



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr O Okanlawon

V

**NG Bailey Facilities
Services Limited**

Heard at: London Central
(by Cloud Video Platform)

On: 7 December 2020

Before: Employment Judge Joffe

Representation

For the Claimant: In person

For the Respondent: Mr T Draper, solicitor

JUDGMENT

1. The claimant's claims for sex discrimination are dismissed on withdrawal by the claimant.
2. The respondent's name is amended to NG Bailey Facilities Services Limited.
3. All of the claimant's remaining claims, save the claim for direct race and age discrimination that Mr Watson raised and pursued concerns about the

claimant's performance because of the claimant's race and/or age, are struck out under rule 37(1)(a) of the Employment Tribunal Rules of Procedure.

REASONS

1. The open preliminary hearing was held by Cloud Video Platform because it was impracticable for it to be heard in person. The parties did not object. The claimant had some initial difficulties connecting and then accessing his documents electronically but these issues were resolved. The claimant failed to attend for the judgment and did not communicate with the Tribunal or the respondent so I gave judgment and reserved the reasons.

Findings of fact

2. The claimant presented a claim form on 13 July 2020.
3. He indicated at box 5 that his employment with the respondent had commenced on 3 April 2019 and terminated on 26 May 2020. He worked as an electrical engineer.
4. At box 8 of the form, the claimant ticked the boxes for unfair dismissal, age, race and sex discrimination and a redundancy payment. He also said that he was owed notice pay, arrears of pay holiday and other payments. He said in the box for 'other claims' that he was claiming breach of contract, racial discrimination and wrongful dismissal.
5. In box 8.2, the claimant set out some narrative which was, with no disrespect to the claimant, very difficult to understand. He did not have legal assistance in filling in the form. So far as complaints about discrimination could be identified these appeared to relate to the identification of performance concerns which led to the termination of the claimant's employment during his probation period and the bagging up of personal items in his locker after his dismissal.
6. Faced with this claim form, the respondent understandably wrote to the claimant on 20 October 2020 asking for further details of his claims and setting out a series of questions. The respondent said in its letter that it reserved the right to apply to strike out the claimant's claims if the claimant failed to provide the information. The claimant replied on 5 November 2020. It is fair to say that his response made the claims no clearer. Again the claimant had no legal assistance at this point.
7. On 19 November 2020 EJ Snelson directed that there should be a hearing to consider whether the claimant's claims or any of them should be struck out as having no reasonable prospect of success or a deposit order made.

8. I was shown the claimant's contact of employment. The commencement date was 2 December 2019. The claimant told me he had been doing some work for the respondent prior to 2 December 2019. So far as relevant the contract provided:

'10. Probationary period

All new employees are subject to a probationary period of 6 months. An initial review will take place after 4 weeks, a further review will take place after 13 weeks and with [sic] a final review at 21 Weeks.

During a probationary period, if unsatisfactory progress is being made, the decision may be made to extend the review period by up to 3 months.

Your appointment will be confirmed in writing on satisfactory completion of the probationary period.

At any point during the probation period, if progress is being made is deemed consistently unsatisfactory, your employment may be terminated.

11. Notice Periods

Your employment with the Company may be terminated by either side giving notice in writing.

For the duration of your probationary period, the minimum period of notice on either side for your role is one week. Upon satisfactory completion of your probationary period the minimum period of notice for your role is one month.

For the avoidance of doubt, if during the 6 month probationary period your employment is terminated by either side giving notice which will expire after the end of the 6 month probationary period, your entitlement to notice remains only that which applies during the probationary period.

...

12. Holiday Entitlement

The holiday year runs from January to December. Full-time employees are entitled to 25 days annual leave per annum plus 8 statutory days. At the beginning of the annual leave year following 5 years' service this entitlement will increase to 26 days.

...

Should you leave NG Bailey, payment will be made for all unused accrued holiday entitlement. If you have taken more annual holiday entitlement than you have accrued during the holiday year, the balance will be deducted from any final monies due.'

9. I was provided with various other documents which showed that Mr Simon Watson, operations manager, raised performance issues with the claimant at

his 21 week review, which concerns led to the claimant's dismissal. There was then an appeal process at which the claimant unsuccessfully challenged his dismissal.

10. The claimant was paid his salary for May 2020 and one week in lieu of notice on termination. He was paid for 56 hours of accrued holiday which worked out at seven days. The claimant told me he had taken five days of holiday in February 2020.

The application to strike out

11. Mr Draper identified three categories of claims:

- a. Unfair dismissal and redundancy payment: under s 108 ERA 1996 for the unfair dismissal claim and s 115 ERA 1996 for the redundancy payment claim, the claimant required two years' service and on his own case he did not have two years' service, therefore the tribunal lacked jurisdiction and the claims should be struck out.
- b. Claims which on the basis of the documents had no prospects of success:
 - i) Notice pay: The claimant accepted that he had been paid one week's notice which was the notice requirement in his contract of employment;
 - ii) Arrears of pay: The claimant did not dispute that he had been paid all sums owing up to his date of termination;
 - iii) Untaken holiday: The claimant did not dispute that he had been paid for the seven days accrued but untaken holiday.
- c. Discrimination claims which Mr Draper recognised as ones which a tribunal would only in unusual circumstances strike out. The claimant had been given multiple opportunities to particularise these claims and had failed to articulate any facts, which, taken at their highest, could establish a claim for discrimination.

12. I investigated with the claimant what his claims were. In essence:

- a) Category 1: He said that the tribunal should hear his unfair dismissal claim because his dismissal had been unlawful and unfair.
- b) Category 2. He said that he was entitled to ten months' notice. That is what his union had advised him.

In terms of arrears of pay, he accepted that he had been paid up until his dismissal but was claiming for sums he had not received thereafter.

His wrongful dismissal was based on the premise that under his contract his employer was obliged to extend his probationary period.

His claim for holiday pay was that he was owed three weeks of holiday pay from his total annual entitlement.

- c) Category 3: He was not pursuing sex discrimination. His direct race and./or age discrimination claims were that:
- i) His manager Mr Watson raised concerns about his performance due to his race and age. He was the only black member of his team of three and he was the oldest. No concerns were raised with him previously and the concerns were not fair;
 - ii) Someone, he did not know who, bagged up and returned to him his possessions which had been in his work locker, after his dismissal;
 - iii) He was not paid further wages which would have accrued had he continued working after his dismissal.

Law

13. Under rule 37(1)(a) of the ET Rules a claim or response may be struck out if it has no reasonable prospect of success.
14. In cases which are likely to be heavily fact-sensitive, such as those involving discrimination or public interest disclosure, the circumstances in which a case will be struck out are rare: Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108, EAT.
15. The test is not whether the claim is likely to fail. It is not a test that can be satisfied by considering what is put forward by the respondent in the response or in submissions and deciding whether their written or oral submissions regarding disputed matters are likely to be established as facts. It is a high test: Balls v Downham Market High School and College 2011 IRLR 217, EAT>
16. In Kwele-Siakam v Co-Operative Group Ltd EAT 0039/17 an employment judge had erred in striking out the claimant's claims for race discrimination and victimisation by proceeding on the basis that the facts of the case before him were largely undisputed. The central issue was the reason for CG Ltd's actions, which would require a tribunal to make findings of fact after a full hearing.
17. It is crucial when considering whether to strike out that the tribunal takes the claimant's case at its highest. If the case is conclusively disproved by, or is totally and inexplicably inconsistent with, undisputed contemporaneous documents, then it might be appropriate to strike it out. But whenever there are core issues of fact that turn to any extent on oral evidence, these should not be decided without an oral hearing: Mechkarov v Citibank NA [2016] ICR 1121.
18. Particular caution should be exercised by a tribunal if a case is badly pleaded, for example by a litigant in person, especially one whose first language is not English or who does not come from a background such that he or she is familiar with articulating complex arguments in written form: Mbuisa v Cygnet Healthcare Ltd EAT 0119/18 .

Deposit orders

19. A deposit order may be made under rule 39(1) ET Rules where a claim or response has little reasonable prospect of success. Even if a claim does have little reasonable prospect, the tribunal must exercise its discretion as to whether to make such an order, bearing in mind the overriding objective.
20. A tribunal is required under rule 39(2) to make reasonable inquiries into the paying party's ability to pay the deposit and to have regard to any such information when deciding the amount of the deposit.

Conclusions

21. In relation to the unfair dismissal and redundancy payment claims, the claimant accepts he has less than two years' service. There is no jurisdiction to hear these claims and they will be struck out.
22. In relation to the claim for notice pay, the contract provides for one week's notice during the probationary period and the claimant does not dispute that this was paid. There is no contractual basis for his claim for ten months pay and this claim is struck out.
23. In respect of the claim for wrongful dismissal, the contract provides that the respondent may extend the probationary period but it is not obliged to do so. This claim has no reasonable prospect of success and is struck out.
24. There is no claim for arrears of pay since the claimant accepts he was paid sums owing to him up until the date of dismissal. This claim has no prospects of success and is struck out.
25. In respect of holiday pay, the claimant was paid for seven days of holiday which had accrued but not been taken in the holiday year from January 2020. That would appear to be 5/12 of his 25 days plus two bank holidays which would have taken place prior to his dismissal, from his allocation of eight. He was not entitled to a further 15 days which had not yet accrued. This claim has no reasonable prospects of success and is struck out.

Discrimination claims

26. In relation to the allegation that someone bagged up the claimant's goods: the claimant was unable to articulate to me why this was a detriment. His employment had ended and he wanted his personal possessions back. It would be absolutely standard for an employer to return such possessions. The claimant was really complaining about having been dismissed, which was what led to the return of his possessions. I could not see any basis on which a discrimination claim could succeed and this claim is struck out.

27. So far as the allegation that the respondent did not pay the claimant wages from June onwards is concerned, the claimant had been dismissed. No employee of whatever age or race would continue to be paid after dismissal. This claim has no reasonable prospects of success and is struck out.
28. In terms of the raising of performance concerns by Mr Watson which led to the claimant's employment being terminated, Mr Draper said that this was a clear case which could be struck out because, taking the claimant's case at its highest, it could not amount to discrimination.
29. I was unable to accept that submission. There was here a central dispute of fact, that is a dispute as to Mr Watson's reasons for raising performance concerns. On the claimant's case, which I had to accept at its highest, he said there had not be previous issues prior to May 2020. There was no contemporaneous documentation which was drawn to my attention which was conclusively inconsistent with his case on that point. He identified a difference in race and age between himself and two comparators who did not have performance concerns raised, that is the two other members of his team.
30. Accordingly, it does not seem to me that I am in a position to say that this claim has no reasonable prospect of success and it is not struck out.

Application for deposit order

31. I would have to find that there was little reasonable prospect of success to consider making a deposit order in respect of the claimant's remaining claim. I have regard to the fact that after Mr Watson raised complaints about the claimant's performance the matter was dealt with by the respondent following a detailed process which was evidenced in documents with which I was provided. In particular, the claimant appealed his dismissal and ultimately attended a probation appeal hearing in front of Mark Davis, account director. The claimant disputed the allegations of poor performance and these were considered at the hearing. Mr Davies upheld the decision to dismiss and the claimant has not suggested that Mr Davies was discriminating against him because of race or age.
32. It seems to me on the basis of the documentation and what the claimant has said about his claims that there is little reasonable prospect of this remaining claim succeeding. All of the claimant's other claims I have concluded were misconceived; in discussion with the claimant, it did not appear to me that he had given careful thought to his claims or done appropriate research or sought out any sources of free legal advice which might be available to him. That lack of care and lack of a reasoned basis for his claims causes me to have doubts as to whether the claimant will be found to have any basis for the remaining claim.
33. I considered whether I should exercise my discretion to make a deposit order and concluded that it would be in accordance with the overriding objective to

do so. It seems to me that, in fairness to the respondent, the claimant should give careful consideration to whether his remaining claim has any real prospects and that making a deposit order would be appropriate to focus the claimant's attention on that issue.

34. I made enquiries of the claimant's means. Happily he is in new employment, earning £2750 net per month. He has a wife who works and pays the family food bills. They have two dependent children. The claimant pays £600 per month for rent. He will be required to pay £950 per month towards loan repayment and pays £150 per month towards credit card bills. He pays £150 per month for electricity and £20 per month to pay off a water bill. He pay £100 per month for laundry and dry cleaning. He owes £1350 in arrears of rent. He sends £450 per month to his mother.
35. I considered that a deposit of £50 would be appropriate; it was not such a high sum that the claimant would not be able to pay it but it was a sufficient sum that the claimant would need to think about the limitations of his claim.

Employment Judge Joffe
London Central Region
08/12/2020

Sent to the parties on:
08/12/2020

For the Tribunals Office