



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4103729/2020 (V) Preliminary Hearing by Cloud Video Platform (CVP)
at Edinburgh on 7 January 2021

Employment Judge: M A Macleod

10

Mr J Montgomery

Claimant
In Person

15

Caledonia Fire and Security Limited

Respondent
Represented by
Mr P Brown
Solicitor

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25

The Judgment of the Employment Tribunal is that the claimant's claim for unfair dismissal is struck out on the basis that it has no reasonable prospect of success.

REASONS

30

1. The claimant presented a claim to the Employment Tribunal dated 11 July 2020 in which he complained that he had been unfairly dismissed by the respondent.

35

2. The respondent submitted an ET3 response resisting the claimant's claim and denying that the Tribunal had jurisdiction to hear the case, on the basis that the claimant lacked the necessary minimum qualifying service on which to base an unfair dismissal claim.

3. A Preliminary Hearing was listed to take place by CVP on 7 January 2021 in order to determine whether or not the respondent's application for strike-out of the claim, which failing a deposit order, should be granted.
4. The claimant appeared on his own behalf at the PH, and Mr Brown appeared for the respondent.
5. The start of the hearing was delayed owing to some technical difficulties experienced by the claimant and by the Employment Judge. These were resolved satisfactorily and the hearing commenced at approximately 10.35am. I was satisfied that all participants could see and hear each other, and be seen and heard. The hearing proceeded without interruption and each party was able to set forth their submissions in full to the Tribunal.
6. It is appropriate to consider the background to the application being made; the application itself; and the parties' respective submissions before me; and then to set out the Tribunal's decision on this matter.

15 **Background**

7. In his ET1, the claimant set out his dates of employment with the respondent as 1 August 2019 to 1 June 2020.
8. The claimant ticked the box, at paragraph 8.1, confirming that "I was unfairly dismissed". He also ticked the lower box which stated "I am making another type of claim which the Employment Tribunal can deal with", and entered into the form the following detail:

"automatic unfair dismissal for requesting that I take bank holiday as company requested I take".

9. In paragraph 8.2 of the ET1, the claimant narrated the circumstances of his claim. He explained that on Friday 22 May 2020, his manager Andrew Thomson had telephoned him to discuss the on call rota for the following Monday, a bank holiday, 25 May 2020. The claimant said that as he was on the on call rota for the evening of 25 May, Mr Thomson asked the claimant to cover the day from 8.30am until 5pm. The claimant asserted that he

agreed to do so, "for a day in lieu back". Finding then that his diary had been booked to work timed appointments on Saturday 23 May, he contacted Mr Thomson again to say that he could not cover both timed appointments and the on call rota at the same time on that day. Following discussion, he requested to take the statutory holiday, Monday 25 May, after all. He stated that the shift on Monday 25 May was covered by another worker, but that the following week, the claimant was dismissed, and averred that when he asked Mr Thomson if it was anything to do with him requesting a statutory holiday, he replied "yes".

10 10. The respondent disputes the claimant's version of events.

11. On 14 August 2020, the Employment Tribunal wrote to the claimant on the order of Employment Judge Robert Gall, and stated:

15 *"Whilst the claimant has mentioned a claim for automatically unfair dismissal, as he accepts he does not have 2 years' service, he is to specify within 14 days: The basis on which he regards himself as able to proceed with a claim of automatically unfair dismissal."*

20 12. The claimant replied to that "order" (though in fact it was not constituted as a formal Case Management Order of the Tribunal) by email dated 25 August 2020. He attached to his email a two page letter narrating the circumstances upon which he wished to rely in advancing his claim. He concluded the letter by stating that *"I ask that my claim for Employment Tribunal claim be accepted for Automatic Unfair Dismissal on the grounds of Statutory Holiday issues."*

The Application

25 13. By letter dated 14 September 2020, the respondent's solicitor, Mr Brown, wrote to the Tribunal to make an application that the claimant's claim be struck out under Rule 37(1)(a), which failing a deposit order be granted, on the grounds that the claim was scandalous or vexatious, and that it had no reasonable prospect of success.

14. The respondent pointed out that they did not consider that the claimant's letter provided sufficient explanation or justification for his request to proceed with the claim, and that the letter simply reiterated his narrative, and did not provide or specify the legal basis upon which he considered he was entitled to proceed with such a claim for unfair dismissal.

15. They requested a formal Preliminary Hearing in order to address the issue, and said that they considered that the claimant had raised the claim in an attempt to put the respondent to considerable expense and inconvenience in defending the action. The claimant, they said, did not have 2 years' qualifying service and has been unable to state why it is that he believes that he has a right to proceed with a claim for automatically unfair dismissal.

Submissions

16. For the respondent, Mr Brown submitted that as the matter is relatively straightforward, he would rely upon his letter of 14 September 2020 in its terms. The claimant does not have sufficient service upon which to base a claim for unfair dismissal, and having been given the opportunity to present further and better particulars by Employment Judge Gall, the claimant simply restated what he had said in his claim form, but provided no further justification for his claim.

17. On the basis that the claimant requires, but lacks, 2 years' continuous service with the respondent in order to found an unfair dismissal claim, the claim has no reasonable prospect of success and should therefore be struck out by the Tribunal, he said.

18. In the alternative, Mr Brown invited the Tribunal to impose a deposit order upon the claimant, requiring him to make payment as a condition of being permitted to continue with his claim, given that the claim has little reasonable prospect of success.

19. Mr Brown continued by arguing that the claimant has acted scandalously and vexatiously by presenting the claim, on the basis that he has merely done so in order to cause inconvenience and expense to be incurred on the

part of the respondent. Mr Brown therefore invited the Tribunal to strike the claim out on the grounds of the claimant's scandalous and vexatious conduct.

5 20. The claimant responded. He said that he understood that he lacks the necessary qualifying service for a claim of unfair dismissal, but that prior to lodging his claim he had looked online and believed that he had been automatically unfairly dismissed. The statutory basis of his claim arises from two provisions, he said, namely section 104 of the Employment Rights Act 1996, and Regulation 31 of the Working Time Regulations 1998, now
10 embodied in section 45A of the Employment Rights Act 1996.

21. He referred to the final paragraph of his further and better particulars, and advised that he has no legal qualifications himself. He consulted with "Glasgow Law Society". He maintained that his automatically unfair dismissal arose out of his refusal to comply with a requirement which was
15 imposed in contravention of the Working Time Regulations 1998, for which he was "sacked on the spot". He also said that he was asserting a statutory right, for which he was dismissed, the statutory right being the right to take annual leave.

22. In relation to the question of cost, he maintained that he has not taken this
20 claim forward out of a desire to obtain monetary redress. He felt he was treated very unfairly, particularly in light of his commitment to continue working during the lockdown arising from the coronavirus pandemic and the fact that he worked through lockdown and allowed his colleagues to be furloughed. He pointed out that he has to explain to any future employer
25 what happened to him at the hands of the respondent, though he acknowledged that he has now found alternative employment with a new employer, who, he said, agreed with him that he had been unfairly dismissed.

23. He denied that this claim was raised in order to cause expense to the
30 respondent. He believes that he has been treated very unfairly by the

respondent, and unfairly dismissed by them, and wishes to highlight this before the Tribunal.

24. Mr Brown took the opportunity to reply by suggesting that while the claimant has asserted that the claim was not raised for monetary reasons, he is seeking £17,000 in his ET1 in order to resolve the claim. Further, it is quite arrogant of the claimant to suggest that he kept the business going during lockdown, and Mr Brown asserted that while the claimant did work during lockdown, he was not the only one.

25. Mr Brown argued that the claimant has failed to comply with the Order of Employment Judge Gall, and that he had had many months to prepare for the PH to provide more information as to the statutory basis of the claim.

26. He pointed out that section 45A does not provide an exception to the minimum qualifying period for a claim of unfair dismissal. He was “grasping at straws” in the hope that something might stick.

15 **The Relevant Law**

27. Rule 37(1)(b) provides:

“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-

20 *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious...”

25 28. Section 104 of the Employment Rights Act 1996 provides:

(1) “An employee who is dismissed shall be regarded for the purposes of this Part [of the Act] as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee –

- a. *brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*
- b. *alleged that the employer had infringed a right of his which is a relevant statutory right.*

5 (2) *It is immaterial for the purposes of subsection (1) –*

- a. *whether or not the employee has the right, or*
- b. *whether or not the right has been infringed,*

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.”

10 29. The statutory rights set out in section 104(4) include rights conferred by the Working Time Regulations 1998.

15 30. Section 45A(1) of the Employment Rights Act 1996 provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker refused or proposed to refuse to comply with a requirement which the employer imposed or proposed to impose in contravention of the Working Time Regulations 1998, and on other grounds not relied upon by the claimant.

20 31. Section 45A(4) provides that *“This section does not apply where a worker is an employee and the detriment in question amounts to dismissal within the meaning of Part X...”*

25 32. Section 108(1) of the Employment Rights Act 1996 provides that *“Section 94 [the right not to be unfairly dismissed] does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.”*

33. Section 108(3) goes on to provide that subsection (1) does not apply if any of a number of sections subsequently set out apply. That list includes section 104(1), read with subsections (2) and (3) (section 108(3)(g)).

Discussion and Decision

34. In this case, the issue for the Tribunal to determine is whether or not the Tribunal has the jurisdiction to hear a claim for unfair dismissal by the claimant in respect of the termination of his employment by the respondent.

5 35. The claimant worked for the respondent for a period of less than two years. There is no dispute about this. As a result, section 108(1) of the Employment Rights Act 1996 provides that the claimant is not permitted to claim unfair dismissal.

10 36. However, section 108(3) provides for exceptions to that principle, and it is upon one of these exceptions that the claimant seeks to rely.

15 37. The claimant argues that he was “automatically unfairly dismissed” by the respondent, a phrase which he used both in his ET1 and in the further particulars provided in response to Judge Gall’s Order. The issue, then, for this Tribunal is whether or not the claimant is entitled to proceed with such a claim on the basis that it falls under one of the exceptions in section 108(3).

20 38. The claimant’s claim submits that he was automatically unfairly dismissed for having requested time off on a statutory holiday. In neither his ET1 nor his further and better particulars does the claimant make reference to any statutory provision upon which he wishes to rely, but before me, he referred to two: section 104 of the Employment Rights Act 1996, and section 45A of that Act.

25 39. Dealing firstly with section 45A, it is clear to me that the claim to be made under that section is one relating to detriments visited upon a claimant for having asserted a right under the Working Time Regulations 1998, but dismissal is specifically disapplied as a detriment (section 45A(4)). In addition, section 45A does not appear in the list of exceptions to the two year qualifying rule set out in section 108(3).

30 40. It is clear, therefore, in my judgment, that the claimant cannot rely upon section 45A in founding a claim of automatically unfair dismissal against the respondent.

41. The second provision relied upon, then, is section 104(1)(b), namely that he claims that he was dismissed because he *“alleged that the employer had infringed a right of his which is a relevant statutory right”*.

42. In his claim form, the claimant asserts the following:

5 *“...Andrew Thomson informed me on the spot that I had been sacked. I requested that Andrew give me proper reason as to why I had been dismissed, to which he reply was ‘I don’t need to give you one’. I replied to him that of course he does need to give me proper reason for my dismissal. I then asked him if it was anything to do with me requesting to take the*
10 *statutory holiday like they request to which his reply was ‘Yes’...”*

43. The respondent argues that this claim has no reasonable prospect of success, on the basis that the claimant has not properly set out the reason why he says that he was automatically unfairly dismissed, nor has he demonstrated that he has two years’ qualifying service to make an unfair
15 dismissal claim.

44. It appears to be the respondent’s position that the claim form did not adequately specify this claim, as Employment Judge Gall required the claimant to provide further particulars in order to clarify the matter, and he simply restated his claim and made no reference to any legal provision.

20 45. Section 104(4) provides that the assertion of a statutory right includes statutory rights conferred by the Working Time Regulations 1998. The claimant says that this claim is based on his assertion that he refused to comply with a requirement which was imposed by the respondent in contravention of the Working Time Regulations 1998.

25 46. The claimant does not say, however, exactly which provision of the Regulations the respondent contravened. His reference to Regulation 31, now enshrined in section 45A, does no more than refer to the right not to be subjected to a detriment because he refused to comply with a requirement imposed by the employer in contravention of the Regulations. It does not

specify, and nor does the claimant, which provision of the Regulations the respondent is alleged to have contravened.

47. The complaint made by the claimant is that he was dismissed because he agreed to work on a bank holiday, then withdrew that agreement as he realised that he was going to have to work on call on the Saturday beforehand, and requested to take the bank holiday after all. He did so (apparently with the agreement of his manager).

48. It is not clear what requirement was imposed by the respondent in contravention of the Regulations, and nor is it clear that he refused to comply with it. So far as can be discerned from his claim, the claimant had a number of discussions with his employer about which hours he would work, and reached agreement with them about this, apparently to his satisfaction. As a result, it is not clear that any requirement was imposed upon him by the respondent; and further, it is entirely unclear how the respondent is alleged to have contravened the Working Time Regulations 1998 in the first place.

49. The claimant avers that requesting to take the statutory holiday was said by his employer to be something to do with his dismissal, and thus he links the two events together. In doing so, however, there is a step missing in his claim: what provision of the Regulations did the respondent contravene in presenting him with a requirement, which he then refused? I am unable to detect a basis for this claim in these pleadings.

50. Even if his claim were that he was dismissed simply because he took the bank holiday off, and that that act itself amounted to the assertion of a statutory right, I am unable to understand what provision of the Working Time Regulations 1998 the claimant is pointing to as founding the right to take a bank holiday off. That the claimant was granted the right to take the bank holiday in any event rather weakens his case further.

51. As a result, with a degree of hesitation, I have come to the conclusion that the claimant's claim has no reasonable prospect of success, and therefore it must be dismissed. There is no discernible statutory basis for the claim

made out. The fact that the claimant, who is not a qualified solicitor, did not enumerate the particular legal provisions on which he relied in his claim form or further particulars does not appear to me to be relevant. He was able to enunciate a complaint in his claim, and the absence of the legal provisions relied upon until this hearing is not a reason for strong criticism of the claimant. The problem is that when analysed in light of the legal provisions which may assist the claimant the Tribunal is unable to discern a proper basis for a claim that he was automatically unfairly dismissed following the assertion of a statutory right.

52. Mr Brown sought to argue that the claim was scandalous and vexatious because it was raised merely to cause expense and inconvenience to the respondent. However, I am not prepared to sustain this submission. The claimant made clear in the hearing that he genuinely felt that he had been unfairly treated by the respondent. He may not have been able to articulate such a claim clearly but in my judgment his conduct falls far short of scandalous or vexatious conduct, and there is no basis, on the information before me, upon which I could find that he had acted in such a way.

53. The claimant's claim is therefore struck out on the basis that it has no reasonable prospect of success.

Employment Judge: Murdo Macleod
Date of Judgment: 13 January 2021
Entered in register: 14 January 2021
and copied to parties