



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON CENTRAL
BEFORE: EMPLOYMENT JUDGE ELLIOTT

BETWEEN:
Mr M Tint
Claimant

AND

Flextrade UK Ltd
trading as Flextrade Systems
Respondent

ON: 22 December 2023

Appearances:

For the Claimant: In person

For the Respondent: Ms Y Chong, solicitor

JUDGMENT

The Judgment of the Tribunal is that:

1. The claim for unfair dismissal is struck out for lack of qualifying service.
2. The claim for age discrimination is struck out as having no reasonable prospect of success.
3. The claim for race discrimination continues to a full merits hearing.

REASONS

1. This decision was given orally on 22 December 2023. The claimant requested written reasons.
2. By a claim form presented on 9 July 2023 the claimant Mr Michael Tint brings claims of unfair dismissal, age and race discrimination.

3. The claimant worked for the respondent from 5 September 2022 to 2 March 2023 as a Systems Administrator. The respondent is a company providing software solutions in the financial sector.

This remote hearing

4. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.
5. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.
6. The parties were able to hear what the tribunal heard. From a technical perspective, there were no difficulties.
7. The participants were told that it was an offence for them to record the proceedings.

The issues for this hearing

8. The issues for this hearing were identified by Employment Judge Nicolle as to determine the respondent's application to strike out various elements of the claim on the basis that they have no reasonable prospect of success. The Notice of Hearing was sent to the parties on 8 December 2023.
9. A preliminary hearing for case management was listed to take place on 19 September 2023. The claimant applied for a postponement for family reasons and this application was granted by Employment Judge E Burns and relisted to take place today, 22 December 2023.
10. On 9 November 2023 the respondent made an application for an open preliminary hearing in public to consider whether the claims should be struck out as having no reasonable prospect of success. The application was renewed on 8 December 2023 and this appears to have resulted in the Notice of Hearing referred to above.

The claimant's application for this hearing to be in private

11. On 10 December 2023 the claimant said that he wished this hearing to be in private rather than in public. He gave three reasons. Firstly, personal distress. He said he believed that the presence of a public audience could significantly increase his personal distress given the sensitive nature of the case. He said this may adversely affect his mental well-being. Secondly he relied upon the impact of self-representation. He said that the pressure of a public hearing could impede his ability to represent himself. Thirdly he said that the case had no public interest concerns and was a private dispute between himself and the respondent.

12. Employment Judge Nicolle refused the claimant's application and that decision was sent to the parties in a letter dated 11 December 2023 based on the principle of open justice.
13. In the event, no members of the public attended. The only participants were the claimant and the respondent's solicitor.

Documents for the hearing

14. There was a non-agreed joint bundle of 77 pages.
15. The respondent took issue with the claimant including his Response to the ET3 Grounds of Resistance but nevertheless included it in the bundle and it was considered by the tribunal. The claimant said in a letter to the tribunal dated 20 December 2023 that he had included it "*following consultation with my legal advisor*" and "*upon advice from my legal counsel*".
16. At 19:31 hours, the evening before this hearing, the claimant emailed the tribunal to say that he had been served with a new bundle by the respondent and he had not had time to consult with his legal advisor about it and wished it to be excluded. I told the claimant that if I was taken to a document that he had not previously seen he should tell me about that
17. The respondent had sent some written submissions on the morning of the hearing to which the claimant objected. I initially asked the respondent to make them as oral submissions as the claimant objected to the late introduction of this document and I did not wish him to feel disadvantaged by this. The respondent's solicitor said that she was going to speak to those written submissions which the claimant had in front of him so it seemed sensible for me to see them as well, so they were sent across to me. The claimant did not object to this.

The unfair dismissal claim

18. The respondent made the point that the claimant did not have 2 years' service. In the ET1 the claimant did not state his dates of service in the section that asks this question, Box 5.1 and instead ticked the box that his employment was continuing.
19. Had the claimant stated his dates of service - 5 September 2022 to 2 March 2023 – this would have generated a standard strike out warning from the tribunal in respect of his unfair dismissal claim.
20. I asked the claimant if he had been made aware by his legal advisors, to whom he referred in his letter to the tribunal dated 20 December 2023, as to the need for two years' service to claim unfair dismissal? He said

that he had.

21. The claimant said he was accessing legal advice via his current employer and this was oral advice only.
22. The claimant was content for the unfair dismissal to be struck out so no submissions were necessary on this point.

The application on the discrimination claims

23. The respondent's case was that the claimant's dismissal was for poor performance and was not because of his race. They said that the claimant had not explained the basis of his complaint of age discrimination and made no prior complaint of age discrimination.
24. The respondent relied upon the claim being scandalous and vexatious as well as having no reasonable prospects of success – see Rule 37(1)(a) Employment Tribunal Rules of procedure, set out below.
25. The respondent relied upon the case of ***Bennett v London Borough of Southwark 2002 IRLR 407*** in which Sedley LJ said that the meaning of scandalous seemed to embrace two meanings including *'the misuse of privilege of legal process in order to vilify others; the other is giving gratuitous insult to the court in the course of such process'*.
26. The respondent also relied upon ***Attorney General v Barker 2000 EWHC 453*** (a family law case) in which Bingham LJ considered the meaning of vexatious: *'The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant ...'*
27. The respondent said that on Sunday 6 August 2023 the claimant sent an email to the respondent's solicitor which opened with the words "Hello Dear" and went on to say *"This is not the first time I have taken employer to ET and I have either won or settled and have not lost. I have also taken recording of conversation with Tim Morrison and Annabel also few others ET would be keen to listen to. Further more I will publish all on Domain flextrade-exposed.com to embarrass the org. Indeed you have rights to terminate anyone within first 2 year without any reasons however I strongly believed decision to terminate me by Tim Morrison was racially motivated. Let me know if you want snippet of recording I have done?"* (bundle page 61).
28. On the evening of his dismissal at 20:04 hours the claimant sent a message to HR Officer Ms Chung saying: *"Don't expect an easy next few weeks and I might lodge ET1 form"* (page 47). The respondent says that the claimant has acted *"vexatiously, disruptively or otherwise unreasonably in pursuing the proceedings and that it is an abuse of*

judicial resources, time and cost for the claimant to pursue these proceedings” (page 45).

29. The respondent submitted that the claimant was seeking to cause the respondent as much embarrassment as possible and therefore his claim should be struck out as scandalous or vexatious.
30. The respondent also referred to the notes of the claimant’s appeal hearing on 30 March 2023 were in the bundle at page 56. The note showed that the claimant said he was not looking for reinstatement but was looking to prevent legal action and wanted a financial settlement.
31. On prospects of success the respondent accepted that there was a dispute of fact as to whether the claimant passed his probationary period.
32. The respondent said that it had not been able to identify the legal issues based on the claim as issued. Although the box for age discrimination had been ticked there was no reference to a claim for age discrimination in the ET1. The respondent pointed out that in the claimant’s initial appeal against dismissal dated 13 March 2023 in which he did not mention age or race discrimination (page 54). The first time it was raised was in the appeal hearing.
33. The note of the appeal hearing of 30 March 2023 showed that the claimant said he believed his dismissal was racially motivated.
34. The respondent said that the claimant was a poor performer and there were figures considered by the dismissing officer which supported this. I saw these figures which were set out in an email to the respondent’s solicitor dated 27 July 2023, significantly after dismissal. The respondent also said that there was another employee with poor figures who was also dismissed for poor performance. The respondent could not point to any reference to this in the ET3 and the claimant said he had not seen it. The figures were disputed by the claimant as he believed the figures were “*cooked up by HR*”.
35. The respondent submitted that the claim had no reasonable prospect of success and should be struck out.

The claimant’s response

36. The claimant submitted that he had not done anything that was scandalous or vexatious.
37. He submitted that the reason for his termination was never clear to him until his appeal. He said that if he had performance issues, they would have been put in writing to him or dealt with in a daily meeting with Mr Morrison, who dismissed him. The claimant said that the purpose of his appeal was to get a good reason for the dismissal as by the date of the appeal hearing he had managed to secure a couple of job offers.

38. In his Particulars of Claim the claimant said that his line manager Theresa Falco did his probationary meeting just days before she left the respondent at the end of January 2023 and she said that his performance was satisfactory. The claimant said he received a certificate from HR on about 23 January 2023 confirming that he had passed his probationary period.
39. In his Particulars of Claim at paragraph 16, the claimant said that he believed that his contract was terminated by Mr Morrison because of his racial origins. The claimant describes his racial origins as Burmese. The claimant made no mention in his ET1 or Particulars of Claim of any claim for age discrimination other than ticking the box for age discrimination at Box 8.1 of the ET1 in addition to the box for race discrimination.
40. As set out above, the claimant also introduced a response to the ET3, which is not part of the normal process. It was essentially his dispute as to what was said in the Grounds of Resistance.
41. The claimant did not say in either his letter to the tribunal of 13 November 2023 or his Response to the Grounds of Resistance that he considered his dismissal to be because of his age. He stated that he did not consider the respondent's actions to be "*within the framework of a fair and reasonable employment practises.*"
42. In his oral submissions the claimant said that he believed his dismissal was racially motivated. He did not say in oral submissions that he believed it was to do with his age.

The relevant law

43. In relation to strike out, Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides as follows:
- (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;*
- (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.*
44. **In relation to a deposit order, Rule 39 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.

45. In ***Anyanwu v South Bank Students’ Union 2001 ICR 391*** the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact sensitive and require full examination to make a proper determination. It may be necessary to determine whether discrimination is to be inferred. Where central facts are in dispute, the tribunal should only exercise the power to strike out in exceptional cases ***Ezsias v North Glamorgan NHS Trust 2007 IRLR 603***.
46. In ***Balls v Downham Market High School and College 2011 IRLR 217*** the EAT said that the test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that 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 a high test. It can be unfair to strike out if there are crucial facts in dispute and there has been no opportunity to test the evidence. Strike out is a draconian power.
47. There is no blanket prohibition on the strike out of claims presented under the Equality Act 2010 and the tribunal is entitled to strike a claim out where it has reached a tenable view that the claim cannot succeed (see ***Jaffrey v Department of the Environment, Transport and the Regions 2002 IRLR 688*** at paragraph 41 – Mr Recorder Langstaff (as he then was)).
48. The claimant’s case must be taken at its highest when considering a strike out application, the test does require that there is a reasonable, rather than merely fanciful, prospect of success and if the Tribunal is satisfied that there is no such reasonable prospect then strike out is available even where there are disputes of fact - ***Ahir v British Airways plc 2017 EWCA Civ 1392, CA*** (Underhill LJ). This point was also made in ***Kaur v Leeds Teaching Hospitals NHS Trust 2018 IRLR 833***.
49. In ***Cox v Adecco 2021 ICR 1307*** the EAT said that you cannot decide whether a claim has reasonable prospects of success if you do not know what it is. Before considering strike out, or making a deposit order, reasonable steps should be taken to identify the claims, and the issues in the claims. With a litigant in person, this involves more than just requiring the claimant at a preliminary hearing to say what the claims and issues

are; but requires reading the pleadings and any core documents that set out the claimant's case.

Conclusions

50. The claimant did not have two years' service and understood that he did not have sufficient qualifying service. As a result, the claim for unfair dismissal is struck out as the claimant did not have the necessary qualifying service under section 108 Employment Rights Act 1996.
51. I deal next with the argument that the claim should be struck out as being scandalous or vexatious. It is not scandalous or vexatious for the claimant to tell his employer that he plans to bring a claim against them. It is also not scandalous or vexatious to seek to settle a potential dispute and indicate an interest in settlement. Parties are regularly encouraged to seek to settle their disputes. What has the potential to be scandalous or vexatious is an intention to seek to cause embarrassment or harm to the respondent's reputation. I accept that when a person is summarily dismissed, emotion and upset will be high. The claimant makes the point, which I accept, that he did not follow through on any of this and he has not taken any such actions.
52. In those circumstances I find that the claimant has not acted scandalously or vexatiously and I decline to strike out the claim on that ground.
53. In terms of the claim for race discrimination, there is a very clear dispute of fact. The respondent says that the claimant was dismissed for poor performance, the claimant says that a few weeks prior to his dismissal he had passed his probationary period. He takes the view that this abrupt change of position was a decision made by Mr Morrison because of the claimant's race.
54. This is a dispute of fact which can only be resolved upon hearing the evidence from both sides. The question of the performance figures will also need to be considered in evidence as the claimant disputes their accuracy. I consider that on the face of it the claimant has a sufficient prospect of success, such that I decline to strike out his claim for race discrimination or to order him to pay a deposit as a condition of continuing to advance that allegation.
55. There will need to be an explanation from the respondent as to why the claimant apparently passed his probation, yet a few weeks later found himself dismissed for poor performance with none of those matters being raised with him in advance. The claimant asserts that it was because of his race and the views on his race that he contends are held by Mr Morrison.
56. The claimant has not advanced a claim for age discrimination any further than ticking a box in the ET1. He has set out no basis for this claim in

his ET1/Particulars of Claim or in correspondence sent to the tribunal or even in oral submissions at this hearing. I take the view that this was no more than the speculative ticking of a box and the claimant has put forward no basis for a claim for age discrimination. The claimant has access to legal advice and has not advanced such a claim in any of his documents put to the tribunal.

57. For these reasons I strike out the age discrimination claim as having no reasonable prospect of success.
58. The claim for race discrimination proceeds to a full merits hearing.

Employment Judge Elliott
Date: 22 December 2023

Judgment sent to the parties and entered in the Register on: 28 December 2023

_____ for the Tribunal