



EMPLOYMENT TRIBUNALS

Claimant: Mr Joe Butler
Respondent: Smartcomms SC Ltd

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: Watford (by telephone) **On: 7 July 2020**
Before: Employment Judge Alliott (sitting alone)

Appearances

For the claimant: In person
For the respondent: Mr J England (counsel)

JUDGMENT

1. No order is made following consideration as to whether the claim should be struck out on the grounds that it has no reasonable prospects of success.

REASONS

1. This open preliminary hearing was ordered by Employment Judge Lewis on 8 February 2020 to determine the following issue:

“To consider if the claim should be struck out on grounds that it has no reasonable prospects of success.”
2. The claimant was employed by the respondent on 3 April 2018 as an associate javascript developer. His employment was terminated with immediate effect on 23 August 2019, the reason given being unacceptable attendance levels. Although I have not seen a copy of the claimant’s contract of employment I understand that he was paid four weeks’ pay in lieu of notice pursuant to an express contractual clause and his outstanding holiday entitlement was also paid.
3. Obviously enough the claimant has insufficient service to present a claim for “ordinary” unfair dismissal.
4. By a claim form presented on 5 November 2019 the claimant claims breach of contract, relying on an implied term of the contract. In discussion with the claimant it would appear that page 7 of the claim form was cut off when the claimant submitted his claim. This was pointed out by the respondent to the

tribunal and the claimant told me that he emailed a complete copy of his claim to the tribunal and the respondents. I caused my clerk to search the system for a full copy of the claim form and the email referred to could not be located.

5. My understanding of the implied term of the claimant's contract of employment that he seeks to rely upon relates to dismissing him thereby preventing his potential claim under permanent health insurance.
6. Events leading up to 23 August 2019 do not appear to be in material dispute. On 30 October 2018 the claimant went off work with a urinary tract infection and fatigue. He returned to work on 1 January 2019, on a phased return to work, working four days per week. Initially this was intended to be for four weeks. However, on 11 February 2019 the four day working week was extended for a further eight weeks. It was further extended on 30 April for 12 weeks.
7. On 2 July 2019 the claimant was referred to occupational health and a report was prepared dated 3 July 2019. The OH report states that the claimant had returned to work on reduced days (four days per week) and has been well since. It states that he does not suffer with any other medical conditions and he is not on any medication. The report recommends:-

“Mr Butler does not suffer with any underlying medical condition, however working full time has impacted on his mood and he has been off work for two months. Since he has been working four days per week his mood has improved and he feels well in himself.”

8. On 23 July 2019 a meeting was held with the claimant to discuss the OH report. The claimant did not dispute how the respondent summarised that meeting in paragraphs 11 and 12 of the response form. The four day working week was extended for a further eight weeks but it was pointed out to the claimant that it was a full time role and the intention remained to return the claimant to working full time.
9. In early August 2019 the claimant told me that he had a substantial escalation in his condition. He had a panic attack whilst at work and sought advice from an emergency GP. He states that he was diagnosed with depression and that his symptoms were the same as experienced the previous year. It would appear that he submitted a fit note on 5 August 2019 in which he was said to be suffering from stress and depression. He was signed off work for four weeks.
10. It would appear that due to the claimant going off sick a disciplinary meeting took place on 23 August 2019 in order to discuss the claimant's unacceptable attendance levels. He had had apparently 72 days off over the last 10 months. At the conclusion of that meeting the claimant was dismissed with immediate effect.
11. There is a significant disagreement as to what the claimant said at that meeting. In the letter dated 23 August 2019 it is recorded that:-

“You asked us to put on record that you had thought an arrangement working four days was manageable and that this will have a profound effect...”
12. The claimant told me today that he did not state this and that he was, as far as he was concerned, potentially off on long term sickness absence. The claimant thought that the respondent had videoed and recorded that meeting and, if so, a

transcript would be of assistance. Obviously enough I cannot at this hearing determine that conflict of evidence.

13. The respondent did have permanent health insurance. The respondent's document headed: "Group Income Protection Scheme" has been produced to me. This states as follows:-

"What benefit is provided?

The GIP scheme is designed to provide you with a continuing income in the event of you suffering long term ill health but prevents you from carrying out your normal occupation.

...

What benefit is received?

...

If you become well enough to return to work either on a part time basis or in a less well paid occupation then you may be entitled to a partial benefit, or if you are already receiving benefit, this may continue but at a reduced rate.

When is the benefit payable?

In the event that you have been unable to work because of sickness or injury for 13 weeks, the insurer will medically assess you to determine if you are able to make a claim. If payment is granted then benefits will continue until you return to work or reach your State Pension age.

How is illness defined under the GIP scheme?

The illness or injury that you suffer must be such that you are totally unable to carry out your own occupation."

14. The claimant produced to me the insurance company policy documentation which does appear to have a materially different definition of illness or injury. This document has the following definition:-

"As a result of the illness or injury the member is incapable of performing the material and substantial duties of their occupation and they are not carrying out any other work or occupation."

15. The policy also refers to payments due to reduced working.

The law

16. I record here that I have considered the extract from Harvey on Industrial Relations and Employment Law/-7 Termination of contract – (2) Implied constraints on the right to give notice.

17. In particular the following references appear to me to be relevant:-

At 415 –"In Aspden v Webbs Poultry and Meat Group (Holdings) Ltd [1996] IRLR 521, an otherwise unrestricted power to terminate the contract of employment was held to be qualified by an implied term to the effect that the employer would not terminate the contract whilst the employee was incapacitated where to do so would have the effect of preventing an incapacitated employee qualifying for a permanent health insurance benefit."

18. That implied term was apparently approved obiter by the Court of Appeal in two further cases.
19. Harvey goes on to state:-

“This principle was given recent application in Awan v ICTS Ltd [2019] IRLR 212, EAT. It was held that a term may be implied to prevent the employer depriving the employee of the benefit of a long term disability plan by application of the officious bystander and business efficacy tests”
20. At paragraphs 417.03 and 417.04 cases are cited in support of the proposition that notwithstanding such an implied term an employer could still dismiss an employee if it was “necessary” or for “reasonable and proper cause”. Further, express provisions of the employment contract may nevertheless permit dismissal for any specific or indeed no cause.

Conclusion

21. I conclude that the existence of an implied term of the claimant’s contract as set out in the case of Aspden is good law.
22. The claimant’s complaint is that having had two months off work followed by eight months of working four days a week and having gone off sick on 5 August 2019 the respondent should have delayed dealing with him for absence until such time as it may or may not have become apparent he could make a claim under the permanent health insurance. He characterises the decision to dismiss him as a breach of contract.
23. I have concluded that I cannot say that he has no reasonable prospect of succeeding in that argument.
24. Following my determination Mr England, on behalf of the respondent made an oral application for a Deposit Order. For the same reasons that I have concluded on the Strike Out, I have decided that I cannot say that the claimant has little reasonable prospect of succeeding. Accordingly I determine not to make a Deposit Order.

Employment Judge Alliott

Date:.....25th July 2020.....

Sent to the parties on:

.....9th October 2020.

For the Tribunal:

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