



EMPLOYMENT TRIBUNALS

Claimant

Mr S Adams

Respondent

Booker Limited

v

PRELIMINARY HEARING

Heard at:

Watford

On: 3 July 2019

Before:

Employment Judge Bloch QC

Appearances:

For the Claimant: In person

For the Respondents: L Ashwood, Solicitor

JUDGMENT

1. Pursuant to Rule 37 of the Employment Tribunal Rules of Procedure, the claimant's claims of constructive dismissal (as set out at paragraph 4.3 of the Case Management Summary of 20 March 2019) and discrimination by association (as set out at paragraph 4.1 of the Case Management Summary) are struck out on the basis that those claims have no reasonable prospects of success.
2. Pursuant to Rule 39 of the Employment Tribunal Rules of Procedure the claimant is ordered to pay a deposit of £50 as directed in the attached Deposit Order.

REASONS

1. At a Case Management Preliminary Hearing on 20 March 2019 before Employment Judge Henry (sitting alone), he listed preliminary hearing to determine the following issues:
 - 1.1 On the claimant having made an application to amend the claim, is it appropriate in all the circumstances of the case for the tribunal to exercise its discretion to allow such amendment;
 - 1.2 Whether pursuant to Rule 37 of the Employment Tribunal Rules of Procedure any complaint of the claimant has no reasonable prospect of success for which it is appropriate that the complaint be struck out;
 - 1.3 Whether pursuant to Rule 39 of the Employment Tribunal Rules of Procedure any allegation or argument in the claim has little reasonable prospect of success, for which it is appropriate that a deposit be taken as a condition of the claimant continuing to advance that allegation or argument.

2. Finally, Employment Judge Henry determined that following determination of the preliminary issues, the tribunal would give further directions for the conduct of the case to final hearing and set the matter down for hearing as appropriate.
3. In the Case Management Summary (paragraph 3) the Judge summarised the claim as follows:

“By a claim form presented to the tribunal on 9 March 2018, the claimant presented complaints for, discrimination on the protected characteristics of age, unfair dismissal and an unlawful deduction from wages. He then referred to an application to amend (the claimant’s application) dated 25 August 2018 when the claimant stated that he no longer pursued the claims as presented, but instead pursued complaints for wrongful dismissal; discrimination by association; and constructive dismissal when he tendered his resignation on or around 6 August 2018.”

4. The Judge summarised the claimant’s amended claims as follows:

“Discrimination by association

- 4.1 The claimant states that, on his introducing a colleague to the respondent for employment, on the colleague subsequently being the subject of disciplinary action, the claimant states that the respondent then took action against him (the claimant), on the premise that by introducing the colleague, he had brought problems into the workplace, and by association with that colleague the respondent then took disciplinary action against him, subjecting him to an unfair and biased investigation and disciplinary action. The claimant is unable to relate the claim of which he complains to any protected characteristic under the Equality Act and for which a cause of action for discrimination by association may lie.”

He then summarised the wrongful dismissal claim as follows:

- 4.2 “The claimant states that on his being the subject of disciplinary action, the respondent carried out an unfair and biased investigation and then subjected him to an unfair disciplinary hearing in February 2018. The claimant states that the respondent had broken the implied term of mutual trust and confidence. On the claimant presenting an appeal against dismissal, for which he was successful and reinstated, the claimant has been unable to state how he alleges he had then been dismissed, so as to amount to a wrongful dismissal.”

In relation to the constructive dismissal claim the Judge summarised this as follows:

- 4.3 “The claimant states that, having been unfairly dismissed in February 2018, although being reinstated, he did not feel that he could then work for the respondent, for which he states he sought to find an amicable resolve, but that on being informed that he was to either continue working or otherwise terminate his employment, the claimant states that the respondent was unfair, of which he states he was then on sick leave suffering with depression, at which time he looked for alternative employment. The claimant states that he got another job on 13 August 2018.”

5. Employment Judge Henry then ordered the following particulars to be provided by the claimant:

“6. The claimant shall, no later than 3 April 2019, set out full particulars of his claims as referred [to] in the summary above, as amounting to discrimination by association, wrongful dismissal, and constructive dismissal.

- 6.1 The dates, or approximate date, of each act,

- 6.2 Who was responsible for such act,
- 6.3 Whether any written complaint was made about each such act of the respondent.
- 6.4 What is the alleged treatment he received, and where the claimant relies on a comparison with another person, to state who that person is and how they were treated differently.
- 6.5 In respect of any breach, to state whether it was a breach of an express term or implied term of the contract.
- 6.6. To state exactly, because of which breach, or breaches he states he terminated the contract of employment for.”

6. In paragraph 7 of the order the Judge directed as follows:

“The respondent has liberty to 17 April 2019, to furnish an amended response setting out the respondent’s factual assertions in connection with the claim as understood following the claimant’s further particulars.”

7. Thereafter, apparently on 2 April 2019 (the date being as told to me by Mr Ashwood on behalf of the respondent), further particulars were provided by the claimant. In paragraph 6.1 he gave the date of the acts as being from 21 January 2018 to 10 February 2018. The date of the constructive dismissal was stated as 2 August 2018. This was the date that he wrote to to the respondent, resigning with effect from 6 August

8. In relation to paragraph 6.4, the claimant stated:

“6.4-I was discriminated through association I recommended an employee for a job Olumide olyaini who was later caught for a misconduct I was accused also in the process of misappropriation of company goods I was not caught for nothing and was accused through assumption we both were put forward for two investigation and two disciplinary’s at the same time which I felt they were attacking me in the process of dealing with another colleague I was treated harshly I had a clean record no verbal’s or written warnings my character was not taken into account or my reputation.”

9. In relation to paragraph 6.6

“6.6-breach of trust and confidence and faith, the colleagues that I dealt with lied and covered for other colleagues leaving me looking a perpetrator. I was promised a part time contract which I never got under the condition that I don’t leave the company otherwise I wanted to leave the company as the relationship was broken down and wanted to seek other remedies as in settlement for what I was put through with the company through acas. I was of sick with depression for months 4-5) and never received this contract during my period of depression. Which I expected through the post, which further broke down the relationship of trust and confidence and faith, when I returned to work I never received the 1st remedies part time contract and apology which was agreed other than settlement as I already had a active acas negotiations in process which the company never willingly participated in. when I returned I asked for the contract an felt ignored so I filed for constructive dismissal as the trust and confidence was completely destroyed another violation of contract from this point the company was not sorry for what they did and displayed no remorse towards me and showed no signs of repairing the relationship. I also felt the company was going to fire me sooner or later

as I was also on a final warning after being found not guilty with no evidence or witness statements which I felt was not fair as I wanted the slate clean and I have no confidence as a employee at this point and wanted to leave like I wanted to do in the beginning with a settlement for the damages and trouble I been through. After all they put me through and all I went through I felt like I was not being heard or listened to professionally and it was what was best for the company and not was best for the colleagues who make and work for the company also. Pushing thing under the rug did not make feel confident at all and caused for me to leave as trust was gone and confidence was gone .colleagues who were involved in the process did not honour their contracts neither me as a colleague it was just a downhill relationship from the day I was dismissed and reinstated and one thing after the next I've been hurt and violated on grounds of contract and integrity to the contract.in all this I never once received a apology from not one colleague.”

10. Attached to that document was the amendment application dated 25 August 2018. Under paragraph 8.1 it stated: “I was discriminated against on age-no.” He then said:

“I am making another type of claim which the Employment Tribunal can deal with:

1. Wrongful dismissal
2. Discrimination by association
3. Constructive dismissal”

11. It appears to be the same document (or substantially the same document) which Employment Judge Henry was referring in paragraph 3 of the Case Management Summary, describing the amendment application.
12. During the course of the hearing the claimant appeared to suggest that he had come under some pressure from Employment Judge Henry to drop the age discrimination case. However, it is plain that the withdrawal of that claim was at the instigation of the claimant since it was set out in his application to amend dated 25 August 2018, to which I have referred above.
13. In accordance with the order the respondent filed amended grounds of resistance. Under paragraph 2 of these amended grounds, the respondent did not object to the claimant amending his claim as recorded at paragraph 3 of the Case Management Summary, sent to the parties on 21 March 2019. That was confirmed to me today by Mr Ashwood.
14. In relation to the claim of constructive dismissal, the respondent pleaded as follows:

“Constructive dismissal

4. The Claimant was continuously employed by the Respondent for less than two years. Therefore, the Claimant cannot rely upon section 94(1) of the Employment Rights Act 1996 (“ERA”) and claim that he was dismissed pursuant to section 95(1)(c) of the ERA and that his dismissal was unfair pursuant to section 98 of the ERA because he had not been continuously employed for a period of not less than two years ending with the effective date of termination pursuant to section 108(1) of the ERA.
5. The Claimant’s employment commenced on 23 April 2017, as stated in his contract of employment. (The Claimant’s ET1 claim form states at section 5.1 that his employment started on 20 April 2017.)

6. By letter dated 2 August 2018, the Claimant gave notice of his resignation on 6 August 2018.
 7. On 6 August 2018, the Claimant's employment with the Respondent terminated by way of his resignation (as confirmed by the Claimant in his application to amend his claim)."
15. I should mention that the claimant put before the tribunal today a further document, not in the bundle but which the respondent's solicitor accepted had been received by his office in April 2019. The tribunal had that document printed out. That document contains numerous bullet points nearly all of which related to his complaints about how the process was unfairly conducted and which resulted in his (initial) dismissal on 6 February 2019. As indicated above, following the claimant's appeal on 7 February, there was an appeal hearing on 21 February 2019, the result of which the claimant's appeal was upheld and he was reinstated.
16. For six weeks prior to the appeal hearing the claimant had been off sick from (as he told me) depression and that following his reinstatement he continued to be off sick until his return to work on a date in late July 2019. He told me that after a week he tendered his resignation letter dated 2 August 2018. It is worthwhile recording at this stage the terms of that resignation:

"02/08/2018

Mr .Shekhar damani adams

Booker

camford way

luton

Bedfordshire lu3 3an

Dear Michelle guy

I would like to inform you I am resigning from my position at booker Luton as warehouse replenishment staff effective 06 august.

I feel that I am left with no choice but to resign, the relationship between me and booker is unrepairable and too hostile for me to work in and I feel my safety in the environment is not secure. I do not feel safe at work working with other colleagues the trust has been broken. The colleagues don't communicate with me and isolate me making me feel like I me feel wrong.

I still have not received a part time contract nothing has been done or said to me just false promises. I feel again the confidence and trust has been violated and I have no

choice but to resign the poor communication has left me upset. I do not feel secure in my position as a result...”

17. In his resignation letter the claimant mentioned that he had not received a part-time contract. He explained to me that this had been promised to him in the appeal process and that he felt that confidence and trust had been violated in that regard. The claimant’s hours had been reduced at his request in order for him to attend college from 1 October 2017 from 7.5 hours to 15.5 hours (or 15 hours as the respondent maintained). He explained to me the reason for his wanting a new contract was because, although his hours had been reduced to 15.5 hours, this was not reflected in the contract. He did not suggest he was being made to work more than 15 hours or that the respondent was otherwise imposing a set of hours which was not the 15.5 hours which had previously been agreed, to which he had worked since October 2017.

18. In the resignation letter the claimant continued that:

“I asked to leave with a settlement and was refused making me feel as if I had no other choice but to accept what the company wanted reinstatement which I was not happy with and expressed this too bookers management and hr, was not the guilty party I was the innocent party I feel this is a strong repudiatory breach and I am revoking my affirmation I was not made clear of my legal rights and options and felt forced to accept what the company wanted.my trust and confidence had been breached once again. When I spoke to hr. about my wish for a settlement to leave the breach was continued when it was my right to have this option and I was refused more than once I feel bullied and undermined by company my trust in the company to treat me fairly and honestly and that has not happened once again ,I wanted to leave when I was offered my job back but was made to believe taking my job back was my only option I only wanted to clear my name and my reputation.

I was promised training on the forklift and electric pump trump 3 month into my employment I have been at bookers 1 year and no training has ever been offered to me.

Your sincerely

Shekhar d adams”

19. Returning to the document which the claimant produced on 2 April, in that document he said that after he had won his appeal he clearly stated that he did not want to return (to work) as he did not feel safe or trusting of his colleagues working in a team with him. He wanted to leave with a reference and settlement and was made to believe that he had no other choice and given a week to decide if he was going to return or resign from his position. Those were his options which made him feel everything was his fault and he was not properly listened to. He added at a later part of that document that he was reinstated but did not understand his rights and was not legally represented. He clearly stated he wanted to leave with payment but was declined. He mentioned that he was still on a full-time contract but with reduced hours. There was a reference in one of the many bullet points as follows:

“• I was working reduced hours part-time and believed this was another reason I was dismissed and discriminated against receiving complaints from Supervisor about unpaid wages since I went part-time.”

Constructive dismissal

20. Turning to the specific heads of claim as summarised in the Case Management Summary, in relation to the constructive dismissal claim (paragraph 4.3 of the Case Management Summary) the respondent was obviously right and the claimant was not really able to raise any points which might gainsay the point that the claimant simply did not have sufficient continuity of service to bring an unfair dismissal claim. On that basis, there was no alternative but to strike out that claim as having no reasonable prospect of success.

Discrimination by association

21. I accepted the respondent's submissions (as set out in the amended grounds of resistance). The claimant failed to relate his complaint to any protected characteristic.
22. By way of further elaboration of that part of the claim (as set out in the amended grounds of resistance and which appear to be common ground), on or shortly after 22 January 2018, an allegation was raised that the claimant had taken two pots of yoghurt from the stock of the branch at which he worked, eaten them and not paid for them either before eating them or at all.
23. On 28 January 2018 the claimant, who was accompanied by a colleague, attended an investigation meeting. The claimant admitted taking and eating the yoghurt and not paying for it.
24. The respondent placed the claimant on paid suspension.
25. On 6 February 2018 the claimant attended a disciplinary hearing at which he faced an allegation of theft. The claimant accepted that he had not paid for the yoghurt. During an adjournment the respondent considered the evidence before it and decided the claimant was guilty as alleged and therefore that he should be dismissed summarily.
26. On 7 February 2018, having been offered the opportunity to appeal, the claimant provided in writing the grounds of his appeal and raised various issues the respondent considered amounted to a grievance.
27. On 21 February 2018 the respondent heard the claimant's appeal and grievance. The respondent then investigated the claimant's appeal and grievance and reached its decisions in respect of the same. The respondent decided to overturn the claimant's dismissal and reinstate him.
28. By letter dated 8 March 2018 the respondent invited the claimant to a meeting on 12 March 2018 at which it would provide him with the outcome of his appeal.
29. On 12 March 2018 the meeting took place. The respondent provided the claimant with the outcome of his grievance. The respondent informed the claimant that he was reinstated and that he would receive back pay accordingly.
30. By a letter dated 14 March 2018, the respondent confirmed the claimant's reinstatement and settlement of back pay.

31. The above background (set out the amended grounds of resistance) is, as I understood, broadly common ground.
32. The claimant struggled as best he could to identify a protected characteristic. As I explained to him the tribunal did not have jurisdiction in relation to a discrimination case unless the discrimination was in relation to a protected characteristic. Protected characteristics are set out in section 4 of the Equality Act 2010, as follows:
- “Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.”
33. Accordingly, no matter what sympathy a tribunal might have with the claimant’s predicament (taking his evidence at its highest for present purposes) it simply does not have the power to assist the claimant in relation to discrimination unrelated to a protected characteristic. It was clear (as confirmed by the claimant to me) that his complaint really was that he was discriminated against for bringing someone into the company of whom the respondent (eventually) disapproved.
34. I did give some consideration whether the claimant might feasibly have a claim for the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. Under regulation 5 – the part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker:
- b. ... by being subjected to any other detriment by any act, deliberate failure to act, of his employer.
35. The real question was whether the claimant had no reasonable prospect of success in relation to such a claim or little reasonable prospect of success. I did not see any other realistic way of looking at this claim).
36. In the end I concluded that the claim was so tenuous that there was indeed no reasonable prospect of success in this regard. I say this for the following reasons:
- 38.1 In the further and better particulars which the claimant filed, pursuant to the Case Management Orders made by Employment Judge Henry, there was no mention of discrimination on this ground;
- 38.2 Nor does there appear to have been any suggestion of this at that hearing, as recorded in the Case Management Summary by Employment Judge Henry.
- 38.3 In reality, the claimant’s complaints (to the extent there were any) regarding his part-time status was that his contract was not amended to reflect his reduced hours. However, given that there was no (pleaded) threat or suggestion that the respondent would not allow the claimant to continue to work his part-time hours, and the only complaint was the failure to provide a contract (reflecting what was accepted practice between the parties going back as early as 1 October 2017) it is difficult to see how a claim of detriment on the grounds of part-time status could be made out.

- 38.4 There is reference to a belief on the part of the claimant (as recorded in the 9 April 2019 document) that the fact that his work had been reduced to part-time hours was the reason he was dismissed. That is in such tangential terms that it does not (unsupported by anything else of relevance) form a proper basis for any claim of less favourable treatment of a part-time worker. Apart from the fact that it is wholly unparticularised, and not taken up in the further and better particulars provided pursuant of the order of Employment Judge Henry, it also seems to be mixed up with complaints about unpaid wages since he went part-time.
- 38.5 In short, I concluded that the claimant had no reasonable prospect of success in relation to his pleaded claim. I concluded that despite the fact that the claimant is unrepresented and therefore not best able to articulate his claims. I took into account, in particular, the chance which the claimant was given to amend his claim and provide particulars in relation to the amended claim and the absence of any reference in the amended claim to unfavourable treatment on grounds of his part-time status. As indicated above the gravamen of the complaint was rather he wished to see his current status reflected in an updated contract of employment.
37. Turning to the wrongful dismissal claim.
- 39.1 It was clear the burden of the claimant's claim in this regard related to his treatment up until the appeal hearing on 21 February 2018. After that date (as set out above) he went off sick. As submitted on behalf of the respondent (even taking into account the period of illness) the lapse of time is very considerable between the appeal hearing of 21 February 2018 and the resignation letter written on 2 August 2018. Presenting an even more formidable problem for the claimant is the fact that he went back to work. Although he says that he did not wish to return to work, it is plain that he did so. Eventually after many months off sick, he returned to work towards the end of July. In those circumstances, the chances of the claimant succeeding in an argument that he resigned (in time and in response to the respondent's breaches which ended on 21 February 2018) appear low.
- 39.2 The claimant did make something of the failure by the respondent to provide a written contract reflecting the number of hours that he was actually working as another reason for his resigning.
- 39.3 However, it seems clear even on the claimant's own case that that was not the principal reason for his resignation. It was clear from all the documentation that he provided and what he told me today, that the principal reason for his resigning (or regarding himself as being subject to repudiatory breach by the respondent) was the respondent's treatment of him in the course of the disciplinary hearing.
38. I accordingly do not conclude that the claimant has no reasonable prospects of success in relation to his claim. However, in my judgment he has little reasonable prospects of success in this regard. Accordingly, in my judgment, it is appropriate for him to be required to pay a deposit in relation to the pursuit of that claim.
39. The claimant told me that he was on Universal Credit and had no substantial assets. He was generally resistant to engaging in the process of determining what sum he

could reasonably pay by way of deposit. I concluded that on any view, provided a substantial period of time was given, the claimant could pay the sum of £50. I concluded 3 months would be more than enough time for him to raise this sum.

Employment Judge Bloch QC

25.07.19

Sent to the parties on:

.....05.08.19....

For the Tribunal:

.....