



EMPLOYMENT TRIBUNALS

Claimant: Mr. U. Uno

Respondent: HCA International Limited

Heard at: London Central (by CVP)

On: 15 July 2022

Before: Employment Judge J Galbraith-Marten (sitting alone)

Appearances

For the claimant: Mr. Uno, in person

For the respondent: Mr. N. Caiden, of Counsel

RESERVED JUDGMENT

- A. The Tribunal has no jurisdiction to consider the Claimant's complaint of unfair dismissal and it is dismissed.
- B. The Tribunal finds the Claimant's complaint of breach of contract has no reasonable prospects of success and it is struck out.
- C. The Claimant's application to amend to include a disability discrimination claim is granted.
- D. The Respondent's application to strike out the Claimant's disability discrimination claim is refused.
- E. The Respondent's application for a deposit order in respect of the Claimant's disability discrimination claim is refused.

REASONS

Background

1. The Preliminary Hearing was listed to consider the Respondent's application to strike out or to case manage the claims.
2. The Claimant pursues unfair dismissal and breach of contract claims and there is reference to discrimination in the claim form.
3. The Respondent's primary position is that no disability discrimination claim is pleaded but if the Tribunal determines otherwise or the Claimant is given leave to amend, all the claims should be struck out on the grounds that they have no reasonable prospects of success in accordance with rule 37(1)(a) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
4. The parties prepared a joint 168-page bundle for the hearing. The Claimant did not provide a witness statement, but he gave evidence and was cross examined. Both parties referred the Tribunal to various documentation in the bundle and they each produced a skeleton argument.

Findings of fact

5. The Claimant commenced employment with the Respondent on 19 July 2021 as a Healthcare Assistant based at the Princess Grace Hospital. His gross salary was £24,500.00 per annum and his employment was terminated on 9 September 2021. At the date of dismissal, the Claimant had less than two months service.
6. The Respondent maintains his employment was terminated due to the unsuccessful completion of his probation period on the grounds of unsatisfactory performance. As set out in the Claimant's contract of employment, his employment was subject to a 13-week probation period. The letter confirming the Claimant's dismissal was included in the bundle at page 45.
7. The Claimant refutes the Respondent's assertion that he provided unsatisfactory performance. During his employment the Claimant maintains he had two periods of sickness absence and one late attendance at work and that did not warrant dismissal.
8. The Claimant's first episode of sickness absence took place on 9 August 2021. However, he only reported he was too unwell to work at 10.42am the next day and that email was included in the bundle at page 58. The Claimant reported being disorientated, not organised and his phone was not charged and that is why he hadn't reported his absence earlier.

9. The second episode of sickness absence took place when the Claimant was admitted to hospital on Wednesday 1 September 2021. This was confirmed in his GP's letter included in the bundle at page 46 and a discharge letter from the Royal Free London NHS Foundation Trust at pages 49 and 50. On that occasion, the Claimant took two sleeping tablets prescribed by his GP and he fell asleep in the street. An ambulance was called, and the Claimant was taken to hospital. During his transportation to hospital the Claimant submitted his mobile telephone was damaged.
10. The Claimant's time sheet included in the bundle at page 51 records he was sick on both Thursday 2 September 2021 and Monday 6 September 2021. In evidence, the Claimant confirmed he rang the Respondent on 2 September 2021 to report he was unable to work due to ill health. He spoke with the duty nurse manager who informed him he should let the Respondent know when he would be able to return to work and he would be referred to Occupational Health.
11. The Claimant confirmed a series of calls followed over the course of that weekend as his line manager wanted to know whether he would be available to attend for his next shift on Monday 6 September 2021. The Claimant's evidence was that his phone was not working, he was in hospital unconscious, and he was unable to take her calls.
12. The Claimant did however attend work late on 6 September 2021 and he met with his line manager, Ana Magalhaes, Clinical Nurse Manager. He showed her his telephone and advised her that he remained unwell, and he was sent home.
13. The Claimant returned to work the following day and worked a night shift. Following that shift and on the 8 September 2021, he received an invite to attend a probationary review meeting with his line manager. The invite letter was included in the bundle at page 44 and the purpose of the meeting was to review the Claimant's performance during his probationary period. A summary of the Respondent's main concerns were multiple absences of work/sickness and reliability as a team member. The Claimant was advised of his right to be accompanied at the meeting.
14. Minutes of the meeting were included in the bundle at pages 121-123. The Claimant's line manager opened the meeting by referring to previous conversations that had taken place in relation to the Claimant's sickness, communication and reporting late but despite that, in her opinion, matters hadn't improved. The Claimant's position was that he was unwell and that impacted on his ability to communicate.
15. He also informed his line manager that he was suffering from anxiety and his GP had changed his medication resulting in his hospitalisation. His line manager responded by stating this was the first she had heard this information. She also referred to a lateness incident when the Claimant reported 20 minutes late for work on 11 August 2021 which followed the first episode of sickness absence. In evidence, the Claimant stated this was due to a bus problem and

he had texted his employer to let them know he was running late, and it was outside his control. She also passed on general feedback from her team, and she confirmed she couldn't rely on the Claimant and that put patients at risk. Therefore, the Claimant's employment was terminated.

16. The Claimant maintained in evidence this meeting was deliberately brought forward and the real reason his employment was terminated was due to the fact his line manager was overworked and she was angry he had missed a shift.
17. The Claimant sought to appeal his dismissal on the basis it is unlawful to dismiss someone who is sick, and the Respondent didn't follow the probation and disciplinary process correctly. The Claimant's email dated 10 September 2021 was included in the bundle at page 127. The Respondent provided a written response on 11 October 2021 and that letter was included in the bundle at pages 129 – 132.
18. Adrian Brady the Respondent's Chief Operating Officer reviewed the Claimant's concerns and confirmed the Claimant was not dismissed because he was sick but due to a combination of performance, lateness, absence, and a failure to let the ward know he was not going to attend work. He also found the probation and disciplinary process had been followed correctly. The decision to dismiss remained.
19. The Claimant submitted his claim to the Employment Tribunal on 24 December 2021 following a period of early conciliation between 24 November 2021 and 16 December 2021.
20. The Claim Form was included at pages 3 – 15 in the bundle. At box 8.1 on page 8, the Claimant ticked the unfair dismissal box and the other complaints box, but he did not tick the discrimination box. However, at box 8.2 the Claimant stated the events he was complaining about included unfair dismissal, unfair probation process, breach of contract and discrimination. At box 12.1 on page 11, the Claimant ticked the no box when asked whether he had a disability.
21. A separate document was attached to the Claim Form at page 15 of the bundle which states; "*I am taking my employer to court as I believe this is an unfair dismissal or breach of contract*". There is reference to the Claimant being hospitalised in the document and it ends with the statement; "*... the decision increase or exacerbated the Claimant's health issues.*"
22. In addition to the Claim Form and included in the bundle at pages 40-43, was a letter from the Claimant to the Employment Tribunal further setting out his grounds of complaint and he listed three types of claims.
23. His first complaint is unfair dismissal and automatic unfair dismissal. The Claimant accepts in that document that he does not have the requisite service to bring an ordinary unfair dismissal claim but nevertheless, he believes the Respondent breached the law as they did not follow a fair or lawful disciplinary process. In respect of the automatic unfair dismissal allegation, the Claimant

refers to section 10 of the Employment Relations Act 1999 and he asserts he was not afforded the right to be accompanied at the meeting on 9 September 2021 when his employment was terminated.

24. The Claimant's second complaint is breach of contract. The complaint is put on the basis the Respondent could not support its assertions regarding the Claimant's unreliability and lack of communication as he was not obliged to take calls from his line manager outside of work hours.
25. Discrimination is the third complaint. The Claimant alleges the Respondent did not make any reasonable adjustments to accommodate his disability and allow his new care plan (alternative medication and counselling) provided by his GP to take effect. Instead, he was dismissed. Furthermore, the decision to dismiss him was at odds with the Respondent's decision to sign off his competency requirements and a conversation he had with his line manager the week before when she discussed the possibility of promotion with him. When questioned, the Claimant also asserted the Respondent's failure to refer him to Occupational Health was also a failure to make a reasonable adjustment.
26. The Claimant accepted in evidence that he had not referred explicitly to disability discrimination in his original claim form. He also accepted he had not ticked the discrimination box and he had confirmed he did not have a disability. The Claimant's position was he is not a lawyer, he had made mistakes on the claim form, and he thought it was sufficient to mention his sickness and provide further details after he lodged his claim. Furthermore, he clarified that he was seeking to amend his claim to expressly include a complaint of disability discrimination.
27. The conditions the Claimant relies on are HIV, diagnosed in January 2015, and psychotic disorder that was formally diagnosed by his GP in May 2022. However, the Claimant stated he has struggled with anxiety, persecution complex, kidnapping ideation and difficulty leaving his home for many years, and this was first recorded in his GP records as non-organic psychotic disorder with chaotic and challenging disorder in September 2017. Entries for anxiety and depression appear from June 2015 onwards. The Claimant's GP history was included in the bundle at page 168.
28. During cross examination, the Claimant accepted the Respondent was unaware he has HIV, but he maintained he had informed his line manager about his anxiety after his first episode of sickness absence on 9 August 2021 and this is also recorded in the minutes of the dismissal meeting on 9 September 2021.

The Law

29. Section 104 Employment Rights Act 1996 provides: -

(4) The following are relevant statutory rights for the purposes of this section-
(a) any right conferred by this Act for which the remedy for its infringement is by way of complaint or reference to an [employment tribunal]

30. **Section 108 Employment Rights Act 1996** provides: -

- a. *Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than [two years] ending with the effective date of termination.*

31. **Section 3 [Employment Tribunals] Extension of Jurisdiction (England & Wales) Order 1994** provides: -

- b. *Proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if –*
 - i. *the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine.*
 - ii. *the claim is one to which article 5 applies; and*
 - iii. *the claim arises or is outstanding on the termination of the employee's employment.*

32. In relation to amendment applications, the leading authority is **Selkent Bus Company Ltd v Moore [1996] ICR 836**. In deciding whether to exercise its discretion to grant leave for an amendment, the Tribunal should consider all the circumstances and balance the injustice or hardship which would result from the amendment or the refusal to amend. The factors to be considered include the nature of the amendment, the applicability of the statutory time limits, and the timing and manner of the application to amend.

33. Lord Justice Langstaff in **Chandok v Tirkey [2015] IRLR 195** set out; *“The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case.”*

34. In **Vaughan v Modality Partnership 2021 ICR 535, EAT** the Employment Appeal Tribunal emphasised the core test in an amendment application is the balance of hardship or injustice in allowing or refusing the application.

35. The Presidential Guidance on General Case Management for England and Wales also states there is a distinction between applications to amend which add new claims essentially out of facts that have already been pleaded and applications to add new claims which are entirely unconnected with the original claim. The Tribunal must consider the entirety of the claim form.

36. In **Anyanwu v South Bank Student Union [2001] ICR 391**, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious of cases as they are generally fact sensitive and require full examination to make a proper determination.
37. The Court of Appeal in **North Glamorgan NHS Trust v Ezsias [2007] EWCA Civ 330** stated it is only in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute.
38. Further guidance on strike out was provided in **Cox v Adecco & Others UKEAT/0339/19/AT(V)** and His Honour Judge James Taylor held; *“You can’t decide whether a claim has reasonable prospects of success if you don’t know what it is. Before considering strike out, or making a deposit order, reasonable steps should be taken to identify the claims, and the issues in the claims. With a litigant in person, this involves more than just requiring the claimant at a preliminary hearing to say what the claims and issues are; but requires reading the pleadings and any core documents that set out the claimant’s case.”*
39. The Employment Appeal Tribunal in **Van Rensburg v Royal Borough of Kingston-upon-Thames EAT/96/07** held that Tribunals have greater leeway when considering whether to grant a deposit order but there must be a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.

Submissions

40. The Respondent submitted the entire claim should be struck out on the grounds it has no reasonable prospect of success. In respect of the unfair dismissal claim, the Respondent’s position is the Claimant does not two years’ service therefore, the Tribunal does not have jurisdiction to consider an unfair dismissal claim.
41. Nor does the Tribunal have jurisdiction to consider an automatic unfair dismissal claim. The Respondent understands the Claimant relies on section 10 Employment Relations Act 1999 and his right to be accompanied in respect of his automatic unfair dismissal claim. However, that is not a relevant statutory right in accordance with s.104(4) Employment Rights Act 1996. Therefore, this complaint also has no prospects of success.
42. In relation to the breach of contract claim, the Respondent submits the Claimant would need to identify a term of his contract that was breached and losses which flowed from that breach. The Claimant stated during his evidence the breach of contract he relies on is the Respondent could not support its assertions in relation to his alleged unreliability and lack of communication as he was not obliged to take calls from his line manager outside of work hours.
43. The Respondent submits this is not a breach of contract, and even if it was, it does not give rise to a claim for damages that can be pursued in the Tribunal. In terminating the Claimant’s contract, the Respondent acted in accordance

with it, and he received two weeks' pay in lieu of notice and his outstanding holiday pay.

44. Turning to the issue of disability discrimination, the first question the Tribunal must determine is whether the claim is present or not. The Respondent maintains the claim form and the supporting documentation confirm it is not. The disability discrimination box was not ticked, there is only mention of the word discrimination on the form but not the subject or substance of it, there is no reference to the conditions relied upon, the additional document attached to the claim form refers to unfair dismissal and breach of contract and the only mention of health issues relates to the effect of the dismissal. In the Respondent's opinion, merely stating the word discrimination is not sufficient.
45. Therefore, the Respondent's primary position is there is no live disability discrimination claim and the Tribunal must consider the claim as it is in accordance with **Chandok v Tirkey**.
46. Also, if the Tribunal accepts it does not have jurisdiction to consider the Claimant's unfair dismissal, automatic unfair dismissal complaint and the breach of contract claim has no reasonable prospects of success, there is no live claim that is capable of being amended to include disability discrimination. Furthermore, there is no articulation by the Claimant of the amendment sought before the Tribunal.
47. Finally, if the Tribunal finds the disability discrimination claim is present or the Claimant is granted leave to amend, the claim should be dismissed as having no reasonable prospects of success or, a deposit order should be made as it has little prospects of success.
48. The Respondent relies on the following factors; (a) the Claimant hasn't properly set out his complaints with reference to the relevant disabilities, (b) the Respondent had no constructive knowledge of the Claimant having HIV and it disputes it had knowledge of his psychotic disorder, although the Claimant mentioned anxiety, that isn't sufficient to impute knowledge and at no point during or after the dismissal did the Claimant inform the Respondent that he was a disabled person and, (c) the crux of the Claimant's disability discrimination complaint relates to the Respondent's failure to refer him to Occupational Health after his absences on 2 and 6 September 2021 and that is not a reasonable adjustment.
49. The Claimant's submissions related to the factual background to his dismissal. He couldn't speak to his line manager whilst in hospital as he was unconscious. He did tell the Respondent he was sick and therefore disabled as confirmed by the minutes of the dismissal meeting included in the bundle at pages 121-123. Also, his line manager had spoken to his mother during his first episode of absence, and she had explained his condition and although he didn't inform the Respondent of the formal diagnosis of psychotic disorder, his line manager was aware of his anxiety symptoms.

50. The Respondent required the Claimant to report any absence from work which he did. In his opinion he was not required to speak with his line manager when he was unwell. There was insufficient time for him to find a companion to accompany him to the meeting on 9 September 2021. The Respondent's HR department informed him he couldn't ask a union rep to attend and the colleague he approached was informed he shouldn't attend either. The Claimant submitted this was deliberate on the Respondent's part to ensure he did not have a witness present at the meeting.
51. As he was not performing clinical work, he was not required to disclose his HIV status to the Respondent.
52. The Claimant always attended work early save for one occasion when there was a difficulty with public transport.
53. Finally, in relation to his claim form, he reiterated he is not a lawyer, he felt that mentioning his sickness that resulted in his absence from work and his dismissal was sufficient.
54. The Respondent did not provide him with a period of supernumerary practice during his employment, nor did it follow any of its policies. The Claimant has worked as a Healthcare Assistant in the NHS since 2008 and his work has never been questioned so he doesn't accept he provided unsatisfactory performance.
55. The Claimant applies to amend his claim to include a disability discrimination complaint. Disability discrimination was not explicitly mentioned in the claim form as he wasn't aware of the technicalities of separating it from his unfair dismissal complaint.

Conclusions

56. In accordance with s.108 Employment Rights Act 1996 the Tribunal does not have jurisdiction to consider the Claimant's unfair dismissal complaint as the Claimant did not have two years' service at the date of his dismissal. Accordingly, the claim is struck out on the grounds it has no reasonable prospects of success in accordance with Rule 37(1)(a) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.
57. In accordance with s.104(4) Employment Rights Act 1996, the Tribunal does not have jurisdiction to consider the Claimant's automatic unfair dismissal complaint as the right relied upon by the Claimant, the right to be accompanied as provided by s.10 Employment Rights Act 1999, is not a relevant statutory right for the purposes of automatic unfair dismissal on the grounds of asserting a statutory right. Accordingly, the claim is struck out on the grounds it has no reasonable prospects of success in accordance with Rule 37(1)(a) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.
58. In accordance with s.3 Extension of Jurisdiction (England & Wales) Order 1994, the complaint as framed by the Claimant i.e., the Respondent could not

support its assertions regarding the Claimant's unreliability and lack of communication as he was not obliged to take calls from his line manager outside of work hours does not have reasonable prospects of success as the Claimant has not established that amounts to a breach of contract or that damages flow from the alleged breach. Accordingly, the claim is struck out on the grounds it has no reasonable prospects of success in accordance with Rule 37(1)(a) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

59. In relation to the disability discrimination complaint and the Claimant's application to amend, the Claimant did not tick the relevant disability discrimination box on the claim form, nor did he specifically mention the disabilities he relies upon, and he stated he did not have a disability. The Tribunal accepts the Claimant's evidence that he is a litigant in person and those were mistakes on his part.
60. However, the Claimant did refer to discrimination at box 8.2 of the claim form. Also, in his letter to the Tribunal dated 14 April 2022, he specifically referenced disability discrimination. The letter was included at page 42 in the bundle, and it refers to two potential reasonable adjustments the Respondent could have made rather than dismiss the Claimant; make a referral to occupational health and, accommodate his health issue by allowing him further time until his new care plan had taken effect.
61. In addition, and in the supporting statement attached to the claim form, the Claimant referred to his ill health and hospitalisation, the absence of an occupational health referral, his dismissal, and the impact it had on his existing conditions. Therefore, the Tribunal finds the Claimant is seeking to add a new claim to the same factual complaints that have already been pleaded and the Tribunal considers this a relabelling exercise, notwithstanding the Tribunal's conclusions in respect of the Claimant's unfair dismissal and breach of contract claims.
62. As to the statutory time limits and as the Tribunal finds this is a relabelling exercise, no time limit issue arises. The claim was issued within the relevant time limit including the extension provided by ACAS conciliation.
63. In relation to the timing and manner of the application, the application was effectively made on 14 April 2022 when the Claimant wrote to the Tribunal outlining his disability discrimination complaint albeit he did not refer to it formally as application. This is the first hearing in these proceedings and no additional delay has been caused, nor was any issue raised by the Respondent regarding the cogency of the evidence being affected.
64. For those reasons, the Claimant's application to amend is granted. If the Tribunal is wrong, it would have allowed the amendment on the grounds that the balance of hardship favours the Claimant in any event. A refusal of the application would have left the Claimant without any head of claim and the only prejudice to the Respondent is that it will need to defend such a claim.

65. Turning next to the Respondent's application to strike out the disability discrimination complaint. The Tribunal has followed the guidance as set out in **Cox v Adecco** and it heard from the Claimant, read the pleadings and the core documents to understand the claims and issues before considering the Respondent's application.
66. The Tribunal is also mindful of the necessity to exercise caution when dealing with applications to strike out discrimination complaints generally and particularly when facts are in dispute. The central facts in this matter are disputed and require further examination before a proper determination can be reached. Therefore, the Respondent has not established the disability discrimination claim has no reasonable prospects of success and its application is refused.
67. Rule 39(1) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 Schedule 1 provides if a Tribunal considers that any specific allegation or claim or response has little prospects of success, it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
68. This threshold is lower than the threshold for striking out a claim but nonetheless it requires the Tribunal to find there is a proper basis to doubt the likelihood of the Claimant being able to establish the facts essential to the claim. Although the Respondent points out the availability of various defences it can use to defend the claim, there is no proper basis to assert the Claimant will be unable to establish the essential facts of his claim. As such the Tribunal declines to make a deposit order.

CASE MANAGEMENT

<p>The Equality Act 2010 says that a person has a disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day to day activities. There is more information here: https://assets.publishing.service.gov.uk/government/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf.</p>

1. The Claimant says the disability he relies on is psychotic disorder. (The Claimant also has HIV, but he accepted in evidence the Respondent had no knowledge of that disability at the date of his dismissal.)
2. The Claimant must provide to the Respondent by **12 August 2022** a disability impact statement including the following information:
 - 2.1 How long has the Claimant had psychotic disorder?

- 2.2 What are/were the effects of psychotic disorder on the Claimant's ability to do day-to-day activities?
 - 2.3. Give the dates when the effects of psychotic disorder started and stopped. If they have not stopped, say how long they are expected to last.
 - 2.4 If the effects lasted less than 12 months, why does the Claimant say they were long-term?
 - 2.5 Has the Claimant had medical treatment, including medication? If so, what, and when?
 - 2.6 Has the Claimant taken other measures to treat his psychotic disorder? If so, what, and when?
 - 2.7 What would the effects of psychotic disorder have been without any treatment or other measures? The Claimant should give clear day-to-day examples, if possible.
 - 2.8 Any other information the Claimant relies on to show that he has a disability.
3. The Claimant must also by **12 August 2022** send to the Respondent:
- 3.1 Copies of the parts of his GP and other medical records that are relevant to whether he had a disability at the time of the events the claim is about. He may blank out anything that is clearly not relevant.
 - 3.2 Any other evidence relevant to whether he had the disability at the relevant time.
4. The Respondent must write to the Tribunal and the Claimant by **23 September 2022** confirming whether or not it accepts that the Claimant has or had a disability and, if so, on what dates. If the Respondent does not accept the Claimant has or had a disability on any relevant date, it must explain why.
5. The Tribunal will conduct a private Case Management Preliminary Hearing to determine the issues and timetable for the final hearing following receipt of the Respondent's letter referred to in direction 4 above. This may also include listing a further Preliminary Hearing to determine whether the Claimant is disabled.

Employment Judge J Galbraith-Marten

18th July 2022

REASONS SENT TO THE PARTIES ON

18/07/2022

FOR THE TRIBUNAL OFFICE