



EMPLOYMENT TRIBUNALS

Claimant: Mr A Artyunov
Respondent: Staffline Recruitment Limited
Heard at: East London Hearing Centre
On: 30 November 2022
Before: Tribunal Judge D Brannan, acting as an Employment Judge

Representation

Claimant: Dr Sevik (lay representative)
Respondent: Mr A Francis (counsel)

RESERVED JUDGMENT

The Claimant's claim for unpaid wages from 17 April 2021 to 9 July 2021 is struck out.

The Claimant's claims for unfair dismissal and direct race discrimination shall proceed to a substantive hearing.

REASONS

Background

1. On 17 January 2022 there was a prehearing for case management before Employment Judge Jones. She gave Case Management Orders dated 9 February 2022 (the "CMO"). These included a case summary which identified the Claimant's complaints and issues to be determined by the Tribunal. The parties were directed to write to the Tribunal and other side by 7 March 2022 if they thought the listed claims and issues were wrong or incomplete. Neither party did so.
2. The complaints are consequently as stated in the CMO, namely:
 - (a) Constructive unfair dismissal;

- (b) Direct race discrimination about the following:
 - (i) Dismissal;
 - (ii) The Respondent's failure to adhere to Health & Safety in April 2021;
 - (c) Unlawful deduction of wages
 - (i) Unpaid wages from 17 April to 27 May 2021
 - (ii) Possible holiday pay
3. The Claimant was also directed in the CMO to provide the following information by 7 March 2022:
 - (a) The date on which the Claimant says he resigned from the Respondent's employment, if he says that he resigned verbally then details of who he spoke to, where and on what date;
 - (b) The date of the email sent to confirm his resignation;
 - (c) The details of the breaches of Health & Safety that he says contributed to the fundamental breach of contract allowed him to resign;
 - (d) Details of the wages he believes that he is owed, showing how this is calculated.
 4. Dr Sivek sent emails to the Respondent and Tribunal on 6 March 2022 and 7 March 2022. In these it was not explicitly stated when the Claimant resigned or how.
 5. The health and safety breaches were specified in the email of 6 March 2022.
 6. The wages are explained in the email of 7 March 2022 as being from 17 April 2021 to 9 July 2021 and amounting to 7 ½ weeks at a rate of £440 per week totalling £3300.
 7. On 4 April 2022 the Respondent applied for a preliminary hearing to consider whether the Claimant's claim or parts of it should be struck out or subject to a deposit order in accordance with rule 37 and rule 39 of the Employment Tribunal Procedure Rules 2013 (as amended). The Respondent identified the claims of "unfair dismissal", "wages" and "race discrimination" as the claims which it was seeking to strike out and gave different reasons for each.
 8. Employment Judge Jones directed that a prehearing be listed for this purpose. That hearing was originally listed for 28 October 2022 but was postponed due to no judge being available. It was relisted before me for 30 November 2022.
 9. I was told at the hearing before me that the parties had decided (not necessarily in concert) not to exchange witness statements on 1 August 2022 as directed in the CMO, pending the outcome of this hearing.
 10. The final hearing is listed for 12 to 14 April 2023.

Law

11. The Employment Tribunal Procedure Rules say, as relevant:

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it ... has no reasonable prospect of success;

...

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

...

12. The Respondent rightly accepts that the threshold for striking out a claim for no reasonable prospects of success is a high one. It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute (*Eszias v North Glamorgan NHS Trust* [2007] EWCA Civ 330).

13. On the other hand, in *Ahir v British Airways PLC* [2017] EWCA Civ 1392, Lord Justice Underhill said at paragraph 16:

Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'.

14. Having established the legal framework I will now look at each application in turn.

Unfair Dismissal

15. Mr Francis provided a skeleton argument at the hearing of seven pages and 25 paragraphs. Paragraphs 14 to 21, covering almost three pages, explain why the Respondent thinks the unfair dismissal claim should be struck out or subject to a deposit order.

16. I note that Mr Siwek initially objected to this document being provided at the hearing, particularly given the amount of law contained therein, on which Mr Siwek, while claiming to having expertise in Scots law, said he was inexpert. I explained that the law was an issue for me – if I was misled by the Respondent or got it wrong for any other reason in my decision he would be able to appeal against my decision. The key points I needed to hear from him concerned the facts. I consequently gave him time to read the skeleton argument before we discussed the issues in detail. It was certainly not in the interests of justice to postpone the hearing.
17. The nub of the issue is that the Respondent's position is that the Claimant has not resigned at all. In the ET3 the Respondent said at box 4.2 that employment was continuing. The Claimant was ordered to provide details about his resignation in the CMO. He failed to comply. At the hearing before me I asked Mr Sivek to tell me when the resignation took place. He said it was in a telephone call by him to the Respondent on 9 July 2021. He said he could not remember the name of the specific person he had spoken to. This was the first time within the proceedings that the circumstances of the claimed resignation had been identified.
18. Mr Francis submitted that even if this now provides a dispute of fact regarding dismissal which needs to be determined, the fact that Mr Sivek delayed so long in disclosing this and still cannot identify who he spoke to means that the claim is not credible and has either no or little reasonable prospect of success.
19. I have not heard the evidence on this point, simply Mr Sivek's submission on the Claimant's behalf. Mr Sivek has made himself the primary witness to the resignation. It is therefore surprising that he was unable to provide the details which Judge Jones ordered in the CMO earlier. Nevertheless, now there are facts to be tried, I think it inappropriate to make a strike out order. This is particularly important given the race discrimination claim relates to the resignation as well.

Wages

20. The basis for the Respondent's strike out application in relation to wages is that the Claimant did not perform any work for the Respondent between 17 April 2021 and 9 July 2021. That is not disputed. I asked Dr Sivek the basis for the wages claim for a period when no work was performed. Dr Sivek could not explain it.
21. I note that this is normally a question of contractual terms. There appears to be a dispute about what contract the Claimant worked under. The Respondent relies on a contract in the bundle. Dr Sivek says that this was not agreed to. He also mentioned that the Respondent also tried to impose another contract, which was not in the bundle but which he had the front page of at the hearing. Dr Sivek says that in any case the contract was under the "common law". What has not happened is Dr Sivek or the Claimant identifying any reason why he should have been paid when he did not perform any work. The claim for unpaid wages from 17 April to 27 May 2021 (as identified in the CMO) or 9 July 2021 (as now relied on by the Claimant) consequently has no reasonable prospects of success and is struck out.

Race Discrimination

22. The Respondent's argument in its original application on 4 April 2022 relating to race discrimination is that there is insufficient material from which the Tribunal could conclude that the Respondent had committed an act of unlawful discrimination. Mr Francis added in his skeleton argument that the claim appears to have been manufactured to embarrass and put pressure on the Respondent, having not been mentioned in the Claimant's grievance.
23. I note that this application was made after the CMO in which Judge Jones summarised the basis for the race discrimination claim and did not decide it was necessary to direct the Claimant to provide additional information prior to the exchange of documents or witness statements. I cannot see how that same information now has no reasonable prospects of success. Indeed Judge Jones has identified in the CMO the issues for determination which arise from that element of the claim.
24. The application to strike out the race discrimination claim as having no reasonable prospects of success is consequently refused.

**Tribunal Judge D Brannan,
acting as an Employment Judge
Date: 12 December 2022**