



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. D R Crystal-Kirk

**Respondents:** Florentino's Pizzeria Limited (R1)  
Mr. M Arjemandfar (R2)

**Heard at:** Lincoln

**On:** 8<sup>th</sup> December 2022

**Before:** Employment Judge Heap (Sitting alone)

## Representation

**Claimant:** In person

**Respondent:** Mr. D Bansal - Solicitor

## JUDGMENT

1. The Respondents' application to strike out the complaint relating to a breach of Section 1 Employment Rights Act 1996 or for a Deposit Order to be made is refused.
2. No amendment to the claim can be granted at this stage as further particularisation of the complaints that are sought to be advanced as harassment relying on the protected characteristic of age are required.
3. Case Management Orders are made separately.

## REASONS

### BACKGROUND & THE ISSUES

1. This Preliminary hearing was listed by Employment Judge Ayre following one which she dealt with on 27<sup>th</sup> September 2022. It was listed to deal with the following matters:
  - a. Whether to allow any application to amend the claim;

- b. The Respondents' application to strike out the complaint of a failure to provide a statement of main terms and conditions of employment or, alternatively, for a Deposit Order to be made;
  - c. To finalise the list of issues that the Tribunal will be required to decide;
  - d. To discuss the existing listing of the hearing; and
  - e. To make any other necessary Orders.
2. It has not been possible to determine the amendment application today because the complaints that the Claimant seeks to advance as harassment related to the protected characteristics of age remain far from clear. I deal with the reasons for that and what needs to be done to rectify matters in separate Orders.
  3. Given that position it has also not been possible to finalise the list of the issues that the Tribunal will need to decide because that will depend upon whether the Claimant is permitted to amend his claim. To the degree that it was possible to do so some further detail has been provided as to the complaints of race discrimination and again those are dealt with separately in the attached Orders.
  4. I did, however, determine the Respondents' applications upon which I heard submissions from both parties.

## **THE LAW**

### **Striking out a claim or part of it – Rule 37 Employment Tribunal Constitution and Rules of Procedure Regulations 2013**

5. Employment Tribunals must look to the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("The Regulations") when considering whether to strike out a claim.
6. Rule 37 provides as follows:

*"At any stage of the proceedings, either on its own initiative or on the application of a party, the 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 it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out.)”*

7. The only consideration for the purposes of this Preliminary hearing is whether the complaint about a failure to provide a statement of main terms and conditions of employment can be said to have no reasonable prospect of success.
8. In dealing with an application to strike out all or part of a claim a Judge or Tribunal must be satisfied that there is “no reasonable prospect” of success in respect of that claim or complaint.
9. It is not sufficient to determine that the chances of success are fanciful or remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and for it to be appropriate, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained in **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (paragraph 6):

*“The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words “no” because it shows the test is not whether the Claimant’s claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects...”*

10. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal at a full hearing will rarely, if ever be, apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested (see **Anyanwu v South Bank Student Union [2001] ICR 391** and **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126**).

Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013

11. Different considerations apply, however, in relation to Deposit Orders made under Rule 39 of the Regulations. Rule 39 provides as follows:

*“(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.”*

12. Thus, a Tribunal may make a Deposit Order where a claim or part of it has little reasonable prospect of succeeding. However, this is not a mandatory

requirement and whether to make such an Order, even where there is little reasonable prospect of success, remains at the discretion of the Tribunal to determine whether or not such should be made.

13. The Tribunal is required to have regard to the means of a paying party both as to whether to make an Order and, if so, the amount of that Order. Otherwise, the setting of a Deposit which the paying party is not able to pay will amount to a strike out by the back door (see **Hemdan v Ishmail & Anor 2017 ICR 468**).

### **CONCLUSIONS**

14. The only complaint that the Respondents seeks to have struck out or made subject to a Deposit Order is the complaint of a failure to provide an initial statement of employment particulars.
15. Given that that is a very small part of the claim and would not appear to affect the hearing duration or the issues to be determined (given the constructive dismissal claim issues and the existence of Section 38 Employment Act 2002 if the Claimant succeeds in other complaints) I raised with Mr. Bansal whether it was in fact still a live matter. He confirmed that the Respondents did still wish the matter to be determined and accordingly I heard from both parties on the applications.
16. The Respondents say that that complaint has no reasonable prospect of success because the Claimant was provided with a statement of employment particulars, and it appears in a bundle prepared for the purposes of this hearing at pages 57 to 61. They point to the fact that it was signed by the Claimant.
17. The Claimant contends that he was only provided with that document five years after his employment commenced and so it did not comply with Section 1 Employment Rights Act 1996 as to the time in which they should have been supplied. He also says that the document was deficient in terms of the information that is required by Section 1(4)(d) Employment Rights Act 1996 because that did not reflect the reality of the arrangements between himself and the Respondent.
18. Albeit of less relevance to the application he also says that he signed the document under duress and that he disagreed with some of the clauses such that he marked them up and submitted a different statement of main terms and conditions to the Respondent as a counter proposal. That is the document which appears at page 62 to 63 of the hearing bundle.
19. Ultimately, there is a factual dispute between the Claimant and the Respondents as to whether the document was given to the Claimant in the timeframe required by the legislation and whether it was compliant in terms of the information required by Section 1(4)(d) Employment Rights Act. I cannot resolve that on the documents alone and evidence will be necessary before a determination can be made. It is therefore not a complaint that is apt either to be struck out or for a Deposit Order to be made.
20. For those reasons the applications are refused.

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**Employment Judge Heap**

Date: 12 December 2022

FOR THE TRIBUNAL OFFICE  
**Yahya Merzougui**

**Note:**

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