



# EMPLOYMENT TRIBUNALS

**Claimant**  
Mr F Cianci

v

**Respondent**  
London XXI Limited t/a ME London

Heard at: Central London Employment Tribunal On: 1 December 2023  
Before: Employment Judge Norris, sitting alone (via CVP)

Representation:

Claimant – Not present or represented  
Respondent – Mr K Wilson, Counsel

## JUDGMENT – PRELIMINARY HEARING

1. The Tribunal does not have jurisdiction to hear the Claimant's claim of unfair dismissal, which is accordingly struck out.
2. The remainder of the claim is struck out in any event under Rules 37(1)(b) and/or (d) (Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013), i.e. because the manner in which the Claimant has conducted the proceedings is unreasonable and/or because the claim has not been actively pursued.

## WRITTEN REASONS

### Background

1. The Claimant worked for the Respondent, a West End hotel, as a Server in one of its restaurants, from 11 April 2022.
2. On 21 January 2023 an incident took place in which the Claimant says (according to the particulars of claim) the Floor Supervisor Mr Farcas made an accusation against him and used "racist petty names" in front of everyone. The Claimant says that security escorted him from the building and that he was summarily dismissed on that day. He appealed unsuccessfully in April 2023.
3. The Respondent says that the Claimant was not dismissed on 21 January but instead was invited to a meeting on 25 January 2023, chaired by the Security Manager Mr Henderson. It says the Claimant attended the meeting unaccompanied and that having considered the CCTV footage from the night of 21 January, Mr Henderson took the decision to dismiss the Claimant summarily for gross misconduct. The Respondent agrees that following a

hearing that took place on several dates over a prolonged period, the Claimant's appeal was ultimately dismissed, with confirmation being sent to the Claimant by letter of 19 April 2023.

4. Early Conciliation took place via ACAS between 13 April and 19 May 2023. The claim was lodged by the Claimant on 5 June 2023. He had ticked boxes on the claim form to indicate he was bringing complaints of unfair dismissal, race discrimination, notice pay and "other payments". The Respondent defended the claim by ET3 lodged with the Tribunal on 21 August 2023. Among other points, it requested more details of the Claimant's race discrimination claim.
5. On 25 September 2023, Employment Judge Gidney conducted a Preliminary Hearing (Case Management) (PHCM) by remote means. The Respondent was represented by a solicitor, Ms Odey. The Claimant was not represented and did not attend himself. EJ Gidney noted that on 28 July 2023, the Tribunal had sent out a notice of hearing to the Claimant's home address and the clerk had emailed and telephoned him using the details on the claim form, without success, to see if he wished to participate in the hearing, which was delayed in starting by 15 minutes to see if the Claimant joined. Since he did not, EJ Gidney proceeded in his absence, noting that his failure to engage "*might*" be an indication that he no longer wished to pursue his claim.
6. EJ Gidney ordered the Claimant to provide the details of his race discrimination claim as requested by the Respondent ("Further and Better Particulars") by 16 October 2023, including the race or nationality relied on as a protected characteristic, the "racist petty names" that Mr Farcas is accused of using on 21 January 2023 and whether the Claimant was relying on an actual or hypothetical comparator. EJ Gidney noted that if there were any other incidents of race discrimination on which the Claimant wished to rely, he should provide full details; and EJ Gidney further observed that as there were no other allegations in the claim form, it was likely that any such additional allegations would require an application by the Claimant to amend his claim.
7. The matter was accordingly listed for a Preliminary Hearing (PH) on 1 December 2023 to consider:
  - a. Any amendment application by the Claimant that might arise from his Further and Better Particulars;
  - b. Any application by the Respondent for a strike out or deposit order;
  - c. Whether the Tribunal has jurisdiction to hear the Claimant's unfair dismissal complaint, given that he had less than two years' continuous service at the date of dismissal; and
  - d. Any further case management.
8. EJ Gidney also made orders for the Claimant to produce a schedule of loss, for the Respondent to update its response by 6 November 2023 following receipt of the Claimant's Further and Better Particulars and for the parties to liaise to agree a bundle and any witness evidence for the PH on 1 December.
9. The Claimant did not provide any Further and Better Particulars or a schedule of loss and he did not liaise with the Respondent over the production of a bundle. On 3 November the Respondent emailed to the Claimant and to the Employment Tribunal a letter setting out the basis of its strike out application. The Claimant acknowledged receipt of this letter just as he had acknowledged

receipt of emails from the Employment Tribunal. He did not, however, engage in any substantive correspondence with the Respondent or with the Tribunal. On 28 November 2023, the Respondent emailed the Claimant a copy of the bundle it had prepared for the PH.

10. On the afternoon of 30 November, the Tribunal emailed joining instructions to the parties for the PH listed for the following day.

### **Preliminary Hearing**

11. At the Preliminary Hearing on 1 December 2023, the Respondent was represented by Mr Wilson of Counsel who had prepared a skeleton argument. The Tribunal clerk called the Claimant twice and left him a voicemail but could not make contact. Mr Wilson observed that this was similar to the experience of the Respondent's representatives, who had tried to contact the Claimant but without success. I was satisfied that the Claimant had received adequate notice of the hearing and that it would be in the interests of justice to proceed in his absence since he had given no explanation at all for his non-attendance at the PH and had not participated in the preparations for it.
12. I noted that there had been no application by the Claimant to amend his claim and therefore the first point in EJ Gidney's list was not applicable. I then dealt with the unfair dismissal claim and the Claimant's lack of continuous service. Finally, I heard submissions from Mr Wilson regarding the Respondent's application to strike out the claim (there was no application for a deposit order). For the reasons given below, I decided to strike out the claim in its entirety.
13. As the Claimant was not present or represented, I indicated that I would give written reasons for my decision.

### **Law**

#### Unfair dismissal

14. According to the Employment Rights Act 1996 (ERA) an employee does not have the right to be unfairly dismissed until he or she has been "*continuously employed for a period of not less than two years ending with the effective date of termination*" (section 108(1)). There are some exceptions to that rule; although he had ticked box 10.1 on the claim form ("*Information to regulators in protected disclosure cases*") none of those exceptions appears to be relied on by the Claimant in this case.

#### Strike out – Rule 37(1)(b)

15. The Respondent has very properly acknowledged that the authorities on strike out make it clear that the striking out of a claim is a "*draconian power*", or a decision of "*last resort, not a short cut*".
16. Nonetheless, if a party has behaved unreasonably, the Tribunal must consider whether that unreasonable conduct has taken the form of "*deliberate and persistent disregard of required procedural steps*" or that it has "*made a fair trial impossible*"<sup>1</sup>.

#### Strike out - Rule 37(1)(d)

17. So far as failing actively to pursue the case is concerned, the Respondent

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<sup>1</sup> *Blockbuster Entertainment Limited v James* [2006] IRLR 630

draws the Tribunal's attention to the case of *Evans v Commissioner of Police of the Metropolis*<sup>2</sup> which gives two situations where strike out might be appropriate: where there has been a delay that is intentional or contumelious (i.e. disrespectful or abusive to the court); or where there has been inordinate and inexcusable delay giving rise to a serious risk that a fair trial is impossible or which is likely to cause serious prejudice to the Respondent.

18. Mr Wilson observed in his skeleton argument that the first of these two situations is likely to include a scenario where the Claimant has failed to adhere to an order of the Tribunal and thus to overlap with the power under Rule 37(1)(c) to strike out for non-compliance with the Tribunal Rules or orders.

## **Conclusions**

### Unfair dismissal

19. Although there is a dispute on the Claimant's exact dates of employment, it is common ground that he did not have two years' continuous service, and as I have observed above, he has not made out any argument that he comes within one of the exceptions to the requirement to have that service. This complaint is therefore struck out as the Tribunal does not have jurisdiction to hear it.

### Other complaints

20. Even if I had not struck out the unfair dismissal complaint because of a lack of jurisdiction, I would have struck it out, along with the remainder of the complaints ticked by the Claimant for the following reasons:

- a. I accept Mr Wilson's submissions that other than lodging the claim, the Claimant has failed to pursue the matter. He did not attend the PHCM before EJ Gidney; he did not provide the details of the race discrimination complaint required to clarify his claim sufficiently for the Respondent to defend the matter or set out any other allegation that the Tribunal might have jurisdiction to hear; he has not complied with the other directions/orders to make the matter ready for this PH; and he did not attend the PH. The Claimant has given no explanation for this lack of participation on his part.
- b. The inference can be drawn that the Claimant's non-compliance is deliberate. He has received the Tribunal's correspondence – having acknowledged it - and has been reminded by the Respondent's representatives of his obligations to produce the information necessary to proceed. He has not substantively engaged with either the Tribunal or the Respondent, again without any explanation. I appreciate that he is a litigant in person but he has not suggested, for example, that he requires more time or that he has been unable to access what he has been sent. I find in the circumstances that his non-compliance amounts to unreasonable behaviour.
- c. I further accept that without the Claimant's engagement in this matter, no progress can be made with it. It would, as Mr Wilson says, be absurd to press on with a claim in which the Claimant has given every indication (through his lack of co-operation) that he does not intend to pursue it. A fair hearing has to be fair to both parties. It is not fair to the Respondent to require it to second-guess what the allegations against

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<sup>2</sup> 1993 ICR 151

it are. Nor is it for the Tribunal to make the Claimant's case for him.

- d. The race discrimination complaint required details from the Claimant. They were not complicated details. He was being asked to put his case in terms so that it could be defended. He has not done so. The Respondent cannot defend a case if it does not know what the case is, and the Tribunal cannot make findings in those circumstances either.
- e. The Respondent admits it did not pay the Claimant his notice. Arguably, it could defend the wrongful dismissal complaint by adducing evidence to show that that failure to pay was justified as a result of the Claimant's conduct. In the circumstances, we discussed briefly whether the Respondent could deal with a case of wrongful dismissal/notice pay without the Claimant's attendance at a final hearing. However, I accept Mr Wilson's submission that the idea of preparing for and conducting a trial in which only one party was participating would be baffling; in adversarial litigation, the Respondent needs an adversary. Unless the Claimant either pursues the claim or withdraws, the Respondent alone has no power to discontinue the case.

21. In the circumstances, I conclude that the Claimant has behaved unreasonably because he has deliberately and persistently disregarded the required procedural steps to pursue his claim, and further that he has intentionally and repeatedly failed to comply with the Tribunal's directions or attend hearings so that it can properly be said he is not actively pursuing the claim, and therefore the claim is struck out in its entirety under Rules 37(1)(b) and/or (d) of the Employment Tribunal Rules.

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Employment Judge Norris

Date: 2 December 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON

02/12/2023

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FOR THE TRIBUNAL OFFICE