



EMPLOYMENT TRIBUNALS

Claimant: Mr S Alexander

Respondent: Mersey Care Foundation Trust

PRELIMINARY HEARING

Heard at: Manchester (in public by CVP)

On: 2 November 2020

Before: Judge Brian Doyle (sitting alone)

Representatives

For the claimant: In person

For the respondent: Ms B Worthington, solicitor

JUDGMENT

(1) The respondent's application under rule 20 of the Employment Tribunals Rules of Procedure 2013 is granted and its response to the claim is accepted.

(2) The claimant has insufficient length and continuity of employment for the purposes of sections 108 and 218 of the Employment Rights Act 1996 and the Tribunal does not have jurisdiction to determine his complaint of constructive unfair dismissal. That complaint is dismissed.

(3) The sole remaining complaint in respect of holiday pay may proceed to a final hearing.

REASONS

1. This is a preliminary hearing held by video conference technology to determine two preliminary issues as follows. First, whether to grant the respondent's application under rule 20 of the Employment Tribunals Rules of Procedure 2013 to present a response to the claim out of time. Second, whether the claimant has sufficient continuous length of service to be enabled to bring an unfair dismissal complaint.
2. On both preliminary issues I heard submissions from the claimant and from the respondent. I do not reproduce those submissions here, although they will be apparent from the way in which I have dealt with the preliminary issues below.
3. The first preliminary issue is whether to grant the respondent's application under rule 20. Although I do not have the case file before me, it appears that the claim was presented on 11 May 2020. I am unable to conclude that the claim was not sent to the respondent by the Tribunal office and that it was not received within the respondent's organisation. In the absence of better evidence, I am entitled to conclude that the claim was sent to the respondent and that it was received.
4. Whatever the position might actually be, the respondent did not respond to the claim within the time limit provided by rule 16, namely, within 28 days of the date on which a copy of the claim was sent to the respondent. It appears likely that notice of the claim was not reacted to until someone within the respondent's organisation became aware that the matter was listed for a hearing. The respondent's solicitor was alerted to the matter on 30 July 2020 and she took urgent steps to present a response to the claim on the same day.
5. For the respondent, Ms Worthington accepts that the response has been submitted late. She refers to the difficulties created for the respondent and for the NHS generally by the current at Covid-19 pandemic and the pressure that that has created for the health care system generally. She accepts that the claim was likely to have been received within the respondent's organisation, but was not picked up by the relevant staff. With her assistance, the respondent responded as soon as it became aware of the matter and submitted an ET3 response, albeit without knowing the full detail of the claimant's unfair dismissal complaint. The respondent's HR Department had a dim recollection of some contact from Acas, likely to be as part of the early conciliation process, in November or December 2019, but this had not been enough for the potential of an Employment Tribunal claim to be on the respondent's watch list.
6. Ms Worthington submits that the length of the delay in presenting a response does not prevent the claimant from having the benefit of a fair hearing. In her rule 20 application for an extension of time she advances the argument that the respondent has at least an arguable defence to the claim. First, for the purposes of the complaint of unfair dismissal, there is an issue about whether the claimant has sufficient continuity of service qualifying him to bring such a complaint. Second, in respect of the claimant's holiday pay complaint, the respondent believes that the claimant has taken his annual leave entitlement

and has been paid at for it between 23 September 2019 and 13 October 2019. Third, as the claimant resigned his employment, he must rely upon a constructive dismissal in order to establish his unfair dismissal complaint. There is not enough information in the ET1 claim, but this makes the matter potentially arguable.

7. The claimant resists the rule 20 application. He points out that he completed his tribunal documents in good time. He says that the respondent was 6 weeks late in presenting its response. The matter only came to the respondent's attention because he contacted the tribunal in order to inquire about the progress of his claim. He contends that it was highly unlikely that the respondent did not receive the relevant documents from the tribunal. He points out that he is working under similar difficulty as an employee of an NHS employer. While he accepts the respondent's difficulties, he objects to a rule 20 extension of time. He says that he did not take paid holiday during the last days of his employment (except for 3 days), but had been placed on gardening leave. He asserts his entitlement to be paid for untaken holidays.
8. I shall assume for present purposes that the response to the claim has been presented up to 6 weeks later than the requirement of rule 16. The respondent must rely upon rule 20, which is silent as to the test I should apply when considering the respondent's application. I have an absolute discretion to extend the time limit for presenting a response, subject to the overriding objective to deal with cases fairly and justly (rule 2).
9. I have taken account of the respondent's explanation as to why an extension of time is required and I accept that explanation. The delay is not a serious one, but the respondent has provided a satisfactory and honest explanation for it. The application is not without merit and the balance of prejudice to the respondent if it were not allowed to defend the claim outweighs any prejudice to the claimant. The potential defence to the claim, on the face of it, is not without potential merit and requires to be tested at a hearing. I take particular account of the fact that this is an NHS employer operating in unusually difficult circumstances created by the current pandemic.
10. Accordingly, taking all of these matters into account, I grant the rule 20 application and permit the response to be accepted. The respondent has leave to apply to amend its grounds of resistance, if so advised.
11. The second preliminary issue is the question of the claimant's length of service.
12. To qualify for the right to complain of unfair dismissal employees must generally show that they have been continuously employed for at least two years. See section 108 of the Employment Rights Act 1996. There are a number of exceptions to this requirement, but the claimant does not seek to rely upon them.
13. Rather his position is that he has been employed within the NHS as a national organisation for the requisite length of service and he relies upon the total length of his NHS employment between April 2017 and October 2019. While

evidence of this might be required in due course, for present purposes I have taken what the claimant has told me at face value. His NHS service began in April 2017 when he was employed by the Salford Royal Hospital NHS Foundation Trust, having previously been employed by Wigan Council. In August 2017 he left Salford and became employed by the Lancashire Care Foundation Trust, before joining the present respondent in August a2018, until his employment terminated in October 2019.

14. As I anticipated, and as the respondent's representative has submitted, each of those three NHS employers are separate legal entities. The claimant is not permitted to add those separate employments together so as to provide him with the necessary continuity and length of employment qualifying him to bring a complaint of unfair dismissal by reference to section 108. While there are various exceptions whereby an employee who has worked for different health service employers may seek to claim continuity of employment, none of those exceptions apply in respect of bringing a complaint of unfair dismissal. See for example the provisions in section 218 of the Employment Rights Act 1996.
15. Accordingly, the claimant does not have sufficient length and continuity of employment to qualify to bring his unfair dismissal complaint against the present respondent and that complaint is dismissed.
16. That leaves the complaint in respect of holiday pay. It seems possible or probable that that dispute is actually about whether in the period in question the claimant was on gardening leave, and therefore entitled to be paid his salary in the usual way, or whether he was being treated as using up unused holiday entitlement, for which he was paid. Ms Worthington for the respondent has undertaken to check the position with the respondent and communicate with the claimant and the tribunal within the next 14 days. I anticipate that if that matter can be resolved with the benefit of better information then the need for a further hearing can be avoided. The parties shall advise the tribunal whether this matter has been settled between them or whether a further and final hearing is required as soon as possible.

Judge Brian Doyle

DATE 3 November 2020

JUDGMENT & REASONS
SENT TO THE PARTIES ON

10 November 2020

FOR THE TRIBUNAL OFFICE