



EMPLOYMENT TRIBUNALS

Claimant: Mr P Bohacik

Respondent: YHA England and Wales

Heard at: Liverpool

On: 18 April 2018

Before: Employment Judge T Vincent Ryan

REPRESENTATION:

Claimant: Litigant in person

Respondent: Mr D Flood, Counsel

JUDGMENT having been sent to the parties on 26 April 2018 and written reasons having been requested on 8 May 2018 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Background

- 1.1 By an ET1 claim form presented on 9 February 2018 the claimant, who was employed by the respondent as a “team member” from 24 July 2017 until 9 September 2017, claimed that he had been unfairly dismissed. In section 8.1 of the ET1 form he ticked the box saying “I was unfairly dismissed (including constructive dismissal)”. The claimant chose not to tick any of the other available boxes indicating further or alternative claims, such as discrimination by reference to any of nine listed protected characteristics. The claimant also ticked the final box indicating “I am making another type of claim which the Employment Tribunal can deal with” and he typed beneath that heading to confirm the nature of the claim simply the words: “Unfair dismissal over political opinions”.
- 1.2 The claimant expanded upon his claim in sections 8.2, 9.2 and 15 of the ET1 form and in an attached “supporting statement”. He attached copies of email correspondence to his claim form. In essence the claimant alleged that the respondent dismissed him because his manager disagreed with his “socio-political opinions/positions”; he said that his

manager “wanted to aggressively shut me down...as is so very typical of the post-modernist neo-Marxist ideologically tyrannical aggressively-self-entitled-speech-suppressively assertive character-assassinating abusive extreme ‘left’ of late”. The claimant expanded on this theme concluding section 9.2 of the ET1 claim form by saying “...It needs to be asserted that firing people over differing socio-political opinions/views/positions to perpetuate your ideological tyranny is unacceptable, prosecutable and punishable”.

- 1.3 The respondent presented its response to the claimant's claim in form ET3 on 16 March 2018. The respondent contended that the claimant had failed to complete his probationary period to its satisfaction and it listed its areas of concern. The respondent cited the claimant's alleged refusal to undertake certain compulsory online diversity and equality training (citing his objection to what he called its “transgenderism”), failure to cooperate with the DBS safeguarding disclosure procedure on recruitment by not returning completed disclosure forms (his employment being subject to a satisfactory DBS report), and comments that he is said to have made to colleagues on 15 August 2017 regarding the Nazi party, Adolf Hitler and Isis, and comments further made on 25 August 2017 regarding both a colleague's five year old niece (asking whether she was single) and repeatedly questioning a third party over their religious beliefs to the point of causing upset.
- 1.4 The respondent contended that the claimant did not have two years' qualifying employment entitling him to pursue a claim of unfair dismissal. The respondent also responded more widely in respect of potential claims of discrimination and detriment or dismissal relating to protected disclosures, denying all such potentially intimidated claims. The respondent included in its response an application to strike out the claimant's claims, and that application is set out in detail at paragraphs 27-29 of the respondent's grounds of resistance attached to the ET3. The respondent's application was based on the claimant's ineligibility to make a claim of unfair dismissal and that his claims were “scandalous and/or vexatious and/or had no reasonable prospect of success”.
- 1.5 The matter was listed for a preliminary hearing to consider the respondent's said application.

2. The Application and Response

- 2.1 The respondent made its application on the basis of the claimant's sole claim being one of unfair dismissal, arguing that as he had less than two years' qualifying employment he was not eligible to pursue his claim which in any event had no reasonable prospect of succeeding in the circumstances described in 1.3 above. The respondent submitted that the claimant had not brought his claim within any exceptions to the two year qualifying period when the claim related to dismissal only.
- 2.2 At the outset of the hearing the claimant confirmed that his claim was one of unfair dismissal and that it was unfair to dismiss him for his political

opinions. He stated that he was not claiming discrimination in respect to any protected characteristic, specifically not religion or belief. He had researched the matter. He said he did not have a relevant ideology although the respondent may have thought he had; he felt that his dismissal was nevertheless due to his opinion rather than any ideology, adding "let's go with it being based on my opinion". He contended that his opinions may have been misunderstood by the respondent. The claimant then explained certain of his opinions on Nazism and what he called "transgenderism" (by which I understood not acceptance of, and respecting the parity of esteem of, Trans people, but the claimant's view that there is social agenda to campaign politically to promote the interests of Trans people above the interests of other people as if they were being oppressed). The claimant was also clear that he was not relying on a claim that he had made any alleged protected interest disclosure. He stated that he knew that political opinions did not form part of any protected characteristic.

- 2.3 The claimant accepted or did not contest that during his probationary period he had refused to complete compulsory on-line equality and diversity training, that he failed to submit completed DBS forms, that he made the comments about Adolf Hitler, the Nazi party and ISIS alleged by the respondent, that he commented as alleged on a colleague's minor niece, and that he persistently queried a visitor to the respondent's premises about her religion which upset her.
- 2.4 The preliminary hearing commenced at 14:15 and ended with judgment at 16:05. During the course of the hearing there was considerable questioning by me and submission by both parties. The claimant confirmed his understanding of the law and was given every opportunity to consider whether he wished to amend his claim to include alternative heads of claim such as may have been indicated by his narrative set out in the ET1 claim form. He insisted that his claim was one of unfair dismissal because he had been dismissed for opinions. He believed that this was unfair. The claimant said he did not consider that he satisfied the test set out in **Grainger PLC & others v Nicholson [2009] UKEAT/0219 09 0311** (3 November 2009) with regard to what constituted a "philosophical belief" protected by the then Employment Equality (Religion or Belief) Regulations 2003 and now by the Equality Act 2010. He denied political affiliation to any Nazi party and did not claim any affiliation to a political party or movement.
- 2.5 It was explained to the claimant that in the authority cited above Burton J endeavoured to set the limitations or criteria which are to be implied or introduced into the definition of "philosophical belief" by listing the following:
- (1) The belief must be genuinely held;
 - (2) It must be a belief and not an opinion or viewpoint based on the present state of information available;

- (3) It must be a belief as to awaiting substantial aspect of human life and behaviour;
- (4) It must attain a certain level of cogency, seriousness, cohesion or importance;
- (5) It must be already of respect in a democratic society, be not incompatible to human dignity and not conflict with the fundamental rights of others.

2.6 The claimant is Czech and English is not his first language (something relied upon by him at least in part in respect of the respondent's costs application), but that said his fluent and intelligent use of the English language was impressive and noteworthy. I say this because I had no doubt that the claimant understood what was said to him, what was explained, and what he was saying in relation to his claim and in response to questions asked. He had clearly carried out a considerable amount of research. He was under no apparent illusions as to what he was arguing and the legal hurdles that he faced in pursuing his argument in the way that he chose to do so. The claimant confirmed he understood that he was not arguing that he had a philosophical belief, that his claim was not one of discrimination but that it was one of unfair dismissal for political opinions because he had researched a Government website, and on that website were details of a successful claim made by somebody (the claimant could not remember the details of the claim) who was dismissed for having stated political opinions at work. I think he may have referring to *Redfearn v United Kingdom* 2013 IRLR 51, where the claimant in that case was dismissed having been elected as a councillor for the British National Party. Following that case protection was given to employees from dismissal for their "political opinions or affiliation" by removing the qualifying period for eligibility to make a claim of unfair dismissal. The claimant stated that he was not a Nazi; I take it from this that he is not affiliated to any Nazi party or any national socialist party known as Nazi party or otherwise, and that he was not expressly espousing any political opinion where the political ideology is that of a national socialist party or Nazi party.

2.7 The following were the admitted descriptions of the claimant's stated views and comments with which he understood the respondent took exception:

- (1) Nazi-ism – The claimant said that Nazi-ism had been historically misrepresented. He said during the hearing that he did not deny that Nazi-ism was evil but said that the public consensus was that Nazi-ism was the biggest evil ever and that Hitler was "the devil incarnate". The claimant's opinion was that there were "plenty more campaigns more evil and that killed more people". He said he was not saying that Nazi-ism was not evil but that it was not "the most evil". The claimant likened the Nazi party to Isis which he said was considered to be a terrorist organisation by some people but others considered ISIS to be heroic.

- (2) “Transgender-ism” – The claimant was required to undertake training modules online on accessibility and inclusion. The claimant objected to the fact that while at the start the training “pertained to disabilities and needs with which he took no exception” it then related to Trans people and he considered that this was blatant propaganda which offended him. He said “I do not agree with transgender-ism. It is detrimental to society”. He said he would not discriminate against people but he “did not want it shouted in my face”. He would not undertake the online training as he did not agree with its contents. The respondent requires all of its employees to carry out online training as part of diversity and equal opportunity training and its induction process.
 - (3) One of the claimant's colleagues complained that having shown a photograph of her five year old niece on her phone the claimant asked if her niece was “single”. The claimant's colleague is said to have found this remark offensive. The claimant did not categorise this matter as one related to his political opinions or any affiliation.
 - (4) The claimant is said to have questioned a colleague and a visitor as to their religion, not believing the answer when told that the visitor was Jewish. The respondent received a complaint that the claimant persisted with his questioning, which is said to have upset the visitor. The claimant did not categorise this matter as one related to his political opinions or any affiliation.
 - (5) The claimant was asked to complete a disclosure and barring scheme DBS form as part of the recruitment process as the form relates to safeguarding. The claimant refused to complete the form. The claimant's appointment was conditional on a satisfactory DBS check being received. He was referred to the respondent's Code of Conduct which requires cooperation in the DBS process. The claimant was informed that a refusal and/or failure to obtain and provide evidence for the DBS procedure would result in termination of employment. The claimant did not categorise this matter as one related to his political opinions or any affiliation.
- 2.8 At least some of these matters are said to have been raised by the respondent with the claimant at a probationary meeting on 2 September 2017. The claimant is said to have maintained his stance in respect of these issues as indeed he did at this preliminary hearing in respect of Nazi-ism, Isis and “transgender-ism”.
- 2.9 The claimant stated at the hearing that he did not refuse to undergo training but refused to complete the part of the training that related to Trans people. He espoused extreme opposition to what he considered to be left-wing causes of which he felt “transgender-ism” was part; he said “transgender-ism” was part of a left-wing narrative of oppressor versus oppressed. He explained his view that since the 1960s and 1970s identity politics had taken over from class based politics and that the left-wing continues to add “so-called oppressed” identity groups to their list, such

that what he considered to be left-wing politicians take it upon themselves to vocally defend and find oppression where there is none.

- 2.10 The respondent is a charitable organisation providing youth hostel accommodation. According to the respondent's ET3 Response to the claim, which the claimant did not dispute, its employees are required "to ensure standards of delivery in accordance with the respondent's policies and to effectively support the strategy, vision values and mission of the respondent" (paragraph 3, Grounds of Resistance – "GOR"); employees are required to comply with a Code of Conduct supporting certain "spirit values" namely "sustainability, passion, innovation, responsibility, inclusivity and trust" (paragraph 4 GOR). The respondent submitted that its employees are "expected to make the respondent's business accessible for everyone, welcome (sic) all irrespective of background, beliefs or culture...". During the claimant's six week probationary period the respondent concluded that the claimant's said conduct was in conflict with its core values and code of conduct. He was dismissed for a reason related to conduct. He had failed to complete essential training and to complete required DBS forms such that the respondent could not receive the required satisfactory DBS check report.

3. The Law

- 3.1 Section 94 Employment Rights Act 1996 ("ERA") sets out the right of an employee not to be unfairly dismissed by his or her employer, and section 95 ERA defines the circumstances in which an employee is said to have been dismissed.
- 3.2 Section 108 ERA excludes that right in certain circumstances by imposing a qualifying period of employment by virtue of section 108(1). Section 94 ERA does not apply to the dismissal of an employee unless he or she has been continuously employed for a period of not less than two years ending with the effective date of termination, subject to exceptions. Section 108(3) ERA disapplies the qualifying period in respect of a number of specified claims by reference to the protection afforded by the ERA and various regulations. Section 108(4) ERA disapplies the qualifying period where the reason (or if more than one the principal reason) for the dismissal is or relates to an employee's political opinions or affiliation, which provision was added by the Enterprise and Regulatory Reform Act 2013 schedule 13 as from 25 June 2013 except where the effective date of termination was earlier than that date.
- 3.3 Section 98 ERA sets out potentially fair reasons for dismissal which includes at 98(2) (a) ERA capability and 98(2) (b) ERA conduct. By virtue of section 98(4) where an employer has fulfilled the requirement to prove a potentially fair reason for dismissal the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient

reason for dismissing the employee. That question is to be determined in accordance with equity and the substantial merits of the case.

- 3.4 Rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the Rules”) provides that 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 in certain circumstances. The permissible grounds for strike out are that a claim is considered scandalous or vexatious, or has no reasonable prospect of success, or 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. Claims or responses can be struck out for non-compliance with the rules with an order of the Tribunal or where it is considered that the claim or response has not been actively pursued. Furthermore, a claim can be struck out if a Tribunal considers that it is no longer possible to have a fair hearing.
- 3.5 Rule 37(2) of the Rules says that a claim may not be struck out unless the party in question has been given a reasonable opportunity to make representations either in writing or, if requested by the party, at a hearing.

4. Application of Law

- 4.1 The respondent says that it dismissed the claimant for unsatisfactory conduct during the probationary period. During a probationary period an employer can expect a probationer to complete essential training and to act in compliance with the ethics of the organisation and consistent with the law.
- 4.2 The respondent required its staff to undergo accessibility and inclusion training including awareness and acceptance of people regardless of their protected characteristics. Gender reassignment is a protected characteristic as is sex and sexual orientation. The claimant refused, and continued to object, to completing parts of the respondent’s essential training; he objected to it. He did not submit that the training was unlawful or inconsistent with the principles of the Equality Act 2010 or the respondent’s lawful ethos. He conducted himself contrary to the ethos of the respondent during the probationary period by refusing diversity training on principles of lawful respect and equality. At the hearing the claimant referred to “transgender-ism” as a political movement or a feature of “left wing” politics. I was not satisfied on the basis of the papers and respective submissions that a tribunal would find that the said training was political as opposed to being intended to be informative, accepting of diversity, understanding and to ensure compliance with legal requirements. The claimant did not claim affiliation to any political organisation or movement. He just did not like certain things being “shouted” at him. The respondent would not tolerate an employee failing to undergo essential and lawful training on issues of diversity and inclusion. The claimant displayed conduct antithetical to the ethos of the respondent’s ethos and practices in its lawful provision of a public service. There was nothing that I read or heard to suggest that the respondent’s

decision in this respect was in any sense related to any political opinion. I concluded that the claimant had no reasonable prospect of establishing that the respondent dismissed him unfairly because of any political opinion or affiliation in this context.

- 4.3 The claimant failed to complete DBS requirements. The claimant did not explain how and why his failure was consistent with any political opinion or affiliation. His conduct simply flouted an essential requirement of the job. The respondent's reaction did not have to relate to politics at all and I considered that the claimant had no reasonable prospect of succeeding with a claim requiring that it was so related. A prerequisite for satisfactory completion of the claimant's probation was a satisfactory DBS report. He could not obtain one without completing the forms provided.
- 4.4 He stated his historical opinion on the comparative evil of Hitler's Nazi party and other unnamed regimes, and also ISIS. The respondent does not allege, and the claimant does not admit to, his holding any political belief consistent with Nazi-ism or the guiding principles and objectives of ISIS. He disavowed both at the hearing. The claimant denied political affiliation with any Nazi party. Having read the papers and heard from both parties the claimant's actual political beliefs are still a mystery to me; on the other hand he has been consistently clear that he feels western society has over-estimated its assessment of the "evil" of Hitler's Nazi party by considering it the most evil in history, being worse than a number of other bloody regimes. That is not a political opinion but an historical analysis, whether right, wrong or even of something that is quantifiable. This theme, however, appears to have unsettled the respondent. It cites this theme of the claimant's amongst its issues with him; it appears disconcerted that an employee would vociferously protest in mitigation of the acts of a regime such as Hitler's. In the circumstances I considered that the claimant had no reasonable prospect of succeeding with his claim that he had been unfairly dismissed for his political opinions or affiliations, if any, in this context.
- 4.5 The claimant was reported by a colleague as making an offensive remark about the photograph of a five year old child. The claimant did not deny it and I was not in a position to make any findings of fact; however, the respondent cites this conduct as part of its reasoning in dismissing the claimant. The comment about a minor is not related to the claimant's stated political opinion or any affiliation, albeit the claimant did not state any political affiliation. In the circumstances I considered that the claimant had no reasonable prospect of succeeding with his claim that he had been unfairly dismissed for his political opinions or affiliations, if any, in this context.
- 4.6 The claimant was reported to the respondent for upsetting a visitor to its site by repeatedly questioning her about her religion. I heard no evidence on this but the claimant did not deny it. This too bothered the respondent. The respondent submitted that such conduct or perceived conduct was inconsistent with its ethos and mission. In the circumstances I considered that the claimant had no reasonable prospect of succeeding with his claim

that he had been unfairly dismissed for his political opinions or affiliations, if any, in this context.

- 4.7 The claimant is not claiming discrimination but, relying on the exemption to the two year qualifying period, he claims that the respondent acted unreasonably in treating his conduct as sufficient reason to dismiss him. None of the conduct of which the respondent complains and the claimant concedes was related to any stated political opinion at the time, or to any political affiliation.
- 4.8 In all the circumstances I consider that the claimant had no reasonable prospect of a Tribunal finding that the respondent had acted unreasonably in treating the claimant's conduct as sufficient reason to dismiss him or that the principal reason for his dismissal was his political opinions or political affiliation.

5. Costs Application

- 5.1 The respondent made an application for costs in the sum of £2,100 on the basis that the claimant's claims were frivolous, vexatious and unreasonable (rules 75 and 76 of the Rules). Mr Flood submitted that the Tribunal had done its best to try to divine something from the claimant's claim but could not find anything, and that this justified his view that the claimant was frivolous, vexatious and unreasonable. Mr Flood contended that the Tribunal should award some element of the costs claimed to reflect the fact that on this was an extraordinary claim which had incurred a considerable amount of expense and time on the part of the respondent that should be compensated by a costs award.
- 5.2 The claimant opposed the application saying that Czech was his first language and he was sure that he had an obvious case as he was fired for what he considered to be his political opinion. He felt that everything he had said and done of which the respondent complained boiled down to the expression of a political opinion, and that was his understanding of the situation. The claimant stated that he was unemployed and not in receipt of any benefit. He has no income but is living off a business loan of approximately £5,000 that he obtained to set up a new business. He has regular outgoings of £350 per week for rent and living expenses.
- 5.3 Mr Flood for the respondent confirmed that the respondent had not issued a cost warning to the claimant.
- 5.4 I considered that the claimant was not acting vexatiously or frivolously but was in fact extremely earnest about his claim which was just wrong and misunderstood. He relied on his interpretation of the Government website and was acting as a litigant in person where English was not his first language despite his apparent skill at it. He had lost a job he wished to obtain and was offended by conduct that he found contrary to his beliefs, of whatever nature they were. He sought recourse. In the circumstances it was appropriate for the matter to be aired fully at a preliminary hearing

and I did not consider that the claimant had acted sufficiently unreasonably to be subjected to a costs order.

- 5.5 Throughout the response and the respondent's application repeated reference was made to the claimant not having two years' employment and being unable therefore to make a claim of unfair dismissal. The claimant submitted that his application was not a discrimination one but that it was on the basis of dismissal for political opinion. There was considerable discussion. During the course of the discussion my notes indicate that I alluded to the claimant requiring two years' qualifying employment. Insofar as the impression was given that that formed the basis of the judgment then I would wish to clarify that the order striking out the claim was on the basis that the claimant had no reasonable prospect of success, and it was not dismissed for want of qualifying employment. If at any stage I seemed to suggest that the claim ought to be dismissed for want of qualifying employment then as a precaution by way of reconsideration I vary the judgment by revoking that part as it is in conflict with section 108(4) ERA.
- 5.6 That said, the judgment of 18 April signed by me on 19 April and sent to the parties on 26 April dismissing the claimant's claim as having no reasonable prospect of success is confirmed and my reasons for that judgment were as stated above.

Employment Judge T Vincent Ryan

Date: 18.05.18

REASONS SENT TO THE PARTIES ON

13 June 2018

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FOR THE TRIBUNAL OFFICE

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