# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Oluokun

**Respondent:** FPC-Global Limited

**Heard at:** in person at the Central London Tribunal

**On:** 22 and 23 January 2025

**Before:** Employment Judge Woodhead (sitting alone)

**Appearances**

For the Claimant: Representing himself

For the Respondent: Mr C Bennison (Counsel)

# PRELIMINARY HEARING IN PUBLIC

# JUDGMENT ON STRIKE OUT

1. The complaint that the Claimant was wrongfully dismissed is struck out under Employment Tribunal Rule 38(1)(a) because it has no reasonable prospect of success.

# REASONS

## INTRODUCTION

2. This claim has had the benefit of the following preliminary hearings:

    2.1 A preliminary hearing for case management conducted by EJ Akhtar on 17 July 2023

    2.2 A preliminary hearing for case management conducted EJ Kenward on 18 September 2023. The case management orders included a detailed analysis of the claim and a list of issues that included complaints of unfair dismissal, wrongful dismissal, direct age, disability and race discrimination, discrimination arising from disability, indirect race, disability and age

discrimination, harassment (race, age and disability), victimisation, redundancy pay, non-payment of holiday pay and unlawful deduction of wages.

2.3 A preliminary hearing conducted EJ Tinnion on 14 June 2024 to consider whether complaints were in the claim, whether complaints should be allowed by way of amendment and applications for strike out. He provided written reasons for his decisions on 3 January 2025 [B2 101-113] (B2 is a reference to the bundle I was provided with in advance of the 22 January 2025 hearing). EJ Tinnion gave verbal reasons at the hearing.

2.4 A preliminary hearing conducted by me on 4 October 2024 to determine whether Claimant had a disability or disabilities (which is the subject of a separate judgment).

3. This hearing was listed by me on 4 October 2024 to deal with residual applications, for case management and to list the claim for a final hearing.

**THE ISSUES**

4. At the point at which I heard the Respondent's strike out applications the claim comprised complaints of:

4.1 wrongful dismissal

4.2 direct age and race discrimination;

4.3 non-payment of holiday pay; and

4.4 unlawful deduction of wages

**THE HEARING**

5. For this hearing I was provided with:

5.1 A List of Issues amended to reflect the decisions of EJ Tinnion

5.2 A bundle of 211 pages [B2/]

5.3 A document setting out the grounds for the Respondent's Strike Out / Deposit Order Applications.

6. I was asked to determine applications by the Respondent for strike out/deposit orders ("**the Applications**").

7. Owing to other matters in this claim that needed to be dealt with first, I heard the Applications in the afternoon of 23 January 2025 and agreed to give my decisions in writing to avoid the need for the parties to attend the hearing on 24 January 2025 and because of the potential travel consequence of storm Eowyn.

8. As a result of questions I raised with the Respondent in respect of the documents presented in support of strike out / a deposit order on the holiday pay complaint, the Respondent withdrew that part of the application.

## The Law

9. I took into account Rule 38 and Rule 40 of the Employment Tribunal Rules of Procedure contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2024 No. 1155 as amended.

10. As regards strike out and as per **Malik v Birmingham City Council & another [2019] UKEAT/0027/19/BA** (29 – 34 and noting that the rule numbering has since changed):

> *29. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:*
>
> > ***"Striking out***
> >
> > ***37.— (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..."***
>
> *30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see Anyanwu & Another v South Bank University and South Bank Student Union [2001] ICR 391. The applicable principles were summarised more recently by the Court of Appeal in the case of Mechkarov v Citibank N.A [2016] ICR 1121, which is referred to in one of the cases before me, HMRC v Mabaso UKEAT/0143/17.*
>
> *31. In Mechkarov, it was said that the proper approach to be taken in a strike out application in a discrimination case is that:*
>
> > ***(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."***

*32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In Community Law Clinics Solicitors Ltd & Ors v Methuen UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that "the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."*

*33. A similar point was made in the case of ABN Amro Management Services Ltd & Anor v Hogben UKEAT/0266/09, where it was stated that, "If a case has indeed no reasonable prospect of success, it ought to be struck out." It should not be necessary to add that any decision to strike out needs to be compliant with the principles in Meek v City of Birmingham District Council [1987] IRLR 250 CA and should adequately explain to the affected party why their claims were or were not struck out.*

*34. I should also refer here to the Decision of the Court of Appeal in Madarassy v Nomura International Plc [2007] EWCA Civ 33 because much has been submitted about the need for a discrimination complaint to contain "something more" than just a difference in status and a difference in treatment. Mummery LJ said as follows at paragraphs 54 to 57:*

> *"54.I am unable to agree with Mr Allen's contention that the burden of proof shifts to Nomura simply on Ms Madarassy establishing the facts of a difference in status and a difference in the treatment of her. This analysis is not supported by Igen v. Wong nor by any of the later cases in this court and in the Employment Appeal Tribunal. It was not accepted by the Employment Appeal Tribunal in the above mentioned cases of Network Rail Infrastructure ...paragraph 15) and Fernandez (paragraphs 23 and 24) and by the Court of Appeal in Fox (paragraphs 9-18 see above).*
>
> *55.In my judgment, the correct legal position is made plain in paragraphs 28 and 29 of the judgment in Igen v. Wong.*
>
> > *'28. …..The language of the statutory amendments [to section 63A(2)] seems to us plain. It is for the complainant to prove the facts from which, if the amendments had not been passed, the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the employment tribunal could conclude that the complainant "could have committed" such act.*
> >
> > *29. The relevant act is, in a race discrimination case …., that (a) in circumstances relevant for the purposes of any provision of the 1976 Act (for example, in relation to employment in the circumstances specified in section 4 of*

> *the Act), (b) the alleged discriminator treats another person less favourably and (c) does so on racial grounds. All those facts are facts which the complainant, in our judgment, needs to prove on the balance of probabilities. [The court then proceeded to criticise the Employment Appeal Tribunal for not adopting this construction and in regarding "a possibility" of discrimination by the complainant as sufficient to shift the burden of proof to the respondent.]'*
>
> *56. The court in Igen v. Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *57."Could conclude" in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment."*

11. A discrimination or whistleblowing claim may be struck out (although it is rare) if, for example:

    11.1 there are no pleaded facts indicative of, or which could plausibly establish a prima facie case **ABN AMRO Management Services Ltd v Hogben [2009] UKEAT/0266/09/DM at [15]**;

    11.2 a claim is based on "*really no more than an assertion of a difference of treatment and a difference of protected characteristic which…only indicate a possibility of discrimination*" **Chandhok & another v Tirkey [2015] IRLR 195 at [20]**;

    11.3 what is asserted by the Claimant is so inherently implausible, and unsupported by any contemporaneous material, that it has no reasonable

prospect of success **Ahir v British Airways [2017] EWCA Civ 1392 at [22-26]**.

12. As regards deposit orders, Rule 40 provides:

> *(1) Where at a preliminary hearing the Tribunal considers that any specific allegation or argument in a claim, response or reply has little reasonable prospect of success, it may make an order requiring a party ("the depositor") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument ("a deposit order").*
>
> *(2) The Tribunal must make reasonable enquiries into the depositor'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 must be provided with the order and the depositor must be notified about the potential consequences of the order.*
>
> *(4) If the depositor fails to pay the deposit by the date specified by the deposit order, the Tribunal must strike out the specific allegation or argument to which the deposit order relates.*
>
> *(5) Where a response is struck out under paragraph (4), the effect is as if no response had been presented, as set out in rule 22 (effect of non-presentation or rejection of response, or case not contested).*
>
> *(6) Where a reply is struck out under paragraph (4), the effect is as if no reply had been presented, as set out in rule 22, as modified by rule 26(2) (replying to an employer's contract claim).*
>
> *(7) If the Tribunal following the making of a deposit order decides the specific allegation or argument against the depositor for substantially the reasons given in the deposit order—*
>
> *(a) the depositor must be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 74 (when a costs order or a preparation time order may or must be made), unless the contrary is shown, and*
>
> *(b) the deposit must be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit must be refunded.*
>
> *(8) If a deposit has been paid to a party under paragraph (7)(b) and a costs order or preparation time order has been made against the depositor in favour of the party who received the deposit, the amount of the deposit must count towards the settlement of that order..*

13. The making of a deposit order is a less draconian sanction than a strike out. The test of "little reasonable prospect" is less rigorous than "no reasonable prospect" and a Tribunal therefore has greater leeway to make such an order. It does not, however, follow that a Tribunal will necessarily make a deposit order in relation to an allegation with little reasonable prospect of success – it must exercise its discretion to do so in accordance with the overriding objective to deal with cases justly and fairly **Hemdan v Ishmail & another [2017] IRLR 228 [10].** In Hemdan, Simler P gave the following guidance:

> *"The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis."*

14. As per the EAT in **Van Rensburg v The Royal Borough of Kingston Upon Thames [2007] UKEAT/0096/07 [27]**:

> *"It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."*

15. Before making any decision relating to the deposit order, the Tribunal must make reasonable enquiries into the paying party's ability to pay the deposit, and must take this into account in fixing the level of the deposit (Rule 39(2)).

# Analysis and conclusions

16. In determining the Applications I have heard no evidence and I make no findings of fact save to say that I have heard evidence and made findings of fact on the question of disability which are recorded in a separate judgment.

17. As regards his means the Claimant told me at the hearing that he works through an agency but "if the work stops, it stops". He has income of around £2,400 per month net from which he has to pay for rent and food. His outgoings are approximately £1,700 but he then contributes around £600 to his daughter who has accommodation and other costs associated with her University studies. The Claimant has a son who is now 24 years old but who needs financial assistance at times.

## *Claimant's Claim for Wrongful Dismissal / Failure to Pay Notice Pay*

18. The Respondent submitted:

    18.1 That the Claimant's contract was at [B2/192-205] and at [B2/198] provided:

> ***27. Notice Periods***
>
> *All resignations must be supplied in writing, stating the reason for resigning from your post.*
>
> ***27.1 Notice Period to be given by the Employee to the Employer***
>
> *Less than one month's service – nil.*
>
> *One month's service or more – one month's written notice to the employer.*
>
> ***27.2 Notice to be given by the Employer to the Employee***
>
> *The Company has the right to serve notice of termination of your employment at any time in accordance with the notice provisions below.*
>
> *Less than one month's service – nil.*
>
> *One month's service but less than five years – one month.*
>
> *Five years' service or more – one week for each complete year of service up to a maximum of 12 weeks.*
>
> ***27.3 General***
>
> *If you leave without giving and working your full notice, any additional cost in covering your duties during the notice period not worked will be deducted from any termination pay due to you.*
>
> *The Company may serve immediate notice on you to require you to take some or all of any outstanding holiday entitlement that you may have during your notice period. This clause amends the obligations to provide notice of taking holiday under regulation 15(5) of the Working Time Regulations*.

18.2 That whilst the contract was not signed it nonetheless was the contract issued to the Claimant.

18.3 It is not in dispute that the Claimant's employment commenced in December 2022 and ended on 30 January 2023 when he was dismissed with immediate effect by the Respondent. The Respondent said that the Claimant therefore had a contractual notice entitlement of 1 month or, in the alternative, a statutory entitlement to notice of 1 week (Employment Rights Act 1996 ("**ERA**") Section 86).

18.4 A payslip at [B2/209] showed the Claimant was paid fully for the month of January 2023.

18.5 A payslip at [B2/210] showed that the Claimant was paid in full for the

month of February 2023 and it is not in dispute that the Claimant did not work during that month the Respondent having terminated his employment on 30 January 2023.

18.6 The Claimant had therefore been paid in lieu of his full entitlement to notice.

18.7 The Respondent said that, although the contract did not reserve the right to pay the Claimant in lieu of his notice, he had suffered no loss because he had received a month's pay without having to work for it and so a claim for compensation for wrongful dismissal would have no reasonable prospects of success.

19. The Claimant disputed that the contract at [B2/192-205] was his contract of employment and said that there was a dispute as to whether his employment started on 5 December 2022 or 12 December 2022. He said that he had been told he had a contractual entitlement to 3 months' notice and he never received the contract of employment. At 11am on 23 January 2025 the Claimant had sent in a two page document dated 28 October 2022 and a separate photo of his signature on the second page of the document. It was clear that this was an offer letter from the Respondent but not a contract of employment. Whilst it referred to a three month probation period it made no reference to notice entitlement. I note here that it also said:

> "*Annual Leave Entitlement: 25 days accrued and utilised from January 1 to December 31 (4 days to be taken in conjunction with company Christmas/New Year holidays shutdown). In addition to this, there are 8 National Holidays.*
>
> *[…]*
>
> *A mid-probation (1.5 months) evaluation will be held. Following the initial probationary period, a progression and performance review will be conducted on a semi-annual basis to assess performance to date, and to clarify or modify this arrangement, as the need may arise.*
>
> *Please confirm your acceptance of this offer by signing and returning this letter. We will also be sharing a Contract of Employment for your review.*"

20. When asked how he was going to show that he had an entitlement to 3 months' notice the Claimant said "*I think there should be another document which dictated my notice*".

21. Given that the offer document, which the Claimant relied upon, provided for a 3 month probation period I think it is improbable that with so little service he would have been given an entitlement to 3 months' notice. I also consider that the Claimant, given what he said and taking it at its highest, has no reasonable prospects of establishing that his notice entitlement was longer than a month and since he has been paid for a month in which he was not at work and after his employment had been terminated I consider that he has no reasonable prospects of achieving an award for wrongful dismissal and I therefore strike this

complaint out.

## *Claimant's Claim for unlawful deduction from wages relating to the alleged failure to pay overtime*

22. The Respondent submitted that in fact it did not need to apply for strike out or a deposit order in respect of a complaint of failure to pay overtime because EJ Tinnion had already determined that that there was no such claim in the Claim Form (the parties agreed this determination) and that he had refused permission to add such a claim.

23. EJ Tinnion's case management orders provide [B2/82-83]:

> **"*Claims not in ET1***
>
> *2. The parties agree – and the Tribunal finds – that the following claims in the LOI are not in the ET1, hence do require the Tribunal's permission to amend the ET1 in order to add and pursue at a final hearing:*
>
> *f. unauthorised deductions from wages claim under s.13 of Employment Rights Act 1996 (LOI para. 14).*"
>
> […]
>
> ***Claimant's application to amend ET1***
>
> *4. For the reasons given orally at the hearing, subject to para. 5 below the Tribunal dismissed the Claimant's application for permission to amend his ET1 to add the following claims:*
>
> *[…]*
>
> *f. unauthorised deductions from wages claim under s.13 of Employment Rights Act 1996 (LOI para. 14).*"

24. EJ Tinnion's written reasons for his case management order of 14 June 2024 refusing the Claimant's application to amend his claim to include a complaint of unauthorised deductions from wages was as follows [B2/113]:

> *"41. The Tribunal denied the Claimant's application for permission to amend his ET1 to add an unauthorised deductions from wages claim under s.13 of the Employment Rights Act 1996 set out at List of Issues, paras. 14.1 – 14.7 because this claim, as set out in therein, was wholly unparticularised. This claim had simply not been properly thought through, and allowing it would not put the Respondent on reasonable notice of the claim it had to meet*."

25. In his further particulars of claim of 14 August 2023 there was reference to failure to pay overtime [B2/36] but the Claimant did not particularise it. EJ Kenward noted at paragraph 24 of his case management orders [B2/64] "*24. It is to be noted that the Schedule of Loss sets out various heads of claim. However,*

*there is no head of claim in respect of a redundancy payment (although a basic award is claimed for unfair dismissal). There is no head of claim in respect of holiday pay. The Schedule of Loss does include a head of claim in respect of arrears of pay which does not seem to have been included in the ET1 Form of Claim, with this being in relation to overtime.*".

26. In a document dated 14 March 2024 the Claimant had provided the following details [B2/171]:

> ***Claimant carried out overtime on 31st December, 2022 yet to be paid;***
>
> | | *Qty* | *Rate* |
> |---|---|---|
> | *27/12/22* | *8.00 x2=16hrs* | *36.06* |
> | *28/12/22* | *8.00x2=16hrs* | *36.06* |
> | *29/12/22* | *8.00x2= 16hrs* | *36.06* |
> | *30/12/22* | *8.00x2= 16hrs* | *36.06* |
> | *Total* | | *= 64hrs* |
> | *Money owed* | | *£2,307.84* |
>
> ***January 31/1/23- Overtime Money owed***
>
> | | | |
> |---|---|---|
> | *7/1/23-* | *8hrs x 2= 16hrs* | *36.06* |
> | *10/1/23-* | *2hrs x2= 4hrs* | *36.06* |
> | *14/1/23-* | *8hrs* | *36.06* |
> | *21/1/23-* | *8hrs x2 = 16hrs* | *36.06* |
> | *Total* | | *= 44hrs* |
> | *Money owed* | | *£ 1,586.64* |

27. It is therefore clear to me that, by virtue of EJ Tinnion's decisions, the Claimant's claim does not include a complaint of unlawful deduction from wages. There is therefore no such complaint which could be the subject of a strike out or deposit order application. The question of res judicata/issue estoppel does not arise because there is no application to consider again whether the claim should be amended to include a complaint of unlawful deduction from wages.

28. The Respondent argued that, in the alternative, the claim should be struck out as having no reasonable prospects of success or should be the subject of a deposit order as having little reasonable prospects of success. I make no finding on the points but note here that the Respondent argued that:

    28.1 The contract of employment [B2/194] provided:

"***13. Timesheets***

*You are required to complete and submit timesheets as directed in order to ensure that you receive the correct payment. Incorrectly completed, or late submission of timesheets may result in incorrect or delayed payment of wages. Deliberate falsification of timesheets will be regarded as a disciplinary offence and may lead to your summary dismissal.*

*[…]*

***14.1 Overtime***

*On completion of your normal hours in a week, Monday to Friday, any agreed overtime will be paid at single time. For all agreed hours worked on Saturday, you will be paid at time and a half. For all agreed hours worked on Sunday you will be paid at double time. All overtime must be pre-authorised by a Director or Head of Department.*"

28.2 There were no timesheets for the hours the Claimant claimed and the overtime he claimed was not authorised by a Director or Head of Department.

28.3 The dates claimed in December corresponded with the Respondent's Christmas shut down which was referred to in the offer letter submitted by the Claimant and the contract of employment [B2/196]: "*You are required to reserve sufficient days from your annual holiday entitlement to take during the Christmas/New Year shut-down period. You will be advised of the number of days you are required to reserve at the start of each holiday year.*"

28.4 A holiday systems record [B2/206] evidenced that the Claimant had had to borrow holiday from the 2023 holiday year in order to take leave on 28, 29 and 30 December 2022 (albeit there were some questions about what this document showed).

28.5 The Claimant's payslip of 31 January 2023 showed the Claimant having been paid for 8 hours of overtime at the rate of 36.06 [B2/209] and this corresponded with the record [B2/207-208] for overtime completed on 21 January 2023.

29. I make no finding on the point but note here also that the Claimant:

29.1 produced no documentary evidence of overtime having been agreed or worked and said that there might have been evidence on his work laptop but it had been taken from him;

29.2 said that Mr Simon Pearce (Contracts Manager) had assigned him the overtime work by email.

***Claimant's Claim for alleged accrued and untaken and unpaid holiday pay***

30. As noted above, the Respondent withdrew its application for strike out / deposit order in respect of the Claimant's holiday pay claim.

_____

**Employment Judge Woodhead**

Date 24.01.25

Sent to the parties on:

29 January 2025

.....

.....

For the Tribunals Office