# EMPLOYMENT TRIBUNALS

**Claimant: Mr AM Gai**

**Respondent: Tesco Stores Limited**

# JUDGMENT

1. The Claimant's claim is struck out pursuant to Rule 38(1)(a) of the Employment Tribunal Procedure Rules 2024, on the grounds that it has no reasonable prospect of success.

2. Alternatively, the Claimant's claim is struck out pursuant to Rule 38(1)(a) of the Employment Tribunal Procedure Rules 2024, on the grounds that it is scandalous or vexatious.

3. The Tribunal does not however, conclude that the Claimant's claim should be struck out pursuant to Rule 38(1)(b) of the Employment Tribunal Procedure Rules 2024, on the basis that the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious.

4. Alternatively, the Claimant's claim is dismissed as being outside the Employment Tribunal's jurisdiction. The Claimant's application to extend time is refused.

# REASONS

**Introduction**

5. This Preliminary Hearing has been listed to determine whether the Claimant's Claim against the Respondent should be struck out and/or dismissed on the various bases set out by EJ Britton in the Notice of Hearing, namely:

   (a) Whether the claim should be struck out as having no reasonable prospect of success, or being scandalous or vexatious; and/or the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious; and

   (b) Whether the ET has jurisdiction to consider the Claimant's claims.

**Background & Claim 1**

6. The Claimant was employed by the Respondent as a Customer Assistant at its Coventry Arena store from 16th October 2004 to 2nd February 2019 when he was summarily dismissed for gross misconduct following an altercation with a customer on 2nd December 2018.

7. The Claimant issued a claim against the Respondent on 14th March 2019, in which he alleged unfair dismissal, race discrimination and claim(s) in respect of arrears of pay. The Respondent sought to file its ET3 and Grounds of Resistance on 5th August 2019, however their email contained the Grounds of Resistance and a copy of the Claimant's ET1 Claim Form. All claims were denied and Tesco set out a conduct-related reason for the dismissal.

8. Despite the error, the ET accepted the Response, and 7 hearings were required as follows:

   (a) On 14.10.19, a Case Management Preliminary Hearing was conducted by EJ Camp at which a further open Preliminary Hearing was listed to determine, among other things, whether the claim should be struck out;

   (b) On 6.2.20, an open Preliminary hearing was conducted by EJ Meichen at which the ET determined the full array of claims pursued in the First Claim, refused permission to add further claims, and listed a further open Preliminary Hearing to determine further proposed amendments and strike out / deposit applications;

   (c) On 1.4.20, a further Preliminary Hearing was heard by EJ Dean at which further case management directions were made;

   (d) On 24.9.20, a further open Preliminary Hearing was heard by EJ Algazy QC, in which the matters listed for determination were held over to a final hearing commencing on 20.9.21 for five days. C's unfair dismissal claim was dismissed upon withdrawl;

   (e) On 20.9.21, EJ Meichen with members convened to hear C's claim but upon the case not being ready to be heard, proceeded to attempt to case manage the claim. EJ Meichen refused to add two ET judges as respondents and re-listed the claim for a final hearing commencing on 20.10.22 for seven days, with a telephone Preliminary Hearing listed on 12.9.22 to ensure readiness for trial;

   (f) On 20.12.21, EJ Meichen refused reconsideration and made further case management orders in relation to further applications made by the Claimant;

   (g) A further Preliminary Hearing was then listed for 21.3.22 at which EJ Gaskell refused the Claimant permission to amend his claim and struck out all of his claims, having considered Tesco's application dated 19.1.22 which sought a strike out on the basis that the manner in which C had conducted the litigation was scandalous, unreasonable or vexatious; for non-compliance with orders;

and/or on the basis that a fair trial was no longer possible.

9. EJ Gaskell's reasons are set out at pp 40-56 of the bundle. At paragraph 55, he concluded that:

"*I am satisfied that the Claimant's abusive conduct towards ET staff, its judges (including the Regional Employment Judge) and towards Ms Hextell is scandalous, unreasonable and vexatious (Rule 37(b)). That conduct of itself however does not necessarily render it impossible for there to be a fair trial... However, the conduct falls to be considered as part of the overall picture.*

*Of greater concern, is the Claimant's failure to comply with the Case Management Orders made by EJ Meichen. This non-compliance does not arise through oversight or misunderstanding. Despite being urged by the ET and the Respondent to cooperate, the Claimant has deliberately refused to do so and has clearly expressed on numerous occasions that he has no intention of ever doing so.... Because of that current and intended future conduct, the Tribunal is faced with the proposition that the Respondent will incur cost and expense in preparing for the hearing and engaging counsel in order to respond to claims which the Claimant has no intention of attending to make good. In my judgment, it would be a perversion of the overriding objective to oblige the Respondents to proceed in such a way.*

10. EJ Gaskell went on to conclude that a fair trial was impossible as a result of the unreasonable conduct of the Claimant, and the claims were struck out.

11. Furthermore, and at a subsequent Cost Hearing on 15.7.22, EJ Gaskell ordered C to pay £13,199.80. I asked the Claimant whether that sum had been paid, and he confirmed that it had not. His explanation was that the "*Order of EJ Gaskell was invalid*". He made it clear that he had no intention of complying with that Order.

**Claim 2**

12. On 29.4.24, the Claimant instituted a second claim against Tesco on 29.4.24 alleging post-termination race discrimination, harassment, victimisation and whistleblowing detriment. The claim is based on the Respondent's failure to file an ET3 response in Claim 1, which it is alleged, prevented a fair adjudication of his claims.

13. Tesco responded to the Second Claim by ET3 and Grounds of Resistance lodged on 23.5.24, averring inter alia, that:

(1) None of the conduct about which C complains was done by Tesco (instead by Pinsent Masons and/or HMCTS staff);

(2) The Second Claim is inherently an abuse of process; and

(3) C's claim should be struck out on the basis that the claim is "scandalous or vexatious or has no reasonable prospect of success".

14. EJ Britton subsequently listed this hearing to consider:

(1) Whether the claim should be struck out as having no reasonable prospect of success, or being scandalous or vexatious; and/or the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious; and

(2) Whether the ET has jurisdiction to consider C's claims.

**Documentation**

15. Considerable documentation has been filed with the Tribunal, which I have read. In addition, I heard submissions from Mr Crozier (Counsel) on behalf of the Respondent, and from the Claimant in person.

**Submissions**

16. Mr Crozier spoke to his skeleton argument, concluding that the 2nd Claim was simply an attempt to relitigate the 1st Claim.

17. Mr Gai began by highlighting that the documentation contained a number of errors, including the title of the Grounds of Resistance wrongly naming 'Watford ET' as the venue. He explained that, in the 1st Claim, the Respondent had made an application to amend, which had not been determined as the claim had been struck out. This application remained outstanding, which he described as amounting to a trick being played upon him.

18. Mr Gai submitted that, due to the Respondent's failure to file the ET3, EJ Gaskell had no jurisdiction when he made the Order following the hearing on 21st March 2022. He explained his view that *Clark v Sainsburys [2023] IRLR 562, CA* did not apply in these circumstances as the ET should have rejected the Respondent's attempt to file its Grounds of Resistance.

19. Mr Gai told me that he had first realised that no ET3 had been filed in late February 2023, when he emailed the Tribunal and the Respondent. He submitted that the Respondent's representatives were aware of the errors, and had concealed them. It was the unreasonable conduct of HMCTS and the Respondent's representatives that had led to this point.

20. He had not, and would not pay the £13,199.80, which had been ordered by EJ Gaskell. 'All of this' had allegedly occurred 'because I am black.' He did not explain this conclusion, nor offer any basis for this statement.

**Legal Principles**

21. Rule 38 of the Employment Tribunals Procedure Rules 2024 ('the ET Rules') provides that:

(1) The Tribunal may, on its own initiative or on the application of a party,

strike out all or part of a claim, response or reply 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;

22. It is clear that the Tribunal's power to strike a claim out is discretionary, and even if one of the grounds under r.38(1) is made out, the ET must then consider whether to exercise its discretion to strike out the claim: *HM Prison Service v Dolby [2003] IRLR 694, EAT.*

23. The test for 'no reasonable prospect of success' is well known, and is helpfully set out in *Mechkarow v Citibank [2016] ICR 1121, EAT*, in which it was said:

"*the approach that should be taken in a strike out application in a discrimination case is as follows: (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*."

24. In relation to the alternative basis for strike-out, the Court of Appeal in *Bennett v London Borough of Southwark [2002] IRLR 407* defined 'scandalous' as embracing both "the misuse of the privilege of legal process in order to vilify others", and "giving gratuitous insult to the court in the course of such process" whereas 'vexatious' was described in *Attorney General v Baker [2000] 1 FLR 759 CA* by Lord Bingham CJ as:

"'*Vexatious' is a familiar term in legal parlance. 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; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.*"

25. I also have to consider whether the Tribunal has jurisdiction to hear the claims, and I remind myself that the ET has a wide discretion under s.123(1)(b) of the Equality Act 2010 to extend time where a complaint is brought outside the usual three-month time limit. In respect of the whistleblowing detriment claim, s.48(3) of the Employment Rights Act 1996

provides that the ET shall not consider a complaint unless it is presented (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them; or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

**Conclusions**

26. I deal firstly with whether the claim should be struck out as having no reasonable prospect of success. I remind myself of the dicta in *Mechkarow v Citibank [2016] ICR 1121, EAT,* that a discrimination claim should only be struck out "*in the clearest case".* Furthermore, "*where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence."*

27. Taking that guidance into account, I have concluded that this claim has no reasonable prospect of success. There are no core factual issues which turn on oral evidence, and even taking the Claimant's case at its highest, as I must, this claim does not enjoy a reasonable prospect of success.

28. Firstly, I agree with the Respondent that, in reality, this claim is an attempt to resurrect the 1st Claim, which was struck out for the reasons set out above. The basis of this 2nd Claim is simply that the 1st Claim was erroneously decided by EJ Gaskell. That much is clear from the Claim Form dated 29th April 2024 and the Claimant's Skeleton Argument, whose conclusion is as follows:

"*I submit to the tribunal to invite it to restore my claim 1301093/2019 and dismissal the response to my second on the ground that it has no reasonable prospects of success. It is deployed using arguments relying entirely of assertions of EJ Gaskell at the 21 March 2022 hearing. EJ Gaskell had no jurisdiction to hear Tesco at the hearing and was mislead in to believing that an ET3 form had been filed".*

29. Furthermore, the Claimant's witness statement for this hearing sets out the alleged Discriminatory & Detrimental acts as follows:

*"(a) Tesco claiming to attaching an ET3 form to its 05 August 2019 email filing a response, but none was attached to it. Denial of access to competent tribunal to have my claimed determined.*

*(b)Tesco failing to disclose to me and the tribunal that, it did not file any ET3 form on expiry of the 28 days but deployed an amendment response application to conceal the fact and deny me my entitled 21 Judgment process.*

*(c) Tesco confessing for the first time on the 16 April 2024 but deceitfully deployed an argument that its none filing of an ET3 form makes no difference to the status co of determination of my claims in the usual way. This is*

*intellectual dishonesty and fraudulent misrepresentation for none filing an ET3 form under Rule 16(1) is fundamental to the jurisdiction of both tribunals. Tesco has misled the tribunal to assume jurisdiction to determine my claims it did not have thus denying me my entitled 21 Judgment rule procedure crystallised since 06 August 2019.*

*(d) Ms Hextel deployment of Mimecast to keep parties' filings from the case record and concealment of that HMCTS and tribunals have a policy to not accept filing to it using web-based file sharing platforms of which Mimecast is one."*

30. Finally, in his submissions, Mr Gai focused repeatedly on perceived errors within the 1st Claim, and its determination. He stressed inter alia that:

(a) The Respondent's application to amend had not been determined;

(b) EJ Gaskell's Judgment was "*ultra vires"* – as the Respondent did not file the ET3, he alleged that he had no jurisdiction;

(c) the 1st Claim should be restored.

He concluded that the *"the First Claim is the basis of the Second Claim. The Second Claim is a complaint about what happened in the First Claim."*

31. In those circumstances, I am satisfied that the high bar set out in *Mechkarow* is met. The entire Second Claim is a criticism of the First Claim, which, if the Claimant wishes to pursue, should be brought as an appeal.

32. The second basis for my conclusion that this claim does not have reasonable prospects of success is that the Claimant's allegations do not concern his previous employer - the Respondent. Rather, and as is clear from the documentation, the Claimant's quarrel is with the conduct of the Respondent's Solicitors - Pinsent Masons, the administrative actions of HMCTS staff, and judicial decisions. None of those matters are within the jurisdiction of the Employment Tribunal.

33. Alternatively, and if I am wrong about the Claim not having reasonable prospects of success, I have concluded that the alternative basis for a strike out under Rule 38(1)(a) also applies, namely that the claim should be struck out for being scandalous or vexatious. I remind myself that the primary reason for EJ Gaskell striking out the first claim was due to C's conduct of the First Claim. In that context, the Claimant now brings a further Claim which has no basis in law.

34. It is simply an attempt to resurrect the First Claim, and is brought as against Tesco, without any clear explanation as to the basis for their potential liability. Consequently, the effects of allowing this litigation to proceed, would be to subject the Respondent to "*inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant"* as set out above in *Attorney General v Baker [2000] 1 FLR 759 CA*.

35. In those circumstances, and if I am wrong about the claim not enjoying reasonable prospects of success, I strike out the claim for being scandalous or vexatious.

36. Having concluded that both of the above tests under Rule 38(1)(a) are satisfied, I now stand back and consider whether the claim should be struck out. I take into account the reasons for the strike out of the previous Claim, the Claimant's ongoing determination to ignore EJ Gaskell's costs Order, and the delay in bringing this claim. In all those circumstances, I have determined that it is appropriate to strike out this claim.

37. However, and if I am wrong about my aforesaid conclusions, I do not conclude that the test as set out in Rule 37(1)(b) is met. I do not consider that the manner in which this Claim has been conducted by the Claimant has been scandalous, unreasonable or vexatious. This Second Claim is at a relatively early stage, and there are no grounds within these proceedings, for any criticism of the Claimant's conduct.

38. The final matter for my determination is whether the Tribunal has jurisdiction to consider the Claimant's claims. It is said by the Claimant that the Second Claim effectively amounts to a continuing act. However, the central act relied upon was Ms Hextell's error made on 5th August 2019. Even if this an unlawful act of the sort which fell to be determined by an Employment Tribunal, the Second Claim was not issued until 29.4.24. It would be over 4 ½ years out of time.

39. The Claimant also told me that he was aware of the error in late February 2023. He did not proffer any explanation as to why he did not bring this second Claim for a further 14 months. Furthermore, none of the allegations relied upon could form the basis for an allegation of a continuing act(s) and/or a continuing course of conduct and/or series of similar acts to bring his claim into time.

40. I therefore conclude that there is no basis upon which I could exercise my discretion to extend time. Consequently, and if I am wrong about my above determinations, the Claimant's claim should be dismissed for wont of jurisdiction.

**EJ Murdin**
**17th January 2025**