



EMPLOYMENT TRIBUNALS

Claimants

Mr M Aamir

Respondents

Axis International Security Limited

AND

Heard by: CVP

On: 18 December 2020

Before: Employment Judge Nicolle

Representation

For the Claimant: In person

For the Respondent: Mr P Bradley

JUDGMENT following a hearing at London Central by CVP on 18 December 2020

Judgement

The claims for ordinary unfair dismissal under section 98 (4) of the Employment Rights Act 1996 (the ERA), the assertion of a statutory right under s.104 of the ERA, for a failure to provide a written statement of reasons for dismissal under s.92 of the ERA and for holiday pay under s.23 of the ERA are struck out.

REASONS

Request for written reasons

1. Detailed reasons were given in an oral judgement. Written reasons were requested by the Claimant on 12 January 2021, but this was not forwarded by the Tribunal administrative staff to Employment Judge Nicolle until 7 April 2021.

The Hearing

2. This is a decision following an open preliminary hearing heard on 18 December via CVP. The Claimant gave evidence and both Mr Bradley on behalf of the Respondent and the Claimant made submissions. The issues

I needed to decide were those set out in paragraphs 6, 7 and 8 of my case management order following a closed preliminary hearing on 16 June 2019.

Unfair dismissal claim

3. The first issue to be considered is whether the Claimant has two years' continuity of service which is a requirement for him to be able to pursue a claim for unfair dismissal but also to have an entitlement to request written reasons for dismissal. The Claimant's position is that he has continuity of service from 1 November 2011 until a termination date on 13 September 2019. The Respondent says that the Claimant's employment did not commence until 14 April 2019 and that any previous engagements should be discounted.
4. It is common ground between the parties that the Claimant provided his services to the Respondent from November 2011 through to 29 March 2019. However, the Claimant's own evidence was that this was an engagement for which he submitted invoices and tax was not deducted with him being responsible for paying tax on the sums invoiced. He was initially a security guard but from 2012 had an office-based role at the Respondent's Esher premises as an admin and screening officer.
5. It is also accepted between the parties that the existing arrangement came to an end on 29 March 2019. Mr Bradley says that that was a result of the Respondent moving to a system of operating PAYE with individuals being offered employment contracts. A dispute exists between the parties as to what contract was provided to the Claimant. He contends that he did not receive the terms and conditions which appear at pages 65 through to 74 in the bundle of documents. Nevertheless, it would appear that a very similar document would have been provided, albeit the Claimant says that it provided for an annual salary of circa £23,000 as opposed to an hourly rate of £9.40.
6. The relevant point is that the Claimant was initially unhappy with the terms offered and did not immediately commence employment. A text message was included in the bundle to that effect from Mr Amir to someone called Pete on 20 March 2019 in which he said unfortunately I do not want to sign the contract as I have been offered a lot less money in comparison to my current wage. The Claimant also accepts that between 29 March and either 14 April or 16 April 2019 with the latter being the date given by the Claimant in response to a question in cross examination) but I prefer 14 April (the date the Respondent uses in its response form) given that the Claimant did not attend the Respondent's premises to carry out work, did not receive any payments and was not subject to any contractual arrangement.
7. The Claimant says that he had an expectation that he may be asked to perform services again in the future, he refers to 4 April 2019 as being a day on which he entered a dialogue regarding potential future engagement. Nevertheless, it is apparent that for a period of over two weeks that the Claimant was not performing services whether on a self-employed basis or

as an employee. I therefore find that this gap would have been sufficient to break any continuity of employment had it existed with the Claimant's earlier service. As such, I find that the Claimant did not have the required two years' continuity of service and the Tribunal therefore does not have jurisdiction to hear a claim for ordinary unfair dismissal under s.98 of the ERA and is nor does it have jurisdiction to hear a claim for a failure by the Respondent to provide him with written reasons for dismissal pursuant to s.102 of the ERA. Those claims are therefore struck out as result of the Tribunal not having jurisdiction. It is therefore not necessary for me to consider what the Claimant's status was in his engagements with the Respondent from 1 November 2011 to 29 March 2019 given the finding I have made above.

8. I find that the period between 29 March 2019 under 14 April 2019 was sufficient to break any continuity of service which may have existed in respect of the Claimant's previous engagements under contracts for services.

Assertion of a statutory right

9. The next issue I need to consider is whether the Claimant's claims that his dismissal was automatically unfair pursuant to s.104 of the ERA have no reasonable prospect of success. He brings two separate claims in this respect, the first of which is that he requested time off to undertake training. He says the training in question was not related to his duties with the Respondent but rather represented re-training to obtain certification as a Corgi approved Gas Fitter. The rights under the ERA are limited to the statutory rights as set out at s.104 of the Act. I find that attendance at, or a request to have time off to attend training in effect to take up an alternative position, could not possibly constitute the assertion of a statutory right and as such find that that element of the claim has no reasonable prospect of success and is therefore struck out.
10. The second element is that in his email of 12 September 2019 the Claimant asserted a statutory right. That email contained the following, can you please tell me if I have any holidays that I have not yet taken as I would like to request this to be paid, also can you explain how the holidays are calculated. Paula Hickey of the Respondent's Human Resources Department responded in an email of 13 September 2019 to say, as you have already taken holidays and been paid for them you will be paid the remainder with your P45 as I understand you no longer work for the Company, but you did work the 1 September 2019.
11. It is relevant for me to consider that under s.104(3) of the ERA that the employee needs to be clear what statutory right he contends the employer has infringed. It is also relevant that under s.104(1) the protection is where an employee has either brought proceedings against the employer to enforce a right which is a statutory right or under s.104(1b) that the employee has alleged that the employer had infringed a right of his which

is a relevant statutory right. If those apply it is then necessary to consider whether the employee suffered any detriment or dismissal on account of asserting such a statutory right.

12. Having read the Claimant's email of 12 September 2019 I do not consider it can reasonably be interpreted as the Claimant alleging that the Respondent had infringed a right of his which is a relevant statutory period right. Whilst it relates to holiday, I read it as an enquiry as to what holidays have been taken and what will be paid. I do not consider it capable of being read as an assertion that the Respondent had infringed a statutory right. In reaching this finding it is also relevant that the Claimant accepts that he had been paid all holiday pay, whether as taken holiday or accrued holiday, in the period of his employment with the Respondent from 14 April 2019 and therefore I do not consider that the Claimant has raised or asserted a statutory right and therefore those claims have no reasonable prospect of success and are accordingly struck out under Rule 37 (1) (a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (the Rules).

Accrued holiday entitlement

13. I also considered the basis of the claim for accrued holiday. It is relevant that the Claimant says that he has received payment of holiday during his employment with the Respondent from 14 April 2019. Therefore, his claim is confined to alleged entitlements to holiday pay when he was engaged under a contract for services from 1 November 2011 through to 29 March 2019. In this respect a claim for an unauthorised deduction from wages under s.23 of the ERA needs to be brought within a period of three months of a deduction or a series of deductions that is in accordance with s.23(2) of the Act ERA or that it was not reasonably practicable to present the complaint within the relevant period of three months in accordance with the s.23 (4) of the ERA.

14. It is apparent that such a claim brought by the Claimant in a claim form dated 28 January 2020, following a period of ACAS early conciliation between 29 November 2019 and 29 December 2019, was substantially out of time and no reason has been advanced as to why it was not reasonably practicable to present the complaint within the relevant time and therefore it is not one which the Tribunal has jurisdiction to hear. This claim therefore is also dismissed.

Remaining claims

15. For the avoidance of doubt the claims for an unauthorised deduction of wages between 1 and 13 September 2019 and for a failure to provide a

written statement of employment of particulars in accordance with s.1 ERA
proceed to a full merits hearing.

Employment Judge Nicolle

Dated: **9 April 2021**

Sent to the parties on:

12th April 2021.

For the Tribunal Office