



EMPLOYMENT TRIBUNALS

Claimant: Mr S Ayadi

Respondent: Whitbread Group PLC

Heard at: London South (by CVP)

On: 10.3.26

Before: Employment Judge McLaren

Representation

Claimant: In Person

Respondent: Ms M Dalziel, Solicitor

JUDGMENT

The claim is struck out as it has no reasonable prospects of success.

REASONS

While oral summary reasons were given during the hearing, the claimant immediately asked for written reasons. Under rule 60 I can provide a written summary reasons or can choose to provide full written reasons. The claimant also indicated that he wished to appeal. On that basis I have decided to provide full written reasons.

Background

1. The claimant was employed as a night team member working at the respondent's hotel in Southwark from 4 January 2016 until he resigned from his employment with effect from 17 June 2024.
2. He brought a claim for constructive unfair dismissal in a claim form dated 16 October 2024.
3. The claim was case managed and there was a preliminary hearing on 28 March 2025. The draft list of issues was agreed at that hearing which related to a claim for constructive unfair dismissal and the claimant was also ordered to send the respondent a list of the breaches that he says led him to resign.
4. He duly did so and he sent a letter of 23 April 2025 which had nine headings. Following receipt of that information the respondent filed an amended Grounds of Resistance on 20 May 2025. By letter 21 July 2025 they also

made an application to strike out the claim or in the alternative for a deposit order.

5. A second preliminary hearing was listed for today, 10 March 2026. The notice of hearing made it clear that it was to consider the respondent's application and, following that to make any necessary case management orders.
6. In correspondence since the respondent's application the claimant had also made applications in respect of concerns about the bundle and witness statements. It was clear that case management orders would be required should the strikeout application be unsuccessful.

Relevant documents

7. I have been provided with a 326 page bundle. In discussion with the parties we agreed that I would need to read the claim form, the additional particulars provided by the claimant, the amended Grounds of Resistance the respondent's application to strike out and the claimant's response to that.
8. I also considered the draft list of issues that had been set out at the preliminary hearing on 28 March 2025. This clearly set out the key matters of fact and law that the claimant would have to establish. Namely was there a fundamental breach of contract, did the claimant resign in response to these breaches and did the claimant waive any breach and affirm the contract.

Initial discussion with the parties

9. I started the hearing by clarifying that I understood this to be a claim for constructive unfair dismissal. The claimant told me that it was also a claim for discrimination on grounds of his nationality. He confirmed that he is British Tunisian. The claim had not been understood by the respondent to include a claim for discrimination and I have certainly not seen this in the papers that I had read.
10. I asked the claimant to show me where he says he had made such a claim. He took me to paragraph 6 of his letter 23 April 2025 and the reference to being a breach of contract that he was not bought a birthday gift. In his written document the claimant had made reference to an individual being behind that because of his "discriminatory behaviour".
11. The claim form itself made no reference whatsoever to discrimination. While there is this one reference in the additional particulars the claimant was ordered to provide, in context the complaint appears to be about breach of contract. If, and to the extent that the claimant now wishes to bring this as a race discrimination claim this would require an application to amend as it would be a substantial new claim that is not set out in the claim form. No such application had been made or advised.
12. The parties confirmed that they understood that the purpose of this hearing was to consider the respondent's application. I explained to the claimant that depending on the outcome of that application, I would then go on to make general case management orders to deal with his concern about bundles and witness statements.

The respondent's application

13. The basis of its application was set out in detail in the letter of 21 July. In brief the application was made under rule 38 on two grounds. The first that the claimant's claim of constructive unfair dismissal has no reasonable prospects of success and the second is that the claimant's manner of conducting these proceedings is unreasonable and/or vexatious.
14. On the first ground, prospects of success, summarising the written application, the respondent submitted that the claimant had no reasonable prospect of asserting that any of the alleged breaches amounted to repudiate a breach of contract nor would he be able to establish that taken together they amounted to repudiatory breach. Further the claimant had affirmed the breach in each case.
15. The claimant set out a number of breaches in his further particulars. In analysing the events and dates given for these there are two that are said to occur throughout his employment, namely breaches of health and safety relating to a broken gate and using cleaning products and a failure to provide opportunities and career progression. On the claimant's case, taken at its highest, as he says this was ongoing throughout his employment the respondent submits that he affirmed any such breach by continuing to work.
16. As far as the other one off events are concerned there are incidents in 2021, 2022 and 2023 with the last alleged breach being a refusal to refer the claimant operational health in December 2023. On the claimant's case the next incident and the one that he says he relied on was a failure to pay him statutory sick pay instead of making a payment for holiday pay. While the dates are in dispute, taking the claimant's case at its highest he says that the date of this failure to pay was 28 March 2024 and he resigned on 10 June 2024. Even on his account was a 2 ½ month gap. It was submitted that these matters did not amount to a breach and in any event the claimant had affirmed the contract.
17. In the alternative the respondent argued for a deposit order on similar grounds.
18. On the second ground, conduct, the matters complained of were again set out in the letter. The respondent confirmed, however, that the conduct has not reached a stage where a fair trial was not possible.

The claimant's response

19. The claimant had set out his objection to the strikeout application in writing. In brief he believed that he had full evidence to support his case. He never waived any breach but was always protesting and complaining about the breaches. In terms of conduct he has complied with the tribunal orders, it is the respondent who is being uncooperative.
20. I asked him in detail about the breaches on which he was relying. He accepted that there was an alleged breach in December 2023 and the next matter about which he complains took place in 2024. Assuming that he would

be able to establish disputed facts in his favour that would have occurred on 28 March 2024.

21. The claimant explained to me that it was a breach to be paid holiday pay instead of statutory sick pay. As he was off sick at the time he was entitled to roll his holiday forward and either take it when he returned to work or be paid in lieu of that holiday should his employment end. In unilaterally forcing him to treat a period of sickness as holiday he was in effect being deprived of statutory sick pay and losing a valuable right, namely holiday and holiday pay.
22. The claimant accepted that he did not resign until he says 10 June 2024. He also accepted that the holiday was paid to him in February 2024. His explanation for the delay in acting was that he was unable to focus as he was suffering from depression.
23. I asked him to explain his thought process and he told me that when he started to do his resignation he found that they had reduced his SSP. I questioned the claimant on this and explained that this was the wrong way round. If he was saying that he went to resign and found that they had reduced his SSP, then that reduction could not be the reason that he went to resign. The claimant replied a few times that he could not remember and then said again that it was when he resigned he checked all his documents.
24. Whether he had or had not said this was subsequently disputed by the claimant. I checked my notes and they record this. I checked with the respondent's solicitor whose notes recorded the same. The claimant did not, at the time he was asked to give an explanation tell me that he realised his pay was missing and subsequently resigned. His account was the opposite. My notes record that he gave the same explanation even after I had explained the difficulty with it.

Legal principles

25. Rule 38 provides

—(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;
- (c) for non-compliance with any of these Rules or with an order of the Tribunal;
- (d) that it has not been actively pursued;

(e)that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim, response or reply (or the part to be struck out).

(2) A claim, response or reply may not be struck out unless the party advancing it has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

26. A strike-out application is to be considered in two stages: the first is to assess whether the specified ground has been established and, if so, the second stage requires the ET to determine as a matter of discretion whether to strike out the claim.

27. In *Cox v Adecco* [2021] ICR 1307, the Employment Appeal Tribunal (HHJ Tayler) reviewed the authorities in this area and distilled the principles governing the approach to strike-out applications on merit as follows:

1. No one gains by truly hopeless cases being pursued to a hearing.

2. Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate.

3. If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.

4. The claimant's case must ordinarily be taken at its highest.

5. It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.

6. This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.

7. In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing.

8. Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer.

9. If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the

possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

28. A decision to strike out a claim without a hearing is clearly a draconian measure. Usually, it would involve a clear denial of justice for a party to lose their case without a hearing.

29. The Court of Appeal considered the proper approach to such applications on grounds of conduct in the case of *Blockbuster Entertainment Ltd v James* [2006] IRLR 630:

“5. This power [a reference to what is now the power to strike out for unreasonable conduct under [rule 38(1)(b)]] as the employment tribunal reminded itself, is a draconic (sic) power not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response.”

30. In *Bolch v Chipman* 2004 IRLR 140 the EAT set out the steps that a tribunal must ordinarily take when determining whether to make a strike-out order:

- a) before making a striking-out order an employment judge must find that a party or his or her representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings
- b) once such a finding has been made, he or she must consider, whether a fair trial is still possible, as, save in exceptional circumstances, a striking-out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed
- c) even if a fair trial is unachievable, the tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty, for example, by making a costs or preparation order against the party concerned rather than striking out his or her claim or response.

31. Turning to the application for a deposit order, Rule 40 provides that:

(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.

Constructive unfair dismissal

32. Section 95(1)(c) of ERA 1996 states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. To do so there must be a breach of a fundamental term of the contract, which can include the implied term of trust and confidence. trust and confidence. Both sides are expected to absorb lesser blows.

33. Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA set out that in order to claim constructive dismissal, the employee must establish that: there was a fundamental breach of contract on the part of the employer, the employer's breach caused the employee to resign, the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

Conclusions

Striking out on grounds of conduct

34. The first step would be to consider whether the claimant's conduct has met necessary hurdle. I am, however, short cutting that thought process because even if it did, the respondent accepts that the claimant's conduct does not mean that a fair trial is not possible. I'm rejecting the application to strike out the claim on the grounds of conduct because, even if it did meet the threshold, it is not sufficient to stop a fair trial happening. Strikeout is too Draconian measure in those circumstances.

Striking out on grounds of merit

35. I am considering here whether or not the claim has no reasonable prospect of success.

36. The first legal issue he would have to establish is whether the act or acts he is relying on amount to a breach of contract. The claimant is relying on a number of breaches. Taking the claimant's evidence at its highest I accept that it is possible he could show that some or all of these did amount to a repudiatory breach. In particular I can see that being denied statutory sick pay and having his holiday entitlement used up without his consent could be seen as a breach of contract. Similarly, being asked to work more days, refusing to allow him to go to occupational health, an unfair disciplinary process and a generally unsafe environment may amount to breaches. I can't say the claimant has no reasonable prospect of success in establishing this.

37. The second legal issue is whether he resigned in response to this breach or breaches. On the facts of this case that is closely tied to the final question did the claimant waive any breach under firm the contract.
38. There is only one breach that is said to occur in 2024, i the year in which he resigned. I conclude that the claimant has no reasonable prospect of success in showing that previous breaches prior to 2024 were the reason for his resignation. Similarly I conclude he has no real prospect of success relying on these historic breaches as he clearly continued working and therefore affirmed those breaches.
39. Turning then, to the last act, the payment of holiday pay instead of statutory sick pay. The claimant delayed for 2 ½ months before reacting to this. I consider that there on no reasonable prospects of success relying on this breach because the delay was too long.
40. I also conclude that, based on what the claimant told me that when he went to resign he then saw statutory sick pay position that there are no real prospects of him establishing that he resigned because of the sick pay issue. This is an unrepresented claimant and I am aware that when pushed by a judge to such a claimant may fail to properly explain his case. It was for that reason that I considered the written documentation as well as what the claimant told me today. It was also for this reason that I took particular care to put the point to the claimant more than once and to explain the impact of what he was saying.
41. I am satisfied that the claimant did tell me the facts as he understood them that is that he went to resign and then noted the pay issue rather than the other way round. I consider that he changed his account once he became aware that this point went against him.
42. For all these reasons I'm therefore striking out the claim on grounds of merit

**Approved by
Employment Judge McLaren
10.3.26**

Sent to Parties.
26 March 2026

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