



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Achour  
**Respondent:** Rainsford Contracts Limited  
**Heard at:** London South (by video)  
**On:** 26 March 2024  
**Before:** Employment Judge Evans

## Representation

**Claimant:** in person  
**Respondent:** Thomas Westwell, Counsel

## WRITTEN REASONS PROVIDED FOLLOWING A REQUEST MADE PURSUANT TO RULE 62(3)

The Tribunal gave oral judgment with reasons in this claim on 26 March 2024. The judgment was sent to the parties on 12 April 2024. On 19 April 2024 the claimant made a request for written reasons pursuant to Rule 62(3) of the Employment Tribunal's Rules of procedure. Those written reasons are set out below.

The Tribunal's judgment given on 26 March 2024 was as follows:

1. The complaint of breach of contract is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success.
2. The complaint of direct race discrimination is not struck out.

## REASONS

### Preamble

1. These are the Tribunal's reasons for its decision given orally at the end of the Hearing on 26 March 2024 in relation to the respondent's application for the whole of the claim to be struck out. The Tribunal also made a deposit order in

relation to the claimant's complaint of direct race discrimination. That order and the Tribunal's reasons for making it have been sent to the parties previously. The deposit order is not considered further in these reasons.

2. The claimant's employment with the respondent began on 23 January 2023 and ended on 10 February 2023.
3. The claimant presented their claim on 24 April 2023. Following a case management hearing which took place on 27 November 2023, his complaints were recorded as follows in the case management orders sent to the parties on 18 January 2024.
  - 3.1. **Direct race discrimination:** did the respondent treat the claimant less favourably because of race by dismissing him? The claimant described his race for the purpose of this claim as "Arab".
  - 3.2. **Breach of contract:** was the respondent's dismissal in breach of contract? The claimant relies upon a provision in the employee handbook stating that employees would undergo a three month probationary period and that it was unlikely that they would be dismissed before their probation period was completed.
4. The respondent's applications came before me today. The parties had agreed a bundle of 121 pages prior to the Hearing. All references to page numbers are to the pagination of the bundle. The respondent had provided a skeleton argument and a bundle of authorities.
5. The respondent and claimant both made oral submissions. Once they had done so, I deliberated briefly before delivering an oral judgment.

## **The issues**

6. The issues arising on the respondent's application for the claim to be struck out were as follows:
  - 6.1. Should the complaints of direct race discrimination and/or the complaint for breach of contract be struck out because each of them had no reasonable prospect of success?

## **The Law**

### **Strike out**

7. Rule 37(1) of the Employment Tribunal's Rules of Procedure 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; [...]*

8. In Balls v Downham Market High School & College [2011] IRLR 217, EAT, Lady Smith explained the nature of the test to be applied as follows (at para 6):

*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.*

9. Further, a claim should not be struck out on this basis where the central facts are in dispute unless there are exceptional circumstances, such as where the contemporaneous documentation is inconsistent with the facts asserted by one party.
10. The Tribunal's power to strike out a discrimination claim must be exercised with great caution. In Mechkarov v Citibank NA [2016] ICR 1121 (EAT) Mitting J, after reviewing the authorities, summarised the approach to be taken as follows at para 14:

- (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.*

## **Conclusions**

### **The breach of contract claim**

11. The claim for breach of contract was summarised as set out at [3.2] above in the case management summary at page 121 and the claimant confirmed to me that this was an accurate description of his claim.

12. The specific provision in the employee handbook (page 20) which the claimant relied upon in this respect read as follows:

*The Company may extend your probationary period if it deems it necessary. In the unlikely event that at any stage or your probationary period you are considered unsuitable for the job you have been offered, the Company may terminate your employment by the giving of notice in writing or salary in lieu of notice. Notice periods are as stated in your offer letter and contract of employment.*

13. The claimant's contract of employment (page 21) provided as follows at clause 3.4:

*During the Probationary Period, either we or you may end your employment by giving one (1) week's written notice.*

14. At its clause 13.4 it further provided:

*We may in our sole and absolute discretion end your employment at any time with immediate effect by:*

*13.4.1 making a payment to you in lieu of notice equivalent to Salary only for the notice period or the balance of it; and ...*

15. I have concluded that the claim for breach of contract has no reasonable prospect of success because I conclude that the claimant has no reasonable prospect of proving all three of the following as he would need to in order for his claim to be successful:

15.1. That the part of the employee handbook referred to at [12] above was incorporated into his contract of employment (and so intended to have contractual effect). This is because there is no wording in the contract of employment or employee handbook which states that it is incorporated and the wording itself does not point in that direction.

15.2. That the unqualified right to dismiss on notice or by paying an amount in lieu of notice which is contained in the contract of employment is qualified by that part of the employee handbook. This is because there is no wording which suggests that the unqualified right to dismiss is in fact so qualified. As a matter of construction, it is unlikely that a Tribunal would find the unqualified right so qualified.

15.3. That the respondent did not consider him unsuitable for the job. This is because the documents contained in the bundle contain various emails and other documents suggesting that that is how the respondent considered the claimant: for example, the letter of 10 February 2023 (page 57), the email of 4 February 2023 (page 51) and the email of 2 February 2023 (page 49).

16. Having concluded that the claim for breach of contract has no reasonable prospect of success, I go on to consider whether to exercise my discretion to

strike it out. I have decided to exercise my discretion to strike it out because it is in accordance with the overriding objective to strike out a claim with no reasonable prospect of success because this saves the time and other resources of the parties and of the Tribunal.

### **Race discrimination claim**

17. At the heart of the respondent's submissions is a submission that, even taking the claimant's case at its highest, he has no reasonable prospect of shifting the burden of proof to the respondent. The respondent contends that the contemporaneous documentation is entirely consistent with its case.
18. As I have noted above, the hurdle for strike out is a high one. I conclude that it cannot be said that the claimant's claim has no reasonable prospect of success in light of the following matters:
  - 18.1. The reference to the claimant as a "Persian" in the email at page 58. The respondent says that this was a typographical error and the writer intended to type "person". However, I conclude that the claimant's argument that the use of "Persian" was *intended* to be a derogatory reference to his racial origins which therefore demonstrates racial bias by the respondent cannot be said to have no reasonable prospect of success.
  - 18.2. The dismissal letter frames the reason for the claimant's dismissal in terms of the client's concerns about suitability as a reason for his dismissal but in fact the respondent's pleaded case relies considerably on an alleged lack of professionalism and a failure to follow instructions. I accept that there is no necessary inconsistency, but the gap between the two positions leave open the possibility that the Tribunal will find that the reason for dismissal was not that stated.
  - 18.3. The potential relevance of matters of witness evidence to the Tribunal's final conclusion – for example, what Mr Dennis said to the claimant on 10 February; how Mr Houghton spoke to the claimant generally.
19. Taking matters in the round, the claimant's case is that he was dismissed because he is Arab. He says the reference to him as a "Persian" points to racial prejudice and that the same will be found in respect of the way that Mr Dennis and Mr Houghton spoke to him (a matter which can only be decided by the hearing of witness evidence). In Bahad v HSBC Bank plc [2022] EAT 83 HHJ Tayler noted that it was for common for respondents to assert that a claimant had not shown the "something more" needed to make out a claim of discrimination before going on to say:

*When considering strike out, it is not necessary that the claimant has already reached the destination of establishing the 'something more', but a claim can properly be struck out if there is no realistic prospect of the claimant getting there.*

20. In light of the points set out at [18] above, I conclude that it cannot be said that there is no realistic prospect of the claimant getting there. For that reason I conclude that it is not the case that the complaint of direct race discrimination has no reasonable prospect of success. I therefore do not strike it out.

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Employment Judge Evans

Dated: 25 April 2024

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>