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THE EMPLOYMENT TRIBUNALS

Claimant: Mr B Atradraco

Respondent: FIS Apes International Limited

Heard at: East London Hearing Centre **On:** 5th March 2018

Before: Employment Judge McLaren

Representation

Claimant: In Person

Respondent: Mr Z Sammour , Counsel

JUDGMENT

The claimant's case is struck out under Rule 37(1)(a) as having no reasonable prospects of success

Employment Judge McLaren

6 March 2018

TYPING KEEP ON FILE BUT DON'T SEND OUT OR TIDY UP THE SUMMARY

SUMMARY

Background

1. This is an application by the respondent that the claimant's claim against it be struck out, alternatively subject to a deposit order. The claim is in effect damages for breach of contract and the claim form sets out the basis of the claim.

Finding of facts

2. The claimant's position, as set out in his claim form and in his submissions before me today were that he applied for a graduate role with the respondent. After having had two interviews he received a telephone call from a Matthew Cooke , the claimant says offering him the job, but In the ET1 he then clarifies this by adding the words in brackets, he told me I would have the written offer the next week for a September start.

3. From then on until November the claimant regularly chased for this offer. His claim form made reference to e-mails between the parties in which the respondent apologised for the delay in making a formal offer but added it is still our intention to do so. Again he refers to an e-mail when he is reassured that senior management will be approving the hire and they were very keen to offer him the position.

4. At no point did the claimant believe he would not ultimately be offered the job. He even moved to London so as to be ready for starting in September and

endured significant financial hardship as a result of the respondent's failure to confirm the position. The uncertainty and continual waiting for the call from the respondent caused him a degree of mental anguish and considerable distress. He describes this as probably the most difficult thing he had been through.

Relevant law

5. When considering whether to strike out, a tribunal must:

Consider whether any of the grounds set out in rule 37(1)(a) to (e) have been established (first stage).

Having identified any established ground(s), the tribunal must then decide whether to exercise its discretion to strike out, given the permissive nature of the rule (second stage).

6. The requirement for this approach was confirmed by the EAT in Hasan v Tesco Stores Ltd UKEAT/0098/16, in which it was held that an employment judge had erred in failing to consider whether to exercise his discretion to strike out claims on the basis that they had no reasonable prospect of success. The factors that could have been considered included the early stage of the proceedings, the ability to direct further and better particulars and that absence of any application having been made by the respondent for the claims to be struck o

7. The threshold for striking out a claim or response for having no reasonable prospects of success is high. In Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330, the Court of Appeal held that where there are facts in dispute, it would only be "very exceptionally" that a case should be struck out without the evidence being tested. It upheld the EAT's decision that tribunals should not be overzealous in striking out a case as having no reasonable prospect of success,

unless the facts as alleged by the claimant disclosed no arguable case in law.

8. The Court of Appeal has described strike out as a "draconian power" that should not be exercised lightly by an employment tribunal (Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684)

9. While the respondent confirmed that this was a case where the claimant's evidence was disputed, on this occasion Counsel submitted that nonetheless strikeout was appropriate on the basis that the claimant's pleaded claim even accepting it at its highest could not succeed as there was no jurisdiction.

10. For breach of contract claim to succeed before the employment tribunal the individual must be an employee and therefore must have entered into a contract of employment as claims can only be dealt with if they arise or are in existence on the termination of employment.

11. A contract is characterised by four things, there must be an offer, acceptance, consideration, intention to create legal relations and certainty of terms. I do not find that this had occurred here. I do not find that there had even been an offer in this sense.

12. An offer is a promise by one party to enter into a contract on certain terms and must evidence an intention that no further bargaining take place. This can be distinguished from an invitation to treat which is invitation to deal but with no intention to be bound.

13. I accept the respondent's submissions on this point that on the claimant's pleaded case the initial "offer" was nothing more than an indication that the respondent intended to make a formal offer to contract which in the event did not occur. I find that the description of events as set out in the ET1 with reference to the respondent wanting to make an offer and intending to make an offer support this submission. I find that the interview process which the claimant had passed

and the conversation that occurred thereafter did not amount to an offer of employment or form the basis of a contract. It indicated the respondent's intention to make an offer when it is completed some further internal processes and at some date in the future but sadly this did not occur.

14. On that basis as no contract was formed this is not a claim for which the employment tribunal has jurisdiction and I am striking it out on that basis.

Employment Judge McLaren

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE