



EMPLOYMENT TRIBUNALS

Claimant: Marion Cristea

Respondent: Accolade UK Ltd

Heard at: East London Hearing Centre (by telephone)

On: 11 January 2021

Before: Employment Judge Housego

Representation

Claimant: In person

Respondent: Claire Johnson of Aktiv Law Ltd

JUDGMENT

All the Claimant's claims are dismissed.

REASONS

Unfair dismissal

1. The Respondent says that the Claimant was a self-employed worker for another company, Dovergreen Ltd, who made him available to the Respondent. They say that he was not an employee or a worker for them. The Claimant accepts that he was self-employed with Dovergreen Ltd.
2. The Claimant did not work for or with the Respondent for 2 years. He was with them from 15 May 2018 – 14 July 2019, when he says he was dismissed. If he was an employee, then on his own case he has not the 2 years' service required to bring a claim for unfair dismissal. He does not put forward any of the reasons which do not have a 2 year service requirement. For that reason, and with the consent of the Claimant, I dismissed the claim for unfair dismissal for want of jurisdiction.

Redundancy payment

3. The Claimant does not say that he was made redundant. He withdrew that claim, for that reason.

S13 deduction from wages

4. After some discussion the Claimant said that he had been paid for all the work he had actually done for the Respondent. He thought he was owed £6, an expense on his Oyster card for getting from Stratford to Hounslow Central on one day, but could not recall which. He withdrew that claim also.

Notice pay

5. The Claimant was allocated shifts for which he was paid. He ceased to accept shifts, and said that this was because of his constructive dismissal. He withdrew that claim also.

Race and disability discrimination claims: law

6. The Respondent had applied for strike out or deposit orders for the race and disability discrimination claims. Rule 37 so far as relevant states:

“Striking out

37. (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it ... has no reasonable prospect of success;”

7. In doing so, I gave careful consideration to the case law indicates that this is not an easy test to meet. In most of the cases relating to discrimination cases it is the Claimant who appeals the striking out of his or her claim. The case law is set out fully in Malik v Birmingham City Council & Anor (Striking-out : dismissal) [2019] UKEAT 0027. Striking out discrimination claims is particularly sensitive. Striking out a claim ends it totally, and without evidence being heard. For public policy reasons this should be done in race (and other) discrimination cases in only the clearest cases. I have borne this in mind.

8. Paragraphs 29 of that case onward sets out the law, and at paragraph 31:

*“In **Mechkarov**, it was said that the proper approach to be taken in a strike out application in a discrimination case is that:*

- (1) only in the clearest case should a discrimination claim be struck out;*
- (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;*

- (3) *the Claimant's case must ordinarily be taken at its highest;*
 - (4) *if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and*
 - (5) *a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."*
9. The test for a deposit order is the slightly lesser test of "*little reasonable prospect of success*".

Race Discrimination claim

10. The race discrimination claim was first considered. The Claimant first said that he was withdrawing that, but later said that he had been confused when he said so. Therefore, I reversed an initial decision that it was dismissed on withdrawal by the Claimant.
11. The Claimant says that a manager, Isaac, is black and favoured other black people in the allocation of shifts at London Zoo, where he worked after being removed from his permanent posting at Calvin Klein. He says that when he left his posting at Calvin Klein, and moved to Isaac's management, he got fewer hours in shifts. He says this is because he is not black.
12. The Claimant accepted that he had been working at Calvin Klein full time, and that it was Calvin Klein who had asked that he be replaced. He thought this very unfair of them, but accepted that it was Calvin Klein's decision not that of the Respondent.
13. The Claimant accepted that there was a regular team at London Zoo, working full time, and that he was allocated shifts there on an ad hoc basis to cover gaps.
14. Despite careful and lengthy exploration of his claim, it was impossible to ascertain any alleged link between the number of hours worked and race. The Claimant elided the unfair (as he saw it) removal from Calvin Klein, the reduction in his working week from about 55 hours to about 25 hours, and the fact that his manager and about half of the staff at London are black, and said that by reason of these matters his reduction in hours was race discrimination. The removal from Calvin Klein was (as the Claimant accepts) nothing to do with the Respondent. The Claimant agrees that the posting at London Zoo was a good one for him. He agrees that there was a permanent team of people there, so that he filled in gaps. He does not say that his manager at the Zoo had any control over postings at other sites. He gave no reason why his manager should have wanted, or been obliged to, remove any of his existing team to make room for the Claimant. He does not say that there was any intention by the Respondent's head

office to give him fewer shifts than before, or that they did not try to find him alternate postings, and he was content with his placement at the Zoo.

15. The Claimant's primary concern was that because he had fewer hours to work (about 25 a week) he was unable to pay his rent and other bills, and that caused him financial difficulty and those caused him mental health issues. Because he is not black and many of those at the Zoo are, including the manager, he says that this reduction in hours is race discrimination.
16. As a pleaded case, this cannot succeed, for want of the assertion of any causative link between race and detriment. For that reason I dismissed the race discrimination claim as having no reasonable prospect of success.

Disability discrimination claim

17. I asked the Claimant what mental or physical impairment he said that he had. It was anxiety, depression and PTSD. His claim form says that he way he was treated, and its effect, caused him mental health problems. He claims (and it is entirely possible) that being treated unfairly (as he saw it) and having a resultant reduction in income, such as to cause financial problems, may cause mental health problems. But the very essence of a disability discrimination claim is that the unfairness (and resulting financial problems) arise from having a mental health impairment, and not that these issues result from unfairness occurring when well. You have to be disabled when you suffer the detriment, being unfair to a person without a disability does not become disability discrimination if a disability is the result of that unfairness.
18. For this reason I dismissed the disability discrimination claim also.

Summary

19. For the avoidance of doubt all the Claimant's claims are dismissed.

**Employment Judge Housego
Date: 25 January 2021**