EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K Iheagwazi	**v**	Coca-Cola European Partners Great Britain Limited

Heard at: Cambridge Employment Tribunal

On: 31 January 2022

Before: Employment Judge King

Appearances
For the Claimant: Mr Amaradasa, Solicitor
For the Respondent: Mr Kelly, Counsel

JUDGMENT

1. The Claimant's claim for unfair dismissal is dismissed as the Tribunal does not have jurisdiction to hear the same.

2. The Claimant's claim for race discrimination under the Equality Act 2010 is struck out as having no reasonable prospects of success.

REASONS

Background

1. Both parties were represented, the Claimant was represented by his Solicitor and the Respondent by Counsel.

2. I did not hear any evidence in this case and I raised with the parties my concerns regarding having a mini trial of this matter. The case was decided purely on the submissions of the parties and the documentary evidence, together with the facts that are not disputed in this case.

3. The respondent had prepared a witness statement for a witness but I did not have regard to the same. The claimant did not attend the hearing as he was at work. The claimant's solicitor asked for a postponement of the hearing so that the claimant could attend and the solicitor could take instructions on the documentary evidence. I declined this application. The

hearing had been listed for 5 months and the claimant's solicitor in possession of the documentary evidence long enough to obtain instructions from his client. His client was working but the Tribunal was listed to deal with these very issues today and the claimant was legally represented and ought to be ready to proceed. He had had the prepared bundle since last week. The documentary evidence as to scoring and that his comparator was not given a permanent contract as alleged will not change with instructions and submissions could be prepared in advance.

4. The parties had prepared an agreed preliminary hearing bundle which ran to 116 pages. This included the documentary evidence referred to and the pleadings.

5. At the outset of the hearing today, we confirmed the claims as those of unfair dismissal and direct race discrimination. In terms of the issues today, the issue to be determined was whether the claim had reasonable prospects of success, orr in the alternative, whether the Claimant should be ordered to pay a deposit as the case had little reasonable prospects of success. The claimant was also already on a strike out warning in respect of his unfair dismissal claim and not having two year's service to bring a claim.

The Law

6. The relevant law that we need to refer to in this case is as follows:

7. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 deals with strike out:

Striking out

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 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

8. Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 deals with deposit orders:

Deposit orders

39.*—(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.

9. Section 108 of the Employment Rights Act 1996, deals with the requisite service for unfair dismissal claims;

s108 Qualifying period of employment.

(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

(2) ……

(3) Subsection (1) does not apply if—

(a). . . . . .

……..

10. Section 136 of the Equality Act 2010, in relation to the burden of proof as follows:

136. Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

(b)……..

11. The claimant's solicitor referred to the Race Relations Act 1976 which has of course been repealed over 10 years ago and replaced with the Equality Act 2010, therefore I have not had regard to that as it was not applicable during the relevant period and has no relevance in this case.

12. Counsel for the respondent referred me to the case of Efobi v Royal Mail Group Limited UKEAT/0203/16 which he sent to the claimant's solicitor in advance; and

13. In addition, I raised a case with the parties, Anyanwu & Another v South Bank Student Union [2001] 2 All ER 353.

Findings of Fact

14. The claimant was legally represented when he presented his claim and brought a claim for unfair dismissal contrary to s94 Employment Rights Act 1996 and for race discrimination on grounds of ethnicity under the Race Relations Act 1976. This referred to the dismissal being an act of discrimination and also made reference to a failure to make the claimant a permanent employee. The claim was presented by an ET1 dated 6 May 2021. This was following an Acas Early Conciliation period between 26 March 2021 and 29 March 2021.

15. The claimant was employed by the respondent on a fixed term contract and commenced employment on 26 August 2019. There was a dispute as to the dismissal date, however, I am taking this for the purposes of this hearing as the claimant's date, i.e. taking the claimant's claim at its highest, the claimant was dismissed for gross misconduct on 16 February 2021.

16. The claimant attended work on 19 December 2020 following a period of having a high fever and having taken a PCR test but was awaiting the results. The claimant's case was that he took the test as his colleague had tested positive but in the papers he accepted he had had a fever previously. The claimant's PCR results were subsequently positive. This factual matter was not in dispute. At the time of his testing the pandemic and COVID-19 had been a real issue for nine months. Testing and isolation rules fluctuated but were a fact of life.

17. The claimant made various points as to fairness of that dismissal and that the respondent was obliged to make it clear what the rules were. He was, however, dismissed for gross misconduct.

18. At the outset of the hearing the issues were discussed as the claimant had been asked to clarify them in advance. The claimant's solicitor confirmed the two acts relied upon as direct discrimination related to the dismissal and not having been made a permanent member of staff. The later dated back to February 2020 and October 2020 so unless part of the continuing act in relation to dismissal were both substantially out of time in connection with the primary time limit in which to bring claims with no explanation advanced as to why they were brought out of time.

19. By letter dated 21 August 2021, the claimant was given a strike out warning in respect of the unfair dismissal claim, as under section 108 Employment Rights Act 1996, the claimant was not entitled to bring a claim without two years' service and there was no apparent exceptions applicable.

20. Employment Judge Lewis, on the same day, 21 August 2021, asked the Claimant to confirm the only event upon which he relied for race discrimination was dismissal, and if not to provide details of comparators.

The claimant was invited to show just cause by 6 September 2021. The claimant was legally represented and failed to do so. Unfortunately this was not actioned before the hearing by the Tribunal.

21. By notice dated 29 August 2021, Employment Judge Lewis listed the case for an open preliminary hearing which was listed today to deal with whether in light of the grounds of response, the claim had no reasonable prospects of success under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The claimant was represented throughout and had 5 months notice of the hearing and the issues that would be determined today and what the respondent's case was.

22. By letter dated 15 September 2021, the Claimant's solicitor provided information to the Employment Tribunal and the respondent, as ordered by way of further and better particulars. This stated the claimant believed he was dismissed for gross misconduct due to race and at paragraph 8 set out that the Respondent made people permanent, including John McCullough. This was in an exercise in February 2020 and again October 2020.

23. The claimant said at paragraph 10 of that further and better particulars that at the same time he joined the company, John McCullough also joined as an agency employee and that he did not pass the Meccano test and that both did the test on 20 February 2020. Four or five people took the test and the claimant only completed 40% or 50% of the test and John McCullough completed less than 10%. The claimant states,

> *"…he sat next to me and we were laughing and joking about how silly we were to do the test as we believed the test did nothing to improve our productivity and ability to operate the machine we were working"*

24. Further, at paragraph 12, the claimant says the next day he met John McCullough he had asked the claimant whether he had been made permanent. The claimant's position was that he told him he was not and John McCullough was surprised and told the claimant that he was made permanent. The claimant was shocked to find this as he did not even manage to fit a single piece of the Meccano. The claimant was then told that John McCullough knew he would be made permanent even before he went for the test. This was in February 2020 so 12 months earlier. The claimant had not complained about this at the time. The respondent submitted that it was clear from the claimant's own case that he did not take the test seriously, did not complete it fully and further did not pass.

25. By email dated 28th October 2021 the respondent then also made an application (which had not be dealt with by the time of the hearing) for a strike out with submissions as to why and in the alternative that a deposit order be made. The hearing was already listed to deal with the former in any event but the application gave further detail to the claimant. The

respondent also raised issues that matters raised in the further and better particulars were not part of the claim. This has not been dealt with today as for the purposes of the hearing today I have considered all the information provided by the claimant to take his case at its highest.

26. The claimant has not provided other evidence as to racial disparity of treatment connected with dismissal. He provided other examples such as other people had not been promoted such as those as set out in his further and better particulars of Ghanaian and Jamaican descent, but brings no claim as to lack of promotion himself. Other than John McCullough he cannot provide a comparator in relation to him not being made permanent and has no comparator in respect of his dismissal claim.

27. The respondent has provided documentary evidence to show that both John McCullough and the claimant failed the test and both were offered a fixed term contract. This was in February 2020. The act the claimant relies on is significantly out of time. The failure to make him permanent arose in February 2020 12 months before dismissal. He took another test in October 2020 but makes no specific allegation in relation to this date and does not allege that John McCullough took the test then too. Even if the act relied on was an act of race discrimination he did not bring a claim for almost 15 months so more than a year after the primary time limit expired. The only other act relied on is dismissal in February 2021 and it is also hard to see how this can be a continuing act or a series of acts. Even if the claimant was able to establish primary facts which in the absence of an explanation could shift the burden time would be a significant problem for the claimant to overcome and there is no evidence in his claim form as to why it is just and equitable to extend time.

28. The claimant has provided no evidence of a direct comparator for the dismissal. There is no evidence the COVID rules were unclear or as the claimant alleges the respondent failed to tell him the rules. The Government issued copious guidelines at the time which the claimant was asked to follow by the respondent. Attending work whilst awaiting a Covid PCR result could constitute gross misconduct. The respondent set out in its response it was not aware of other examples of employees who have acted as the claimant did and attended work having had symptoms and whilst waiting for PCR results.

29. The Claimant was invited at the disciplinary interview process to put forward names of other people he said that had attended work in those circumstances, but he declined to do so. There is nothing in the appeal or interview notes that reference race specifically. No grievance was raised at any time during employment. The first time race is raised is part of the claim to the tribunal.

Conclusions

30. In respect of the unfair dismissal claim first. Under s108 Employment Rights Act 1996, the claimant clearly does not have sufficient service.

This is not in dispute. He needs two years' service to bring a claim and none of the exceptions apply. The claimant's solicitor has failed to explain why the claim was brought in the first place and has failed to show just cause if indeed there is an exception to the two year rule.

31. Further to the Strike Out Warning given by Employment Lewis, there is no evidence to the contrary.

32. The Employment Tribunal does not have jurisdiction to hear the unfair dismissal complaint and the claim for unfair dismissal is struck out.

33. Turning now to the race discrimination claims. As set out above these cannot be brought under the Race Relations Act as this was repealed over 10 years ago. Dealing with the first aspect of the claim which does not have time issues, the dismissal. The claimant accepts he did the act in question. There is no dispute. He does not have service for us to consider the reasonableness of that decision. There is prima facie evidence of gross misconduct.

34. Taking guidance from Efobi which Counsel for the respondent referred to me and considering s136 Equality Act 2010 there are no facts from which the Employment Tribunal could decide in the absence of another explanation, that the respondent had contravened the Equality Act 2010.

35. The claimant has not provided any named comparators who attended work in comparable circumstances and who were also not dismissed. There was no difference of treatment established, let alone bare facts of a difference status. There is no evidence from which an Employment Tribunal could conclude that the respondent has committed an act of discrimination. There is a reason unconnected to race. It is entirely reasonable for the respondent to dismiss an employee who attends work having had symptoms and awaiting a PCR test result. The reason for dismissal is not weak or without merit.

36. This Employment Tribunal understands the claimant believes that this decision to dismiss him was unfair and that he has "suspicions" that it was related to his race, but that is not enough to get a claim for race discrimination out of the starting block. There needs to be something else, there needs to be something more. There are no comments or other matters which are relied upon which would establish a disparity in treatment. I am not convinced that listing the matter for a final hearing would provide that. The claimant has had his case set out twice, once in the ET1 and once in his response to the order for further and better particulars and that I should take those documents in the highest in the way that the claimant pleads his case.

37. I therefore conclude that the dismissal on the grounds of race has no reasonable prospects of success. The respondent dismissed for gross misconduct by reason of the claimant's conduct, the facts of which are not in dispute.

38. Turning now to the second act of discrimination relied upon. This is the decision not to make the claimant permanent back in February 2020. The claimant named a comparator however, the respondent has shown in documentary evidence without having to hear oral evidence that the comparator was not treated differently. The claimant's further and better particulars do not set out the other applicant's race. The claimant has not referred to the comparators race so the Tribunal is left with the assumption that he does not share the claimant's race.

39. There is no other disparity of treatment and given this, suspicion of itself is not enough. There is no difference of treatment established, let alone bare facts, as to a different employment status. There is no evidence of which an Employment Tribunal could conclude that the respondent has committed an act of discrimination. The claimant's case is built on how he did not get made permanent but his comparator did. The documentary evidence shows that this was not the case, neither the claimant nor his comparator were made permanent.

40. I therefore conclude that in respect of not being made permanent, that claim also has no reasonable prospects of success on the facts of the case and the documentary evidence. Even if this was not the case, time would be a problem for the claimant as the act or omission relied on was in February 2020 and the claim was not brought for over 12 months. I would therefore reach the same conclusion that in the absence of any evidence as to why the claimant waited so long, it would not be just and equitable to extend time and the claim would have a second reason to have either no reasonable prospects of success or little prospects of success. I need not consider this in detail as the claim on the facts has no reasonable prospects of success.

41. Having found that the dismissal and the failure to make the claimant permanent have no reasonable prospects of success as race discrimination claims under the Equality Act 2010, this is not the end of the matter. I remind myself, that this is a two stage test. The first stage is to consider whether the grounds in Rule 37 (1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, are met and I do consider that the case has no reasonable prospects of success in respect of the race claims.

42. I must, however, go on to decide whether to exercise my discretion to strike out this claim given the permissive nature of Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, what is often referred to as the second stage. I may strike out the claim but do not have to. I considered a number of factors before reaching a conclusion as to whether a strike out in this case would be appropriate.

43. I have considered that this is an early stage of the process and that full disclosure has not yet taken place. I have also considered that further and

better particulars have been ordered, and in fact provided by the claimant so he has had two opportunities to make his case. I have taken into account the fact that the claimant is legally represented and has been throughout. I have also taken the claimant's case at its highest.

44. I have considered that this is both a matter that appears before the Employment Tribunal today because another Judge of their own initiative has listed it for a Preliminary Hearing following the sift. Further that the respondent has made an application which set out detailed grounds as to why a strike out and indeed, as an alternative, a deposit order should be made. The claimant has had an opportunity to consider these grounds and as he has been legally represented should be aware of the law.

45. I have considered the overriding objective, the need to deal with cases proportionately and fairly and to save cost, time and expense. I have considered the competing interests of the parties. The claimant will of course be prejudiced by having his claim struck out but equally the respondent by allowing the case without clear merits to continue for a further period and be listed for a multi-day hearing.

46. I have also considered whether a deposit order would be more appropriate as an alternative, but the claimant's representative submitted today the claimant is of limited means and cannot pay a deposit even if it was made at the lowest sum and that he is struggling to fund his legal fees for this case.

47. A deposit order would of course would require a lower test, set out in rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 as in such a case it would only need to be established that the case had 'little' reasonable prospects of success. However, I have found a higher test that the discrimination case has no reasonable prospects of success.

48. I also take in mind the guidance of Anyanwu & Anr v South Bank Student Union, that only in the clearest cases should a claim for discrimination be struck out. In my view this is one such clear case.

49. Taking the claimant's claim at its highest on the papers, there are no core issues of fact that turn on oral evidence. What John McCullough told the claimant matters not if it is a matter of fact that he was not made permanent. The respondent has produced documentary evidence that this was the case. I can understand why the claimant would bring a claim on the basis of what he has been told, however, it has been established in documentary evidence that this is not in fact the case. I do not need to determine whether the claimant was in fact told this to determine his claim. His claim is that John McCullough was made permanent and he was not. The claim does not even get off the ground if the facts are not as he asserted and neither he nor John McCullough were in fact made permanent.

50. I did express caution at the beginning of this hearing in conducting a mini trial of the evidence and I have not done so. I have decided this case on the papers and submissions from both parties. Taking the claimant's case at its highest, in particular the ET1 but also the further and better particulars document referred to in my findings of fact. The claimant has been legally represented throughout and had the opportunity of stating his case with that assistance.

51. The Claimant may not agree with the decision that was taken. Even taking his case at its highest, he has a suspicion of race discrimination and not evidence. The facts as to his own conduct are not in dispute. The comparator was not made permanent.

52. I find in this case it is appropriate to strike out the claims for discrimination having considered all of the above and that is the order of this Employment Tribunal. It is apparent that the claims have no reasonable prospects of success and this would not change at a full hearing and whilst such decisions are rare, it is appropriate in this case.

53. As set out above the claimant's claim for unfair dismissal is dismissed as the claimant does not have sufficient service to bring a claim.

54. At the conclusion of the hearing having heard the decision, the claimant's solicitor stated he wanted leave to appeal my decision. I explained to the claimant's solicitor that as he was no doubt aware that this was not the process used in the employment tribunal. I said I would however take this request as a request for written reasons. I informed the claimant's solicitor that if he wished to appeal information would usually accompany the judgment with written reasons.

55. The claimant's solicitor also asked for a copy of the transcript of this hearing at public expense. I explained to the claimant's solicitor that Tribunal's do not record proceedings like other forums but that he would get a written record of the decision in the form of written reasons.

_____

Employment Judge King

Date: ……12.04.22…….

Sent to the parties on: 13.04.2022

For the Tribunal Office