



EMPLOYMENT TRIBUNALS

Claimant: Mr G Brown

Respondent: DEF Software Limited

PUBLIC PRELIMINARY HEARING

Heard at: North Shields

On: 2 May, 2019

Before: Employment Judge Nicol

Representation

Claimant: appeared in person

Respondent: Mr P Morgan, Counsel

JUDGMENT

After hearing the parties, the judgment of the Tribunal is that

- 1 the correct name of the respondent is DEF Software Limited and
- 2 the claimant's complaints should be dismissed in their entirety on the basis that
 - 2.1 the effective date of termination of the claimant's employment with the respondent was on or about 29 August, 2018,
 - 2.2 if that is not correct, then the effective date of termination was still less than three months before ACAS was consulted and these proceedings were presented
 - 2.3 although the complaint that the claimant was unfairly dismissed was presented within the prescribed time limit, he is not entitled to pursue that complaint as he does not have the prescribed length of continuous employment with the respondent and he has not shown that one of the exceptions to that requirement applies so that that complaint is dismissed
 - 2.4 although the complaint that the claimant was not dismissed in accordance

with the terms of his contract of employment was presented within the prescribed time limit, the nature and extent of the breach is such that having regard to the complexity and importance of the issues it is not proportionate to allow this complaint to proceed and it is dismissed

- 2.5 although the claimant's complaint that he did not receive all of the holiday pay to which he was entitled was submitted within the prescribed time limit, the claimant has received all of the holiday pay to which he was entitled so that this complaint is not well founded and is dismissed

REASONS

1 At the end of the hearing, the Tribunal gave its Judgment and Reasons for the Judgment. The claimant indicated that he would consider appealing against the Tribunal's decision. As the claimant is not represented, the Tribunal invited the claimant to request that the Tribunal should set out its Reasons in writing, which he did and the Tribunal agreed to provide them. Accordingly, these Reasons set out the Tribunal's findings in support of its Judgment. Whilst the wording and order may differ from the announced version, this is with the benefit of more preparation time and is not the result of further deliberations by the Tribunal.

2 These are complaints by Gary Brown, the claimant, against DEF Software Limited, the respondent, named in the application as DEF Software, arising out of his employment by the respondent as a junior developer. The claimant's employment with the respondent commenced on 11 June, 2018, and the effective date of termination is to be decided by this Tribunal. However, it is agreed that the claimant had been in continuous employment for less than one complete year.

3 The claimant contends that he was called to a meeting on 21 August, 2018, when he was told that his employment was being terminated. The respondent contends that this was a summary dismissal with immediate effect for poor performance and accepts that it did not comply with the claimant's contract of employment. The claimant further contends that he requested representation at the meeting, which the respondent denies, and that this was the reason or part of the reason for his dismissal. The respondent contends that it paid the claimant to the end of the month and paid him the holiday pay to which he was entitled. The claimant accepts that he was paid but alleges that he was not paid all of the holiday pay to which he was entitled.

4 By a Notice dated 1 April, 2019, issued on the direction of a different Employment Judge, the parties were informed that this Tribunal would deal with the following issues, which are set out briefly,

4.1 To determine the effective date of termination of the claimant's employment

4.2 To determine whether it was reasonably practicable for the claimant to present his claim for unfair dismissal before the end of the period of three months beginning with the effective date of termination of his employment and, if not, whether the claim had been submitted within such further period as is reasonable

- 4.3 To determine how the claim for unfair dismissal is advanced and whether or not the claimant has the right to advance such a claim given that he lacks the qualifying service
- 4.4 To determine whether it was reasonably practicable for the claimant to present his claim for breach of contract (wrongful dismissal) before the end of the period of three months beginning with the effective date to termination of his employment and, if not, whether the claim has been presented within such further period as is reasonable
- 4.5 To determine how the claim for unpaid holiday pay is advanced and whether or not it has been filed in time.

5 The respondent conceded that any sum due in respect of holiday pay should have been paid on 24 August, 2018, which is less than three months before ACAS was consulted so that that complaint was brought within the prescribed period.

6 It should be noted that the claimant is not alleging that he requested but did not receive written reasons for his dismissal and he does not make any claim for unpaid wages or holiday pay, as such, in respect of the period from the end of August, 2018, until 26 October, 2018, when his contract of employment, if still in existence, was terminated by a letter dated 24, September, 2018, which will be referred to below.

7 The Tribunal heard evidence from the claimant and from John Rollins, technical director, and Graeme Cooke, commercial director, on behalf of the respondent. The Tribunal heard oral submissions by both parties. The Tribunal had before it a bundle of documents submitted by the respondent, marked exhibit 'R1'. From the evidence and arguments that it heard and the documents that it has seen, the Tribunal finds the following facts.

8 ACAS received early conciliation notice on 23 November, 2018, and these complaints were presented to the Tribunal on 26 November, 2018. In them, the claimant claims in respect of unfair dismissal, holiday pay and breach of contract – failure to send notice of termination.

9 The claimant's employment with the respondent commenced on 11 June, 2018, and he was given a written contract setting out the terms and conditions of his employment. The first three months of employment were to be treated as a probationary period which could be terminated by the employer 'on one weeks' notice in writing at any time during or at the end of that period without adherence to the grievance or disciplinary procedures'. The contract also provided that the claimant 'was entitled in addition to statutory holidays to take 25 working days as holiday in each year'.

10 It was in dispute whether the claimant had been made aware during the course of his employment that his performance was not to the required standard. However, the Tribunal was satisfied that the respondent, through its directors, including Mr Rollins and Mr Cooke, decided that the claimant's employment should be terminated and the reason given was his level of performance.

11 Towards the end of the working day on 21 August, 2018, Mr Rollins asked the claimant to go with him into a room away from the main work area where they could talk in private. The claimant was not given any indication of the purpose of the meeting or offered the opportunity to be accompanied. Mr Rollins opened their discussion by saying that the respondent was going to let the claimant go, meaning that he was to be dismissed. The claimant alleges that he then asked to be accompanied but Mr Rollins denied that this happened. In any event, the discussion continued and no one was present.

12 In a reply to a request for comments dated 5 March, 2019, the claimant states '...I was given no prior warning or notice of the meeting...There was no indication of what the reason for the conversation was. Because of this exercising the right to be accompanied...was taken away from me...Once I became aware of what this meeting was about I stated that I would want to have someone present at the meeting as my witness...'. Broadly, this accords with the respondent's version, except for the request to be accompanied.

13 Mr Rollins informed the claimant that this was his last day at work but that he would be paid until the end of the month. According to Mr Rollins, the claimant asked if he was being placed on garden leave and was told that he could call it what he liked. At the end of the discussion, they returned to the main work area and the claimant cleared his desk. He said goodbye to Mr Cooke and left the premises.

14 On 28 August, 2018, the claimant received his P45 by email. He replied asking 'what will be happening about the accrued (sic) holidays im (sic) entitled to? 25 days/4 (1/4 of the year) minus the 1 day I took off for the dentist. I would also like to know what my official leave date will be'. The Tribunal construed this as showing that the claimant was only asking about his contractual leave of 25 days in addition to public holidays.

15 The claimant accepted in evidence that during his employment he had understood that he was only entitled to bank holidays plus twenty five days and that this was similar to what he had been entitled to in previous employments. The respondent stated that its holiday provision was in accordance with the normal industry practice but was slightly more generous than what it considered to be the industry average.

16 There is then a string of emails between the two of them, including one in which the claimant states 'I can agree on the amount of holidays owed being 5 days'.

17 The string also includes arguments on various points, including the claimant requesting a week's written notice. Mr Rollins sought to put forward his view of when the contract of employment had ended.

18 In a letter dated 19 September, 2018, the claimant sets out various demands including stating that he was still in employment, that his probation period had ended and that he was entitled to one month's written notice. He also advances the argument that he is entitled to twenty eight days statutory holiday plus twenty five contractual days. The respondent responded in a letter dated 24 September, 2018, by denying what the claimant suggested but giving him one month's written notice as a precaution. On any assessment, this is the latest possible date on which the claimant was

employed but it seems to have been ignored. In a letter dated 29 October, 2018, the claimant sets out further arguments.

19 The claimant has provided a schedule of loss under various headings. Under 'illegal deduction of holiday pay', he claims that he was forced to take a holiday for a public holiday after 21 August, 2019. However, he has accepted that he was paid to the end of the month and that he has received all of the holiday pay to which he was entitled on the respondent's version of his total entitlement. Under 'failure to provide a notice of termination (breach of contract)', His claim is for a global sum relation to one year's remuneration but this is not justified by reference to loss or any damage suffered. Under a further heading of 'no disciplinary procedure was followed at all (breach of contract)', this follows then earlier heading of 'failure to provide a notice of termination (breach of contract)' and is, in effect duplication. In any event, if it is accepted that the dismissal was without written notice, that it is dismissal was effective but without written notice, then the failure to follow a procedure was in accordance with the contractual provisions in relation to the probationary period. The total amount claimed is £95725.14.

20 The claimant accepted that during the period following his dismissal, he was aware that there were time limits within which proceedings had to be commenced but that he delayed presenting them because he hoped that this could be avoided by a negotiated settlement. He did not put forward any reason as to why it was not reasonably practicable to have presented his complaints within the prescribed time period if it was found that he had not done so.

21 The claimant contends that the respondent unfairly dismissed him because it failed to allow him to be accompanied at the meeting when he was dismissed, that his contract of employment was breached in the manner of his dismissal, that he did not receive the holiday pay to which he was entitled on the termination of his employment and that all of his complaints were submitted within the prescribed time limits. The respondent contends that the complaints were all submitted out of time, except in relation to holiday pay, that the claimant was not unfairly dismissed for the reason alleged and that he has received all of the holiday pay to which he was entitled.

22 The time limits for presenting complaints to a Tribunal and the extent to which a Tribunal has discretion to extend them are set out in Sections 111 (unfair dismissal) and 207B of the Employment Rights Act, 1966, Regulation 7 (breach of contract) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order, 1994, and Regulation 30 of the Working Time Regulations, 1998. In each case the prescribed time is three months or such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. However, in relation to alleged unfair dismissal, the Tribunal also had regard to Section 108 of the Employment Rights Act, 1966, and Sections 10 and 12 of the Employment Relations Act, 1999.

23 The Tribunal also had regard to Rules 2 and 37 in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations, 2013, which deal with the overriding objective and striking out proceedings.

24 The Tribunal finds that the respondent's approach to the meeting on 21 August, 2018, to have been, at best confused, it had failed to have any regard to the procedure

that might be required and how the meeting should be handled. Whether by accident or design the respondent failed to follow any recognised procedure and failed to offer the claimant the chance to be accompanied or to appeal. The contract of employment does appear to permit the respondent to dismiss 'without adherence to the grievance or disciplinary procedures' but this should not have been construed as entitling the respondent to disregard statutory provisions or the ACAS Code of Conduct. Nevertheless, those were not the issues before this Tribunal.

25 It is clear that 21 August, 2018, was intended by the respondent to be the claimant's last day in work for the respondent but that he was to be paid to the end of the month on the normal payroll run. When the claimant asked about his status between the meeting and the end of the month, on the respondent's own evidence, he was told that he could treat it how he liked. This is not consistent with a complete break on 21 August, 2018, as the claimant could have simply been told that he was no longer an employee and was free to do what he liked in terms of employment. Whatever the intention of Mr Rollins was, the Tribunal finds that his conduct amounted to giving the claimant notice of the termination of his employment, such notice to expire when he ceased being paid. For some reason, this was described as being 29 August, 2018, but, even if that date is wrong, the intended end of payment was within the three month period before ACAS was consulted and/or these proceedings were commenced.

26 On this basis, the claimant's complaint that he was unfairly dismissed was presented within the prescribed time for presenting such claims and can proceed.

27 It is not necessary to consider the issue of reasonable practicability in relation to the complaint of unfair dismissal. However, if the Tribunal is wrong about the effective date of termination, it would have found that it was reasonably practicable for the claimant to have commenced these proceedings within the prescribed period. He did not put forward any reason why he would have been unable to commence these proceedings within the prescribed period. He stated that he knew the length of the prescribed period but delayed commencing proceedings in the hope that agreement could be reached and the need for proceedings avoided. On that basis, this complaint would have been dismissed.

28 However, the claimant's length of service must be considered. He had not been in continuous employment for the required period of two years. The claimant did not put forward grounds on which he could rely on Section 108 of the Employment Rights Act, 1996, but sought to rely on Section 12 of the Employment Relations Act, 1999. (The Tribunal apologises for the manner in which this was described in the Reasons when given orally.) The claimant alleges that he was dismissed because he asserted a statutory right by requesting that someone accompanied him at the meeting and that this was refused. The Tribunal was satisfied that the respondent wanted the meeting with the claimant on 21 August, 2018, in order to dismiss the claimant and that this decision was made before the meeting took place. It was disputed whether claimant ever asked to be accompanied. Even on his own evidence, he was told at the start of the meeting that his employment was being terminated before he had a chance to say anything. Accordingly, the claimant would have been dismissed whether he asserted a statutory right or not and it cannot be said that his assertion, even if made, had any effect on the decision to dismiss. It follows that the claimant is not entitled to pursue a complaint that he was unfairly dismissed and that complaint should be dismissed.

29 For the same reasons as set out above in relation to the alleged unfair dismissal, the complaint that the claimant suffered a breach of contract was presented within the prescribed time limit. With regard to notice, as set out above, the effect of the meeting on 21 August, 2018, was to give the claimant notice of, at least, one week. To that extent, the respondent did comply with its contractual obligation. It did fail to give written notice. However, the intentions of the respondent were clear and were understood by the claimant – his employment was being terminated. The claimant received a P45 so that he could produce it to his next employer and he received the payments due to him. It is clear from the emails that the claimant knew that his employment was being terminated, at the latest, by the end of August, 2018. Whilst he has insisted on being given specific written notice, the Tribunal considers that this is a comparatively minor matter which did not have any consequences, whether financial or otherwise so that the claimant did not suffer anything in respect of which he might receive an award of damages. On that basis, even if he is entitled to anything, he would only be entitled to the award of the most nominal compensation at a level that would not justify the time and expense for the parties and the Tribunal required to hear this complaint. Having regard to this and the overriding principle, it is not appropriate to allow this complaint to proceed and it is dismissed.

30 Again, if the Tribunal is wrong on this and the effective date of termination is earlier so that this complaint was presented out of time, it would have been reasonably practicable for the claimant to have commenced these proceedings within the prescribed period and this complaint would have been dismissed.

31 In respect of holiday pay, the claimant accepted that during the course of his employment he had understood that he was entitled to take twenty five days leave plus eight public holidays. This is confirmed by his agreement to the respondent's calculation of his outstanding holiday entitlement in an email. He only raised his current argument at a much later date and the Tribunal did not accept that this was a reasonable interpretation of the contractual provisions. The expression 'statutory holidays' is a poor one to use and the respondent accepted this. However, the intention was clear and complied with the norm within the industry and within the claimant's own previous experience. His argument that he was entitled to leave as set out in the Working Time Regulations, 1998, plus contractual leave of 25 days does not have any reasonable prospect of success. Further, he received all of the holiday pay to which he was actually entitled so that this complaint is not well founded and should be dismissed.

32 Having regard to all of the above, the Tribunal finds that all of the current proceedings should be dismissed in their entirety.

33 Whilst this Tribunal was not asked to do so, if it had not decided that the proceedings should be dismissed as above, it would have considered whether, in whole or in part, they were vexatious or without any reasonable prospect of success. It has to be accepted that the respondent did not handle the matter well and is open to criticism for the way in which the claimant was dismissed. However, the claimant's own evidence suggested that his complaint of unfair dismissal did not have any reasonable prospect of success. He knew that he had not asserted a statutory right before he had knowledge of his dismissal so that he did not have grounds on which to argue that he was entitled to pursue the complaint notwithstanding his lack of service. In respect of his claim to holiday pay, he had agreed a figure with the respondent before he raised

any argument about how many days leave he was entitled to. He knew what the common understanding was and so this complaint did not have any reasonable prospect of success. With regard to his complaint of breach of contract, there is some merit in the argument that he did not receive written notice in accordance with his contract of employment. However, even in his schedule of loss, he does not show any consequences that flow from this and his claim for one year's remuneration is entirely without foundation. If he is entitled to any compensation under this heading, which is doubtful, it would only be of an entirely nominal amount. In total, the schedule of loss shows a claim for £95725.14, which the claimant knew or ought to have known that he had no real prospect of achieving. Taking all three complaints together, they appear to have been commenced with the intention of harassing the respondent and causing it embarrassment and the expense of defending the proceedings and so were vexatious and/r without reasonable prospect of success. Accordingly, it is likely that, if this had been considered, the complaints would have been struck out on these grounds.

Employment Judge Nicol

Date 7 May, 2019

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