



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr M Barlow

v Carolyn Moore Trading As Charity Link

Heard at: Watford

On: 14 October 2020

Before: Employment Judge Wyeth (sitting alone)

Appearances:

For the Claimant:

In person

For the Respondent:

Ms S Omeri (counsel)

JUDGMENT having been sent to the parties on 12 November 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

The claim

1. By way of an ET1 dated 19 January 2020, the claimant brings one complaint of wrongful dismissal (i.e. dismissal in breach of contract).

The facts

2. The following are agreed facts. The claimant commenced employment on 29 April 2019 and his employment was terminated by the respondent on the 21 November 2019. He was employed as a charity fundraiser (field-based). At a meeting with Greg Sharples on 21 November 2019 the claimant was informed that his employment was to be terminated apparently because he had not undertaken a successful probationary period. The claimant commenced the process of ACAS Early Conciliation ("EC") on 6 December 2019 and a certificate was issued on 20 January 2020 one day after the claimant issued his ET1 claim form.
3. The claimant signed a copy of his employment contract on 22 April 2019 (electronically). A copy of that contract was before me in the bundle in evidence. The following terms of the contract are of relevance:

“1.2 The first six months of your employment will be a probationary period and your employment may be terminated by either party during this period at any time on one week’s notice. Your performance and suitability for continued employment will be monitored during this period. The employer may, at its discretion, extend the probationary period for up to a further three months and if it shall fail to notify you in writing that you have successfully completed your probationary period, it will be treated as having been so extended.

9.1 After successful completion of your probationary period in clause 1.2, your employment with the employer and this contract may be terminated by either party giving to the other at least one week’s prior written notice in the first two years of your employment and thereafter one week’s prior written notice for each complete year of service to a maximum of 12 weeks’ notice.

9.2 The employer may, at its absolute discretion, terminate your employment with immediate effect by giving you notice that it is exercising its right to do so under this clause and that it will make you a payment in lieu of notice equivalent to your salary for the notice period in clause 9.1.

17. Details of the employer’s disciplinary procedures can be found in the fundraisers handbook.... The disciplinary procedures do not form part of your contract of employment.”

4. At the hearing today, the claimant accepted that this was his contract and these were the relevant terms within it. He also accepted that the respondent had paid him one week’s pay in lieu of notice. In essence, his challenge to his dismissal related to the fairness of the procedure followed by the respondent. He accepted that he did not have qualifying service to pursue an unfair dismissal claim and none of the exceptions to qualifying service applied in his case. His claim was not one of discrimination in any form.

The Law

5. Section 18A of the Employment Tribunals Act 1996 states the following:

“(1) Before a person (“the prospective claimant”) presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.

....

(4) If –

(a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or

(b) the prescribed period expires without a settlement having been reached,

the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant.

...

(8) A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).”

6. “Relevant proceedings” includes wrongful dismissal claims (i.e. breach of contract) – see s18(1)(g) of the Employment Tribunals Act 1996.
7. The relevant part of Rule 12 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 state:

“(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim or part of it, may be –

...

(c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;

(d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;

...

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a), (b), (c) or (d) of paragraph (1)."

Conclusions

8. Firstly, I explain to the claimant that the tribunal had no jurisdiction to hear his claim because at the point at which he issued his claim form he had not completed the ACAS early conciliation process. The claimant accepted that this certificate was only issued to him on 20 January 2020. Consequently, he issued his claim incorrectly, one day before the certificate has been issued, and in those circumstances there was no legal entitlement to pursue a claim. This was not a claim in which one of the exemptions to the ACAS early conciliation process applied.
9. In essence, the claim should not have been accepted when it was issued as it did not comply with s18A(8) of the Employment Tribunals Act 1996 and was contrary to rules 18(1)(c) or (d) of the Employment Tribunal Rules of Procedure 2013 in that it did not contain an ACAS EC number and it was suggested that the claim was exempt from ACAS EC when it was not. It was entirely apparent to me that the tribunal had no jurisdiction to hear the claim.
10. Be that as it may, it seemed appropriate for me to go on and consider the strength of the claim that he was intending to pursue had he been able to do so in the event that the claim had been not been issued prematurely.
11. I explained to the claimant that the law in relation to wrongful dismissal was governed by common law principles. In essence there was no obligation on an employer to follow a fair procedure when terminating a contract of employment. That obligation only arises in the event that there is an entitlement to pursue an unfair dismissal claim under the Employment Rights Act 1996. It was agreed that no such claim could arise in this case.
12. There was no contractual disciplinary procedure applicable. It was clear from the terms of the contract that there was no obligatory process that had to be followed before the contract could be terminated. As such there was no entitlement to what might be known as 'Gunton' damages (i.e compensation for the period of time it would have taken the respondent to terminate the contract in accordance with any procedure that must be followed in accordance with the terms of the contract). It was apparent that the employer was entitled as a matter of law to terminate the claimant's contract on the giving of one week's notice or payment in lieu of such notice. There were no other contractual obligations on either side relevant to termination. The views of either party as to the merits of terminating the claimant's employment (or, for that matter, the claimant's performance during his employment) were wholly relevant. Harsh as it may be, there is

no obligation on the respondent to follow a "fair" procedure prior to giving notice to terminate.

13. As a consequence, the only remedy available to the claimant for wrongful dismissal would be compensation for an amount equivalent to the failure to give such notice. That would require the claimant to prove first that he had not received the notice to which he was entitled under the contract. It was an accepted fact that the respondent had paid the claimant in lieu of notice for one week. Therefore, there was no wrongful dismissal/breach of contract. Accordingly, even if this tribunal had jurisdiction to hear this complaint, I would have dismissed the claim in any event for those reasons.
14. By way of a footnote, having explained my decision to the claimant, he expressed disappointment and indicated that he intended to continue to pursue the respondent. He made reference to an intention to pursue a claim for discrimination against the respondent. He did not elaborate on the basis upon which he considered that he had any form of discrimination claim. I raised with him the fact if it was said to arise out of his employment, this would be substantially out of time and there would be a reasonable enquiry into why he did not refer to this in the claim being dealt with today if he genuinely believed the respondent had in some way discriminated against him. I referred the claimant to Rules 76(1)(a) and (b) regarding the possibility of costs being awarded against a party that pursues a claim vexatiously or unreasonably.
15. Finally, I wish to apologise to the parties for the delay in providing these written reasons. I received the request at the beginning of December but in that time due to personal circumstances including a bereavement I have not been able to finalise these as quickly as I would have wished.

Employment Judge Wyeth
Date: 28 January 2021
28.01.2021
Sent to the parties on:
J Moossavi
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For the Tribunal Office