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EMPLOYMENT TRIBUNALS

Claimant: **Mr F Fonche**

Respondent: **Sir Charles KAO University Technical College**

Heard at: **East London Hearing Centre** **On: 18 April 2018**

Before: **Employment Judge Prichard**

Representation

Claimant: Mr H Anyiam (counsel, instructed by Oak Legal London SE5)

Respondent: Mr S Purnell (counsel, instructed by Schofield Sweeney LLP Leeds)

JUDGMENT

The judgment of the Employment Tribunal on this preliminary hearing is that:-

(1) The claim of automatically unfair dismissal under section 103A has no reasonable prospect of success and is struck out under rule 37 of the Employment Tribunal Rules of Procedure.

(2) The claim for automatically unfair constructive dismissal for breach of a statutory right under section 104 of the Employment Rights Act 1996 similarly has no reasonable prospect of success and is struck out.

(3) The claim of direct race discrimination under section 13 of the Equality Act 2010 likewise has no reasonable prospect of success and is struck out.

(4) In addition the race discrimination claim is out of time. It is not just and equitable to extend time for the hearing of that claim under section 123 of the Equality Act 2010.

(5) The claimant's claim of unlawful deductions from pay is not out of time. No orders are made upon it. It is listed for a 2-day final hearing before a Judge sitting alone, on Thursday and Friday 13 &

14 September 2018 at East London starting at 10am.

(6) In view of some remarks below, the present judge shall not sit on that hearing.

REASONS

1 This has been a tough hearing. The claimant's original claims were not at all clear. He was ordered to provide further particulars by Judge Brown, and he did not do so before the next preliminary hearing. On 12 January the preliminary hearing was converted by Judge Russell from a case management hearing to a 2-hour open preliminary hearing to consider strike out on the basis of the claimant's non-compliance with the Brown order.

2 That hearing came before Judge Goodrich on 29 January 2018 when the claimant, who was then unrepresented, stated he was unequal to the task of particularising his claim and he was unprepared, but was on the point of instructing lawyers. The preliminary hearing was therefore adjourned to today's 1-day hearing. The claims have since been particularised. Mr Anyiam of Oak Legal, who appeared today, has represented him and he also drafted the amended particulars of claim against this respondent (and also the previous co-respondent, Hourglass Recruitment).

3 I struck the case against Hourglass out earlier this morning. Their solicitor Mr Peel has since returned to Yorkshire (see separate judgment).

4 There is a confused background. The claimant worked for the respondent for what is agreed to be less than 2 years. He does not qualify for protection from unfair dismissal. After the course of today's long hearing I have been driven reluctantly to the conclusion that the claimant's main claims are a contrivance to get round the fact that he lacks basic unfair dismissal rights.

5 He worked for the respondent from September 2015 to 25 June 2017 when he resigned by letter to the Principal, Mr McKeaveny. It was a long and involved letter of resignation. It was effectively a letter before action. In it, remarkably, he did not mention, directly or even inferentially, anything at all to do with race discrimination.

6 The claimant, Mr Florentin Fonche, is bi-lingual; his heritage is from Cameroon, a one time British and also French colony. Both languages are spoken there and he speaks both. His name is French.

7 The claimant's race seems to have absolutely no connection with the subject matter of his complaints. No connection has been suggested. It is exceptional, I appreciate, and a conclusion to which I am driven with trepidation. The weight of appellate authority is against striking out any discrimination claim at a preliminary hearing like this.

8 I was given some support in case law by a judgment of 18 July 2017 in a

judgment of the Court of Appeal – (Underhill and McFarlane LJJ) - *Ahir –v- British Airways* case no A2–2016–1846.

9 Notwithstanding the plethora of authority on the "draconian" nature of strike out, and thelegions of cases where the tribunal's decisions to strike out have been overturned, I am assured by the judgment of Lord Justice Underhill that:

> "… 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 no reasonable prospect of the facts necessary to liability being established and also provided they are keenly aware of the danger of reaching such conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in the discrimination context".

10 Lord Justice Underhill cites the judgment of Lord Justice Maurice Kay in the well known case of *Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ. 330 - the best known of many strike out appeals. Lord Justice Maurice Kay said:

> "I too accept that there may be cases which embrace disputed facts but which nevertheless may justify striking out on the basis of their having no reasonable prospect of success."

11 It is worth pointing out that the predecessor to this criterion in rule 37 in the Employment Tribunals Rules of Procedure 2004 was:

> "..no prospect of success"

and not the lower bar of:

> "..no reasonable prospect of success"

in the Employment Tribunals Rules of Procedure 2013, upon which I have made this decision today. I cannot conceive of any tribunal finding that these claims are anything other than hopeless for a variety of reasons.

12 In his letter of resignation the claimant stated that he was a whistle-blower but he only made generalised observations about the competence of teachers, a proper complaints procedure register, health and safety compliance, and food hygiene. The only concrete thing that there is any allusion to is a delay in submitting student engineering assignments contrary to the rules of the examination body - "delay in submitting student written exams".

13 I am not sure, because the wording of the resignation letter is vague. Neither party had put it before the tribunal. I was therefore grateful to be given a copy of the resignation letter today by the claimant himself. It is often the most important document in any constructive dismissal case.

14 There is no doubt this is a constructive dismissal case. It is only a constructive dismissal case. The claimant resigned in circumstances where he was facing disciplinary charges on information which had come to light suggesting he was contacting a recruitment agency during his core teaching hours. In his letter of resignation the claimant stated: "The evidence that I was timetabled to teach 10/MA1 on the 7 June 2017 is fabricated". There may well be a dispute as to whether or not his email was

sent during a time that he was timetabled to be teaching a class. The point was that he was being investigated properly, and pursuant to contract, and it was the subject of disciplinary process. For whatever reason, he ultimately chose not to engage with the process and not to attend the disciplinary hearing.

15 The respondent is entitled to rely on the fact that the disciplinary process went ahead nonetheless in the claimant's absence, and the outcome was a first written warning, which strongly suggests that this respondent was not minded to dismiss the claimant.

16 If the claimant had attended the hearing it might not have even resulted in that. Had the claimant demonstrated that he was not teaching at the time of this alleged email to Hourglass Recruitment, then no sanction would have been imposed. But he contributed nothing at all to the process. He has not produced any evidence of his teaching commitments or any indication of what such evidence might be, by way of particulars.

17 In the course of the resignation letter the claimant was effectively positioning himself for what has now turned into these proceedings. The scope of the claim has grown steadily ever since.

18 The respondent has helpfully compiled a draft list of issues, doing their best to extrapolate from the material available from the claimant's amended grounds of claim against this respondent. The list cites paragraph number by paragraph number from the amended grounds of claim. Mr Anyiam did not respond to that but has attempted to respond in his oral submissions today.

19 Mr Aniam's contentions today have amounted to nothing more than a generalised plea for me to adjourn this case for a full and final hearing of all the evidence, on the merits to resolve disputes of fact. That is not what Rule 37(1)(a) is there for. He is asking me to ignore it.

Protected disclosures - whistle-blowing

20 To start with the whistle-blowing disclosure. It is possible that the claimant's mention of late submission of student engineering assignments (not referred to in the resignation letter) might have been a protected disclosure within the meaning of section 43B(1)(b) of the Employment Rights Act 1996.

21 Unhelpfully Mr Anyiam has attended this hearing without a copy of any of the legislation either of the Equality Act 2010 or the Employment Rights Act 1996 knowing that today is the day for decision on striking out of these claims. He seems to be working on the assumption that his submissions will be successful that strike out is "draconian" and the claims will be heard willy nilly. If that were correct that it would render this preliminary hearing, and Rule 37, meaningless. It was listed for strike out / deposit. It was adjourned and now today it is finally being heard.

22 The claimant will be asking a tribunal to accept that he made a complaint about late submission of student engineering assignments in 2016, and, after a year, this

resulted in the respondent's breaches of his contract (what breaches?), entitling him to resign. That was the reason under section 103A or the "principal reason" for his constructive dismissal. This is extraordinarily tenuous. I consider that any tribunal which found that that was the case, on these bare facts, would be successfully appealed on the ground of perversity. It is that strong.

Assertion of a statutory right – s 104 Employment Rights Act 1996

23 The claimant's second head of complaint is under section 104 of the Employment Rights Act. He mentions a complaint about not being issued new terms and conditions to confirm his status as the head of maths. The claimant contends became the head of maths when the previous incumbent, Mr Hatt, left the academy. The respondent's position which at present is only an assertion is that the role was in fact taken over by Francesca Ferguson who is the existing head of science who then became the head of science and maths. They contend that the claimant was never made the head of maths.

24 Now today for the first time ever the claimant has shown the respondent (and the tribunal) emails from outside institutions addressing him as the head of maths. This looks like self-serving evidence. If had held himself out to suppliers like Oxford instruments or to Oxford University Press as head of maths, they would address him as he had asked to be addressed. They also called him by name, Dr F Fonche (which he is).

25 He also showed the tribunal an email inviting him to a conference of heads of maths. However, the email itself states that another teacher may attend if the head of maths is not available. It does not look very probative in itself.

26 The respondent's general case on this was that the claimant appeared to be positioning himself with agencies and employers and he was enhancing his profile in ways which were untrue.

27 In the companion judgment in the Hourglass case, which I gave earlier today I explain it would be in the claimant's interest with prospective employers for them to believe (a) that he was subject to redundancy and therefore available to start work immediately; (b) that he was a British citizen and therefore there would present no immigration problems relating to employment. Further it would help him to present himself as head of department.

28 It is generally well known everywhere that teachers are in demand. Maths and other STEM subject teachers are particularly in demand. The fact the claimant has a doctorate also makes him highly employable. It appears the respondent had no intention of losing his services. There is no suggestion of any evidence whatsoever to the contrary.

29 The claimant said that the school secretary had told him she would get the database amended to reflect that he was head of maths. In fact it was never confirmed and the claimant never received the extra pay that would have been payable for being a head of department. In the teaching world there is what is sometimes called a "TLR

supplement" (Teaching & Learning responsibility) for teachers who have managerial status on top of their core teaching duties. It is hard to accept that this underpayment would have lasted throughout his employment if the claimant really was the head of maths

30 The claimant would have a tribunal accept that because he asserted that he was head of maths and that they denied this, that this somehow manifested itself in the breaches that he has identified in his resignation letter and in his amended grounds of claim as justifying his constructive dismissal.

31 It is remarkable going through the list of breaches as extrapolated conscientiously and fairly by Mr Purnell that only 1½ of those alleged breaches were in fact contained in the resignation letter. The one was a failure to confirm the claimant's status as the head of maths (anyway a circular argument in the context of the s 104 complaint).

32 The half allegation is "… respondent making various false allegations against the claimant". The latter may well refer to the disciplinary process in its generality i.e. the process that started in response to apparently false information put out by the claimant about his status.

33 He was apparently stating that he was redundant and they knew for a fact that he was not redundant. The respondent expected him to be there teaching the following academic year. There is no suggestion of redundancy whatsoever. It is such a tenuous connection between that allegation and these alleged breaches.

34 Further, the "breaches" alleged fall far short of being fundamental, or any, breaches of contract such as are necessary to justify an employee's summary resignation from employment (*Western Excavating v Sharp)*. Again I consider a tribunal finding a constructive dismissal on those facts and that this alleged "breach" was at least the principal reason for dismissal would be a perverse finding.

35 Further, the mere fact that an employer brings disciplinary charges *per se* cannot be a breach of contract. Disciplinary process takes place under the contract of employment. The claimant and his representative have offered nothing but an assertion that the allegation that he was teaching is "fabricated". There is no suggestion of any detail whatsoever.

Direct race discrimination

36 The claimant's claim is for direct race discrimination. I clarified this carefully. It is not being suggested that the claimant made any complaints about race, his race, or the respondent being prejudiced against him, or anyone else, on the grounds of race, whilst he was still at work. This has all come out in the ET1 claim form, originally, and as now, the amended particulars.

37 How many chances does a litigant have of defining their case? I consider that the claimant has now had enough. Therefore I conclude that the direct race discrimination claims which do not refer to constructive dismissal are all out of time.

38 The whole ET1 claim itself is only just in time relative to a resignation on the undisputed date of 25 June 2017. Nearly 3 months later on 14 September the claim was referred to ACAS for early conciliation. A certificate was issued 14 October and the ET1 claim presented 17 October. It was amply in time but not relative to any prior detriments some of which are raised substantially out of time.

39 The only one which might have been in time but appears not to be was that everyone other than him was given a fan which he described as being "sometime in May/June 2017". This is an extraordinarily trivial complaint, with no extra detail to suggest he had requested a fan or protested about its absence.

40 Presumptively the time limits for discrimination claims should be taken seriously. They are there in the legislation for a reason. A workplace is a dynamic place. Witnesses come, witnesses go; today's witness may be tomorrow's claimant. Witnesses must have acts of alleged discrimination brought to their attention in good time so that they can remember them properly. If seemingly forgettable incidents are raised long after the event as acts of discrimination, respondents are at an unfair disadvantage because they have probably forgotten all the detail because it was never underlined to them at the time that this was something important.

41 It affects the entire way in which businesses are run. For instance if there is outstanding litigation, ex employees' email accounts are not closed down and deleted. The contents maybe needed by both sides for the purpose of litigation. This is a practical explanation for the reasoning in *Robertson v Bexley Community Centre* [2003] IRLR, 434, CA. Discrimination time limits should be the rule rather than the exception.

42 There is a further case that is of significance - *Hutchison v Westward Television Ltd* [1977] IRLR, 69, EAT. In deciding whether it is just and equitable to extend the discrimination time limit under section 123 of the Equality Act as it now is, the tribunal has to form a rough assessment of the strength of the claim. The weaker a claim appears to be then the less likely it is that a tribunal would exercise its discretion in favour of extending time. That principle is clearly relevant today. The claims do not look at all strong. They have an implausible genesis. Discrimination was never mentioned in the letter of resignation, and further. There is no suggestion, even today, from outlying evidence, directly or inferentially that anyone's race played any part whatsoever in the respondent's actions or omissions.

43 This appears to be a contrived claim after the event.

44 So the primary finding is that the discrimination claims are out of time for the purpose of s 123 of the Equality Act 2010, and are dismissed on that basis. It is not just and equitable to extend time for them to be heard.

Discriminatory dismissal?

45 The general headings of constructive dismissal of course can only refer to the two automatically constructive dismissal claims under section 103A and section 104. There is no constructive dismissal claim under the Equality Act 2010, even now after

this long time given to particularise the claims. If there were to be such a claim, it would require a formal amendment.

46 It would be quite wrong at this stage, at a preliminary hearing listed for consideration of strike out, to allow any such amendment. It should have been thought of a very long time ago. No application has been made today. The dismissal complaints in the resignation letter are different to the one in the final list of issues derived from the amended grounds of complaint.

47 I take this snapshot as of today because today is the day of judgment on the preliminary hearing. The claimant simply cannot rest on the assumption that everything will be fine at the final hearing, and it will all come together when the evidence is heard. I can see no indication that matters are likely to improve even from the evidence which I have tried to tease out today, just to get a flavour of what is to come.

48 I am reassured I was shown the letter of resignation but it helps the respondent more than the claimant because it shows the very uncertain origins of the claimant's complaints which are now the subject of these proceedings. One can imagine the cross-examination of the claimant on the basis of his resignation letter.

49 I cannot see that any tribunal could possibly uphold any of these complaints.

Unlawful deductions from pay

50 Mr Purnell fairly conceded that he was not going to seek a deposit or a strike out order non the unlawful deductions claim. It consists of a claim for about £20,000 based on the allegation that the claimant was the head of maths and was underpaid throughout, not receiving the appropriate TLR supplement. I informed him that whether you took it as a breach of contract claim or an unlawful deduction from pay claim under Part II of the Employment Rights Act 1996, it was amply in time. A breach of contract claim can be brought for any claim outstanding on the date of termination (25 June 2017). Further, frequently a series of unlawful deductions from pay does not end with employment. There is usually some instalment of pay payable after the termination of employment. As correspondence in response to the claimant's letter of resignation confirms he was sent a letter in July confirming that final payments would be made and a P45 issued in due course. That was 14 July from the Principal, Mr McKeaveney.

51 That case will be listed for a final hearing. The other claims will not go forward and stand struck out.

52 Following the above judgment the parties discussed the listing and directions for the remaining claim. It will now be heard over 2 days on **Thursday and Friday 13 to 14 September 2018** at East London starting at 10am.

53 In view of some remarks made above, I consider it should be heard by another judge, and not myself, and I so direct.

54 Disclosure will now take place by **Thursday 10 May 2018.**

55 **By Tuesday 5 June 2018** the respondent will please provide the claimant with a page-numbered and indexed bundle for the hearing of this claim focusing on the claimant's position as a head of department as alleged.

56 Statements of all witnesses to give evidence in the case will please be exchanged between the parties by **19 July 2018**.

57 It is likely that the final hearing will be done in 2 stages, like an unfair dismissal - was there an unlawful deduction? and then the calculation of the salary differential, if not agreed. (I am credibly informed the appropriate TLR could amount to about £10,000 per annum for the claimant as an 80% part-time teacher).

Costs

58 Having given directions for the hearing of the pay claim, I was asked to consider the respondent's application for costs outstanding from the last hearing on 29 January and a new application for costs based upon the fact that I have found that most of these claims had no reasonable prospect of success.

59 The "no reasonable prospect of success" formula is contained both in Rule 37(1)(a) and in Rule76(1)(b) of the Employment Tribunal Rules of Procedure 2013. "A Tribunal may make a cost or order … and shall consider whether to do so where it considers that … (b) any claim or response had no reasonable prospect of success."

60 I appreciate that for the 29 January hearing the claimant does not even have to be at fault let alone unreasonable. This is a no-fault sub-rule in rule 76(1)(c). A tribunal may make an award of costs where: "a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins." On 29 January it was made on the day of the hearing which Mr Fonche attended, unrepresented, unprepared, and alone.

61 However, I consider that the claimant at the first hearing was a litigant in person. Significantly he was warned late on 12 January of the re-designation of the case management preliminary hearing on 29 January to an open preliminary hearing to consider strike out at a 2 hour hearing, not on the merits of the case but merely on the fact he had not complied with Judge Brown's order to particularise his complaint. The claimant threw himself upon the mercy of Judge Goodrich who allowed an amendment, stood over the application for costs, listed today's, now, 1-day preliminary hearing for full consideration of the claims on the merits and time limits.

62 Turning to today's hearing, I consider that Mr Purnell has imbued my "findings" in dismissing and/striking out the claimant's claims with too much objectivity. Do I find that the claimant's claim was always a lie? Do I find that he has cynically brought this all forward to try to leverage settlement money? No, I do not. He clearly feels strongly about something here. Like many people he may have persuaded himself of the justice of his cause and come to sincerely believe in it. In the event, the case has not stood up to the tribunal's scrutiny at this preliminary hearing today.

63 I have a discretion under rule 76(1) as to whether to make a costs order at all. I

cannot accept Mr Purnell's submission if I find that a claim has no reasonable prospect of success there is no "rational" basis for not exercising that discretion against the party whose case I found had had no reasonable prospect of success, and that I could only proceed to assess the claimant's means under rule 84. The assessment of the claimant's means is a separate consideration if I decide in principle that I would award costs.

64 In this case, whether it is exceptional or not, I am exercising my discretion not to make an award of costs in favour of the respondent. That is even though they are asking for a modest amount of costs - just counsel's brief fees - £1,000 and £2,000 respectively for 29 January and today – total £3,000.00.

65 I should emphasise that the dismissal of the discrimination claims was primarily on the time limits not because of no reasonable prospect of success. I made a rough assessment under *Hutchison v Westward Television Ltd* [1977] IRLR, 69, EAT. It is the two automatically unfair dismissals that I held had no reasonable prospect of success because of the tenuous causation and the other circumstances surrounding his resignation including the letter of resignation.

66 I consider that this hearing had to be. It has been a tough hearing for the claimant. The vast majority of his claims have been struck out. There is a claim which needs hearing with a dispute of fact in it on which neither party is, as yet, well-instructed. Neither knows how the details of how that dispute is likely to play out. It is just assertions and counter assertions at this stage. However it does not suffer from the inherent implausibility of the whistle-blowing, statutory right, and race discrimination claims.

67 On that basis, this has been a necessary hearing. There has been an outcome substantially to the respondent's advantage and to the claimant's prejudice. The net result has been a major reduction in the time estimate, and the scope, of the final hearing. I am exercising my discretion not to make an award of costs notwithstanding that the trigger conditions in rule 76(1)(b) have been met as stated above.

Employment Judge Prichard

4 June 2018