Case Number: 2203278/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
MR K HAMID DANKALI

Respondent
LONDON UNITED BUSWAYS LIMITED

OPEN PRELIMINARY HEARING JUDGMENT

HELD AT: London Central (CVP video audio call) ON: 17 December 2020

BEFORE: Employment Judge Russell (sitting alone)

REPRESENTATION:
Claimant: Mr Ibekwe, Union rep
Respondent: Mr Craven , Solicitor

Judgment

A. The Claimant's claims of race discrimination and or harassment under s,9,13 and or 26 Equality Act 2010 are dismissed upon withdrawal by the Claimant.

B. The Claimant's claim of automatic unfair dismissal under Reg 7 TUPE Regs 2006 and Part 10 ERA 1996 is dismissed upon withdrawal by the Claimant.

C. The Claimant's claims of unfair and wrongful dismissal and a failure to make reasonable adjustments based on his disability continue to a full hearing.

Background and Reasons

1. The Respondent dismissed the Claimant after a long period of absence . On the purported grounds of capability . The Claimant had a number of claims relating to his dismissal and the conduct of the Respondent but as they were , in some cases, unparticularised and or confused an Open Preliminary Hearing was listed for 9 November 2020 to consider the Respondent's application for a strike out and or deposit order.

2. The Respondent applied for a strike out and or deposit order under Rule 37/39 of the ET's (Constitution & Rules of Procedure) Regs 2013 Sch 1 on the grounds that the Claimant's claims of race discrimination under section 9 and/or section 13 of the Equality Act and under Reg 7 TUPE Regs 2006 and Part 10 ERA 1996 for automatic unfair dismissal and further claims of wrongful dismissal/ breach of contract had no or little reasonable prospects of success.

3. On 9 November a judgment was given to allow the Claimant's case of wrongful dismissal/ breach of contract to continue without strike out or a deposit order along with the claim of unfair dismissal but the judgement did strike out the Claimant's claims of race discrimination and claim to have been dismissed for TUPE related reason under Reg 7 TUPE Regs 2006 .But on reconsideration this part of the Judgment was revoked. It was determined that the Claimant's representative had not had sufficient opportunity to make submissions in response to the Respondent's application and so the part of the judgement that was detrimental to the Claimant was revoked and with a view to being considered at a further hearing , which happened today.

4. Mr Ibewye's written and oral submissions were considered by me today along with the Respondent's submission but consideration of the outstanding part of the original strike out application was paused when the Claimant indicated he wished to withdraw two distinct claims. The Claimant , through his representative, first clarified that the race claim was principally one of harassment under s26 Equality Act 2010 but then went on to state he wished to withdrew the claim of race discrimination/harassment and also stated he also wished to withdraw the claim of automatic unfair dismissal relating to the TUPE transfer. As a result it became unnecessary to give further consideration to the Respondent's strike out application per se (as he was no longer proceeding with claims of either race discrimination or harassment on the grounds of race under section 9 and/or section 13 and now 26 of the Equality Act or claiming automatic unfair dismissal under Reg 7 TUPE Regs 2006 and Part 10 ERA 1996).But clarification was needed to clarify what claims the Claimant did wish to pursue. Noting that his claims of unfair and wrongful dismissal/ breach of contract were to continue to a full hearing in any event. There remained uncertainty as to the nature of his disability claim.

5. The Claimant's principal argument was that the Guidelines for Dealing with Long term Sickness Absence (the Policy) were inherited by the Respondent under TUPE in or around 2003 and were not taken not account by the Respondent . In particular in respect of clauses 5 and 9 .

   Clause 5 "DISABILITY" CASES In all cases of sickness absence, managers must consider whether or not the employee is "disabled", within the meaning of the Disability Discrimination Act 1995 and managers should seek advice from HR in case of any doubt about this. If so, the requirements and procedures laid down in the Act will apply, and must be followed. In particular, there is a duty to consider reasonable "adjustments" to enable the "disabled" employee to return to work, in their normal - or some other - capacity. This is a much more demanding and complex requirement than mere consideration of suitable alternative employment, and in all "disability" cases managers should consult with HR at every stage

   Clause 9 NOTICE Termination of employment on medical grounds is a dismissal and notice should be given. This notice is 1 weeks' notice for weekly paid employees with less than two years' service and 4 weeks' notice for salaried staff with less than five years' service. For weekly paid staff with two or more years' service and salaried staff with five or more years' service, one weeks' notice is paid for each year of service (up to a maximum of 25 weeks).

6. This is what I said of the Policy after the hearing on November 9

"*There was no evidence that this policy was being used by the Transferor at the time of the relevant transfer to the Respondent on or about 30 January 2003. Whether it has contractual effect or not as part of a collective agreement (transferring over under Reg 5 TUPE along with the Claimant's employment at that time) or otherwise is unclear .It may be that it is simply part of a series of discretionary employment policies used by the Transferor . But I cannot make and do not make a finding about this given the lack of documentation available and in the absence of evidence"*

7. It is clear that it is legitimate for the Claimant to argue this Policy applies as part of his unfair and or wrongful dismissal complaint . And the Claimant's wrongful dismissal claim / breach of contract claim is straightforward as far as the issues are concerned. This is limited to claiming an extra 4 weeks paid notice under clause 9 of the Policy. He was employed from 18 February 2003 to 24 January 2020 so this is 16 full years and so claims 16 weeks' notice under the Policy (allegedly inherited by the Respondent) as opposed to the 12 weeks he actually received being his minimum statutory entitlement under section 86 ERA 1996. I had already decided on 9 November that this must be determined by the full tribunal and it will be . I observe the amount at stake is a relatively small sum of 4 weeks' pay. This does involve considering the nature of the Policy claimed by the Claimant to be a collective agreement and whether it did pass over on any Transfer and whether it has contractual effect.

8. The disability part of the Claimant's claim is harder to deal with given the Claimant is not seeking to suggest there was a stand-alone case of disability discrimination as far as the dismissal is concerned (and I pressed Mr Ibekwe on this as I did in respect of the original claim that the dismissal was TUPE related and he confirmed more than once that the Claimant did not wish to proceed with either claim) .What the Claimant is stating is that due to the Claimant's disability the Respondent should have followed clause 5 of the Policy in dealing with his absence and should have considered " reasonable adjustments" .And their failure to do so meant they were in breach of the policy and added a further layer of unfairness to the process.

9. The Respondent states that when they dismissed the Claimant it was clear that , inter alia, he was not suffering from a disability (which he claims as a physical disability relating to chronic back pain) and although he was not getting any better he was only using OTC medication to alleviate the symptoms and that there were no reasonable adjustments that could have been made to assist the Claimant (and none he suggested) . Given his job as a bus driver with the obvious strains that might put on one's back they had come to the end of a fair process at that point (24 January 2020) at which time the Clamant had been off with sickness for some 176 calendar days.

10. And so the issue of the Claimant's disability remains disputed . The Respondent denies he had long term sickness related to a disability . In part because he was expected to be able to return to work even though he did not and in part because his medical reasons for absence varied. However, it is clear that the Respondent's OH department classed his sickness as " long term absence " with " an underlying condition" and so the Claimant believes the Respondent should have accepted their own occupational Health Guidelines and categorised the Claimant as disabled without the need for him to argue this, then or now. However as the position is disputed and as clause 5 (if applicable) of the Policy only applies , as do clauses 20 and 21 Equality Act 2010 , if the Claimant is

disabled there is a need for further medical evidence to establish whether he was , in fact, legally disabled in accordance with Section 6 Equality Act 2010 (which supersedes the DDA 1995 of course).

11. This leads to the rather strange situation that the only stand-alone claim of discrimination is a failure to make reasonable adjustments in compliance with Clause 5 of the Policy or clause 20/1 Equality Act 2010 but the Claimant does not wish to include , as part of his dismissal , an allegation of direct or indirect discrimination based on his disability under ss13,15 or 19 Equality Act 2010.Which is reflected in the issues set out in separate case management orders.

EMPLOYMENT JUDGE

18 December 2020
Order sent to the parties on

05/03/21

for Office of the Tribunals