



EMPLOYMENT TRIBUNALS

Claimant: Mr H Ouedraogo

Respondent: Santander UK PLC

RECORD OF A PRELIMINARY HEARING

Heard at: London Central by video **On:** 27 February 2023

Before: Employment Judge Emery

Appearances

For the claimant: Mr N Toms (counsel)

For the respondent: Ms N Cunningham (counsel)

PRELIMINARY HEARING JUDGMENT

All claims are struck-out on the basis that they have no reasonable prospects of success.

The Issues

1. This hearing was listed to consider the respondent's application for a strike out of the claims dated 19 January 2023 on the basis that the claimant has been unreasonably brought, the allegations of the claim are based on a "falsehood" alternatively that the claim stands no reasonable prospects of success.
2. The respondent served a witness statement from a manager who undertook the disciplinary investigation. I did not consider it appropriate to hear evidence from a witness at a preliminary hearing and I did not consider this statement. I was given a preliminary hearing bundle and both representatives prepared written skeletons and spoke to them.

The claim and defence

3. The claimant was employed from 1 September 2009 as a Community Hub Director to his dismissal for what the respondent characterises as gross misconduct 21 October 2020.

4. The respondent says that the claimant was dismissed for gross misconduct. It says that he wrongly claimed his card had been stolen and unauthorised payments taken from his account. It says that the computerised evidence shows:
 - (i) On Saturday 28 September 2019 at 6.00pm, the Claimant transferred £1,000 into his Santander bank account.
 - (ii) On 28/29 September 2019 between 6.59pm and 02.09am the claimant's Santander bank card was used 4 times to withdraw a total of £1,100 from an ATM close to his home.
 - (iii) At 02.07 there had been an attempt to withdraw £300 which was declined, followed by a log-on to the claimant's mobile banking account, followed by the final withdrawal at 02.09am of £100.
 - (iv) The IP address used to transfer £1,000 into his account on 28 September and to check his balance at 02.07am on 29 September 2019 were the same
5. The claimant accepts that (i) & (ii) occurs. He disputes that he logged on at 02.07, instead he did so the following day and noted that his balance was lower than expected. He says his AMEX card was also missing. He says that he contacted AMEX and was told there were 5 attempts to use an incorrect PIN on this card. He contacted the respondent's Fraud Investigations Team on 29 September 2019 to report the above withdrawals as unauthorised and that his bank card was missing.
6. The Fraud Investigations Team undertook an investigation, and reached the conclusions set out above. They referred the matter to the respondent's Special Investigations Unit on 2 October 2019. The claimant was interviewed shortly after by the SIU Investigator. Further investigations established that, as well as the IP address, the device ID used to transfer £1,000 into his account on 28 September and to check his balance at 02.07am on 29 September 2019 were the same. The claimant was suspended from work at a meeting on 14 November 2019, confirmed in writing on 21 November 2019.
7. The claimant was notified on 5 March of a disciplinary hearing to be held on 19 March 2020. He was provided with a bundle of documents. He provided evidence from AMEX saying that there had been 5 attempted withdrawals which had been declined; the respondent says this is not proof that it had been an incorrect PIN. Because of Covid 19 this hearing took place by Zoom on 21 August 2020 and was reconvened on 21 October 2020. His TU rep attended the hearings. The allegations were that he had made 4 fraudulent ATM withdrawal claims totalling £1,000 and that he had been dishonest in stating to SIU on 25 October 2019 that his bank card had been lost or stolen. The claimant was dismissed following an adjournment on 21 October 2020. He appealed his dismissal.
8. The respondent says that it undertook a fair process and had a reasonable and genuine belief in the claimant's gross misconduct.

9. The respondent also says that in or around September 2022 it undertook a further analysis which shows:
 - (i) On 14 October 2019 the allegedly stolen card was used and declined, that another of the claimant's bank cards was then used successfully for the transaction.
 - (ii) On 18 October 2019 the allegedly stolen card was used to attempt a withdrawal, 4 minutes later his correct card was used at his place of work to check his balance.
10. The respondent says that the only possible conclusion was that the claimant had both cards in his wallet and attempted to use the 'stolen' card first on both occasions.
11. Ms Cunningham argued that this was an "extraordinarily weak" claim, the claimant has difficulty explaining the sequence of events, there is "ample evidence" the respondent can show it acted within the band of reasonable responses. There is "serious evidence" which shows the claimant had committed fraud, there is "no plausible explanation for the undisputed facts". Ms Cunningham argued that there was no way it could be a pure coincidence that the allegedly stolen card was used next to his current card several weeks later: "We say there is sufficient evidence that C has a claim founded on a falsehood and satisfied on evidence to justify band of reasonable responses".
12. The claimant argues that there was an inadequate investigation, an immediate assumption in his guilt as a man of West African origin, an assumption that he was more likely to commit such an offence, Mr Toms argues there were "basic, simple" steps which were not taken. Mr Toms mentions the inherent implausibility of rising a good and long-term career for £1,000. The claimant argues he could have been shoulder surfed when he used the ATM earlier that day; he says that his brothers were staying with him, that it is possible they could have accessed his account. He says that cctv was not checked which would clearly show he was not the card user at the atm. The respondent says it asked the 3rd party bank for the cctv footage in mid-October, but that this had been wiped.
13. The claimant raised all of these issues during the disciplinary process but he says that they were not properly considered. The claimant has worked in banking for years, and "he knows what is recorded or not recorded. He knows there will be cctv". But there was no attempt to find out who had used his card on 29 September for 3 weeks, at which stage the respondent would have known the recording would be erased. The claimant had asked for this to be checked, the only inference is they did not do or take other basic steps is because he is black.
14. Mr Toms argued that the 2nd alleged use of the card on 14 October 2020 has been sprung on the claimant, he cannot be expected to recall what had happened, but that it is quite possibly a family member who has taken his card again. It would be "ridiculous" for the claimant to use the stolen card again when he knows it has been blocked. The plausible explanation is that a family member took his card.

15. Mr Toms argued that the respondent is aware the claimant had no financial difficulties, holding £80,000 in a joint account; it is “bonkers” to suggest the claimant sacrificed his career for £1,000.
16. For comparators, Mr Toms argued that a likely comparator would be hypothetical, but with evidence that white employees “were treated more carefully”. He argued that the respondent has “jumped to the conclusion” that the claimant as of West African origin “is so inherently likely to be corrupt, and not taken basic simple investigative steps, and ignored evidence which suggests he is “not the culprit”. He argued that the alternative explanation – his brother used the card - should have been investigated. “This can only be tested at a hearing”. Mr Toms argued that this was a career destroyed, that the claimant argues he is innocent, that there is sufficient evidence for this to go to trial.

The Law

17. The Employment Tribunals Rules of Procedure 2013: Rule 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;

...

18. Case law

- a. *Balls v Downham Market High School and College* UKEAT/0343/10: The process to be adopted:

“The tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word “no” because it shows that the test is not whether the claimant’s claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects.”

- b. *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] CSIH 46: The power to strike out on the ground that it has no reasonable prospect of success must only be exercised in rare circumstances, and

should not, as a general principle, be struck out on this ground when the central facts are in dispute

- c. *Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330: where there is 'a crucial core of disputed facts' that was 'not susceptible to determination otherwise than by hearing and evaluating the evidence', the case should not be struck out, because at a strike out hearing the tribunal is in no position to properly weigh competing evidence: it will be an exceptional case where it is justified to strike out as having no reasonable prospect of success.
- d. *Mechkarov v Citibank NA* UKEAT/0041/16: The EAT formulated the following test:
1. only in the clearest case should a discrimination claim be struck out;
 2. where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
 3. the Claimant's case must ordinarily be taken at its highest;
 4. if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and
 5. a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.'
- e. *Romanowska v Aspirations Care Ltd* UKEAT/0015/14: *If there is a dispute about the 'reasons why' a decision maker acted as they did, and the parties have competing assertions on those reason, there is a crucial core of disputed fact in a case, and 'it will be very rare indeed that that dispute can be resolved without hearing from the parties who actually made the decision'.*
- f. *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] CSIH 46: Almost every decision in an unfair dismissal case is fact-sensitive, so that where the central facts are in dispute a claim should be struck out only in the most exceptional circumstances, in this case because it was *"instantly demonstrable that the central facts in the claim are untrue"*
- g. *Hawkins v Atex Group Ltd* [2012] IRLR 807: discrimination claims can be struck out – *"Judges should not be shy of making robust decisions in a case where there is realistically only one possible outcome even if the issue is formally one of fact"*.
- h. *Ahir v British Airways plc* [2017] EWCA Civ 1392: If a case is so inherently implausible, it is legitimate for the tribunal to conclude that it had no reasonable prospect of success.
- "...where there is on the face of it a straightforward and well documented explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so. The employment judge cannot be criticised for deciding the application to strike out on the basis of the actual case being advanced."*

Conclusion

Race discrimination

19. The respondent argues that there is compelling evidence that the claimant committed an act of fraud. The claimant says there was an inadequate investigation and this was based on his race. There are therefore two competing accounts which, per *Romanowska*, is a dispute about motive, the 'reason why' the disciplinary process was commenced and how it proceeded. I accept that it would be rare for a claim to be struck-out where there is such a dispute.
20. The claimant argues that others could have obtained his pin and used his card, that CCTV could have shown this, including on 14 October 2020, that this was not investigated, the failure to do so was an act of direct race discrimination. The respondent argues that the evidence is compelling and "damming", clearly establishing that the claimant has attempted to attribute his card use to a 3rd party.
21. I accept that my role at this preliminary hearing is not to determine issues of evidence, that I must take the claimant's case at its highest. To consider strike-out I must be sure that it is manifestly the case that the claimant's case is inherently implausible.
22. Is the claimant able to put forward any evidence that he was treated differently, on grounds of his race? Mr Toms argues the claimant will rely on a hypothetical comparator, also providing evidence of employees who had been treated differently. Names have not yet been provided.
23. It is for the claimant to provide some argument that his treatment was on grounds of race, to be able to give some account why this was the case, how others have been treated or would have been treated differently, to enable me to consider what his case is, at its highest. He has not done so. The respondent's position is that it followed its internal processes, that the Fraud Investigation Team had concerns about the transaction, and it was passed to the SIU who undertook its own investigation. There is no argument from the claimant as to why he considers these decisions were taken on the ground of his race, other than a view that these teams were less likely to believe him because of his race.
24. The respondent's evidence will be able to show there was a suspicious interaction between log-ons from the claimant's device in his home at around the same time as the withdrawals were occurring, that at each step the decision to investigate and escalate was because of this evidence. It can show other suspicion correlations on 14 and 18 October 2019, albeit this was discovered in the course of these proceedings.
25. The claimant's argument that the investigation was inadequate, for example the failure to check the CCTV. The respondent says it asked for the footage. The allegation of race discrimination comes from the failure to seek this footage in the period 30 September and 14 October 2019. I considered this argument to be

very weak – again the claimant has done no more than assert the investigation was flawed and amounts to discrimination. The respondent will say that even if the footage had shown someone else using his card this would not have changed the decision.

26. I concluded that the overwhelming likelihood is that the respondent will be able to show that it had a genuine belief in the claimant's misconduct – that its decisions were taken following an analysis of the undisputed factual evidence of the transactions and logins on 28/29 September 2019 as being suspicious, enough to justify an investigation by the SIU. The respondent can also reply on evidence gained after dismissal of events on 14 October 2019.
27. I concluded that based on this evidence, and the claimant's failure to suggest beyond an assertion that he was treated differently, that the respondent will have no difficulty in showing it had a genuine belief in the claimant's misconduct, that this was the reason why the claimant was investigated and dismissed, and not his race.
28. The claim of race discrimination is therefore struck-out on the basis that this claim stands no reasonable prospects of success.
29. I did not accept the respondent's argument that the claim is founded on a falsehood. It is quite possible that a family member did gain access to the claimant's account and withdrew money, and this may be why his card was used again on 14 and 18 October 2019. But the claimant adduced no evidence at the time of the disciplinary process suggesting that this may be the case – e.g. evidence from a relative. The claim hinges on whether a comparator would have been treated differently had these same facts presented themselves, and I concluded there is no prospect of the claimant proving this. But this is not the same as saying the claim is inherently false.

Unfair dismissal.

30. I accept that it is rare to strike out a claim of unfair dismissal. The claimant points to unfairness in the process, also the fact that others may have taken the money, in particular a family member. But the claimant provided no evidence of this at the time to enable the respondent to investigate this. If the claimant considered that a family member had taken his card, it was for him to bring such evidence at the disciplinary stage for this to be investigated.
31. The claimant argues the failure to secure the CCTV footage is a critical failure. It appears there was over a two-week delay in seeking this footage. It is trite law that a reasonable investigation does not have to be a perfect investigation. Also, that where serious allegations are made which may affect a person's career and livelihood, the investigation must carefully investigate and carefully consider all the evidence, including the claimant's evidence and explanations; if necessary it must investigate further.
32. Taking the claimant's case at its highest, this CCTV footage would not have shown him withdrawing the money. Does this fact add to the prospect of the claimant's

case succeeding? I concluded that this could not do so. The reasons – the cctv footage would not be determinative of any decision, as the respondent does not allege that the claimant personally withdrew the money from the atm.

- 33. I concluded the overwhelming likelihood is that the respondent will be able to show that its investigation was reasonable, that it had a reasonable belief in the claimant's misconduct based upon the electronic evidence of withdrawals and card use, and that dismissal was within the range of reasonable responses.
- 34. For the reasons set out above in the 'race discrimination' section, this claim is struck out as having no reasonable prospects of success.

Employment judge Emery

21 April 2023

Sent to the parties on:

24/04/2023

For the Tribunal Office:

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