EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr D Lowes **v Vinci Construction (UK) Limited**

Heard at: Watford (by video) **On**: 17 June 2021

Before: Employment Judge Bloch QC

Appearances

For the Claimant: In person
For the Respondent: Ms R Kennedy, Counsel

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video (CVP). A face to face hearing was not held because it was not practicable, and no one requested the same and all issues could be determined in a remote hearing"

PRELIMINARY HEARING

JUDGMENT

The claimant's claim is struck out on the basis that the tribunal lacks jurisdiction to hear such claim and/or that it has no reasonable prospect of success.

REASONS

1. The claimant was employed by the respondent on 14 October 2019 as a Senior Quantity Surveyor.

2. On 29 February the claimant resigned with effect from 31 March 2020. He worked his notice until 31 March 2020.

3. On 3 April 2020 the claimant contacted the respondent. In that email he said that as a PAYE worker on the payroll on 28 February 2020 he was entitled to be included in the respondent's furlough arrangements. He had

left the respondent's employ on 31 March but expected to be in employment with another employer on 1 April 2020. However, because of the pandemic he could not start any new employment until the current restrictions had been eased. Under the requested furlough arrangements he would (he said) be entitled to 80 percent of his salary entitlement or £2,500 per calendar month whichever was the lesser. His understanding was that the HRMC would reimburse employers the amount furloughed of gross wages. In addition, HMRC would also reimburse the applicable employer's NIC and Statutory Pension Contributions on this amount.

4. On 22 April 2020 the respondent wrote to the claimant saying that it had reviewed his request and did not agree to reinstate him.

5. There followed an Acas conciliation period from 1 June 2020 until 19 June 2020. On 23 June 2020 the claimant presented his claim to the tribunal. It was not until a date in August 2020 that he commenced new employment. Therefore, his claim was for four months salary at a rate of £2,500 per calendar month, namely £10,000.

6. On 18 April 2021, Employment Judge Vowles directed that the hearing scheduled for 17 June 2021 be converted to a preliminary hearing to determine the following issue: To consider strike out of the claim as having no reasonable prospect of success.

7. At the outset of the hearing I asked the claimant to explain how he formulated his claim as a matter of legal obligation on the part of the respondent. Unfortunately, he had not been able to take the legal advice on the point. He struggled to identify a legal basis and after I had heard submissions from Ms Kennedy on behalf of the respondent, I again requested that the claimant explain his position and he did so by referring to the reason for his resignation, which he accepted was voluntary, but had been in effect an altruistic act to allow the former incumbent of that position, who had been promoted to another role, to return to his initial role. The claimant felt strongly that it was in the interests of the health of the former incumbent that he should be allowed to return to his former position and that employee was extremely grateful to the claimant for allowing him to do so.

8. It is noteworthy that the claimant had a job on 1 April which but for the intervening pandemic would have meant that there was no gap in his employment. The claimant also made criticisms of the general conduct of the respondent, particularly their HR function and felt that they had acted irresponsibly.

9. I heard submissions from Ms Kennedy who, fairly, given that the respondent was not legally represented, attempted in a helpful way to explore how the claimant's claim could possibly be formulated as a legal claim over which the tribunal had jurisdiction. She had as much difficulty in this task as the claimant.

10. Key points in support of the strike out application which Ms Kennedy made were that:

    10.1 the tribunal has no jurisdiction in respect of a claim for "furlough pay";

    10.2 even if the claimant had been in employ of the respondent on 3 April there was simply no right afforded to an employee under the Corona Virus Job Retention Scheme (("CRJS") to be put on furlough;

    10.3 there were no other jurisdictional pathways in the Employment Rights Act 1996 for other like legislation to provide the tribunal with jurisdiction regarding the claimant's claim. In particular, while she could imagine that there might feasibly be some sort of discrimination claim if other employees were placed on furlough but that could not be the case here, because the respondent had placed none of their employees on furlough;

    10.4 in any event the claimant was not even an employee on 3 April 2021 when he requested to be made part of the furlough arrangements.

11. Together with Ms Kennedy I considered what possibilities in law there might be to support the claimant's claim. For example, a claim under ss.13 and s.23 of the Employment Rights Act 1996 for an unlawful deduction from wages could not be made because there was no arguable case that the sums now claimed by the claimant were payable within the meaning of the definition of "wages" in s.27 of that Act. Likewise, there could be no claim for unfair dismissal because there was no dismissal, the claimant accepting that his resignation was voluntary, albeit for the laudable reasons which he explained to the tribunal.

12. Accordingly, it seems that the only basis for a claim would have to be found in the CRJS. However, for various different reasons, no such claim could be founded under that scheme. It is plain that the purpose of the furlough scheme is to give employers, who choose to put an employee on furlough, a right to claim back (at that time) 80 percent of the sums paid. So, the purpose of the Scheme under paragraph 2.1 of the Scheme is stated to be for payments to be made to employers on a claim made in respect of their incurring costs of employment in respect of furloughed employees arising from the pandemic. Likewise, the definition of furloughed employees is provided under paragraph 6.1:

> "An employee is a furloughed employee if
>
> (a) The employee has been instructed by the employer to cease or work in relation to their employment.

13. Under paragraph 6.7 it says:

> "An employee has been instructed by the employer to cease all work in relation to the employment only if the employer and employee have agreed in writing that the employee will cease all work in relation to their employment."

14. It is abundantly clear that there is no obligation on the part of an employer to put an employee on furlough – it is a matter of agreement between the employer and the employee. We also looked at other provisions of the CJRS scheme but none of them appeared to assist the claimant.

15. Accordingly, while one can sympathise with the claimant who unexpectedly, having acted out of the best of motives, found himself without employment for some four months, that does not mean that the claimant has a claim in law or one which is justiciable by this tribunal.

16. In all the circumstances I felt obliged to strike out the claimant on the basis that the tribunal has no jurisdiction to hear the claim and that it has no reasonable prospects of success.

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Employment Judge Bloch QC

Date: 30 June 2021

Sent to the parties on: ....16 July 2021.
THY
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For the Tribunal Office