



EMPLOYMENT TRIBUNALS

at an Open Attended Preliminary Hearing

Claimant: Mr K Kirby
Respondent: Merlin Leisure Pools Ltd
Heard at: Leicester
On: Thursday 5 December 2019
Before: Employment Judge P Britton (sitting alone)

Representation

Claimant: Did not attend and no explanation why not
Respondent: Mr R Lyons, Consultant

JUDGMENT

1. The claim for breach of contract is dismissed as having no reasonable prospect of success.
2. The claim based upon discrimination by virtue of the protected characteristic of marriage or civil partnership is likewise dismissed as having no reasonable prospect of success.
3. The claim for non-payment of wages is dismissed as having no reasonable prospect of success or, in the alternative, for want of prosecution.

REASONS

Introduction

1. Post the presentation of the ET1 in this matter which was back on 11 April 2019 and following the presentation of a Response and given the applications for strike out or deposit orders made clearly therein and for cogent reasons, the following happened.
2. First, the Claimant was asked to show cause as to why the claim of unfair dismissal should not be struck out. This was on the basis that he lacked

qualifying service. He had been employed by the Respondent on 8 May 2018 and dismissed on 6 February 2019. So, he lacked the necessary two years' qualifying service. Him having not shown any cause why the unfair dismissal claim should not be struck out, this occurred on 9 August 2019.

3. That left three claims:
 - 3.1 Alleged discrimination relying upon the protected characteristic at section 8 of the Equality Act 2010. That is to say that "*(1) A person has the protected characteristic of marriage and civil partnership if the person is married or is a civil partner.*" The problem with that claim was that on the face of it, the Claimant was neither married or in a civil partnership at any stage during material events. For reasons that I shall come to, if that be the case, then his claim based upon section 8 would not get off the ground.
 - 3.2 His second claim was for breach of contract (failure to pay notice pay). The Respondent had pleaded that in its fully set out scenario, that when the Claimant was dismissed, it was for gross misconduct and in circumstances which were so severe that they fundamentally undermined trust and confidence, hence no requirement to provide him with notice pay.
 - 3.3 The third claim was for wages, but this was not specified; just the box ticked. The Respondent pleaded fully as to how the Claimant had been paid all his entitlement and asked for further and better particulars.
4. Thus is in the context thereof, it was this Judge who on 12 August 2019 ordered there should be an attended preliminary hearing to determine upon the Respondent's application as to whether all three claims should be struck out or a deposit ordered. This Judge made an order for the preparation of a bundle via the Respondent, and which has occurred, and accordingly there was then a notice of listing sent out to the parties on 12 October 2019 stating that the hearing would take place today here in Leicester commencing at 2 pm.
5. It is to be noted that throughout, the tribunal has communicated not just by written correspondence but principally to the parties by way of email. This is important because the Respondent had complained that the Claimant had gone silent on it so to speak and thus it was concerned as to whether the hearing needed to take place. As a result thereof, the Claimant was asked to reply as to whether or not he was continuing and he was sent that notice by email. He replied on 30 August 2019 stating that he was. The point being that although he may be in difficult circumstances as to accommodation, he was able to reply to the tribunal because he self-evidently got the email.
6. He has not turned up today and the tribunal has received no explanation as to why not.

7. The Respondent has of course made its submissions and these are also in writing before me and I have considered the bundle.
8. Suffice it to say that, to put it at its simplest, that the evidence shows a somewhat messy and even perhaps embarrassing scenario in terms of the employment between the Claimant and the Managing Director of the Respondent business who is Mrs Sophie Rhodes. It is a very small business engaged in installing and maintaining swimming pools. All that needs to be said is that the employment ended on 6 February 2019 and in circumstances where prima facie the Claimant had self-evidently committed an act of gross misconduct in purporting that an email sent to his estranged partner (Susanna) had come from either Mrs Rhodes or her husband purporting to therefore be acting as third parties so as to mean that the communication with Susanna for the purposes of Mr Kirby getting his possessions back would not be in breach of the restraining order which had been imposed by the criminal court.
9. It is to be noted finally on that topic that the Claimant admitted that it was he who had done this certainly when he wrote to the Respondent on 6 February at 10:52 (Bp 95). He may have retracted that subsequently when he appealed but that is what he said at the time of his dismissal.
10. So, absent any submissions to the contrary from the Claimant, and I am wholly satisfied that the Respondent's application is correct from the documentation before me up to and including the dismissal and immediately thereafter when the Claimant was asking for his job back: this becomes a fundamental breach justifying summary dismissal. If anything further needed to be said on that topic, then it is what the Claimant posted on Facebook and Google the day after he had been dismissed. This is at Bp 100. It would render any continuing relationship in terms of employment untenable.
11. It follows that I conclude that the claim for breach of contract (failure to pay notice pay) should be dismissed, it having no reasonable prospect of success.

The Equality Act 2010 based claim

12. I have referred to the definition. I can add that I have considered carefully the commentary on this topic in the current edition of the IDS Handbook – Discrimination at Work, chapter 8. I have then considered the current seminal judgment on the topic: ***Hawkins v Atex Group Ltd & others*** [UKEAT/0302/11/LA, this being a judgment of the Honourable Mr Justice Underhill as he then was.
13. Suffice it to say the following: the construction of section 8 means that under the first limb the Claimant himself can only be protected if he is married. Well, the evidence is that he was only engaged to Susanna and he has never pleaded to the contrary.
14. As to the reference to the second limb of the section, it is made plain this

requires that he be a civil partner. Thus, this is also made plain by section 8(2)(a) and (b) in relation to the protected characteristic of marriage and civil partnership:

“(a) a reference to a person who has a particular protected characteristic is a reference to a person who is married or is a civil partner.

(b) a reference to persons who share a protected characteristic is a reference to persons who are married or are civil partners.”

15. As it made clear in the commentary, civil partnership is as per defined in section 1 of the Civil Partnership Act 2004 (CPS) as a “*relationship between two people of the same sex where the partnership has been registered either in the UK or overseas at a British Consulate ...*”
16. There is no evidence at all that the Claimant was actually in a legal civil partnership. He has never pleaded he was and has never replied to the point made by the Respondent that he cannot engage the terms of section 8 because he was not in a civil partnership.
17. Thus, the Claimant cannot proceed without establishing a first fundamental namely that he was at the material time either married or in a legal civil partnership. He had done neither. Therefore, his case falls at the first hurdle. Thus, as a matter of law, it must be dismissed as having no reasonable prospect of success.

The Wages Act claim

18. This was on the agenda today for potential strike out or a deposit order. The Claimant has the initial burden of proof of showing that he is owed wages. There are no particulars in his claim at all other than the ticking of the box on the ET1. Furthermore, he has failed to attend today, having had clear notice. I dismiss that claim on alternatives. That is to say either (a) that it has no reasonable prospect of success, or (b) on the basis that the Claimant has failed to prosecute his case, for instance by not turning up today or co-operating with the Respondent in terms of the run up to today's hearing and for reasons which have been made plain by Mr Lyons, namely efforts to get him to engage on the discovery process. He was sent the bundle by the Respondent on 26 November 2019 and finally the written submissions of Mr Lyons yesterday. On each occasion, this was by email.

Employment Judge P Britton

Date: 14 January 2020

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.