EMPLOYMENT TRIBUNALS

Claimant: Mr A Dunn

Respondent: CGB Humbertherm Ltd.

Heard at: Sheffield

On: 5 April 2023

Before: Employment Judge Shepherd

Members: Ms Lee
Mr Lannaman

Appearances:

For the Claimant: In person prior to leaving the hearing.

For the Respondent: Ms Senior, counsel.

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim brought by the claimant of refusal of employment on grounds related to union membership contrary to section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992 is not well-founded and is dismissed.

2. Any claim of detriment on the ground that the claimant had made a protected disclosure is not well-founded and is dismissed.

REASONS

1. The claimant appeared in person but said that he wanted the hearing recorded. It had been explained to him that Employment Tribunal hearings are not recorded. He then left the hearing before the oral evidence commenced. The Tribunal decided to proceed with the hearing in the claimant's absence. Ms Senior represented the respondent.

2. The Tribunal heard evidence from:

Richard Staves, Sales Director.

The Tribunal had sight of a written statement provided by the claimant. As he refused to participate in the hearing, this was considered without the opportunity for the Tribunal or the respondent to ask questions and for the Tribunal to assess the claimant's demeanour and credibility.

3. The Tribunal had sight of a file of documents numbered up to page 167 together with a document which had been provided to the Tribunal and the claimant on the morning of the hearing, which was then numbered as page 168.
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4. This hearing had been listed for a two-day hearing by CVP in a Case Management order dated 9 December 2022 and sent to the parties on 14 December 2022.

5. On 4 April 2023 the Tribunal wrote to the claimant stating:

> "Employment Judge Shepherd has considered the claimant's email of 14:12 today.
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> This case has been listed to be heard over two days – 5 April 2023 and 6 April 2023.
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> The parties have been aware of this since 14 December 2022 when they were informed it was listed as a video hearing.
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> Employment Judge Davies informed the claimant on 3 April 2023 that the hearing could be listed to take place by CVP or in person. If it was to be held by CVP, the claimant would need to use a suitable device to connect to the CVP hearing. That means either a computer, laptop or tablet but not a mobile phone.
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> The claimant was also told that he would need either a hard copy of the file or a suitable device to view the documents.
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> It was provided that, if the claimant does not have a suitable device for viewing documents he would need to arrange to collect a hard copy from the respondent, or go to a library or printshop to print it out.
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> The claimant was ordered to email the Tribunal and the respondent by 10 am today (4 April 2023) to confirm:
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> a. Does he want it to be by CVP or in person?
> b. If he wants it to be by CVP, he must confirm that he has a laptop, computer or tablet to connect to the hearing.
> c. He must also confirm that he will either collect or print a hard copy of the documents for his own use at the hearing or that he has a separate, suitable device for viewing them.
> d. If he wants the hearing to be in person, he must confirm that he will either collect or print a hard copy of the documents for his own use at the hearing.

A decision will then be made about whether the hearing should be by CVP or in person.

It was also made clear that if the claimant did not take proper steps to participate in the process, the hearing may go ahead in his absence or a Judge may consider striking out his claim because he has conducted it in an unreasonable way and/or a fair hearing is no longer possible.

The claimant has not complied those orders, but at 9.59 today he sent an email dated and stated "I'll come to Sheffield court tomorrow. If you want"

At 10.01 he sent another email stating "Do as you please. This is bullying and harassment. I'm going to appeal anyway we know your decision."

On this basis, the case was listed for an attended hearing in the Sheffield Employment Tribunal on Wednesday 5 and Thursday 6 April 2023.

The claimant has now, contrary to his email at 9.59, sent an email indicating that he can't make Sheffield at that short notice. He also states "You won't record it so see you Friday for the second day. This is unfair behaviour."

The Tribunal has tried very hard to accommodate the claimant. This is his claim. He should attend the hearing as he indicated this morning that he could.

The case remains listed for an attended hearing in Sheffield on 5 April 2023 and 6 April 2023."

6. On 4 April 2023 at 14:37 the claimant sent an email to the Tribunal stating

"You won't record the hearing, like the other hearing I won't take part, I've sent my witness statement in. You do the hearings anyway and ignore law legislation and fact I can prove every lie the respondent has said in there ET3 responses but that's not enough.

I know your answers you know your decision.

Unless recordered as I don't trust yourselves you do what you want in these hearings

so if not recorded you can go ahead with my permission without me,

I look forward to the judgment.

Giving the 2 days to appear in a court in person.

Minimal deadlines on these last 2 days email. Working with the respondent solicitors everyone, anything they ask they get.

You have my witness statement

I don't need a bundle.

I ask for another date if I. In person. Not 2 says notice."

7. The claimant attended the Hearing of 5 April 2023. He asked if the hearing was going to be recorded. The Employment Judge attempted to discuss this issue with the claimant. However, the claimant stated that:

> "I don't need to be here, you can do this without me I will just appeal"

8. The claimant left the hearing stating that the Tribunal could go on and get started without him. The Employment Judge attempted to explain to the claimant that Employment Tribunal hearings are not recorded. However, the claimant referred to pages 92 – 110 and said this "blows their case out of the water" and asked the Tribunal to read those pages. The Employment Judge indicated that the Tribunal would do that. The claimant then said that he was being threatened and he would just appeal. The claimant then left the hearing and did not return.

9. The Tribunal discussed the matter and, having read the hearing file and witness statements of the claimant and Richard Staves, the respondent's Operations Director, it was decided to proceed with the hearing in the claimant's absence.

10. Mr Staves gave evidence on oath. The Tribunal asked questions in order to clarify issues. Ms Senior made submissions on behalf of the respondent.

The issues

11. On 9 December 2022 in an annex to a Case Management Order, Employment Judge Cox provided that:

> "The claimant worked as a thermal insulation engineer. He alleges that the respondent refused him employment because of his union membership, contrary to section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992. He alleges that this occurred on various occasions from February 2021 to the date of the claim (9 March 2022) in relation to work at Keadby Power Station, Scunthorpe.
>
> The principal issues to be decided in the claim are:
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> 1. Did the respondent refuse to employ the claimant at Keadby on any occasion in that period?
>
> 2. If so, was the claim presented within 3 months of the date of that refusal?
>
> 3. If not, was it reasonably practicable for it to have been presented by then?
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> 4. If not, has it been presented within a further reasonable period?
>
> 5. If so, was the refusal because of the claimant's Union membership?

Findings of fact

12. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities.

13. The respondent uses a mixture of employees and workers provided through employment agencies. The majority of staff are directly employed and some agency workers are also appointed.

14. Richard Staves, the respondent's Operations Director contacted Zac Collins of Alpha Recruitment Labour and Recruitment Ltd in June 2021 indicating that the respondent may need some agency workers at the Keadby site. On 15 June 2021 Zac Collins provided Mr Staves with a list of 19 names.

15. Eight of those names were for labourers and, therefore, not relevant. There were 11 Thermal Insulation Engineers "laggers" which included the claimant. The respondent requires Thermal Insulation Engineers who work for it to hold the Client Contractor National Safety Group Safety Card (CCNSG).

16. Of the 11 Laggers on the list, only 4 were marked as having the Client Contractor National Safety Group Safety Card. The information provided by Alpha Recruitment showed that the claimant did not have the required CCNSG card. Richard Staves selected two of the workers as they had the CCNSG card and the information provided indicated that the claimant did not have this.

17. Richard Staves did not select the claimant because the information provided by the recruitment agency was that he did not have the requisite card. He also stated that, even if the claimant did have the CCNSG card, he would have picked the other two workers as they had worked for the respondent before and were a known quantity.

18. The claimant presented a claim to the Employment Tribunal on 9 March 2022. The claimant referred to "whistleblowing". It includes allegations against five respondents. The only respondent remaining in the case is CGB Humbertherm Ltd and the issues identified by Employment Judge Cox are in respect of the allegations of refusal of employment because of his Union membership contrary to section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992.

The Law

19. Section 137(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that it is unlawful to refuse a person employment because he is, or is not, a member of a Trade Union.

20. To succeed with a claim under section 137 the claimant must show that the reason for the refusal to employ him was because of his Trade Union membership.

21. As direct evidence of the reason why employment was refused can often be sparse, a Tribunal may need to draw inferences from the surrounding facts and the employer's explanation. It has been held that the refusal under section 137 is, in effect, a form of discrimination on the ground of Union membership and it is appropriate to adopt the

same approach to causation and the burden of proof as in section 136 of the Equality Act which provides:

> "(1) This Section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.
>
> (5) This Section does not apply to proceedings for an offence under this Act.
>
> (6) A reference to the court includes a reference to –
>
> (a) An Employment Tribunal."

22. Section 139 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:

> "(1) An employment tribunal shall not consider a complaint under section 137 unless it is presented to the tribunal –
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> (a) before the end of the period of three months beginning with the date of the conduct to which the complaint relates, or
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> (b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such period as the tribunal considers reasonable."

Conclusions

23. The Tribunal had sight of a message sent from the claimant to Zac Collins on 2 July 2021 in which he referred to being "blacked for humbertherm" as he had never worked for them. This message was not sent to the respondent and had not been seen by Richard Staves prior to the claim to the Tribunal.

24. Richard Staves gave clear and credible evidence that he had no knowledge of the claimant's Trade Union membership or activities before the claim was presented to the Tribunal. He only became aware that the claimant was a Trade Union member when the respondent received notice of this claim. In those circumstances the Tribunal accepts Richard Staves' evidence that it cannot possibly have played any part whatsoever in the decision as to who was offered employment.

25 The Tribunal considered the documents which the claimant said would blow the respondent's case out of the water. These were largely messages with the employment agency. The claimant had informed Zac Collins that he had the CCNSG card in November 2020. This is not information that was given to or within the knowledge of the respondent. There was mention of the claimant and other interested laggers provided to Richard Staves by Zac Collins in June 2021 but no reference to their Trade Union membership or the CCNSG card.

26. The claim was in respect of the employment of agency workers at the Keadby site and relates to the events of June and July 2021. The claimant raised the issue that he had been blacklisted by the respondent with the employment agency on 2 July 2021. There was no mention of the claimant's Trade Union membership or activities in his witness statement or the documents to which he referred when he left before the oral hearing commenced. The claim was presented to the Tribunal on 2 March 2022 following the ACAS early conciliation procedure.

27. The claim was substantially out of time, approximately five or six months, and there was no evidence that it was not reasonably practicable for the claim to have been presented within the three months period. The Tribunal had no jurisdiction to hear the claim.

28. If the Tribunal did have jurisdiction to hear the claim then it is not satisfied that the claimant had established facts from which the Tribunal could conclude that there was a refusal to employ the claimant because of his Trade Union membership. The burden of proof did not shift to the respondent but, if it had, there was clear and credible evidence that the respondent had no knowledge of the claimant's Trade Union membership and the Tribunal is satisfied that the respondent has established that the failure to employ the claimant was in no way whatsoever because of his Trade Union membership.

29 There was no evidence of any claim of detriment on the ground of making a protected disclosure.

30. In those circumstances, the unanimous decision of the Tribunal is that the claim is not well-founded and is dismissed.

Employment Judge Shepherd
6 April 2023