



# EMPLOYMENT TRIBUNALS

**BETWEEN**

**Claimant**

**AND**

**Respondent**

**MR R BERKSHIRE**

**SECRETARY OF STATE FOR FOREIGN  
AND COMMONWEALTH AFFAIRS**

**Heard at:** London Central

**On:** 24 January 2020

**Before:** Employment Judge O Segal QC

**Representations For the Claimant:** In person

**For the Respondent:** Mr A Bershadski, counsel

## **JUDGMENT**

This claim is struck out pursuant to r. 37(1) and is dismissed.

## **REASONS**

1. I heard submissions and considered evidence from the Claimant, including documents to which he referred me contained in a bundle headed **Preliminary Hearing – 24 January 2020 – Evidence for Consideration of Issues**.
2. Based on those submissions and evidence in part, I find the following facts.

2.1. The Claimant worked for the Respondent between February 1996 and 24 June 2014.

- 2.2. On the latter date the Claimant was dismissed on grounds of capability (nonattendance due to ill health). His appeal against that dismissal was unsuccessful.
- 2.3. The Claimant made a claim to this tribunal (2201681/14) alleging that this dismissal was unfair and that he had been discriminated against by reference to a protected characteristic, disability. Those claims were rejected by the tribunal in June 2015, including that the Claimant was disabled within the meaning of the Equality Act. I was passed a copy of that Judgment and Reasons.
- 2.4. The Claimant applied to the EAT in January 2019 to appeal that decision – as I understand it from the Claimant, because he considers that he has come into possession of fresh evidence demonstrating that the Respondent misled the tribunal in 2014/15 and therefore the tribunal made a wrong decision (I was not shown the notice of appeal to the EAT). I was told that application to the EAT has been rejected as being substantially out of time. The Claimant is apparently considering applying to the Court of Appeal to appeal that decision of the EAT.
- 2.5. The Claimant told me that over the past 4-5 years he has been working from home gathering information in relation to the way he was treated by the Respondent between 2012 and 2015, including during the tribunal process, which enabled him to reach conclusions about wrongdoing within the Respondent. He has, he told me, brought that wrongdoing to the Respondent's attention and has thereby been working in its interests and on its behalf.
- 2.6. The Claimant was not asked or required by the Respondent to perform that 'work'; he has not been paid or promised payment for it.
- 2.7. The Claimant purported to resign from the Respondent's employment with effect from 24 June 2019.
3. In the present claim to this tribunal the Claimant asserts that he in fact remained employed continuously from 1996 until 24 June 2019. He claims: unfair dismissal, discrimination on grounds of disability, holiday pay, arrears of pay. He clarified to me that he was pursuing the latter claim as a breach of contract claim.

4. I explained, and the Claimant seemed to understand and accept, that in order for this tribunal to have jurisdiction to consider any of the present claims, the Claimant would have to show that he had been employed by the Respondent until about June 2019 – and that included any breach of contract claim under the 1994 Extension of Jurisdiction Regulations (see in particular Reg. 7).
5. The first and primary hurdle for the Claimant in showing he remained employed until 2019 (the “mountain” he had to climb, as the Claimant aptly put it) is that in 2014, when the Respondent wrote a letter to him telling him he was dismissed he did not state that he remained employed, but rather appealed the dismissal and then brought a claim asserting that he had been (unfairly) dismissed; moreover and most fundamentally, a competent court has already decided as a fact (in the Judgment of this tribunal in case 2201681/14) that the Claimant had been dismissed by the Respondent in 2014 – and that was a judgment I had no jurisdiction to ignore or to reconsider.
6. Those facts make the Claimant’s case very different to the type of unaccepted repudiation scenario which the Supreme Court considered at paragraphs [18-19] of **Societe Generale v Geys** [2012] UKSC 63, to which the Claimant referred me.
7. As I pointed out to the Claimant, however, even in the event that he could somehow climb, or circumvent, that “mountain”, he would still have to show that between June 2014 and June 2019 there was a sufficient mutuality of obligation between himself and the Respondent to justify a finding of a continuing contract of employment.
8. As to that, it appears that the work the Claimant said he had been doing during that period was performed on an entirely voluntary basis, neither required by the Respondent nor even known about by them, at least in advance. Further, it is clear that the Respondent had undertaken no obligation to pay the Claimant for such work. At one point the Claimant suggested to me that an analogy might be drawn between this period and a much earlier period (before 2014) when he had been placed on special unpaid leave; apart from there being no evidence that the Respondent considered the Claimant to be in such a situation between 2014 and

2019, if the Claimant was working on an unpaid basis that would in any event undermine the claims he now seeks to bring.

9. I therefore have no hesitation in finding that the Claimant was not employed by the Respondent between June 2014 and June 2019.
10. I must therefore strike the present claims out pursuant to r. 37(1)(a), on the basis that they have no reasonable prospects of success.

Employment Judge Segal

24 January, 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

27/1/2020

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FOR THE TRIBUNAL OFFICE