



# EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mr A Rehman

Lionheart Security Management limited

## OPEN PRELIMINARY HEARING

HELD AT London South

ON 17 February 2017

EMPLOYMENT JUDGE FRANCES SPENCER

### APPEARANCES

For the Claimant: no appearance,

For the Respondent: Mr P Warnes, legal consultant

## JUDGMENT

The Claimant had insufficient service to bring a complaint of unfair dismissal and that complaint is dismissed.

The Respondent's application to strike out the remaining parts of Claimant's claim on the basis that (a) the manner in which the Claimant had conducted the proceedings was unreasonable and vexatious and/or (b) that the claims have no reasonable prospects of success is refused.

## CASE MANAGEMENT ORDER

### Further Preliminary Hearing

1. The case is listed for a further Preliminary Hearing on 28<sup>th</sup> March 2017 at 10 a.m. for 3 hours. The Claimant is ordered to attend. Provided that the Claimant attends (so that the unless order set out below does not take effect) the purpose of that hearing is:
  - a. In respect of the Claimant's claim of race discrimination and harassment (sections 13 and 26 of the Equality Act 2010) to

clarify the acts of less favourable treatment/harassment relied on, and the basis of the complaints and, if appropriate, to list the case for hearing and give and necessary further directions for case management.

- b. to consider whether to strike out all or any part the Claimant's claim on the basis that it has no reasonable prospect of success or on the basis that a fair trial is no longer possible;
- c. to consider whether to order the Claimant to pay a deposit as a condition of being permitted to continue to advance any or all of the allegations or arguments specified in the order

Unless order

- 2. Pursuant to Rule 38 of the Employment Tribunal's Rules of Procedure 2013 and on the application of the Respondent, unless the Claimant attends the hearing on 28 March 2017, the claim will stand dismissed on that date without further consideration of the proceedings or further order. My reasons for making this order are set out below.

Full merits hearing

- 3. The full merits hearing currently listed for 2 days commencing on 21 March 2017 is vacated. The hearing will be relisted, if appropriate, following the Preliminary Hearing on 28 March 2017. In the meantime any outstanding case management orders for the conduct of the case to a full hearing are suspended.

## **REASONS**

History of the proceedings

- 1. By a claim presented on 2 June 2016 the Claimant presented a claim to the Tribunal. At box 8 he ticked boxes for unfair dismissal, race discrimination, notice pay, holiday pay and arrears of pay. At box 5 he identified that he was employed from 7 December 2015 to 12 February 2016. In his particulars he said that he had worked until 12<sup>th</sup> February when his employment was terminated by text. He did not receive his February wages. In March and April the Respondent failed to respond to his grievances and they subjected him to direct race discrimination and harassment by ignoring him and spreading malicious rumours about him by text messages on 10<sup>th</sup> and 13<sup>th</sup> February, on 21st March and by a call on 2 June 2016. The Claimant also refers to being treated unjustly because he had blown the whistle against the company on 5<sup>th</sup> April 2016.
- 2. The Respondent presented their response on 14 July 2016 stating that the Claimant was a self-employed contractor and denying all the complaints.

3. The matter was listed for a preliminary hearing before Employment Judge Baron. At that preliminary hearing the matter was set down for a full merits hearing over 2 days commencing on 21 March 2017. The purpose of the hearing was to clarify the issues which would need to be determined by the Tribunal.
4. What happened at that preliminary hearing is set out in the subsequent Case Management Order made by Employment Judge Baron sent to the parties on 17 August 2016. Suffice to say, for these purposes, that having initially attended the hearing the Claimant refused to return after the adjournment and the hearing then continued in his absence. At that preliminary hearing EJ Baron made orders for the management of the case to a hearing including orders that the Claimant provide further particulars to clarify his claims. It was explained to the Claimant that in order for a person to have the right not to be unfairly dismissed he needed to have been employed by his employer for 2 years. The Claimant was given notice that the Tribunal intended to strike out the claim of unfair dismissal on the ground that it had had no reasonable prospects of success but that the Claimant could give reasons in writing within 14 days of the date the order was sent to the parties as to why that claim should not be struck out.
5. The Claimant provided his response to the order for further particulars on 1 September 2016 which he followed up with a proposed list of issues sent on 15<sup>th</sup> September. (There was no specific response to the 2 year point.) That response was not a model of clarity. The Respondent then sent their further particulars of response on 29<sup>th</sup> September.
6. In the meantime the file became heavy with applications from both parties for a strikeout of the claim and the response. Those applications were refused.
7. On 26 October 2016 EJ Baron determined that there should be a further preliminary hearing so that the claims being made by the Claimant could be ascertained once and for all. On 8 November 2016 the Claimant lodged appeals with the EAT against (i) the Tribunal's refusal to strikeout the Response and (ii) the order of EJ Baron that there be a further Preliminary Hearing. The proposed Preliminary Hearing was then postponed for 2 months.
8. The Claimant's appeals were rejected on the sift on 19 January 2017. On 1<sup>st</sup> February 2017 the Claimant was sent notice that the (previously postponed) preliminary hearing would be heard today. The purpose of that hearing was to ascertain the Claimant case and to consider whether or not a strike out of or any part of the claim was appropriate.
9. In the meantime the Claimant made various applications that the Tribunal should direct that the Respondent's representative, Peninsula

Business Services Ltd, should cease to represent the Respondent. He was advised that the Tribunal had no power to make such an order.

10. On 8<sup>th</sup> February the Claimant wrote to the Tribunal saying that his appeal rights to the EAT had not been exhausted. He asked if he should continue with the EAT or the ET. Although there appears to have been no reply to that letter, a letter of 15<sup>th</sup> February (sent by email) made it clear that the preliminary hearing was going ahead and that all matters could be raised on that occasion. At 10.30p.m on Wednesday 15<sup>th</sup> the Claimant sent a letter seeking to set aside the ET directions of 1<sup>st</sup> February (i.e. the Notice of Hearing) since he had a pending appeal in the EAT. This was followed up by a further email sent last night saying that he had not received a response from the ET and he had brought to our attention that he had an appeal in progress.
11. This morning the Claimant did not attend. The clerk telephoned him at 9.45 but his phone was switched off. The clerk called again at 9.50 and left a message asking the Claimant to call back urgently as he was expected to attend the Tribunal this morning. No response has been received to that message

#### Today's hearing

12. I considered what to do in the light of the Claimant's non-attendance. I did not consider that the Claimant had a valid excuse for not attending. He had had a notice of hearing and a letter on 15<sup>th</sup> February which made it clear that the hearing remained listed for today. The hearing had not been postponed. He was aware from EJ Baron's order of the importance which was attached to his attendance. I decided to proceed with the hearing in the Claimant's absence.
13. On behalf of the Respondent Mr Warne made an application that the Claimant's complaints should be struck out. He submitted that there was no basis for the Claimant advancing a complaint of unfair dismissal as he did not have 2 years' service. In respect of the other claims he had failed to provide clear particulars despite orders of the Tribunal. The Respondent was now severely prejudiced by the delay in particularising these claims as the company had (a) ceased to trade and (b) been sold. The new owner knew nothing about the circumstances of the Claimant's engagement and all those previously working for the company no longer did so. Moreover the Claimant had behaved unreasonably in the conduct of the litigation and that Peninsula were now receiving daily emails from the Claimant questioning their right to represent the Respondent and demanding disclosure of documents which did not exist. The Respondent had disclosed as much as was possible without knowing exactly the case against them. He submitted that Claimant would never be able to deal with the case in a reasonable manner, would continue to challenge any decision that was not to his liking and would continue to fail to attend at the tribunal. The only position he would accept was a strike out of the Response. He was also contacting the Respondent, despite having

been told that all communications should go through Peninsula. This was not reasonable conduct or in accordance with the overriding objective. It was placing an unfair burden on the Respondent and their insurers. In any event the claims were bound to fail.

14. As far as the Claimant's conduct was concerned I was not prepared to strike out the complaints. It does appear that the Claimant has become side-tracked and was not properly progressing his case, but I was not of the opinion that the point has yet been reached where it could be said that a fair trial is no longer possible. It is, however, important that the Claimant attend hearings. Without his attendance his claim cannot proceed and it was my view that provided Claimant attend the next hearing the case could get back on track.
15. Insofar as Mr Warne submitted that there was no reasonable prospect of the claims succeeding it was first necessary to understand the Claimant's claims. He had provided his further particulars and his "list of issues" in response to EJ Baron's order. I went through these with Mr Warnes.
16. In relation to the complaint of unfair dismissal, even on the Claimant's own case, he does not have 2 years' service. Section 108 of the Employment Rights Act 1996 provides that the right not to be unfairly dismissed does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than 2 years ending with the effective date of termination.
17. There are various exceptions to this provision as set out in section 108 (3). This was explained to the Claimant at the previous hearing and was set out in the Case Management Order made following that hearing. EJ Baron gave the Claimant notice that the Tribunal intended to strike out the claim of unfair dismissal on the ground that it had no reasonable prospect of success unless the Claimant gave reasons in writing within 14 days of the date why that claim should not be struck out.
18. The Claimant had not provided these reasons but before deciding the point I had regard to original claim, his further particulars and his list of issues. None of these documents contained information that would suggest that the Claimant's case could benefit from any of the exceptions to the two-year rule. The claim form does refer to the fact that the Claimant was treated "differently and unjustly because I blow the whistle against the company unlawful and suspicious activities on 5 April 2016" – (and there is a glancing reference to this in the proposed list of issues at paragraph 34) but since the alleged protected disclosure postdates the dismissal this could not be the basis of a successful complaint for automatic unfair dismissal contrary to section 103A of the Employment Rights Act 1996.

19. As the Claimant does not have two years' service and had not put forward any basis upon which one of the exceptions in section 108(3) would apply I find that the Tribunal has no jurisdiction to consider the complaint of unfair dismissal and this complaint is dismissed.
20. I then considered the other complaints. There is a clear claim for unpaid wages in respect of wages from 1<sup>st</sup> to 12<sup>th</sup> February 2016. There is also a claim for holiday pay, although it is not clear whether the Claimant is claiming that he took holiday during his 8 week engagement with the Respondent and was not paid for it or whether he is in fact complaining of failure to pay for a holiday accrued but not taken on termination, and this will need to be clarified. However there were no grounds for striking those complaints out.
21. (The list of issues also refers to victimisation but this does not appear to be a claim for victimisation in the legal sense. At paragraph 20 of his list of issues the Claimant alleges that the Respondent failed to pay his wages because he had asked for HR and company director details and because he intimated he would bring an employment tribunal claim for unpaid wages. That does not qualify as a "protected act" for the purposes of the Equality Act. There was also no reference to this in the original claim.)
22. As for the race discrimination claim I agree that it remains unclear and that the lack of particularisation to date may have caused prejudice to the Respondent in its ability to defend the claims. However I was not prepared to strike out the race discrimination complaints at this stage. Such complaints are notoriously fact sensitive and I consider that the Claimant should be given one more chance to attend a hearing to clarify the basis of his complaints. I bear in mind that the Claimant is a litigant in person and appears to have got side-tracked in the conduct of this litigation by extraneous matters. However what was apparent was that these complaints were not yet sufficiently clear to be sensibly responded to and that the full merits hearing cannot proceed until there is greater clarification. Accordingly there will have to be a third preliminary hearing in order that the Claimant clarify his claims. The full merits hearing currently listed for 2 days commencing on 21<sup>st</sup> March 2017 will also need to be postponed. If the case proceeds following the next preliminary hearing a new date for the full merits hearing will be set at that time and the parties should attend on 28<sup>th</sup> March with their dates to avoid.
23. It is imperative that the Claimant attend this further preliminary hearing. It is in his interests to do so. I do not consider that it would be helpful to make an order for him to provide further clarification in writing, as the list of issues that he has already provided has not elicited this necessary clarity. However, if the Claimant attends in person he can explain what it is that he considers amounts to race discrimination and why. He should be prepared to attend with full details including who he is complaining about, the date such complaints and the reasons why he

considers it amounts to race discrimination or harassment contrary to section 26 of the Equality Act. Given the history of non-attendance to date and the importance of clarifying the issues I have made an unless order as set out above.

24. The list of issues sent by the Claimant identifies that the Claimant believes that he was less favourably treated/harassed for reasons related to his race in the following respects: –
- a. The Respondent failed to provide him with work.
  - b. The Respondent failed to contact him for future work.
  - c. The Respondent accused the Claimant that he did not turn up to weekend shifts on 13<sup>th</sup> and 14<sup>th</sup> February.
  - d. the Respondent failed to tell who had his personnel file.
  - e. The Respondent failed to act on his numerous requests/complaints.
  - f. On 10<sup>th</sup> May 2016 the Respondent “wrongly perceived that the Claimant did not work for them”.
  - g. The Respondent failed to give the Claimant access to his personnel file.
  - h. The Respondent failed to respond to his protected disclosure of 5 April 2016.
  - i. The Respondent set him unachievable tasks so he was set up to fail.

Clearer particulars are required of all of these matters. The Respondent points out that the Claimant does not indicate at all the basis of any belief that the treatment accorded to him was because of or in any way connected with his race and points out that Mr Jahangir, the previous owner is of Pakistani origin as is the Claimant. That is an issue that can be canvassed at the next Preliminary Hearing.

Employment Judge Frances Spencer

20<sup>th</sup> February 2017 London South