



# EMPLOYMENT TRIBUNALS

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**Claimant:** Ms B Jozwiak [2300515/2022]  
Ms I Janicki [2300516/2022]  
Ms D Lysycz [2300517/2022]

**Respondent:** AIM Commercial Cleaning Limited

**Heard at** LONDON SOUTH  
Remotely via CVP

**On:** 11 April 2022

**Before** EMPLOYMENT JUDGE N COX  
sitting alone

**Appearances:**

**For the Claimants:** In person with interpreter Ms M Jakubowska  
**For the Respondent:** Ms S Jones: trainee solicitor

## JUDGMENT

1. The claims for unfair dismissal pursuant to section 94 of the Employment Rights Act 1996 ("the Act") are struck out because the claimant did not have the qualifying period of employment required by section 108 of the Act.
2. The claims for discrimination on the grounds of race are not struck out and may proceed.

## SUMMARY STATEMENT OF REASONS

1. The Tribunal refused the respondent's application to strike out the claimants' claims of direct race discrimination.
2. The reasons were stated orally at the hearing. This is a summary of those reasons.
3. The respondent applied to strike out the claimants' claims under Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013.
4. Rule 37(1)(a) provides that the tribunal may strike out all or part of a claim on the grounds that it has no reasonable prospect of success.
5. The respondent submitted that the claimants' claims had no reasonable prospect of success because:-
  - 2.1. The claimant rely on their Polish nationality as the protected characteristic under s 9 of the Equality Act 2010.
  - 2.2. The respondent employed seven employees on site. Of those employees a further two were also Polish.
  - 2.3. The respondent's manager had evidence from CCTV and other circumstantial evidence to justify his decision to dismiss for gross misconduct (theft). There is no basis for a tribunal to infer that that decision had anything to do with the claimants' nationality.
  - 2.4. The claimants rely on the differential treatment of non-Polish nationals by the client company. These people were not under the respondent's control and so are not relevant comparators.
3. The claimants say that they were not guilty of any misconduct, that there was no adequate investigation, they were not made aware of the details of the allegations against each of them, they were not shown any CCTV (and disputed that there was any relevant CCTV coverage) and they were all three wrongly dismissed without good reason.
4. Although I was not referred to any authorities I reminded myself of the special considerations that apply when it is sought to strike out claims of discrimination on the ground that it has no reasonable prospect of success. In Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases. This was because discrimination claims are generally fact-sensitive, and it is a matter of public interest that they should be fully examined to make a proper determination.
5. I reminded myself also that in deciding whether to order strike-out, tribunals should have regard to the overriding objective of dealing with cases 'fairly and justly', set out in rule 2 of the Tribunal Rules and that this includes, among other things, ensuring so far as practicable that the parties are on an equal footing, dealing with cases in ways that are proportionate to their complexity and importance, and avoiding delay. I must also consider proportionality and the impact of striking out on the claimants.

6. I take account also of the fact that the claimants were acting in person and that English was not their native language when considering the way their claims were expressed in their claim forms.
7. It appeared to me correct that the respondent would have no control over employees of another employer on site and so they would not be a valid actual comparator for the claimants.
8. However, it appeared to me that there was a more than trivial dispute of fact as to the CCTV evidence and the evidential basis beneath the decision to dismiss. Further it was a significant factor that all three claimants were subjected to the sanction of dismissal for gross misconduct for the same conduct.
9. Whilst there was not a clear expression of the facts from which a tribunal could infer that the conduct relied upon was discriminatory, it was not clearly the case that such a claim could not be supported on one view of the disputed facts.
10. Whilst the claim appears somewhat weak on the face of it, the respondents did not pursue any application before me for a deposit order, and I was not satisfied that the respondents had shown that the claim has no prospect of success.
11. Accordingly the claim of direct race discrimination is permitted to continue.
12. I have made a separate case management order for that purpose.
13. The respondent also submitted that it was not possible to have a fair trial since the respondent's main and critical witness had ceased employment with the respondent on 31 March 2024. The claim should also therefore be struck out under Rule 37(1)(e).
14. I rejected the further argument that the claims should be struck out because there could not now be a fair trial for the following reasons:-
  - 14.1. The respondent's representative had no instructions that the witness could not be traced, only that efforts (which were not specified) to date had not led to his being found. It remained possible therefore that he could be found and would give evidence;
  - 14.2. The respondents knew of the claims in February 2022, and could have taken steps to interview or obtain evidence from the witness before his departure on 31 March 2022;
  - 14.3. The effect of striking out the claims would be highly prejudicial to the claimants.

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Employment Judge N Cox

Date: 11 April 2024

Note

*Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.*

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