



EMPLOYMENT TRIBUNALS

Claimant: Mr Z Gilpin

Respondent: Financial Ombudsman Service Limited

Heard at: East London Employment Tribunal

On: 23 June 2023

Before: Employment Judge Park

Representation

Claimant: Did not attend

Respondent: Ms R Thomas (counsel)

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. All the claimant's claims are struck out because they do not have reasonable prospects of success.

REASONS

Claims and Issues

1. The claimant submitted an ET1 on 23 February 2023 against the respondent. In this he stated his employment commenced on 23 December 2022 and his employment was ongoing. He indicated he wished to pursue the following claims:

- 1.1. unfair dismissal;
- 1.2. discrimination on the grounds of race;
- 1.3. redundancy payment;
- 1.4. notice pay;
- 1.5. arrears of pay; and
- 1.6. other payments.

He also stated he was seeking compensation of one million pounds related to his "*Barclays Bank complaint*".

2. In the background information on the ET1 the claimant set out briefly an explanation of a complaint he had made to the respondent in respect of various banking transactions involving Barclays Bank. He also stated:

“As supplier of confidential personal financial data, I have an employer employee relationship with Barclays Bank and Financial Ombudsman Service”.

3. In its ET3 the respondent stated that the claimant was neither an employee or worker of the respondent. In its Grounds of Resistance, the respondent provided brief details of a complaint made to it by the claimant and an associated ongoing investigation. Its position was that there was no basis for the claimant to pursue a claim against it in the Employment Tribunal as the only connection between it and the claimant was the fact he had made complaints to the respondent in relation to financial services.

4. For completeness, I also note here in correspondence sent by the claimant to the Tribunal after he submitted his ET1 he also made reference to whistleblowing. On his ET1 he had also ticked the box in section 10 of the ET1. This raises the possibility that the claimant may also have been trying to include a claim for automatic unfair dismissal due to whistleblowing or that he had been subjected to a detriment.

5. At the hearing Ms Thomas also informed me that since submitting its ET3 the respondent had found out that the claimant had applied for a role with it in December 2022 but rejected. The Tribunal would have jurisdiction to hear a potential race discrimination claim by the claimant relating to the unsuccessful application. I reviewed the ET1 in light of this and could find no reference to the claimant having applied for a job with the respondent. I also could not find reference to any application in the numerous emails from the claimant to the Tribunal. I concluded there was no claim in respect of a job application by the claimant to be considered.

6. This preliminary hearing was listed to determine whether the claimant's claims should be struck out on the basis they had no reasonable prospects of success pursuant to Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 and/or the Employment Tribunal has no jurisdiction to consider the claimant's complaints.

Procedure, documents and evidence heard

7. The hearing was listed to be in person. The claimant did not attend. On being contacted after the hearing was due to start, he confirmed he would not be attending. He did not provide any explanation for his non-attendance.

8. The respondent attended and was represented by counsel.

9. The respondent had prepared a short bundle. Along with the pleadings, this included the following:

9.1. a skeleton argument;

9.2. a witness statement by Rosemarie Wray, an Employee Relations Partner with the respondent;

- 9.3. some documents relating to the claimant's original complaint to the respondent in December 2022; and
- 9.4. an email from the claimant to a number of recipients dated 11 June 2023 purportedly about his Employment Tribunal claim.

10. The claimant had sent a number of emails to the Tribunal between instituting his claim and the hearing which I was also able to consider.

11. As the claimant did not attend, and indicated he had no intention of participating, I decided I did not need to hear further from the respondent's witness in person. I decided to consider the documentary evidence and respondent's submissions and reserve judgement.

The Law

Strike out

12. Rule 37 of the Employment Tribunal Rules 2013 provides:

- (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).

13. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid

14. In **Mechkarov v. Citibank N A** UKEAT/0041/16, the EAT set out the approach to be followed including:-

- (i) Ordinarily, the claimant's case should be taken at its highest.
- (ii) Strike out is available in the clearest cases – where it is plain and obvious.

- (iii) Strike out is available if the claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

Employment status

15. The claimant included the following possible claims in his ET1:
- 15.1. unfair dismissal contrary to the Employment Rights Act 1996;
 - 15.2. race discrimination contrary to the Equality Act 2010
 - 15.3. redundancy payment under the Employment Rights Act 1996;
 - 15.4. notice pay under the Employment Rights Act 1996 and potentially breach of contract;
 - 15.5. arrears of pay under the Employment Rights Act 1996 and potentially breach of contract;
 - 15.6. other payments; and
 - 15.7. whistleblowing detriment/automatic unfair dismissal contrary to the Employment Rights Act 1996.
16. To pursue any of the above claims the claimant must first show the following:
- 16.1. For unfair dismissal (normal and automatic unfair), notice pay, redundancy payment and breach of contract the claimant must have been an employee within the meaning of section 230 of the Employment Rights Act 1996.
 - 16.2. For a claim for unpaid wages and that he had been subjected to a detriment due to whistleblowing the claimant must be or have been a worker within the meaning of section 230 of the Employment Rights Act 1996.
 - 16.3. For a race discrimination claim the claimant must be or have been an employee of the respondent within the meaning of section 83 Equality Act 2010.
 - 16.4. For the purposes of a race discrimination claim the claimant may also be able to pursue a claim if he had applied for employment with the respondent.
17. The minimum requirement to show he is or was an employee or worker are as follows:
- 17.1. To be an employee under the Employment Rights Act 1996 the claimant must have "*entered into or work under a contract of employment*".

17.2. To be a worker under the Employment Rights Act 1996 the claimant he must have:

“entered into or work under:

(a) *a contract of employment; or*

(b) *any other contract, whether express or impliedwhereby the individual undertakes to do or perform personally any work or services for another party to the contract..”*

17.3. Employment under the Equality Act 1996 requires *“a contract of employment, a contract of apprenticeship or a contract to personally to do work”*.

18. Though the tests vary they all require that there is a contract between the claimant and the respondent that involves him personally doing work for the respondent. If that type of contractual relationship does not exist, then the Tribunal does not have jurisdiction to hear the claims that require the claimant to be either an employee or worker.

19. If there is a dispute about status the burden is on the claimant to show on the balance of probabilities that he is an employee or worker.

Discussion and Conclusions

20. The respondent's position in its ET3 was that the only dealings they had with the claimant was due to complaints he had made to them relating to financial matters. The respondent provided evidence to corroborate this position. This included the complaint the claimant made about Barclays in December 2022.

21. The witness statement provided by Ms Wray confirmed that she had checked the relevant database and could find no record of the claimant having ever been employed by the respondent or having worked for it in some other way, such as a contractor. Although I did not hear from Ms Wray in person I see no reason to doubt this evidence.

22. In his ET1 the claimant has stated he is employed by the respondent, and that employment commenced on 23 December 2022. However, in the background information he has not provided any further information consistent with an employment relationship. On the contrary he has only provided background information about his complaint to the respondent relating to Barclays Bank. He has then said he is an employee of the respondent because he had supplied his confidential personal financial data.

23. The provision of personal data to another party does not in itself create any form of employment relationship, personal data is provided by individuals to organisations in a wide variety of contexts. Taking the claimant's case as set out in his ET1 there is no other information that suggests the claimant may be or may have been employee or worker of the respondent. There is no indication in the ET1 of any form of contract between the claimant and respondent or that the claimant has ever worked or intended to work for the respondent.

24. The claimant will have been aware of the respondent's position since receiving the ET3. He was notified of this hearing to consider striking out his claim on 29 March 2023. He has had plenty of time to provide further information or evidence to show that he is or was an employee or worker. He has not done so.

25. The claimant sent a number of emails to the Tribunal, often copying numerous other recipients. I have considered these carefully to see if within any of these there is any information that may support the claimant's position. The most I was able to ascertain was the following:

25.1. Most of the content of the emails was unrelated to any complaints the claimant has about the respondent or any possible Employment Tribunal claim. He made frequent reference to other types of legal proceedings against other parties, including in other Employment Tribunals. It is completely unclear how these other possible proceedings relate to this claim.

25.2. In an email dated 11 April 2023 the claimant has stated he is whistleblowing and "*whistleblowers get paid*". The claimant repeats this assertion in an email dated 22 April 2023.

25.3. In the email dated 22 April 2023 the claimant said he was doing work for the respondent's representative, Ms Thomas, by doing legal research. In this email he asserts that "*depending on the complexity of complaint made to FoS, a complainant would be considered as a self employed contractor with FoS*".

25.4. In the same email he refers to being in receipt of Universal Credit and asserts that the DWP "*has a direct legal interest in complaining to Employment Tribunal about FoS on my behalf*".

26. From the emails, it appears that the claimant is essentially asserting that he should be paid by the respondent for various reasons. However, there is still nothing that remotely indicates there he has any contract of employment with the respondent or other type of contract under which he is personally required to work for the respondent. On the contrary, everything he has said about his dealings with the respondent appear wholly consistent with having raised a complaint to the respondent which is being investigated.

27. With regards to some of the specific points I have ascertained from the claimant's emails above:

27.1. There is no legal right for whistleblowers to be paid. This assertion is misconceived. In addition, whistleblowing can occur in a number of different contexts, not just within an employment relationship.

27.2. It is unclear what the claimant means by his having done work or legal research for Ms Thomas. It appears that it could be just engaging in correspondence with the respondent as it deals with either his original complaint or this Tribunal claim. These would be normal dealings in this context and not create any form of employment relationship.

28. I have no difficulty in concluding that the claimant has no reasonable prospect of success of showing that he is or was an employee of the respondent or a worker. The

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result of this is that the Tribunal would not have jurisdiction to hear any of the claimant's claims. My conclusion is that this is a case where it is plain and obvious and hence, I have concluded that all the claims should all be struck out.

Employment Judge S Park
Date: 18 July 2023