



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr J Wyrwal
Mrs A Stempien-Wyrwal

v

Chapel Cottage Plants Ltd

Heard at: Bury St Edmunds

On: 10 December 2020

Before: Employment Judge S Moore

Appearances

For the First Claimant: Mrs A Stempien-Wyrwal

For the Respondent: Ms Bewly, Counsel

JUDGMENT

The judgment of 13 August 2020 is varied in the following respects:

- (1) The First Claimant's claims brought under case number 3328257/2019 for unfair dismissal and disability discrimination have no reasonable prospect of success and are struck out
- (2) The First Claimant's claim brought under case number 33282366/2019 has no reasonable prospect of success and is struck out.
- (3) The Second Claimant's claim brought under case number 3328365/2019 for constructive unfair dismissal has no reasonable prospect of success and is struck out.
- (4) The Second Claimant's claim brought under case number 3328258/2019 has no reasonable prospect of success and is struck out.

REASONS

1. This was an application to strike out the claims, alternatively for a deposit order under rules 37 and/or 39 of the Employment Tribunal rules of Procedure 2013.
2. Claims were made on 30 December 2019 in respect of the First Claimant, brought by both the First and Second Claimant. Claim 3328257/2019 was brought by the First Claimant. Claim 3328258/2019 was brought by the Second Claimant and is misconceived and/or has no reasonable prospect of success and should be struck out.
3. Claims were similarly made in respect of the Second Claimant, brought by both the First and Second Claimant. Claim 3328365/2019 was brought by the Second Claimant. Claim 33282366/2019 was brought by the First Claimant and is misconceived and/or has no reasonable prospect of success and should be struck out.
4. The First Claimant's claim brought under case number 3328257/2019 and the Second Claimant's claim brought under case number 3328365/2019 are addressed below.
5. The First Claimant's claim is for unfair dismissal and disability discrimination. The disability relied upon is depression. He was employed by the Respondent between 2 February 2009 and 2 October 2019
6. It is common ground that the Claimant received a written warning about his alcohol use on 18 January 2019 when he had to be taken home from work. He was suspended on 22 July 2019, following what the Respondent says were several alcohol related incidents. After four disciplinary hearings were rearranged because of the Claimant's absence, a disciplinary hearing took place on 2 October 2019 following which he was dismissed. The reason given for dismissal was "erratic behaviour whilst under the influence of alcohol putting the business at risk."
7. On 16 March 2020 he was directed to provide to the Respondent an impact statement and any medical evidence by 3 April 2020. No such information was provided
8. The Second Claimant's claim is for constructive dismissal. On 31 March 2020 the Respondent wrote to the Tribunal requesting it be struck out as no legal claim was made out and on 10 April 2020 the Second Claimant was ordered to provide particulars of her claim.
9. On 6 May 2020 the Second Claimant provided further details of the First Claimant's claim but no information about disability was provided. Further she did not particularise her constructive dismissal claim.
10. On 23 August 2020 the First Claimant was ordered to provide his information in respect of disability within 21 days.

11. At a preliminary hearing on 21 September 2019 an unless order was made requiring the First Claimant to provide a statement in respect of his disability by 16 October 2020 and listing the Respondent's strike out application and/or for a deposit order to be heard at an Open Preliminary Hearing.
12. The First Claimant has now provided medical certificates (translated from Polish) dated 15 and 16 October 2020 which states that he has been diagnosed with depressive disorders and alcohol abuse. He also produced a report from a Psychiatrist from a private medical clinic in Poland dated 2 November 2020. This refers to the First Claimant undertaking a 2-week long psychotherapy treatment in Poland in March 2018 for alcohol addiction and to further and ongoing treatment for depression and alcohol addiction. In July 2019 the First Claimant went to hospital because he was contemplating suicide but was not admitted. After his suspension from work he went to Poland where he had a 4-month period of alcohol in-patient psychotherapy in Poland. The First Claimant's medical notes from his GP have not been provided because (so it appears from an email exchange between the Second Claimant and the First Claimant's GP) the notes were destroyed after the First Claimant returned to Poland. However sick notes submitted to the Respondent in May and July refer to the First Claimant's conditions as depression and problems with drinking alcohol.
13. The First Claimant has also provided an impact statement. He states that he began treatment for depression in 2017 and at that time began to drink to calm his nerves. Unfortunately, he became too dependent on this method and the alcohol took over. He further states that he believes his dismissal is discriminatory because the Respondent used a side-effect of his depression - namely alcoholism - to dismiss him.
14. The First Claimant did not attend either the hearing on 21 September 2020 or today, and I understand that he remains in Poland.
15. Miss Bewly points out that the reason for the Claimant's dismissal was his alcoholism and/or his behaviour arising from his alcoholism and that alcoholism is excluded from the definition of disability for the purposes of the Equality Act 2010 by regulation 3 of Equality Act (Disability) Regulations 2010.
16. The Second Claimant submitted that the First Claimant's alcoholism was a side effect of his depression. She also said that as a result of his alcoholism he had been disqualified from driving in October 2018. Although the Respondent said the reason that they dismissed the First Claimant was because of his alcoholism they hadn't provided evidence of particular incidents. After the First Claimant was suspended from work he felt very low and went to Poland for treatment for his alcoholism. However, the underlying cause of his problems with alcohol was depression and anxiety.
17. Although it may well be true that the First Claimant's problems with alcohol arise from his depression, if the reason for his dismissal was due to his problems with alcohol then because addiction to alcohol is excluded from

protection under the Equality Act it does not help him that the underlying cause of his addiction is depression (**Wood v Durham County Council UKEAT/0099/18/00**). The question is what was the effective cause of the dismissal?

18. In this case the reason for dismissal given by the Respondent is the First Claimant's "erratic behaviour whilst under the influence of alcohol putting the business at risk" and I consider that that there is no reasonable prospect of some other reason, in particular the First Claimant's underlying depression, being found to be the effective cause of dismissal.
19. First, the First Claimant's claim form begins "Since 2017 I have problems with depression. My employers accepted my situation and they told me if I need any time free I can take it. They have been supporting me all this time."
20. Second, although I did not hear evidence today a number of facts were undisputed, and they are all consistent with the Respondent's assertion that the reason for dismissal was because of the Claimant's problems with alcohol (rather than depression). In particular, the fact the First Claimant had been disqualified from driving in October 2018, that he had received a written warning in January 2019 for being under the influence of alcohol at work and needing to be taken home, and thirdly that during the period of the Respondent's disciplinary process he was in Poland undergoing a 4-month period of alcohol in-patient psychotherapy. Further, in his own statement of discrimination the First Claimant contends that the Respondent dismissed him because a side-effect of his depression – namely his alcohol addiction, and he further states that he relied on alcohol to get through his working day.
21. It follows from this that I agree with Ms Bewley that the First Claimant's claim of disability discrimination is fundamentally flawed. I therefore find it has no reasonable prospect of success and must therefore be struck out.
22. As regards the complaint of unfair dismissal, in his claim form the First Claimant appears to assert that the dismissal was unfair because the Respondent did not provide him with evidence of his drinking at work and because he wasn't sent the notes of the disciplinary meeting. The Respondent says evidence was provided to the Claimant under cover of a letter from an HR Consultant dated 31 July 2019, but in any event the First Claimant has admitted using alcohol to "get through his working day" and it is manifestly apparent that at the time the Claimant was suspended and dismissed his problems with alcohol were severe. Indeed, it is common ground that the Respondent re-arranged the disciplinary hearing 4 times because the Claimant was in Poland having in-patient treatment for alcohol addiction. In these circumstances it appears plain that the Claimant knew the reason why disciplinary action was being brought against him, and was given the opportunity to be heard at a disciplinary hearing. It is common ground that he chose not to appeal the outcome. In these circumstances it again seems to me that the Claimant's chances of succeeding in his claim for unfair dismissal

are fanciful. I consider it has no reasonable prospect of success and must therefore be struck out.

23. I turn now to the Second Claimant's claim of constructive dismissal. She resigned on 2 October 2019 at the conclusion of the First Claimant's disciplinary hearing at which he was dismissed. The matters she relies upon as constituting a fundamental breach of contract are:

- Mr David Green allegedly shouting at her in an open field in front of other staff, "I'm the boss and I do what I want to do, do you understand Ellie?" in August 2019
- After returning from holiday in September 2019, being invited to a meeting with HR and David Green and asked how the First Claimant was doing and if he was improving, and how their life and relationship was fairing;
- HR asking to come to their home the day before the disciplinary meeting to speak to the First Respondent about how he was, but David Green also coming too and having more of an official meeting and not just a "chat".

24. I do not consider that any of these matters, even taken at their highest, could amount to a fundamental breach of contract by the Respondent that entitled the Second Claimant to resign and claim constructive dismissal. Further, the Second Claimant plainly did not resign in response to either of the first two alleged incidents, she resigned on 2 October 2020 in response to her husband being dismissed at the conclusion of the disciplinary meeting. I therefore consider that the Second Claimant's claim of constructive dismissal has no reasonable prospect of success and that it must also be struck out.

Employment Judge S Moore

Date:5/3/21.....

Sent to the parties on:

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For the Tribunal Office