Case Number: 3314862/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr K Hussain Kamran**

Respondent: **1. United Parcel Service (ups Ltd Ups R)**

Heard at: **On:** 26 November 2020

Before: Employment Judge Hindmarch

Representation
Claimant: In Person
Respondent: Miss Murphy (Counsel)

JUDGMENT

The Respondent's application for strike out of the claim is granted and the claim is struck out.

REASONS

1. This matter came before me listed for a one day Open Preliminary Hearing in person.

The hearing was listed by Employment Judge Woffenden at a Case Management Preliminary Hearing on 26 August 2020, the purpose being to consider the Respondent's application made in a letter to the Tribunal dated 5 March 2020 for a strike out and/or deposit order.

2. The Claimant was a litigant in person and the Respondent was represented by Counsel, Miss Murphy. There was an agreed bundle of documents. Employment Judge Woffenden had ordered the Claimant to provide a witness statement but he had not done so.

3. Counsel for the Respondent had prepared Opening Submissions and handed up case law. I ensured at the outset of the hearing that the Claimant had seen these documents and had taken time to digest them. The Claimant attended the hearing without a copy of the agreed bundle and so I also ensured he had access to a spare copy.

4. I asked Counsel for the Respondent, given it was her client's application, to address me first and to take me through her Opening Submissions in detail so that the Claimant could understand matters. I then adjourned to

give the Claimant time to consider his response before hearing from him. After hearing all arguments I indicated I would be reserving my Judgment.

5. The Claimant resigned from his employment with the Respondent on 17 May 2016. The period of ACAS Early Conciliation was 14-15 August 2016. The claim before me was presented on 15 May 2019. The claim form indicated complaints of unfair dismissal, discrimination on account of a number of protected characteristics – race, disability, sex, religion or belief and holiday pay, arrears of pay, and "other payments". The claim form also referred to claims of "harassment", "performing a perfidy" and "breach of trust and confidence". The Response was filed on 16 July 2019 and the Respondent indicated its intention to defend all claims.

6. The claim was issued in the Watford Employment Tribunal. On 5 March 2020 the Respondent's Solicitors wrote to that Tribunal making an application for a strike out and/or deposit order. The case was then transferred to the West Midlands Employment Tribunal and listed for a Case Management Preliminary Hearing before Employment Judge Woffenden on 26 August 2020. The Respondent's application of 5 March 2020 had not yet reached the file now held at West Midlands Employment Tribunal. Hence, Employment Judge Woffenden listed the application for the Open Preliminary Hearing which came before me on 26 November 2020.

7. When the case came before Employment Judge Woffenden she established that the Claimant wished to withdraw all of his claims save for breach of trust and confidence and constructive unfair dismissal. The Claimant told Employment Judge Woffenden he also had a "pension retirement claim". Employment Judge Woffenden explained to the Claimant that if he wished to pursue such a claim, and it was unclear to her exactly what sort of claim this might be, he would need to do so in writing to the Tribunal by way of an amended application.

8. Later in the day of the Case Management Preliminary Hearing the Claimant emailed the Tribunal stating he wished to pursue a "pension claim".

9. At the start of the hearing before me I sought to understand what the "pension claim" was about. It became clear from discussions with the Claimant that it was not in fact a separate claim but was rather part of the losses he was pursing should he succeed in his constructive unfair dismissal claim.

10. The Respondent's application for strike out and/or deposit was based on a number of separate arguments the first being res judicatar and/or an abuse of process.

11. In 2016 the Claimant had brought a claim for constructive unfair dismissal against the same Respondent. I did not have a copy of that claim form (the Respondent has apparently changed Solicitors in that time that since passed and does not have a copy), but the bundle did contain some pertinent papers relating to what I shall call "the 2016 claim".

12. The 2016 claim was presented on 31 July 2016 and given case number 1302156/2016. In the bundle at pages 39-51 was a copy of the Response filed on 27 October 2016. It is clear that the Respondent was responding to (amongst others) a claim of constructive unfair dismissal.

13. The 2016 claim was also the subject of an application by the Respondent for an order for strike out and/or deposit which came before Employment Judge Self on 1 February 2017. His Judgment and Reasons were in the bundle at pages 52-60. Employment Judge Self decided the constructive unfair dismissal claim (and others) should be struck out pursuant to Rule 37(1)(a) of Schedule 1 of the 2013 Employment Tribunal Rules of Procedure on account of having no reasonable prospect of success.

14. In his Judgment Employment Judge Self set out all the breaches relied on by the Claimant as giving rise to his constructive unfair dismissal claim Paragraph 21 of his Judgments (page 56 of the bundle) sets out some seven breaches in detail as follows.

a) The Claimant had been absent from work from 12 November 2015 following an accident at work. The Claimant complained that he had not been allowed to go home on that shift after the injury had been sustained.
b) Further the Claimant asserted that in various letters dealing with his sickness absence the date when he was injured was stated as being either 13 November or 16 November which was not correct and which he perceived was dishonesty on the Respondent's part. There were no financial ramifications of these different dates, I saw letters where these incorrect dates were put in.
c) He complained that when he filled in an accident report on 16 November the signature was dated 16 November. His view is that it should have been dated on the date of the accident 12 November and in his view all of the above matters were attempts to cover up his injury.
d) He was not allowed Trade Union representation at two welfare appointments in December but was allowed them in similar meetings in the New Year.
e) He did not receive chocolates as other staff had done in December 2015.
f) The Company had tried to / did impose a new job title on him in 2011.
g) His Trade Union representative told him he could not go to a proposed welfare meeting on 6 May 2017 and the Claimant believed that it because the Trade Union official had been warned off by the Company. He told me he had no evidence for that and would not be able to bring any evidence at any future hearing but that it was just a gut feeling

15. At paragraph 32-33 Employment Judge Self concluded in relation to this head of claim,
32. "I have concluded that the Claimant's constructive unfair dismissal claim does not have any reasonable prospect of success. I have considered the various elements that he has set out both individually and collectively and cannot see that he has come even close to demonstrating that there are any reasonable prospects of success. **Case No:3314862/2019**

33. He has had ample opportunity to set out his case and to provide evidence in support and he has palpably failed to set out the basis for why the Respondent by their conduct would have been in repudiatory breach of conduct entitling him to resign."
16. The Claimant applied for reconsideration of Employment Judge Self's Judgment. That application was rejected on 20 March 2017 on the basis that "*there was no reasonable prospect of the original decision being varied or revoked".*

17. The Claimant appealed to the Employment Appeal Tribunal. Before me, Counsel for the Respondent handed up the Judgment of Her Honour Judge Eady QC in relation to that appeal, the appeal being heard on 19 February 2018, and Judgment handed down on 23 March 2018, appeal no UKEAT/0221/17/DM.

18. Before the Employment Appeal Tribunal it appears the Claimant was arguing that Employment Judge Self had failed to understand his claim. It is clear that before the Employment Appeal Tribunal, the Claimant was seeking to assert a 'new' breach that he said was the reason he resigned; I say 'new' in that it was not one identified by the Claimant at the hearing before Employment Judge Self. The Employment Appeals Tribunal found that Employment Judge Self had in fact been *"at great pains"* to understand the Claimant's case and did not allow the appeal.

19. The Respondent's first argument before me was that the principle of res judicata should prevent the Claimant seeking now to re-litigate the 2016 claim.

20. The Respondent also argued that under Henderson v Henderson [1843] ALL ET Rep 378 the claim should not be allowed to continue as this would be an abuse of the process. Counsel for the Respondent referred me to the case of Akay v Newcastle University 2020 EWHC 1669, QBD, as a more recent summary of abuse of process principles.

21. The Respondent's next point was in relation to time limits. The Claim before me was presented more than three years after the Claimant's employment with the Respondent terminated. The Claimant, in the Respondent's submission, had offered no reason for why he had not presented this claim in time, particularly when he was able to engage in ACAS Early Conciliation and present the 2016 claim in time, and the delay after the time limited expired was inexcusable.

22. Finally the Respondent confirmed it was making an application under Rule 37 more generally, on the basis the claim has no reasonable prospect of success (as determined in the 2016 claim by Employment Judge Self).

23. After hearing from Counsel for the Respondent, I allowed the Claimant a break before addressing me.

24. The Claimant made in essence two points:-

a) Firstly he referred me to an email at page 99 of the bundle. He referred to this as being a statement made to the Solicitor (I identified by this he meant the Respondent's solicitor at the time) and it being something he was *"not able to tell the Judge at the time".* He told me the email referred to his resigning because there were no light duties available. The email is dated 7 March 2017 and in it, essentially the Claimant objects to the Respondent's strike out application (in the 2016 claim) and refers to various matters including no light duties being available to him.

b) Secondly the Claimant referred me to page 149 of the bundle. This was a letter from a Consultant Psychiatrist at *"Forward Thinking Birmingham"* dated 10 August 2018 and addressed *"To whom it may concern"* which confirmed the Claimant had been under the care of secondary mental health services *"since December 2016"* and that he had been admitted to hospital *"under the provisions of the Mental Health Act 1983 (amended 2007) on two separate occasions (18/12/2016 – 28-12/2016 and 19/11/2017 – 17/01/2018)".* The letter confirmed the Claimant *"has been diagnosed with a psychotic illness"* but does not say when that diagnosis was made.

The Law

25. A party to proceedings who seeks to reopen or raise an issue which has already come before a Tribunal, may be 'estopped' from doing so under the principle of res judicata.

26. The rule in Henderson v Henderson provides that if a party to proceedings fails to raise any issue that he could and should have raised, he may be estopped from raising that issue in the future if to do so would amount to an abuse of process. The Akya case handed up by Counsel for the Respondent referred to the Judgment of Lord Bingham in Johnson v Gore-Wood Co (No1) [2002] 2 AC 1 in which he said, when dealing with arguments as to abuse of process, it should be:-

"a broad, merit-based judgment which takes account of the public and private interests involved and also take account of all the facts of the case, focusing attention on the crucial question whether, in all circumstances, a party is misusing or abusing the process of (the Tribunal) by seeking to raise before it the issue which could have been raised before."

27. On time limits for constructive unfair dismissal claims the relevant provision is at s111 Employment Rights Act 1996 and provides;

"(2) … an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal –
(a) before the end of the period of three months beginning with the effective date of termination, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied it was not reasonably practicable for the complaint to be presented before the end of that period of three months"

28. Rule 37 of Schedule 1 of the 2013 Employment Tribunal Rules of Procedure deals with strike out applications and provides;
"(1) At any stage of the proceedings, wither on its own initiative or on the application of a party, a Tribunal may strike out all or any part of a claim or response on any of the following grounds –
(a) That it … has no reasonable prospects of success."

Conclusions
29. On the issue of res judicata I find the Claimant should be estopped from seeking to re-litigate the 2016 claim. The 2016 claim included a complaint of constructive unfair dismissal and Employment Judge Self identified a list of breaches relied on by the Claimant in that claim.

30. In this claim the Claimant sent an email to the tribunal on 13 December 2019 setting out his various complaints in more detail than he had given in the ET1. In this claim, and taken from these documents, the Claimant appears to be asserting the following:

(a) The Respondent attempted to vary his contract in 2011,

(b) The Respondent failed to make reasonable adjustments from 2013 to 2016 (in relation to the Claimant's injured leg and shoulder).

(c) An allegation that the dates of absence and dating of an accident report by the Respondent was incorrect in 2015/2016.

31. (a) Above was pleaded by the Claimant in the 2016 claim – item (f) of Employment Judge Self's list of breaches. The principle of res judicata prevents the Claimant raising this again.

32. (c) Above was pleaded by the Claimant in the 2016 claim – items (b) and (c) of Employment Judge Self's list of breaches. The principle of res judicata prevents the Claimant raising this again.

33. (b) Above is vague but appears to be the "light duties" argument that the Claimant sought to convince Her Honour Judge Eady in the Employment Appeal Tribunal as being part of his constructive dismissal claim, and where he was unsuccessful in that regard. It is clear from the 2017 correspondence/email the Claimant referred me to and detailed at paragraph 24a) above, he had in mind an argument about light duties in the 2016 claim but it appears he did not articulate it as being part of the constructive unfair dismissal claim before Employment Judge Self. Employment Judge Self's Judgment at paragraph 26 (page 57) makes it clear the light duties' was being relied on in the 2016 claim by the Claimant as part of his disability discrimination claim, rather than constructive unfair dismissal, and Employment Judge Self also struck out that head of claim. It would be an abuse of process to allow the Claimant to resurrect this now.

34. On the time point the Claimant is three years out of time. I am sympathetic to the medical issues the Claimant has clearly been struggling with.

However he was clear that he was not receiving treatment for medical health matters until December 2016, some 4 months after time had expired. He was able to commence the 2016 claim in time, after engaging with ACAS Early Conciliation. He represented himself throughout that litigation, even before the Employment Appeal Tribunal. After his appeal was dismissed by the Employment Appeal Tribunal in March 2018, he has offered no explanation for why he waited another year to file this claim. There is a public interest in the time limits in this jurisdiction. There has been no evidence given and no explanation provided as to why the claim cannot have been filed in the three month time limit. Nor is there any basis on which I can extend time on the not reasonably practicable basis.

35. Turning to the general argument made by the Respondent that this claim has no reasonable prospect of success, for the reasons given above I agree wholeheartedly.

36. For the reasons above I strike out the claim.

37. By way of footnote, at the end of the hearing before me Counsel for the Respondent asked me to look at an email the Claimant had sent to the Tribunal and to her Instructing

Solicitor on 18 July 2020 in which he stated “I am wrriting this latter to let the party know i am an able to pay for the cost of the claim for constructive dismissal… I am not aware of if i have to pay for the claim if i lose i am aware the employment tribunal is free of charge” (sic). Counsel for the Respondent requested that I explain that whilst there are no longer fees charged for bringing proceedings in the Employment Tribunal (as there would have been when the Claimant brought the 2016 claim), it is still open to the Respondent to apply for a Costs Order. I explained this to the Claimant, although I was not addressed on costs at this hearing.

Employment Judge Hindmarch

Date 06/12/2020