EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr C Okeke	**AND**	Open GI Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
ON AN OPEN PRELIMINARY HEARING

HELD AT Birmingham **ON** 16 January 2017

EMPLOYMENT JUDGE Dimbylow

Representation
For the claimant: In person
For the respondent: Mrs R Parkin, Solicitor

JUDGMENT

JUDGMENT having been sent to the parties on 18 January 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided

REASONS

1. The claim. This is a claim by Mr Chetachukwu Okeke (the claimant) against his former employer Open GI Limited (the respondent). The claimant approached ACAS in relation to early conciliation and the 2 dates on the certificate are 13 September 2016, and 28 September 2016. The claim form was presented on 27 October 2016 and there are no time points arising. The claimant brought one claim only, that is, a claim for direct race discrimination contrary to the Equality Act 2010 (EqA) in relation to his dismissal. On 10 November 2016 the tribunal gave notice to the parties that there would be a Closed Preliminary Hearing (CPH) on 29 December 2016, although this was later postponed to 3 January 2017. The response form was lodged at the tribunal office on 8 December 2016; the claim was resisted, and the respondent applied for an Open Preliminary Hearing (OPH) to determine the two preliminary points that I had to deal with today. Employment Judge Broughton considered the respondent's application and agreed to list the case

for an OPH for the two purposes stated. Notice was given by the tribunal on 16 December 2016 that there would be an OPH to deal with the respondent's applications and that the hearing would have a time estimate of three hours commencing at 9:45am today.

2. The issues. The issues before me today were, and I summarise them very briefly:

Issue 1: do I strike out the claim if it has no reasonable prospect of success and;

Issue 2: do I order a deposit if the claim appears to have little reasonable prospect of success.

3.The evidence. I received oral evidence from one witness, namely, Mrs Bernadette Pelster on behalf of the respondent. The parties also made oral submissions to me, which I mention later; and I received a number of documents which I marked as exhibits as follows:

C1 Claimant's bundle of documents (25 pages)
R1 Respondents bundle of documents (55 pages)
R2 Respondent's skeleton argument
R3 Respondent's bundle of authorities

1. Rensburg v Royal Borough of Kingston upon Thames & Others [2007] UKEAT 0096-07-1610
2. Ukegheson v London Borough of Hackney [2015] UKEAT 0312_14_2105
3. Ahir v British Airways plc [2016] UKEAT/0014/16/RN

4. The law on striking out a claim and/or ordering a deposit. Rule 37 (1) (a) of the Employment Tribunal Rules 2013 provides that all or any part of a claim or response may be struck out if it has no reasonable prospect of success. Tribunals always give special consideration to striking out a claim of discrimination on this ground. In the case of Anyanwu and another v South Bank Students' Union and another [2001] ICR 391, the House of Lords highlighted how important it was not to strike out discrimination claims except in the most obvious cases, because they are generally fact sensitive and require a full examination to enable a proper determination of the issues. Such a cautious approach to striking out claims of discrimination has been emphasised in subsequent cases. This has given rise to the proposition that it is unfair to strike out a claim where there are crucial facts in dispute and there has been no opportunity for the evidence in relation to those facts to be considered. It is a Draconian measure, not entertained lightly. If I were to consider that any specific allegation or argument in a claim had little reasonable prospect of success I may make an order requiring the claimant to pay a deposit as a condition of continuing to advance that allegation or argument. This power stems from Rule 39 (1). It is important that I arrive at a decision which is just, fair and proportionate, having regard to the overriding objective, as more particularly described in Rule 2, which states:

"Overriding objective

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."

5. The facts. I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time.

6. The claimant was born on 25 November 1984 and is now 32 years of age. He commenced work for the respondent on 8 February 2016 and the effective date of termination of his contract of employment was on 27 June 2016; and these dates were agreed. The claimant describes his ethnicity as: "Black African." The respondent is in the business of insurance software and its clients are corporate. It employs some 405 personnel at more than one site in the UK. The claimant was employed as a Business Analyst (BA) in the software development department working 37.5 hours per week for a gross salary of £2,917 per month. His contract included a six-month probationary period.

7. The claimant is currently working as a BA for Sainsbury's, initially on a probationary period, which he has successfully concluded and now earns £40,000 gross per annum, which gives him about £2,300 net per month. He is based in Coventry for his work, which is of a technical nature. He has no other income. His current outgoings comprise the following: rent £350 per month, council tax £94 per month, gas £30 per month, electricity £30 per month, petrol expenses for his car £250 per month (he has to drive from Stourbridge to Coventry and back); and otherwise he supports his extended family by sending them money in Nigeria. He also has a partner in Preston and a son aged six years who lives with his mother there. The claimant confirmed that he had savings of £2,700 and a car worth about £500. Otherwise he stated he has no other assets either here or in Nigeria. He

declared no other liabilities in addition to his normal outgoings. This information is necessary in considering a deposit order.

8. The claimant was educated in Nigeria, obtaining a maths degree over a five-year period; the time being extended by strikes that were happening during the course of his degree. Whilst he was undertaking his studies, he also worked as a Business Support Analyst for three years. He came to the United Kingdom in September 2010 and embarked upon a full-time MSc course at Preston University. After his two-year study, which ended in July 2012, he obtained a number of short-term jobs: as a Junior Business Analyst for 15 months, a Lead Digital Business Analyst for 13 months, a Digital Business Analyst for 10 months; and thereafter he applied to work for the respondent.

9. In the claim form the claimant described 4 other BAs, whom he confirmed today were still the comparators in his case: Stephanie Bottomley, Stephanie Mould, Vijay Jagmohan and Michelle O'Shea. The three women are White and the man is Asian. Stephanie Bottomley commenced work for the respondent on 17 June 2015 as a BA with a probationary period. There were no performance issues and she passed her probationary period on 9 November 2015 and is now a BA lead, which is a more senior job to that of the claimant; and she is still with the respondent. Stephanie Mould commenced work with the respondent on 13 November 2015 as a BA, and once again was subject to a probationary period. She too had no issues concerning performance and there was no extension of time for her probationary period. She is still a BA employed by the respondent. Mr Jagmohan commenced work in about 2014 and completed his probationary period before the claimant commenced work with the respondent. Ms O'Shea has worked for the respondent for over 10 years and therefore was not undertaking a BA probationary period at a similar time to that of the claimant.

10. In the last 12 months, 3 employees have been dismissed by the respondent because of performance issues in their probationary periods. Two of them worked in the software development department; one was White and the other Pakistani. The third employee dismissed in similar circumstances was Indian, again in the probationary period; but not in the same department as the claimant.

11. The evidence before me shows that the claimant was dismissed during his probationary period as a result of poor performance. In particular, he was described as a poor communicator. He was also late; and once he was absent without leave for part of the day. It is plain from the bundle that the respondent, through its officers, held a number of review meetings with the claimant, including on 28 April 2016, 31 May 2016, 13 June 2016 and finally on 20 June 2016 when he was dismissed and paid one week's money in lieu of notice. Meetings were held with two of his line managers, the first being Annie Williams and the second James Quinton (in the absence of Ms Williams). The decision to dismiss the claimant was made by Emma Wynne, who was Mr Quinton's line manager. The claimant was given the right of appeal, which he exercised, and this was heard by Mr Justin Ireland, an

Associate Director. On the information before me, the claimant did not raise the issue of race discrimination until his appeal.

12. The submissions. Mrs Parkin went first and spoke to her skeleton argument; and there is no need for me to repeat everything she said in it here. Stated shortly, she submitted the claimant's claim was entirely misconceived. It was fundamentally flawed and therefore should be struck out. The claimant could not succeed on the basis of the case he was putting forward. In particular, his choice of the 4 comparators was wrong in relation to each of them. The respondent was able to show that the claimant was dismissed for poor performance and lack of capability during his probationary period. The claimant had closed his mind to the facts put forward by the respondent, which are well recorded in the documents before the tribunal. The claimant can only conclude wrongly that he was dismissed because of his race, ignoring the evidence.

13. Mrs Parkin submitted that a proper analysis of the case was such that there should be a hypothetical comparator, namely: a BA starting on the same date as the claimant, in the same team, who was approaching the end of their probationary period, whose performance fell below the standard required by the respondent, and was of a different race to the claimant. If I did not strike out the case, then I should order a deposit in the sum of £1,000.

14. The claimant made oral submissions to me. He stated that he had made complaints of poor treatment because of his race and that this was in the bundle supplied by the respondent. I asked him to take me to it, especially if it was before the appeal; but the claimant was unable to do so. He then submitted that it was in his own bundle; but again he was unable to identify where it was to be found. Much of the submissions made to me by the claimant described poor treatment; but not in terms of racial discrimination. He complained to me that his line managers just relied upon what they were told about problems with his work, rather than investigating it themselves. He found line management confrontational; and said Stephanie Mould shouted at him, which made him unhappy. He submitted management was wrong to consider team feedback, without making specific research into matters when he was criticised. He should have been given the opportunity to improve on any weaknesses. He emphasised once again that his 4 comparators were the correct ones; and asserted that Mrs Parkin was incorrect in her analysis about the use of the hypothetical comparator. He also described the quality of his own work is being "standard".

15. My conclusions and reasons. I apply the law to the facts. The claimant has a very fixed mind about his case and how it should proceed. I agree with the respondent's submissions in that the 4 comparators named by the claimant are incorrect and will not work on the facts of the case. I agree that the claimant should be using a hypothetical comparator in the terms described by Mrs Parkin. I gave the claimant the opportunity to endorse the use of such a comparator; but he refused to do so. He offered nobody else as an alternative. There is an initial burden of proof upon the claimant to prove such facts from which the tribunal could decide in the absence of any other

explanation that the respondent contravened the EqA by dismissing him because of his race. If he can do that, then the burden switches to the respondent to show that it did not behave in the way complained about and that the dismissal was not tainted by race discrimination. The claimant established that he had sustained a detriment in that he was dismissed. Using the comparators advanced by the claimant the analysis required does not work in his favour. The reason is because the comparison of cases requires there to be no material difference between the circumstances relating to each case, and there are clear material differences in relation to all 4 comparators advanced by the claimant. There were no complaints in relation to the first 2, who were the nearest in time as trainee BAs to the claimant. The other two comparators are further away in time. If I adopt the hypothetical comparator suggested by Mrs Parkin, then such comparator is more likely than not on the balance of probabilities to have been treated in the same way as the claimant; as others have been so treated, who are not Black. The facts point towards the less favourable or detrimental treatment arising because of the claimant's poor performance; rather than the protected characteristic of his race. The claimant did not raise the subject at the time of dismissal and it only became an issue for him at his appeal. The way in which the claimant described his complaints to me was such that he considered his dismissal to have been unfair; and that he did not lack capability. The case is, in reality, about whether or not the claimant was unfairly dismissed, rather than being dismissed because of his race. The claimant does not have two years' qualifying service to bring such a claim.

16. It was plain to me that 4 separate managers had considered the claimant's performance issues. The contemporaneous data trail supported the respondent's assertions about the reasoning for the dismissal. The claimant would fail to demonstrate that his race had tainted the thought processes and actions of the managers. Even if the claimant were to reverse the burden of proof, it is likely the respondent would establish that in no sense whatsoever was the dismissal tainted by race discrimination, and thereby discharge the burden on it. I have been able to observe the claimant during the hearing. The parties were directed to be here for a 9:45am start. The respondent's team was on time; but the claimant did not arrive until 10:10am. The claimant had not properly prepared himself for the hearing; and had failed to address the essential features of a claim for direct race discrimination. The claimant presented as articulate and intelligent; but had a closed mind, unable to see another view of things.

17. In all the circumstances I conclude this is one of those rare occasions where it is appropriate to strike out the claim as it has no reasonable prospect of success. This outcome is just, fair and proportionate. The case advanced by the claimant is fanciful. He resented being criticised over his performance. He has no reasonable prospect of establishing that he was dismissed because of his race. If I was wrong about that, and I had not struck out the case, then I would have ordered the claimant to pay a deposit in the sum of £1,000 as the claim had little reasonable prospect of success.

Signed by _____ on 21 February 2017
Employment Judge Dimbylow

Reasons sent to Parties on

__23 February 2017_____

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