Case No. 1806609/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr M H Shabir

Respondent: Turning Point

Heard at: Leeds On: 7 May 2021
12 May 2021 (reserved decision in chambers)

Before: Employment Judge Cox

Representation:
Claimant: In person
Respondent: Mr England, solicitor (via video link)

JUDGMENT

1. The claim for notice pay is dismissed on withdrawal by the Claimant.
2. The claim of unfair dismissal is struck out on the ground that it has no reasonable prospect of success.

RESERVED JUDGMENT

The claims of disability discrimination in relation to breaks, shift patterns, takeaway food and leftover food is dismissed on the ground that they have no reasonable prospect of success.

REASONS

1. The Respondent is a charity providing health and social care services, including residential care. The Claimant worked for the Respondent as a Support Worker from 19 November 2018 to 10 July 2020 in one of its residential care homes. He presented a claim to the Tribunal alleging that the Respondent had unfairly dismissed him and discriminated against him on the grounds of disability and owed him notice pay, holiday pay and "other payments". A Preliminary Hearing was held to clarify the nature of the allegations and to decide whether all or any part of the claim should be struck out because it had been presented out of time or had no reasonable prospect of success, and to make case management orders as appropriate.

2. At the Preliminary Hearing, the Claimant withdrew his claim for notice pay as he accepted that he had now received that payment, and that aspect of his claim was dismissed. He was unable to identify how much holiday pay he believed he was owed and so he has been ordered to provide further details of that aspect of his claim. He said that the "other payments" he was claiming was payment for overtime hours that he had worked but had not been paid for because there was a fault with the system he had to access to claim those hours. (It would not allow him to enter his password.) He has been ordered to provide further details of that aspect of his claim also.

Unfair dismissal

3. Because the Claimant had not completed two years' continuous employment with the Respondent, he did not have the right to complain of unfair dismissal (Section 108(1) of the Employment Rights Act 1996 — the ERA) unless the sole or main reason for his dismissal fell within one of the categories of reason that aliow a claim regardless of length of service (listed in Section 108(3) ERA).

4. In his claim form, the Claimant said that he was dismissed for a "false reason", in that the Respondent had said he was dismissed as a result of its Sickness and Absence Policy. At the Preliminary Hearing, the Claimant confirmed that he had been absent from work due to illness on various occasions but the most recent absence, which the Respondent had treated as an unauthorised absence under the Policy and had led to his dismissal, was due to his absence from work on 13 June 2020. On that date, he had had to leave the work place because he was being bullied by his colleagues, 'to the point where I felt I was having to work in a volatile and threatening atmosphere". This was because his colleagues, including a Team Leader,

were following him around the building and pressuring him to take their side against another colleague, also a Team Leader. He was not in a position to put a stop to the situation as he was only a Support Worker and the only Team Leader present was the one instigating and allowing the situation to happen. In a letter to the Tribunal on 5 February 2021 , the Claimant further explained that he had left the workplace because he knew that his colleagues would continue to shout at him and he did not want to cause the residents stress and he "did not want to become involved in disputes in the workplace".

5. The Tribunal considered that the only category of unfair dismissal in Section 108(3) into which the Claimant's allegation might fall was Section 100. Section IOO(1)(d) states that a dismissal is unfair if the sole or principal reason for it is that "in circumstances of danger which the employee reasonably believed to be serious and imminent and which the employee could not reasonably have been expected to avert, he left (or proposed to leave) or (whilst the danger persisted) refused to return to his place of work or any dangerous part of his place of work".

6. The Tribunal did not consider that Section IOO(1)(d) was intended to cover a situation like the one the Claimant alleged he faced on 13 June 2020. The section is entitled "health and safety cases". Section 100(1) (d) is designed to cover situations where an employee leaves their workplace because they reasonably believe that the circumstances there pose a serious danger to health and safety. The Tribunal did not consider that the Claimant has any reasonable prospect of establishing that he reasonably believed on 13 June that his health or safety was in serious danger because of the behaviour of his colleagues, even if the Tribunal were to accept that they were behaving in a hostile manner towards him and making him feel very uncomfortable.

7. The claim of unfair dismissal was therefore dismissed at the Preliminary Hearing.

Disability discrimination

8. The Tribunal went on to discuss the claim of disability discrimination with the Claimant. The Claimant stated in his claim form that the Respondent had not made arrangements for breaks so that he could manage his coeliac disease. The shift patterns he worked meant that he did not have time to prepare his own meals at home. The Respondent did not allow him to have takeaway food delivered to him at work. Staff were allowed up to two slices of bread and any other teftover food that the residents had not eaten, but

this bread and some of the other food contained gluten so the Claimant could not eat it.

9. The Claimant said that he first became aware that he might have coeljac disease at the beginning of 2020. At that time he told Mr Hunt, Manager, and Paula, Deputy Manager, that he had symptoms of coeliac disease and was going for tests. He was given a formal diagnosis on 4 February 2020 and informed the Respondent of that diagnosis shortly afterwards.
10. The Tribunal reserved its decision on whether the Claimant had any reasonable prospect of establishing that these complaints amounted to some form of unlawful disability discrimination. It has concluded that these complaints have no reasonable prospect of success, for the following reasons.

1 1 . The Tribunal notes that the Claimant is not alleging that the Respondent refused him breaks, set his shift patterns in a particular way, refused to allow him to take delivery of takeaway food at the home or allowed staff to eat leftover food because he had coeliac disease or because of anything arising in consequence of it. Rather, he is alleging that these practices were a problem for him because he had coeliac disease. The Tribunal considers that these complaints can only amount to allegations that the Respondent failed to make reasonable adjustments for the Claimant's coeliac disease and/or indirectly discriminated against him as a person with coeliac disease.

12.The Tribunal does not consider that the Claimant has any reasonable prospect of establishing that the Respondent failed to meet the duty to make reasonable adjustments or indirectly discriminated against him, for the following reasons:

12.1 An employer has a duty to make reasonable adjustments only if its practices put a disabled employee at a substantial disadvantage in comparison with employees who do not have his disability (Section 20(1) Equality Act 2010 the EqA). Similarly, a practice is indirectly discriminatory against a disabled employee only if it puts the disabled employee at a particular disadvantage when compared with employees who do not have his disability (Section 19(2)(b) EqA).

12.2 There is no reasonable prospect of the Claimant establishing that not allowing him breaks, or requiring him to work particular shifts, or not allowing him to have takeaway food delivered at work put him at a particular or substantial disadvantage compared with employees who do not have coeliac disease. The Claimant said that these practices caused

him a problem because he wanted to prepare gluten-free food at home and eat it at work. Gluten-free food that does not need to be cooked or is already prepared is widely available and could readily be obtained by the Claimant to eat at work. Any employee would be disadvantaged by not being allowed a break to eat, whatever food they wanted to consume. Any employee who is asked to work shifts that give them little time to prepare food at home would be disadvantaged if they wanted to eat a home-cooked meal. Any employee who has not had time to prepare food at home would be disadvantaged if they were not allowed to order a takeaway to eat at work. There is nothing about these practices that put the Claimant at a particular or substantial disadvantage compared with employees who do not have coeliac disease.

12.3 In relation to the Respondent's practice of allowing staff to eat leftover food, the Tribunal does not accept that this put the Claimant at a pårticular or substantial disadvantage compared to employees without coeliac disease. He was not required to eat the food, he was merely allowed to do so.

12.4 If the Tribunal is wrong about that, and the practice did put the Claimant at a particular or substantial disadvantage, the next issue is whether the Respondent failed to make reasonable adjustments to that practice (if the claim is viewed as one of failure to meet the duty to make reasonable adjustments — Section 20(3) EqA) or whether the practice was justified, as being a proportionate means of achieving a legitimate aim (if the claim is viewed as one of indirect discrimination — Section 19(2)(d) EqA).

12.5 The Tribunal does not consider that the Claimant has any reasonable prospect of establishing that it woutd have been reasonable for the

Respondent to adjust that practice in the way he claims, which is by providing him with gluten-free food. The whole point of the practice was to avoid food waste by offering staff any food not consumed by residents. In those circumstances, it would not be reasonable to expect the Respondent, which is a charity, to buy additional gluten-free food expressly for the Claimant. Likewise, the Tribunal considers that there is no reasonable prospect that a Tribunal would not find the Respondent's practice of offering leftover food to be objectively justified. The Respondent's legitimate aim would self-evidently include preventing food waste. It would be proportionate to offer only leftover food to meet that aim, since purchasing additional, gluten-free food for the Claimant would defeat the aim.

Employment Judge Cox
Date: 12 May 2021

case No.

Judgments and Reasons sent to the parties on: