EMPLOYMENT TRIBUNALS

Claimant: **Mr J Belgrave**

Respondent: **Intercede 2052 Limited t/a Travelhire**

Heard at: **Croydon** **On:** **3/3/2020 – 4/3/2020**

Before: **Employment Judge Wright**
Ms H Bharadia
Mrs J Saunders

Representation
Claimant: In person
Respondent: Mr J Bitran - Director

RESERVED JUDGMENT

The claimant's claims fail and are dismissed.

REASONS

1. The Tribunal had before it a bundle of approximately 160-pages. It referred to the pages it was taken to by the parties. For the respondent it had witness statements from Mr Bitran (Director) and Mr Couser (Operations Manager) and it heard evidence from both. For the claimant, it had a document called a position statement, which the claimant relied upon as his evidence-in-chief/his witness statement. The issues and the law are set out in the case management summary dated 27/2/2019.

2. This hearing did not start on time. It was due to commence at 10am as per the case management summary further to the preliminary hearing which took place on 27/2/2019. That hearing had been listed as a two-day final hearing. At the outset of that hearing and upon discussing the issues, it was clear that the claimant was pursuing claims which an Employment Judge sitting along did not have jurisdiction to hear. Accordingly, that hearing was used for case management purposes and at that hearing, this final hearing was listed for three days to start on the 3/3/2020 before a Tribunal panel of three.

3. The parties had been instructed to attend at 9.30am on the 3/3/2020.

4. The claimant was not in attendance and at 9:47 he sent an email, in response to the respondent's email of the previous day (which referred to the hearing 'tomorrow') to say that he had the incorrect date for this final hearing.

5. The Tribunal clerk attempted to call the claimant on his mobile telephone. The claimant did not answer. He did not answer the telephone even after he had asked the Tribunal to call him to let him know what was happening. There was then an exchange of emails.

6. The Tribunal took the view that the claimant was on notice of the hearing. The hearing was listed at the previous hearing on 27/2/2019. The Employment Judge's notes indicated that there had not been any discussion about alternative dates and the respondent confirmed a three-day listing starting on 3/3/2020 was the only date proposed at the previous hearing. The claimant had been sent (and he later confirmed that he had received) the case management summary containing the hearing date on 14/3/2019. The listing officer had attempted to call both parties to ask if the case was proceeding at approximately 11.30am, on 2/3/2020. Neither party had answered. Finally, on 2/3/2020 Mr Bitran for the respondent had emailed the claimant at 16:36 sending him some paperwork and referred to the hearing 'tomorrow' twice.

7. The Tribunal communicated to the claimant that the hearing would re-start (after reading the papers) at 2pm, rather than 12pm (when it would have resumed had the hearing started on time and the claimant been present).

8. The hearing resumed and at approximately 14:10, the claimant arrived. It had already been agreed that the evidence of Mr Couser would be heard first as he had been seconded to a client of the respondent and he could only be released for one day. The Tribunal set out how it proposed to proceed. The claimant objected as he said that he thought the hearing was due to start on 23/3/2020. He said he was not prepared. This was despite the hearing listed for 27/2/2019 being a final hearing and that both sides had been prepared for that hearing. In advance of that hearing, witness statements had been exchanged (the respondent relied upon the same witness statements) and each party had produced a bundle (which was later converted into a single bundle). It was due to it being identified that the claims the claimant wished to pursue required a full Tribunal panel, that the hearing was re-listed. The claimant therefore should have been prepared for the final hearing on 27/2/2019 (subsequently converted to a preliminary hearing) and had had over a year to prepare for this hearing.

9. The claimant also complained that this case had been dragging on for two or three years.

10. It is true to say that at the time of the hearing on 27/2/2019 the earliest listing was 3/3/2020 and therefore any delay that is due to the lack of resources rather than to the fault of either party. That does not however excuse the claimant's lack of preparation. It is also correct to say that the case concerned events

which ended with the claimant's dismissal on 14/11/2018 and if there was any further delay, the passage of time could cause prejudice to the recollection of the evidence.

11. The claimant did not have any questions for Mr Bitran. In view of the overriding objective and the fact that the claimant's case was set out in the case management summary, the Tribunal suggested it would put the claimant's case as it was understood to Mr Bitran. The claimant agreed to that. The claimant was also asked if he had any questions to put to Mr Bitran once that process was completed. He did not take that opportunity.

12. In respect of the claimant's evidence, he relied upon his position statement as his evidence-in-chief. In the case management summary dated 27/2/2019 the following is noted:

> 'The claimant stated that he had nothing to add to the evidence in his two witness statements already provided. … Should either party wish to rely on additional witness evidence they are ordered to exchange those additional witness statements on or before 3/2/2020.'

13. The claimant did not take that opportunity. The claimant was given the opportunity to give supplementary evidence and he had had the opportunity to hearing the respondent's evidence before doing so.

14. Both parties were given and took the opportunity to make closing submissions.

15. The issues as identified in the case management summary are set out below.

16. The claimant started working for the respondent as a self-employed contractor in June 2015. Both parties accept he became an employee on 1/2/2017. The claimant was dismissed on 14/11/2017.

17. The claimant asserts he was an employee from June 2015 to 31/1/2017. If the claimant was an employee, then he has the requisite service to bring a claim of unfair dismissal under s. 94 Employment Rights Act 1996 (ERA).

18. The respondent says the reason for dismissal was the claimant's conduct on the 8/11/2018 and 9/11/2018. The respondent denies the claimant was an employee prior to 1/2/2017.

19. The claimant also claims he was dismissed for asserting a statutory right under s. 104 ERA. He relies upon the allegation that he asserted his right to a written statement of employment particulars under s.1 ERA and also, that he referred to a breach of the Working Time Regulations 1998 (WTR) in respect of being required to work 50-hours per week in excess of the 48-hour maximum weekly working time and in respect of rest breaks.

20. The claimant says he made a protected disclosure; in respect of the repeated request for written particulars of employment and the breaches of the WTR. His case is that the information disclosed tended to show a breach of a legal

obligation (of s.1 ERA and of the WTR) or in the alternative, his health and safety was put at risk as he was required to work more than 48-hours. The claimant says he reasonably believed his disclosures were in the public interest.

21. A detriment is claimed as a result of making the disclosures. On the claimant's case, he says he was:

    a. berated and humiliated by Mr Bitran;

    b. his role was changed;

    c. no proper investigation was carried out; and

    d. his time-keeping was monitored, commented upon and he was criticised whereas other employees were not.

22. The claimant also claims he was dismissed as a result of making protected disclosures. If he does not have two years' service then the burden is upon him to provide the reason or the principal reason for the dismissal was as a result of him making protected disclosures.

23. Under s.45A of the ERA, the claimant claims that as a result of him raising the issue of his working hours, he was subjected to the following detriments:

    a. berated and humiliated by Mr Bitran;

    b. his role was changed;

    c. no proper investigation was carried out; and

    d. his time-keeping was monitored, commented upon and he was criticised whereas other employees were not.

24. The final claim is that the respondent failed to provide the claimant with written particulars of employment as per s. 1 ERA.

25. The respondent admitted it had not provided the claimant with written particulars of employment. The explanation was that the precedent contracts were being updated. That may have been the case, however it does not take nine months to do so. The respondent is legally obliged to provide written particulars of employment, under the legislation at the time, within two months of employment commencing. Had the respondent provided written particulars, the claimant's working hours would have been set out in writing. It may have been the case that had the respondent complied with its obligations, that the claimant would not have needed to pursue his case.

26. In respect of the claimant's employment status, his own evidence states:

    '… Mr Bitran offered me full time employment in February 2017. I agreed to this…'

27. In the ET1 claim form, the claimant said:

> 'Mr Bitran offered me full time employment in Feb 2017. I agreed to this…'

28. The claimant provided no evidence to attempt to convince the Tribunal that in reality he was an employee between June 2015 and 1/2/2017. Indeed, it appeared to be the claimant's case that he accepted his employment only commenced on 1/2/2017.

29. In the absence of any evidence-in-chief from the claimant as to why the Tribunal should conclude he was an employee prior to 1/2/2017, the Tribunal finds that the claimant's employment commenced on 1/2/2017 and therefore, he does not have sufficient service as per s. 108 ERA in order to pursue a claim for unfair dismissal as per s. 94 ERA.

30. The remaining claims will be determined by whether or not the claimant did, as is his case, repeatedly asked for a written contract raised concerns about breaches of the WTR.

31. The respondent's evidence is that this is 'nonsense'. The claimant did not ask for a contract of employment. Mr Bitran had offered the claimant employment terms on two previous occasions and he finally accepted and an oral agreement was reached so that his status changed from self-employed to employee on 1/2/2017. The environment was an open-plan office and the claimant has not produced any witness to confirmed that he orally requested a written contract. There is no written request, such as in an email or text.

32. The same applies to the working time issue. The claimant's working hours were 7am to 5pm, however he rarely started work on time and he regularly arrived at 7.15-7.30am. Besides other comfort breaks, the claimant would also take a lunch break. This would involve him going to the shop to buy a sandwich and then eating it, which would take at least 25-30 minutes. It is therefore factually incorrect to say that he worked a 10-hour shift so as to exceed the 48-hour working work and that he did not have rest breaks during the day.

33. The claimant again has not advanced in his evidence-in-chief any case or claim to support his contention, as set out in the case management summary, that he repeatedly requested a written contract or that he raised issues about his working time.

34. The Tribunal finds that his allegations are an 'after-thought' and have been raised retrospectively as the claimant realised that as he did not have sufficient service to claim unfair dismissal, he needed to 'bolster' his claims.

35. Firstly, the Tribunal finds that the claimant did not work in excess of 50-hours per week and that he worked fewer than 48-hours and that he also took rest breaks. In view of that finding, there would be no need for the claimant to raise an issue over working time. The claimant did not disagree with the evidence

that he arrived for work late and do did not start work before 7:15am, 7:30am or even later. He also did not disagree that he took a lunch break of anything from 15 minutes to an hour. The claimant did disagree with Mr Bitran when he put it to him the calculation of 5 shifts of 10 hours x 5 days a week = 50 hours, less 30 minutes per day for lunch; that 50 subtract 2.5 equals 47.5. Although he disagreed with that correct calculation, the claimant did not disagree with the other timings as put to him.

36. Secondly, in respect of requesting a written contract, the Tribunal finds that the claimant made no such request of the respondent during his employment. The Tribunal finds that after his employment had ended, the claimant discovered the respondent was in breach (which was admitted) of failing to provide a written statement of terms and conditions as per s.1 ERA and as such, included that failure in his ET1. The claimant is perfectly entitled to pursue a claim under s. 38 Employment Act 2002 when there has been a failure to provide a written statement. It is not however accepted that the claimant repeatedly raised this during the course of employment so as to be able to rely upon that fact for the purposes of his other claims.

37. The Tribunal finds that had the claimant, on his case, repeatedly raised both issues and nothing was done to address them, that he would have taken further action. There were two meetings of a more formal nature between Mr Bitran and the claimant on 27/6/2018 and 24/10/2018. The latter meeting ended with Mr Bitran giving the claimant a formal warning about his future conduct. It is inconceivable if the claimant was so aggrieved about these matters as he claimed to be and if he had repeatedly raised them as issues, that he would not have referred to them at these opportunities. The Tribunal also finds that if as per the claimant's case he had repeatedly raised these issues, he would have put it into some form writing so that he could prove he had asked for the contract and raised WTR issues. For example, he would have mentioned it in an email, text message, WhatsApp message or similar form of less formal communication.

38. In any event, the Tribunal also finds that the reason for the claimant's dismissal was due to the events which took place on 8/11/2018. There was an incident between the claimant and a colleague. The claimant stormed out and returned an hour later and he demanded a meeting with Mr Bitran, which took place with Mr Couser present. The claimant made threats during this meeting and he agreed he was both angry and upset. It was towards the end of the claimant's shift and as it was obvious to Mr Bitran that no meaningful work would take place for the remainder of the shift, he sent the claimant home. The claimant was not suspended. He assumed he had been suspended but he was not. The claimant did not attend work on the following day, although he did speak with Mr Bitran by telephone later that day.

39. During that conversation, the claimant suggested severance terms, which Mr Bitran would not countenance. The claimant did not attend work on the 10/11/2017 to 14/11/2017.

40. On the 14/11/2017 at 13:23 (page 56), Mr Bitran sent an email to the claimant

terminating his employment due to his erratic behaviour over the last few months (which was the subject of the two previous formal meetings) and his subsequent behaviour on 8/11/2018 and 9/11/2018. That was the reason the claimant's employment terminated and it was not as a result of him raising statutory rights or making protected disclosures. In an email in reply, sent at 15:24 the claimant raised, the Tribunal finds for the first time, the issue of a lack of written statement and claimed that there were breaches of the WTR. In fact, the claimant did not say in that email, words to the effect of 'as I have raised repeatedly' or 'as per previous conversations'.

41. He wrote:

> 'If my job role has been changed I do believe that I need to receive this in writing and agree to the changes. This is the matter I have been trying to discuss and I will be happy to take up with Acas. I am also going to take up the environment that you have created for me and others to work in. I was made to work 10 hours a day which accumulates to 50 hours a week with no official lunch or breaks, you are breaking working time laws and I will again be seeking advice from Acas.'

42. Clearly the claimant is here referring to statutory rights, however this post-dates the dismissal and therefore, cannot be the reason for the dismissal.

43. Finally, the claimant made allegations that Mr Bitran had subjected him to detriments in respect of his whistleblowing claim and on the grounds that he had asserted his rights under the WTR. Mr Bitran denied he had berated the claimant or changed his job role. Mr Bitran said there was no investigation as there was no need for one. Finally, in respect of the monitoring of time-keeping, it was monitored as the claimant's was so poor.

44. The Tribunal finds that Mr Bitran did not berate or humiliate the claimant. Mr Bitran agreed that on occasion he would reprimand a member of staff and the claimant himself said there were ups and downs and it was pretty normal for there to be heated discussions. The Tribunal finds there was no change to the claimant's job role. The role may well have evolved over time, but there was no substantive change. In view of the length of service, there was no need for the respondent to follow a disciplinary process when dismissing the claimant. There had been a process prior to that, with two formal meetings. Lastly, the claimant's time-keeping was monitored, but the reasons for this was that his time-keeping was poor; which the claimant agreed was the case. The claimant was not subjected to any detriment(s) (in the sense of being put under a disadvantage or any form of general unfavourable treatment).

45. As the Tribunal has not found in the claimant's favour, it makes no award under s. 38 of the Employment Act 2002 in respect of the respondent's failure to provide a written statement of employment under s. 1 ERA.

46. For those reasons, the claimant's claims fail and are dismissed.

Employment Judge Wright

4 March 2020