EMPLOYMENT TRIBUNALS

Claimant: Mr P Ayalew Tamiru

Respondent: Tiffany & Co. (UK) Holdings Limited

Heard at: London South (by CVP) **On:** 5 January 2023

Before: Employment Judge Kumar

Representation
Claimant: in person
Respondent: Mr O. Jackson (counsel)

RESERVED JUDGMENT

1. The correct name for the respondent is Tiffany & Co. (UK) Holdings Limited.

2. The claimant's claim for unfair dismissal is struck out for want of jurisdiction.

3. The claimant's claim for redundancy pay is struck out for want of jurisdiction.

4. The respondent's application to strike out the claimant's claims for bonus pay and notice pay under Employment Tribunal Rules of Procedure 2013, Rule 37(1)(a) or, in the alternative, Rules 37(1)(b), (c) and/or (d) is dismissed.

5. Unless the claimant provides further and better particulars of his claims for bonus pay and notice pay within 21 days from the date the order is sent to the parties his claims will be struck out.

6. The claimant's claim for bonus pay has little reasonable prospects of succeeding. The claimant is ordered to pay a deposit of £50 no later than 21 days from the date this order is sent to the parties as a condition of being permitted to continue to advance his claim for bonus pay. The tribunal has had regard to the information available as to the claimant's ability to comply with the order in determining the amount of the deposit.

7. The claimant's claim for notice pay has little reasonable prospects of succeeding. The claimant is ordered to pay a deposit of £50 no later than 21 days from the date this order is sent to the parties as a condition of being permitted to continue to

advance his claim for notice pay. The tribunal has had regard to the information available as to the claimant's ability to comply with the order in determining the amount of the deposit.

REASONS

1. The hearing was heard by CVP. It was listed for a full-merits hearing.

2. The claimant attended in person and the respondent was represented by Mr Jackson of counsel. During the hearing I was referred to documents contained within a bundle. I also considered a skeleton argument filed on behalf of the respondent, a witness statement on behalf of the respondent from Ms M Moore, HR Generalist, dated 3 January 2023 and a letter from the claimant dated 30 November 2022 sent to the tribunal by email on 13 December 2022 with accompanying documents. The email had not been copied to the respondent but was sent to the respondent by the tribunal office at my request on the day of the hearing. The parties are reminded that all correspondence with the tribunal is to be copied to the other party in accordance with Rule 92 of the Employment Tribunal Rules of Procedure 2013.

3. The claimant's position was that further disclosure was required from the respondent before the tribunal could determine his claims. The respondent's position was that the claims should be struck out or, in the alternative, if the tribunal was not minded to strike out the claims, the claimant should be ordered to pay a deposit order and to provide further and better particulars of his claim, both within 14 days, as a condition of pursuing his claims, failing either of which the claims should be struck out. Both parties therefore agreed that if the claims were to proceed a further hearing was required. I therefore considered the respondent's applications for strike out and for a deposit order.

Facts

4. The respondent is the UK subsidiary of a luxury jewellery retail business. The claimant was employed by the respondent as an accountant. He commenced work for the respondent on 1 December 2021.

5. On 14 April 2022 the respondent announced to all members of the UK finance team that their roles were at risk of the redundancy on account of a decision to restructure its EMEA finance operations into a central team. The claimant was invited to a one-to-one redundancy meeting which took place on 5 May 2022. At the meeting the claimant expressed his belief that the plan to restructure had been known but not revealed to him at the time he commenced his employment contract. Notes of the meeting and details of a potential severance package were sent to the claimant on the same day and the claimant responded on 6 May 2022 requesting '*detailed calculations of the ex gratia payment for my lawyer? I am expecting 3 months' notice period payment plus my 10% bonus to be included as well*.'

6. The respondent's response, sent out on the same day, stated
'The Tiffany ex-gratia payment is a discretionary amount provided by the Company, and the calculations for this would not be shared. As for the notice period, should the proposal move forward and you choose to stay in your role through its projected end date, we would consider your notice period 12 weeks

prior to that project end date, and you would work through that period. Please note the severance package is only available should you stay with the Company in your role through the projected end date of your role, and you will not be eligible for it should you resign prior.'

7. The claimant sent a further email on 7 May 2022 stating '*I understand that you don't have to pay an ex gratia payment'* and seeking a better settlement figure based upon a retention bonus, payment in lieu of notice and '*my contractual bonus of 10%'.*

8. On 22 May 2022 the claimant sent a resignation letter to the respondent. The letter stated '*in accordance with my notice period, my final day will be on 14th August 2022.'*

9. On 18 July 2022 wrote again to the respondent seeking to bring forward the date of his departure stating '*I have decided to leave Tiffany on 31st July.'*

10. Ms Moore on behalf of the respondent replied by email the same day stating, '*Considering you do not want to work through your contractual notice period and have told me you want to leave on the 31st July 2022, I propose to end your employment as of today with salary payment and holidays accrued until the 31st July 2022...Please let me know asap so I can instruct payroll'.*

11. The claimant responded by email saying '*This is fine'.*

12. The claimant thereafter on 22 July 2022 presented a claim by way of Form ET1 complaining that he had i) been unfairly dismissed, ii) was owed redundancy, iii) was owed notice pay and iv) was owed bonus pay.

13. On 5 September 2022 the tribunal sent to the claimant a letter headed 'STRIKE OUT WARNING' which read as follows:

    Under sections 108 and 155 of the Employment Rights Act 1996 employees are not entitled to bring a complaint of unfair dismissal (except in particular circumstances) or a redundancy payment unless they were employed for two years or more.

    It appears from your claim that you were employed for less than two years. If so, the Tribunal cannot consider your complaint that you were entitled to a redundancy payment or that you were unfairly dismissed.

    As you do not appear to be entitled to bring that part of your claim an Employment Judge is proposing to strike them out. This does not affect the other complaints in your claim form.

    You have until **26 September 2022** to give reasons in writing why your unfair dismissal and redundancy payment claims should not be struck out.

    Meanwhile, the respondent has been told that no response to your claim for unfair dismissal or a redundancy payment is necessary at this stage.

14. The claimant did not respond to this letter. The claimant explained at the hearing he had not responded to this letter because he was unable to contact his lawyer at

the time. He confirmed that the letter dated 30 November 2022 sent to the tribunal on 13 December 2022 was his only response to the tribunal.

15. On 13 September 2022 the tribunal wrote to the parties with a notice of hearing accompanied by an order for directions.

16. The respondent's ET3 filed on 27 September 2022 appended Grounds of Resistance within which the respondent sought strike out of the claimant's claims.

17. On 11 October 2022 the respondent wrote to the tribunal strike out of the claimant's claim and in the alternative the making of a deposit order and an unless order in respect of the claimant providing better and further particulars of claim.

18. On 28 November 2022 a letter from the tribunal directed the claimant to provide the following information:

    1. The basis on which he claims he is entitled to three months' notice pay. In particular, does the claimant agree with paragraph 4.5 (a) of the respondent's letter dated 11 October 2022. If not, how does he say his employment terminated, and with how much notice?

    2. The basis for his bonus pay claim. Does he agree with paragraph 4.4 (a) of the respondent's letter dated 11 October 2022? If not, how does he say he was entitled to the bonus?

    3. A schedule of loss setting out what he is claiming for each claim and the basis of his calculations.

    4. Does the claimant agree that, for the same reason he cannot claim unfair dismissal (lack of 2 years' service) he is not eligible for a redundancy payment?

19. On the 13 December 2022 the respondent renewed its application for strike out.

The Law

Continuous employment

20. Section 94 of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by his employer. Section 108 provides that section not have the right to not be unfairly dismissed unless he has been continuously employed for a period of not less than 2 years before the effective date of termination. There are certain exemptions to this but none of them apply in this instance.

21. Section 155 of the same Act provides that a person does not have a right to a redundancy payment unless he has been continuously employed for a period of not less than 2 years ending with the relevant date.

Strike out

22. Rule 37 of the Employment Tribunal Rules of Procedure 2013, addresses striking out and provides that:

    (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.

23. The guidance from the EAT in **Hasan v Tesco Stores UKEAT/0098/16** is that the tribunal must undertake a two-stage exercise when considering whether to strike out a claim. Firstly it must consider whether any of the grounds in Rule 37(1) have been made out. If it finds that a ground is made out it must then decide whether to exercise its discretion to strike out a claim.

24. In **Blockbuster Entertainment Ltd v James [2006] IRLR 630**, the Court of Appeal considered the approach to be taken under Rule 37(1)(b) and held:

"*This power, as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if… a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response*"

25. In relation to rule 37(1)(c) the guidance in **Harris v Academies Enterprise Trust [2015] ICR 617** was that for there to be strike out on this ground there must be found conduct that was a deliberate and persistent disregard of the required procedural steps, or conduct that made a fair trial impossible.

26. The EAT gave guidance on the tribunal's duties in relation to strike out applications against litigants in person in Cox v Adecco 2021 ICR 1307, EAT, identifying the following principles:

(1) No-one gains by truly hopeless cases being pursued to a hearing;

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;

(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

(4) The Claimant's case must ordinarily be taken at its highest;

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

Deposit order

27. Rule 39 of the Rules of Procedure addresses deposit orders and provides

> (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.

28. The EAT in **Hemdan v Ishmail UKEAT/0021/16**, stated that the Rule 39 test is less rigorous than the Rule 37 test, but that there must be a proper basis for doubting the likelihood that a party can establish the facts essential to the claim. Deposit orders have to be made recognising that the facts have not yet been found but reaching a provisional view as to the credibility of the assertions being put forward.

The Tribunal's conclusions

Unfair dismissal/redundancy pay

29. Having heard submissions from the claimant and from Mr Jackson on behalf of the respondent I conclude that the claimant's claims for unfair dismissal and for redundancy pay are struck out for the following reasons:
    i) The claimant's employment started on 1 December 2021 and ended on 18 July 2021. He does not have the two years of employment required by section 108 and section 155 of the Employment Rights Act to bring these claims;

ii) Nothing contained within the ET1, or which was said by the claimant in his correspondence with the tribunal or during the hearing, suggested that his case fell within any exceptions to the two years' service rule under section 108;

iii) The claimant failed to give an acceptable reason, despite having the opportunity to do so, why these claims should not be struck out.

iv) Accordingly the tribunal does not have jurisdiction to consider the claims for unfair dismissal and redundancy pay.

v) The claimant did not assert that he was entitled to contractual redundancy pay and in any event there was no entitlement to contractual redundancy pay under his contract.

Strike out/deposit order -remaining claims

30. The respondent advances its application for strike out of the claimant's remaining claims on the bases of Rule 37(i)(a) and in the alternative Rule 37(i)(b) and (c).

31. In respect of the claimant's conduct the respondent points to the fact that the claimant failed to respond to the tribunal's Strike Out Warning letter dated 5 September 2022, the tribunal's directions sent out on 13 September 2022 and that the claimant did not remedy this even upon receipt of the respondent's request for strike out made under cover of a letter dated 11 October 2022. The respondent further identifies that the claimant had not provided the information sought by the tribunal in its letter dated 28 November 2022.

32. Bearing in mind that the claimant is a litigant in person I do not consider the claimant's remaining claims should be struck out on the basis of his conduct. The respondent is correct that the claimant did not respond to the tribunal's Strike Out Warning letter dated 5 September 2022 or comply with the tribunal's directions sent out on 13 September 2022. However I do not consider that these actions amount to a deliberate and persistent disregard of the required procedural steps and I acknowledge that without legal advice the claimant may not have realised what was required of him by the tribunal or the potential consequences of him not complying with the court's directions. I do however make it clear to the claimant that he must now comply with my direction to provide further and better particulars of his claims for bonus pay and notice pay within 21 days otherwise these claims will be struck out.

33. I turn to consider whether the claimant's remaining claims are scandalous or vexatious or have no prospect of success (strike out under Rule 37(1)(a)) or whether any specific allegation or argument in a claim has little reasonable prospect of success (deposit order under Rule 39). I do not conclude that the claimants claims are scandalous or vexatious so I am left to consider the prospects of success, the assessment of which is common to both the test under Rule 37(1)(a) 'no prospect of success' and that under Rule 39 'little reasonable prospect of success' with a nuanced difference.

34. During the hearing time was spent trying to ascertain from the claimant the basis of his claims.

35. In respect of the claimant's claim for bonus pay it does, on the information before me, appear to be the case that the claimant was not entitled to bonus pay. His contract of employment contained conditions attached to eligibility for bonus pay, including that that the claimant had to be in employment and not in notice period at the time of payment and that bonus pay was contingent on the claimant remaining in employment with the company through to the end of the fiscal year. I also note that it is stated in several places in the employment contract that bonus pay is at the discretion of the respondent. The claimant informed the tribunal that he does not consider that his bonus pay was discretionary and that he should be paid a bonus because of the circumstances in which he resigned.

36. In respect of the claim for notice pay, based on the correspondence before the tribunal as set out above, it is difficult to see how the claimant would be entitled to notice pay when he worked out part of his notice and was then released from notice at his request and, it is said by the respondent, paid for two weeks without the respondent requiring him to work. The claimant informed the tribunal that he was not required to give 3 months' notice to the respondent as he had never received a letter from the respondent confirming that he was a permanent employee of the company.

37. Whilst it was evident from the claimant's submissions to the tribunal that he was aggrieved by the way he felt the respondent had treated him, I concluded that his remaining claims as presented have little reasonable prospect of success. The claimant's submissions as to why they should be allowed to succeed did not alter my assessment of his prospects of success.

38. However mindful of the difficulties that a litigant in person may have in explaining his claim under the stresses of a hearing, I do not consider it appropriate to exercise my discretion to strike out his remaining claims under Rule 37(1)(a) and I do not conclude that the remaining claims have no prospect of success.

39. Considering the overriding objective to deal with cases fairly and justly and taking into account the tribunal's resources, I do however consider it appropriate to make a deposit order.

40. I made enquiries during the hearing of the claimant as to his means in determining whether he has the ability to pay a deposit order. The claimant's response was that £1,000 as sought by the respondent was nothing for the respondent but a lot of money for him. I accepted the claimant's submission that he has limited means and could not afford to pay a deposit order of this amount. I however considered it appropriate to make deposit orders in respect of the claimant's claims for bonus pay and notice pay and determined that the appropriate amount payable in respect of each is £50.

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Employment Judge Kumar
Date: 16 February 2023

Sent to the parties on
Date: 3 March 2023