



EMPLOYMENT TRIBUNALS

Claimant: Miss S Harker

Respondent: Marine Management Organisation

Heard at: North Shields

On: 19 February 2020

Before: Employment Judge A.M.S. Green

Representation

Claimant: Not present or represented

Respondent: Mr Kerfoot - Counsel

JUDGMENT

Pursuant to Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, schedule 1, rule 47 the claim for wrongful dismissal (breach of contract) is dismissed.

REASONS

1. On 23 December 2019, the parties were notified that the claimant's claim for breach of contract would be heard at a final hearing at North Shields on 19 February 2020. The hearing was scheduled to start at 10am. The claimant had prepared an evidence bundle which had been filed and served on the respondent. She had not prepared a witness statement.
2. At 10 am on the morning of the hearing, my clerk informed me that the claimant had not come to the hearing. He told me that the respondent and their representative was present and ready to proceed. I asked the clerk to telephone the claimant to ascertain her whereabouts. Shortly thereafter, he reported back to me that the claimant had decided not to come to the hearing and he handed me an email from the claimant to the Tribunal administration that was sent at 09:48 am (i.e 12 minutes before the hearing was scheduled to start). In that email, the claimant asks for the hearing to be cancelled because of her deteriorating mental health and the fact that she cannot afford legal representation.
3. I convened the hearing and heard Mr Kerfoot's representations. He submitted that the claim was ill conceived and had no reasonable prospect of success in that the respondent had lawfully terminated her contract and had paid her in lieu of notice which it was entitled to do. He submitted that the application to cancel the hearing

was made very late in the day and was wholly unreasonable. The respondent had incurred unnecessary legal expenses as a consequence. He invited me to dismiss the claim and to make an award of costs against the claimant.

4. I have decided that it would be in the interests of justice to dismiss the claim having considered the information available to me and after enquires had been made about the reasons why the claimant was absent.
5. On the papers provided to me and having read the particulars of claim, it is obvious that the claim is ill conceived and had no reasonable prospect of success. The claimant alleges wrongful dismissal based on various alleged failures by the respondent to follow procedures which, if they had been followed, would have meant that her employment would have continued. She claims 6 months salary as a “compensatory amount”. I note that her contract provides for payment in lieu of notice. The respondent paid the claimant in lieu of notice was entitled to terminate her contract with immediate effect. On the papers it is clear that the respondent paid her four weeks in lieu of notice and this is not disputed. Even if her employment had not been terminated in accordance with her contract, according to well known principles of contract law, she would have been entitled to damages, subject to her duty to mitigate her loss and according to the principle in **Hadley v Baxendale** the measure of damages would be based on putting her in the position that she should have been placed had the contract been properly performed (i.e. by giving her the required notice). Put another way, the maximum compensation she could recover would be her notice and no more. She has been paid her notice and, therefore, has suffered no loss.
6. The overall impression that I gained is that this was, to all intents and purposes, a disguised unfair dismissal claim. The claimant sought 6 months loss of salary which she describes as “compensatory” flowing from alleged breaches of procedure by the respondent. It is well established law that such claims cannot be made under the common law because of the existence of the statutory remedy of unfair dismissal. However, in the claimant’s case, because she did not have the requisite 2 years’ qualifying service to have protection against unfair dismissal, her only claim on termination of employment that she could pursue was wrongful dismissal (i.e. breach of contract). For the reasons given above, that claim fails.
7. I am concerned about the claimant’s conduct. I accept that in certain circumstances, a very late application to cancel a hearing is justifiable. However, the claimant’s behaviour is not justified. Whilst she claims that she is suffering from deteriorating mental health, she did not provide any supporting medical evidence to vouch for that. She could and should have provided a “soul and conscience” letter from a medical practitioner vouching for the fact that she was not fit enough to attend the hearing. She failed to do that. Furthermore her claim that she could not afford legal representation does not, in my opinion, amount to a reasonable excuse for non attendance. Litigants in person (i.e. people who have no legal or other representation) are common place in the employment tribunal. Indeed, the employment tribunal was established to facilitate less formal proceedings than in the civil courts to encourage speedy and straightforward disposals of cases which can be conducted by party litigants. Judging by the fact the claimant has been able to prepare her claim form and put together a coherent evidence bundle, she demonstrated that she is more than capable of conducting her own litigation. Her last minute cancellation of the hearing points to unreasonable and unacceptable conduct on her behalf. She could have asked much earlier for the case to be dealt with on the papers without the need for a hearing. Had she done that, the respondent would not have needed to instruct counsel to attend the hearing.
8. Mr Kerfoot has applied for costs. I said that his application was premature and I would not deal with it at this stage.

Before a costs application can be dealt with, the claimant must be put on notice of such an application to give her a opportunity to answer it and to say why a costs order should not be made.

Employment Judge A.M.S. Green

Date 19 February 2020