order that I have made below.

21. The respondent has also failed to comply with the Case Management Orders and in a case where there is non-compliance on both sides, it would in my view not be in the interests of justice to strike out one party only for non-compliance.

22. In relation to the complaint that the claim is not being actively pursued, the questions I have to consider are (*Birkett v James [1978] AC 297*):

1. Has there been delay that is intentional or contumelious (disrespectful or abusive to the court); or
2. Has there been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.

23. I find, on balance, that this this case does not fall into either of the above categories. There was no evidence to suggest that the delay by the claimant was intentional or contumelious, but rather the claimant said that he was, until recently, a litigant in person who did not fully understand what had to be done. He did respond to the strike out warning, has instructed solicitors, and has prepared for today's hearing.

24. The claim is now being actively pursued and a fair trial is, in my view, still possible. I have today made Case Management Orders to prepare the case for such a trial.

25. In light of the above, the respondent's application for strike out of the claim fails.

#### Deposit Orders

26. Having reviewed the documents on the Tribunal file, and considered the parties' submissions, it is my view that whilst it cannot be said this claim has **no** reasonable prospects of success, it can be said that it has **little** reasonable prospects of success.

27. There are a number of hurdles that the claimant will have to get over in relation to the claim for constructive dismissal. The first is the burden of establishing that he was in fact an employee rather than a worker. The respondent's position is that the claimant was previously an employee but chose, of his own volition, to move to a zero hours worker contract because that suited him best. The claimant has not disputed that position or taken issue with it.

28. As this is a constructive dismissal claim, the claimant will also have to establish that he was dismissed, which will involve persuading the Tribunal that the respondent did fundamentally breach his contract of employment, and that he resigned because of

that breach and not for some other reason, such as having found alternative work. In light of the length of time that he worked for the respondent, the claimant will also have to establish that the reason the respondent breached his contract of employment was because he asserted his statutory right to itemised pay slips. He may struggle to do this as many of the alleged breaches of contract he relies upon occurred before he began to assert his statutory rights.

- 29.** For the above reasons, the claim for constructive dismissal has in my view little reasonable prospect of success.
- 30.** I am also of the view that the complaint of a failure to provide itemised pay slips appears to have little reasonable prospect of success. Mr Delaney told the Tribunal that all payslips have been provided to the claimant, and that the only time payslips were not provided was when it was not possible to calculate the claimant's pay because he had not submitted timesheets. The claimant did not dispute that assertion.
- 31.** I have taken account of the claimant's ability to pay a deposit, both when deciding whether to make a Deposit Order and when deciding the amount of that Order. The claimant is working and in receipt of regular income. His household bills are shared with his wife who is also working, and he has sufficient money in his bank account to be able to pay a deposit.
- 32.** I therefore order the claimant to pay a deposit of £750 as a condition of being permitted to pursue his claim.

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Employment Judge Ayre

Date: 20 November 2023

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