Case Number 2201700/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms C Ngochindo		**Select Service Partner UK Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
ON A PRELIMINARY HEARING

HELD AT London Central **ON** 24 August 2017

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **In Person**
For the Respondent: **Mr T Gillie (Counsel)**

JUDGMENT
(As promulgated on 29 August 2017)

The Judgment of the tribunal is that: -

1 The claimant's claim for unfair dismissal is dismissed for want of jurisdiction.
2 The claimant's application to amend her claims in accordance with the further Information presented to the tribunal by email dated 18 August 2017 is refused.
3 Pursuant to Rule 37(1) of the Employment Tribunals Rules of Procedure, the claimant's claims for discrimination on the grounds of Race; Sex; Age; and Religion together with her claims for Arrears of Pay and Holiday Pay are struck-out as having no reasonable prospect of success.
4 The claimant's claim for Unpaid Notice Pay/Breach of Contract will be heard by an Employment Judge sitting without members at London Central Employment Tribunal on Thursday **26 October 2017** with a time allocation of 1 day.

REASONS

Introduction & Background

1 The claimant in this case is Miss Christiana Ngochindo who was employed by the respondent, Select Service Partner (UK) Limited, from 7 October 2016 until 8 December 2016 when she was dismissed. The reason given at the time of

the claimant's dismissal was gross misconduct.

2 By a claim form presented to the tribunal on 16 May 2017, the claimant purports to bring claims against the respondent for unfair dismissal; unlawful discrimination on the grounds of age, race, religion/belief and sex; and she also claims to be owed notice pay, holiday pay, arrears of pay, and other unspecified payments.

3 The claim form provides no particulars of any of the claims: it simply states that ACAS has tried to conciliate without success. The claimant quantifies her claim in the sum of £29,720.

4 All of the claims are denied, and, in its response to the claim, the respondent points out that the claimant is not sufficiently time-served to bring a claim for unfair dismissal.

5 On 4 August 2017, there was a Closed Preliminary Hearing (CPH) conducted before Employment Judge Goodman. That hearing took place in the afternoon: the CPH was originally scheduled to take place before Employment Judge Norris earlier in the day; but the claimant was given an opportunity to spend time writing down what she could about the grounds of her claim; these were handed to Judge Goodman; but were of little use in determining precisely what was being claimed. Judge Goodman concluded that the claim should be listed for an Open Preliminary Hearing (OPH) before me today: and, in readiness for this hearing, gave the claimant an opportunity to provide further particulars of her claim - including the basis upon which she believes that she was treated unfavourably by reason of race, sex, age, or religion/belief; naming comparators or providing the characteristics of a hypothetical comparator; and setting out any basis upon which the tribunal might have jurisdiction to hear her claim for unfair dismissal.

6 The matters for determination at today's OPH were identified as follows: -

(a) Whether claimant's proposed amendments to her claim form (if any) should be allowed.
(b) Whether any of her claims should be struck out because they disclosed no reasonable prospect of success
(c) Whether the unfair dismissal claim should be struck out for want of jurisdiction.
(d) Whether a deposit order should be made for any of the claims because they show little reasonable prospect of success.

7 In purported compliance with Judge Goodman's Case Management Order, the claimant lodged with the tribunal an email dated 18 August 2017, timed at 20.50hrs, setting out full particulars of her claim.

8 At today's hearing, I heard no oral evidence: I considered the claimant's case at its height; and heard submissions on this from both parties.

Unfair Dismissal

9 Section 108(1) of the Employment Rights Act 1996 (ERA), provides that an employee with less than two years continuous service ending with the effective date of termination of employment does not have the right not to be unfairly dismissed. It follows that the tribunal has no jurisdiction to hear an unfair dismissal claim brought by such an employee. Section 108(2) provides that the requirement for two years continuous service does not apply in certain circumstances.

10 Upon consideration of the claim form, and of the claimant's email dated 18 August 2017, there is no suggestion that the reason for the claimant's dismissal is one of the reasons to which Section 108(2) refers. Accordingly, the claimant would be unable to bring a claim for unfair dismissal without two years continuous service. During oral submissions today, the claimant argues that her dismissal was discriminatory; and that because the dismissal was an act of discrimination the tribunal has jurisdiction.

11 This submission is simply wrong in law: the fact that a dismissal is alleged to be an act of discrimination does not bring the claim within the provisions of Section 108(2). Accordingly, such a claimant without the necessary time service cannot bring a claim for unfair dismissal. But, within a discrimination claim (such as that brought by the claimant), the dismissal can be found to be a discriminatory act and a remedy is accordingly available.

12 It follows that there is nothing in this claim which provides the tribunal with jurisdiction to hear a claim for unfair dismissal. Accordingly, that claim is dismissed for want of jurisdiction.

Holiday Pay & Arrears of Pay

13 Nowhere in the claim form, or in the 18 August email, does the claimant provide any details of unpaid holiday pay or unpaid wages. In an earlier document setting out her calculation of the quantum of her claim at £29,720, there is again no reference to unpaid wages or holiday pay. In oral submissions today, the claimant has been given the opportunity to provide any details of such claims: what she has referred to in respect of unpaid wages is the period following dismissal whilst her appeal against dismissal was pending including her attendance at an appeal meeting on 22 December 2016; and in respect of unpaid holiday pay, the additional holiday which would have accrued had her employment continued until the determination of her appeal on 3 February 2017.

14 Once again, these claims are unsustainable at law: it is quite clear, and not in dispute, that the claimant's employment was terminated summarily on 8 December 2016; she has been paid all wages and holiday pay due and accrued to her until that date.

15 Accordingly, the current claims for unpaid wages and holiday pay are wholly misconceived; they have no prospect of success; and are dismissed pursuant to the tribunal's powers under the provisions of Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013.

Amendment

The Law on Amendment

16 The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order: Rule 29 of the Employment Tribunals Rules of Procedure 2013. Although there is no specific reference to amendment in the Rules, no doubt such an order may include one for the amendment of a claim or response.

17 "As a matter of guidance going beyond the facts of this particular case we cannot over emphasise that where an amendment is sought it behoves the applicant for such an amendment clearly to set out verbatim the terms and explain the intended effect if the amendment which he seeks": ***Harvey v Port of Tilbury (London) Limited*** **[1999] ICR 1030.**

18 In ***Selkent Bus Co Limited v Moore*** ***[1996] ICR 836*** the EAT gave the following general guidance, each part of which is dealt with in more detail below.

(a) Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant.

(b) The nature of the amendment: applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(c) The applicability of time limits: if a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that application is out of time, and, if so, whether the

time limit should be extended under the applicable statutory provisions, eg, in the case of unfair dismissal, [Employment Rights Act 1996 s 111 (2)].

(d) The timing and manner of the application: an application should not be refused solely because there has been a delay in making it. There are no time limits laid down … for the making of amendments. The amendments may be made at any time – before, at, or even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

(e) Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

19 The nature of the proposed amendment (see 18(b) above):

(a) Amendments that involve mere re-labelling of facts already fully pleaded will in most circumstances be very readily permitted: ***T&GWU v Safeway Stores Limited*** **UKEAT/0092/07**. An amendment may be allowed to correct the name of the claimant where an incorrect version of the surname was used by her solicitor: ***Cummings v Compass Group UK & Ireland Limited*** **UKEAT/0625/06**

(b) Generally too a party wishing to amend to add new facts in support of an existing claim will be allowed to do so. However, "one can conceive of circumstances in which, although no new claim is being brought, it would, in the circumstances, be contrary to the interests of justice to allow an amendment because the delay in asserting facts which have been known for many months makes it unjust to do so": ***Ali v Office of National Statistics*** **[2005] IRLR 201**

(c) In deciding whether a claim form contains a particular claim, it is necessary to look at the document as whole. The prescribed form of claim document lists the most common jurisdictions of the tribunal and required the claimant to identify those he claims by ticking a box. A Judge is likely regard as significant, when determining what claims are asserted, which boxes have been ticked. Direct and indirect discrimination are two different types of unlawful act, and a claim which asserted discrimination on racial grounds did not include a complaint of indirect race discrimination, and such a complaint required an application to amend: ***Ali v Office of National Statistics***. "The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say-so. Instead, it serves not only a useful but a necessary function. It sets out the essential

case. It is that to which a respondent is required to respond. … a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time ground; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand-in-hand with it, can be provided for both by the parties and by the tribunal itself, and [to] enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings": ***Chandhok v Tirkey*** **UKEAT/0190/14.**

(d) It is relevant to the exercise of the discretion that the new claim is closely related to the existing one, and depends on facts which are substantially already alleged; it is also relevant that it is a claim that the respondent "would reasonably have anticipated … as the natural, one might almost say inevitable, concomitant of [the original claim]" and that it was omitted "through a lawyer's blunder" (since a remedy against the claimant's solicitors is not equivalent to the primary remedy): ***T&GWU v Safeway Stores Limited.***

(e) The discretion is wide enough to enable the tribunal to allow a claimant to add or substitute a cause of action not available at the date of the claim form, since it had accrued later: ***Prakash v Wolverhampton City Council*** **UKEAT/0140/06.**

20 Timing of applications to amend (see 18(d) above): If a party considers that an application to amend should be made to add a new cause of action, even as late as during the hearing, it is right to make that application, since otherwise the opportunity to raise the claim may be lost entirely: ***Divine-Borty v Brent LBC*** **[1998] ICR 886**: an issue estoppel case in which all three members of the Court considered that it was possible for the claimant to have applied at the hearing to amend his claim form to add race discrimination to unfair dismissal, rather than (as he did) presenting a fresh claim).

21 Consequences of amendment: as is mentioned at 18(e) above, it will often be possible for an amendment to be allowed and the prejudice to the other side offset by allowing further time for preparation and/or making a costs order. Indeed, in appropriate cases the Judge may only allow an amendment on condition that the party seeking it agrees to pay costs caused by it: ***Cocking v Sandhurst (Stationers) Limited*** **[1974] ICR 650.**

Analysis

22 The position in this case is that the proposed amendment is no more comprehensible in terms of exposing the precise details of the claim than was the original claim form. The proposed amendment is a series of complaints about what the claimant regards as unfair treatment: there is no discernible basis to conclude that, even if all of those complaints were upheld, the treatment complained of was unfavourable - and would not have been meted out to other employees; still less is there a discernible basis to conclude that any of the treatment was on the grounds of any protected characteristic.

23 The proposed amendment is not in the form directed by Judge Goodman: it does not provide details of each incident; why the treatment is said to be unfavourable; identify the comparator; or link the treatment to any protected characteristic.

24 If the amendment were allowed, it would be necessary for a further Case Management Order to be made requiring additional particulars to clarify the amended claim - this would cause more delay; and increase the respondent's costs.

25 Applying the ***Selkent*** principles, I have therefore concluded that, in this case, it is not in the interests of justice for the amendment to be allowed. The application to amend is accordingly refused.

Discrimination Claims

The Law on Strike Out / Deposit

26 **The Employment Tribunals Rules of Procedure**

Rule 37: Striking out

(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 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 that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(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.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in Rule 21 above.

Rule 39 Deposit orders

(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.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the

party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

27 **Decided Cases**

Anyanwu –v- South Bank Students' Union **[2001] ICR 391 (HL)**
Highlighted the importance of not striking out discrimination claims except in the most obvious cases - as they are generally fact sensitive and require a formal examination of the evidence to make a proper determination.

Ezsias –v- North Glamorgan NHS Trust **[2007] ICR 1126 (CA)**
A similar approach should generally inform whistleblowing cases, which have much in common with discrimination cases, in that they involve an investigation into why employer took a particular step. It will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when central facts are in dispute.

Shestak –v- RCN **EAT 0270/08**
An example of an exception may be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The tribunal was upheld when undisputed documentary evidence in the form of emails which could not, taken at their highest, support the claimant's interpretation of events. This justified a departure from the usual approach that discrimination claims should not be struck out at a preliminary stage

Balls –v- Downham Market High School and College **[2011] IRLR 217 (EAT)**
The test is not whether the claim is "likely to fail".
The test is not whether it is "possible that the claim will fail".
The test cannot be satisfied by consideration of the respondent's case.
The tribunal must take the claimant's case at its highest.

Analysis

28 Having refused the claimant's application to amend, I must consider the claimant's claims as they are pleaded in the claim form. The simple fact is that there are no pleaded facts which, if proved by the claimant, and taking the claim at its highest, could, on any basis, ground a successful claim for discrimination on the grounds of any protected characteristic. This being the case, this is a proper case for the discrimination claims to be struck out as having no reasonable prospect of success.

29 I have nevertheless considered what the claimant's position would be if the 18 August 2017 email had been the pleaded case within the claim form and thus there had been no need of an application to amend. The position would be

the same: the claim remains incomprehensible; and would be struck out for the reasons set out in Paragraph 22 above.

30 Accordingly, the discrimination claims struck out as having no reasonable prospect of success.

Wrongful Dismissal

31 The claimant's claim for unpaid notice pay/breach of contract is a wrongful dismissal claim: her case is that she was not guilty of any gross misconduct and accordingly was not in repudiatory breach of the contract of employment; thus it is her case that she is entitled to notice pay (this would be a statutory minimum of one week's pay unless there were express terms in the claimant's employment contract entitling her to more).

32 Mr Gillie concedes that it is for the respondent to establish that the claimant was in repudiatory breach and that the respondent was entitled to terminate her employment contract without notice. This claim must be permitted to proceed; I have listed it for trial; and made appropriate Case Management Orders.

_____
Employment Judge Gaskell
25 October 2017