EMPLOYMENT TRIBUNALS

Claimant: **Eriarhemhien Fortune Udomhiaye**

Respondent: **London General Transport Services Limited T/A Go Ahead London**

Heard at: **London South via CVP On: 08/02/2022**

Before: **Employment Judge Krepski**

Representation:
Claimant: **John Neckles – Representative**

Respondent: **Russell Bailey – Counsel**

JUDGMENT

The Claimant's claim for unfair dismissal is not well founded and, as such, is dismissed.

The Claimant is ordered to pay the Respondent's costs in the amount of £400.

REASONS

Preamble

1. The Claimant was employed by the Respondent as a bus driver.

2. He was summarily dismissed for gross misconduct after being involved in a road traffic collision with a pedestrian.

3. The Tribunal received the Claimant's ET1 on 24th September 2020.

4. Section 8 of the ET1 is entitled "*Type and details of claim*". Section 9 is entitled "*What do you want if your claim is successful?*".

5. In Section 8.1, the Claimant ticked the box marked "*I was unfairly dismissed (including constructive dismissal)*", but ticked no other boxes in that section. In Section 8.2, where the Claimant is expected to set out the background and details of the claim, the Claimant simply wrote "Not blameworthy".

6. In Section 9.1, in response to the prompt "*Please tick the relevant box(es) to say what you want if your claim is successful*", the Claimant ticked "*If claiming unfair dismissal, to get your old job back and compensation (reinstatement)*" and "*If claiming discrimination, a recommendation*".

7. In an ET3 accompanied by grounds of resistance dated 3rd November 2020, the Respondent stated (correctly) that an employee has protection from being unfairly dismissed pursuant to section 94 of the Employment Rights Act 1996 ("the Act"), but that the employee must have had a qualifying period of employment of at least two years, as per section 108(1) of the Act.

8. The Claimant was employed from October 2019 until July 2020 and had therefore not been employed by the Respondent for 2 years.

9. In such circumstances, the Claimant would not have the right to bring his claim, and the Respondent's solicitors stated that the tribunal had no jurisdiction to hear this claim.

10. The Respondent's solicitors wrote a letter on 18th January 2021 to the Tribunal, copied to the Claimant, repeating their assertion that the Tribunal had no jurisdiction to hear this claim.

11. The Respondent's solicitors then wrote an email to the tribunal, copying in the Claimant, attaching their letter of 12th February 2021.

12. This resulted in the Tribunal sending to the Claimant a strike out warning dated 11th March 2021. This letter stated that the Claimant appeared to have been employed for less than 2 years and that the Tribunal could not consider the complaint if that was the case. It required a response by 18th March 2021.

13. On 22nd March 2021, the Respondent's solicitors wrote to the Tribunal, copying in the Claimant once again, asking for the claim to be struck out, in the absence of the Claimant providing any reason to the contrary.

14. On 29th March 2021, a response from the Claimant's (then newly appointed) representative, Mr Neckles, came in the form of an email.

15. The email enclosed a letter of appointment dated 17th March 2021 and a document entitled "Claimant's - Amended - Particulars of Complaint" (emphasis as per original).

16. That document contained a section titled "Heads of claim" which itself contained the following subheadings:
    a. "Dismissal for Health & safety reasons: S. 100(1)(c) ERA 1996 claim";
    b. "Race (Direct) Discrimination: S. 13 pursuant to S. 39(2)(a)(b)(c)(d) EqA 2010 claim"; and
    c. "Wrongful dismissal claim".

17. This was followed by a letter from the Respondent on 30th March 2021 objecting to the "New Claims" as they were described.

18. A notice of a preliminary hearing from the Tribunal then followed on 8th June 2021 (originally scheduled for 3rd August 2021 but subsequently held on 8th February 2022), the purpose of which was "*[t]o consider whether the claimant's claim should be struck out and if not, whether the application to amend should be granted"*.

Jurisdiction

19. Though neither party drew my attention to it during the hearing, I note the Employment Appeal Tribunal ("EAT") case of Leicester University Students' Union v Mahomed [1995] I.C.R. 270.

20. In that case, the EAT considered the operation of sections 54 and 64 of the Employment Protection (Consolidation) Act 1978, which I find to be analogous to the modern equivalents, namely sections 94 and 108 of the Act.

21. The EAT noted the difference between certain sections of the 1978 act stating that a tribunal "shall not consider a complaint", and there being no such equivalent provision with respect to the qualifying period.

22. It concluded by saying that "*Proof that the qualifying period has been served is a precondition to a finding of unfair dismissal, and the issue may often conveniently be taken as a preliminary point, but it is not a precondition to the tribunal having jurisdiction*".

23. As such, I find that the I have jurisdiction to consider the initial claim of unfair dismissal and to consider any amendments that the Claimant seeks.

Amendments and the relevant law

24. Having found that I have jurisdiction to consider the initial claim of unfair dismissal as per the ET1, I note that the Claimant was not employed by the Respondent for the requisite 2 years and that the claim, if it were limited to that ground, would fail.

25. In order for the Claimant to have any prospects of success, therefore, he would have to be successful in his application to amend his Claim.

26. As outlined above, the Claimant seeks to amend his claim to the following:
    a. That this was an unfair dismissal with a health and safety basis contrary to s100(1)(c) of the Act;
    b. That there was direct race discrimination against the Claimant; and
    c. That the Claimant was wrongfully dismissed.

27. I remind myself that the overriding objective, as outlined in Rule 2 of the Employment Tribunals Rules of Procedure 2013, is to deal with cases fairly and justly.

28. The Tribunal has power to grant leave to amend a claim under Rule 29 of the Employment Tribunals Rules of Procedure 2013.

29. Guidance for exercising that power was given by the EAT in Selkent Bus Co Ltd v Moore [1996] ICR 836. In particular, it was emphasised that:

    "*Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment.*"

30. I also note Guidance Note 1 of the Presidential Guidance on General Case Management which notes (at paragraph 5) that relevant factors include:
    a. The nature of the amendment to be made;

b. Time limits;
c. The timing and manner of the application.

31. The Guidance Note also states (at paragraph 6) that the Tribunal draws a distinction between: amendments that seek to add or to substitute a new claim arising out of the same facts as the original claim; and those that add a new claim entirely unconnected with the original claim.

32. I shall first consider the nature of the amendments.

33. I find that there is no mention of health and safety or s100 of the Act on the ET1, and I do not infer this from the sole words found at 8.2, namely, "Not blameworthy". Based on the limited information in the ET1, I find that the claim outlined on it is for a 'typical' case of unfair dismissal, as opposed to one made specifically on grounds of health and safety. "Not blameworthy" echoes the general tenor of the Claimant when dealing with his employer post-accident, in which he generally averred that he was not to blame for the accident which caused his dismissal. By contrast, the Claimant submitted at the hearing that the basis of his health and safety claim was his bringing information to an official at the site of the accident. I therefore find this to be a substantial alteration, describing a new ground of complaint.

34. Mr Neckles submitted, on behalf of his client, that the Claimant had ticked the "Race" box at 8.1 of the ET1 but that, for whatever reason, this was not reflected in the ET1 sent to the Tribunal. He further submitted that the fact the Claimant ticked the box at 9.1 marked "*If claiming discrimination, a recommendation*" is a sufficient indication that the Claimant was bringing a race discrimination claim.

35. I do not agree. Even if I were to deem the box checked at 9.1 sufficient to show that a discrimination claim was being brought, it does not indicate on what *grounds* the discrimination claim was being brought. The Respondent (and Tribunal) would have no way of knowing whether the claim was for sex, race, age or any other characteristic. Only with the email of 29th March 2021 did the Respondent learn that the Claimant would be asserting less favourable treatment due to his race (though there would be more than a bare assertion of this fact). As such, I find this to be a substantial alteration, describing a new ground of complaint.

36. Finally, there is the claim for wrongful dismissal. There is no indication on the ET1 of any claim for wrongful dismissal/notice pay and I do not find it possible to infer such a claim from the words "Not blameworthy". As such, I again find this to be a substantial alteration, describing a new ground of complaint.

37. I next turn to the time limits engaged by the amendments.

38. Both the unfair dismissal with a health and safety basis and the wrongful dismissal claims should ordinarily be lodged within three months (less a day) of the effective date of termination (subject to any extension due to early conciliation). The Respondent's contention that these grounds of claim were out of time was not disputed by the Claimant. Rather, the Claimant asked that the Tribunal exercise its powers to extend that time limit. In order to do so, however, I would have to be satisfied that it was not reasonably practicable to bring the claim within that time limit.

39. In respect of the claim of race discrimination, the Claimant averred that this claim was in time, due to it being raised on the ET1. Having found that it was not raised in the ET1, and that it was instead raised for the first time on 29th March 2021, I find that this claim is out of time. I must therefore consider whether it would be just and equitable to extend time in respect of this ground of claim.

40. Mr Neckles submits on behalf of his client that the Claimant had difficulty in finding anyone to assist him in understanding the paperwork, asks me to bear in mind that the Covid pandemic was ongoing, and submits that the Claimant believed his claims were submitted properly, and it was only when he received the Tribunal's strike out warning on the 11th March 2021 that he thought to seek further help/advice.

41. In respect of the claim for an unfair dismissal with a health and safety basis and the claim for wrongful dismissal, I find that it *was* reasonably practicable for the Claimant to have brought these claims within the time limit.

42. I note that the Claimant was able to bring *a* claim for unfair dismissal (albeit a different one) within the time limit. I note the contents of section 8.2 of the ET1, despite them being minimalistic in the extreme, which nevertheless showed the Claimant's understanding of the need to outline his claim. Lastly, I note from the Claimant's witness statement, the fact that he had the benefit of receiving advice from the Citizen's Advice Bureau when submitting his ET1.

43. I also find that it would not be just and equitable to extend time in respect of the claim of race discrimination. In addition to taking into account the above factors, when making this decision, I note that Respondent's ET3, dated 3rd November 2020 which states at paragraph 2 that the Claimant "*has not made any claim for discrimination*". I find that the Respondent should have known by that point that any discrimination claim he thought he had made was defective, and made urgent efforts to clarify his claim, or at the sought advice more urgently than when he finally approached Mr Neckles on 17th March 2021.

44. Lastly, I turn to the timing and manner of the application to amend. I note that the application was made around 5 months after the Respondent's ET3 first should have alerted the Claimant to problems with his claim, and I do not find the explanations given by the Claimant for the delay to be compelling.

45. Considering, therefore, the significant nature of the amendments, the fact that they introduce three new heads of claim, the fact that the claims are made out of time and that I find it would not be appropriate to extend the time limits, the delay in making the application to amend and the unsatisfactory reasons given for the delay, I find that that the injustice and hardship to the Respondent by allowing the amendments, in having to defend three entirely new claims after a significant delay not of its making and at considerable additional cost, would be greater than the injustice and hardship caused to the Claimant by refusing the application to amend.

46. As such, the application to amend is refused.

47. This being the case, the only claim remaining before me is the original unfair dismissal claim, for which the Claimant lacks the requisite qualifying period of employment.

48. I therefore strike out the Claimant's claim under Rule 37 of the Employment Tribunals Rules of Procedure 2013 on the basis that the claim has no reasonable prospect of success.

Costs

49. The Respondent makes an application for a costs order under Rule 76 of the Employment Tribunals Rules of Procedure 2013 and seeks a contribution to costs in the amount of £1250. The basis of the application is that it was unreasonable of the Claimant to have continued the claim having been informed of the lack of jurisdiction to do so.

50. The Claimant denied that he had acted unreasonably, noting in particular his lack of legal and procedural knowledge in respect of Employment Tribunal proceedings.

51. I find it appropriate to make a costs order under Rule 76(1)(b), as the Claimant's claim of unfair dismissal had no reasonable prospect of success due to his not having been employed by the Respondent for 2 years. Whilst the Claimant may not have known this initially, he would have known it when it was brought to his attention by the Respondent and the Tribunal and so it is appropriate to make the order.

52. In view of the Claimant's means, I make the order in the amount of £400.

16/03/2022
Employment Judge Krepski