



EMPLOYMENT TRIBUNALS

Claimant: Mr S Webb

Respondent: Oxford City Council

Heard at: Bury St Edmunds (CVP)

On: 12 May 2023

Before: Employment Judge Laidler

Representation

Claimant: In person

Respondent: Ms J Duane, Counsel

JUDGMENT having been sent to the parties on 12 June 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This hearing was a public preliminary hearing listed to determine whether the tribunal had jurisdiction to determine the complaints or whether they should be struck out.
2. The claimant invoked ACAS Early Conciliation on 14 September and the certificate was issued on the 26 October 2022. The ET1 was received on 23 November 2022. In the ET1 the claimant stated that his employment was continuing but also that he had started another job on 4 July 2022. He ticked the box claiming unfair dismissal and no other box on the form was ticked. He did state in a subsequent paragraph that there had been multiple breaches of contract and failure to follow policy and procedure relating to the probation period, grievance and confidentiality policies.

3. At paragraph 9.2 of the ET1 form the claimant sought financial compensation that reflected the 11 months left of his contract and damages that reflected the bullying he had endured.
4. By a letter of 6 December 2022, the tribunal informed the claimant that as he did not have 2 years continuous service required to bring an unfair dismissal claim the tribunal could not consider that claim. He was given until 13 December 2022 to provide reasons why that claim should not be struck out
5. The claimant provided a response on 13 December 2022 that set out the alleged breaches of contract with each being headed as a repudiatory breach of the contract which led the claimant to resign. As a result of that further information this Hearing was listed to determine whether the claim of constructive unfair dismissal or any other claim in the ET1 should proceed.
6. For this hearing the tribunal had a bundle of 481 pages, a written skeleton argument from the respondent and case management agendas from both parties. Oral submissions were heard from both.
7. The claimant was employed on 24 May 2021 on a fixed term contract seen in the bundle at page 96. Insofar as there might have been a claim in the ET1 that there was a failure to provide a written statement pursuant to the obligation under section 1 of the Employment Rights Act 1996 that claim was clearly misconceived as a statement was provided.
8. The engagement ended on 1 July 2022 when the claimant resigned on notice which was paid.
9. The claimant's contract stated that he was subject to a 6 month probationary period. The statement of particulars also provided:

‘This document gives important information. It is the Statement of Employment Particulars relating to the contract of employment and supersedes any previous such statements or contracts. Together with the Local Collective Agreement(s), the Council's Employment Policies and where relevant the national conditions of service this document sets out your terms and conditions of employment in accordance with Paragraph the Employment Rights Act 1996.’
10. There is also a clause in the written statement at paragraph 15 dealing with employment policies. It provided that a full list was available on the intranet and the Council may change or amend them from time to time. It also provided that ‘these policies confer no contractual rights and may be changed at any time. The policy that is current at the time an event occurs will be the one applied.’
11. Paragraphs 54 - 57 of the statement dealt with probation and made it clear that it was only the Probation Policy which would apply and take precedence during the probationary period. That policy was seen at page 105.
12. The claimant drew the tribunal's attention to his statement of issues which appeared at page 129 of the bundle and ran to 11 pages. The tribunal

adjourned to read this together with page 49 of the bundle which was the claimant's response to the tribunal's letter of 6 December 2022 querying the lack of jurisdiction to hear a constructive unfair dismissal claim.

13. As set out in these documents the claimant relied on various alleged failures by the respondent as amounting to breaches of contract. These included an allegation that he had not been provided with a job specific job description, an alleged failure to comply with the probationary review form, and a failure to consult on the impact of a move to a different project. The claimant then relied upon alleged breaches of the probation policy in relation to the keeping of forms, the review process and the end of the probation period. He alleged there had been a dishonest and fraudulent action contrary to the employee code of conduct and dignity at work policy on bullying and intimidation when notes of the meeting were emailed to him. The claimant took issue with the extension of his probationary period stating there was no provision for that. The claimant alleged that the council had failed in its duty of care to protect him from bullying and harassment and intimidation. The claimant alleged various failures to comply with the dignity at work policy. He alleged instances of bullying and intimidation by colleagues. He alleged failure to follow the council's grievance policy and procedure.
14. In the claimant's reply to the tribunal's letter of 6 December regarding his purported constructive unfair dismissal claim the claimant stated: –

“I appreciate that the usual criteria to bring such a claim is a minimum of 2 years continuous employment with my employer but in this instance, there have been a series of repudiatory breaches of my employment contract as a direct consequence of serious organisational failures by management and HR to comply with their own policies and procedures.”

The claimant therefore argued that his claim for constructive unfair dismissal should be allowed to stand.

15. In the agenda that the claimant filed for this hearing he stated that he wished to withdraw his claim for constructive dismissal “as a separate entity as I understand that I do not have the necessary two-year qualifying period” and he also wished to withdraw his claim under ‘section 1 of The Employment Act 1996.’ He went on however: –

“I now wish that both of these issues be considered as an integral part of my claim in respect of the repudiatory breach of duty of mutual trust and confidence by my employer.

I therefore wish my claim in respect of the breach to read...the repudiatory breach of duty of mutual trust and confidence caused by my employers conduct throughout the period of my employment destroyed my working relationship with the council subsequently led me to resign prior to the completion of my fixed term contract.

I also wish to relabel my claim for breach of contract in respect of harassment and bullying as I now realise that in the legal context and within the council's dignity at work policy “harassment” relates to persons with protected characteristics. My claim for breach of contract should relate to the bullying actions of my line and other

managers during the course of my employment contrary to the council's dignity at work policy".

16. In a 7 page schedule of loss at page 86 the claimant set out each alleged breach of contract and claimed £10,000 injury to feelings for each. In addition, he claimed 'compensation but not financial loss in respect of constructive dismissal caused by the stressful actions by the council and the breach of the implied term of trust and confidence which led to my resignation' a further £10,000.
17. In addition, the claimant claimed a further £10,000 injury to feelings and £10,000 aggravated damages and he added £5000 interest. He claimed an uplift of £10,000 for the respondent's alleged failure to follow its grievance policy and the ACAS guidelines giving a total claim of £85,000.

Respondent's submissions.

18. The respondent provided written submissions in support of its contention that all the claims should be struck out as the tribunal did not have jurisdiction and/or they had no reasonable prospects of success,

Claimant's submissions

19. The claimant argued that the policies including the probation policy were all contractual and that the respondent was in breach of them. That he believes entitles him to claim injury to feelings for the effect that the alleged breaches had on him.
20. The claimant acknowledged in his agenda that he does not rely on any protected characteristic which would be needed to bring a claim under the Equality Act. When he referred to bullying he explained that was in relation to the manner in which the respondent failed to follow its policies in relation to him. He referred the tribunal to his list of issues at page 129 of the bundle which sets out which policy he alleges to have been breached and that document has been taken into account in reaching the decision in this matter.

Relevant Rules

21. Employment Tribunal Rules 2013

Striking out

37.— (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

- (a) that it is scandalous or vexatious or has no reasonable prospect of success;
- (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

- (c) for non-compliance with any of these Rules or with an order of the Tribunal;
- (d) that it has not been actively pursued;
- (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

When a costs order or a preparation time order may or shall be made

76.— (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

- (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
- (b) any claim or response had no reasonable prospect of success; or
- (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins

Ability to pay

84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

22 Equality Act 2010

4 The protected characteristics

The following characteristics are protected characteristics—

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

26 Harassment

(1) A person (A) harasses another (B) if—

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

The tribunal's conclusions

23. Constructive dismissal

The claimant does not have the requisite 2 years service to bring a constructive dismissal claim. This is required by section 108 ERA and does not give the Employment Tribunal any discretion. The claimant has not pointed to any claim where that qualifying service would not be required. When he was asked to provide further information and did so in December 2022 he listed the alleged breaches of contract. They all relate to alleged breaches of the implied term of mutual trust and confidence or alleged breaches of procedure. A fundamental breach of the express or implied terms of the contract can give rise to a constructive dismissal claim but the employee must according to statute have 2 years continuous service to bring such a claim. The claimant did not have 2 years service and acknowledges that. Such a claim has no reasonable prospects and must be and is struck out.

24. Breach of contract

The claimant argues that the respondent breached its own policies. However as expressly stated in his written statement those policies did not have contractual effect. They were applicable to his employment and that is not in dispute. The written statement at clause 15 made it clear they were not contractual.

25. If a claim of breach of contract is brought and found to be well founded the claimant can recover damages for the breach which should as far as possible put the claimant in the same position as if the contract had been performed. The claimant has however suffered no such financial loss as demonstrated by his own schedule of loss. There is no entitlement to injury to feelings in a breach of contract claim. The amount sought by the claimant also exceeds that which this tribunal can in any event award in a breach of contract dispute which is £25,000.

26. The breach of contract claim has no reasonable prospects and is struck out.

27. Bullying

There is no stand-alone claim of bullying. Either it could form part of a constructive dismissal claim but the claimant does not have sufficient service for that or it could be brought under the Equality Act. The claimant has not in

his ET1 or further information and has not at this Hearing identified any protected characteristic that he relies upon under the Equality Act to bring such a claim. The tribunal does not have jurisdiction to deal with this bullying claim which has no reasonable prospects and is struck out

The Respondent's costs application.

28. The tribunal having given its decision on liability that the claim should be struck out the respondent pursued its costs application which had been set out in its skeleton argument. It sought a total of £3350 incurred up to the date of this Hearing. The tribunal was provided with without prejudice correspondence that had been sent to the claimant by Browne Jacobson acting for the respondent on 11 and 28 April 2023. These letters set out the issues that they considered the claimant would have in establishing that this tribunal had jurisdiction to deal with his claims and invited him to withdraw his claims by a certain date in which case no costs application would be made.
29. The claimant took issue in his replies with whether the correspondence could correctly be labelled without prejudice. This tribunal is satisfied it was correctly so labelled and was correspondence that the respondent's solicitors were entitled to send. The respondent set out exactly the points that this tribunal has found at this Hearing and it was appropriate for them to do so. It was not a threat but putting the claimant on notice that costs were being incurred and that an order would be sought if this matter proceeded. They suggested he seek independent legal advice and gave links to advice centres.
30. The claimant took no heed of that letter just arguing that it was not justifiably a without prejudice letter. Not only did the respondent point out the difficulties with the claim but reminded him that the tribunal had already indicated when the claim was received that it was considering strike out of the constructive dismissal claim.
31. This is clearly a case that falls within rule 76 and the tribunal does have a discretion to consider making a costs order as these claims had no reasonable prospect of success.
32. The rules do provide that the tribunal may have regard to the paying parties means. The claimant was asked about those means and explained that he is on a similar salary to when he with the respondent which was stated in his written statement to be £31,575 pa. He owns a property worth in the region of £660,000. The claimant has 3 children but is divorced from their mother. He resides in the property on which there is a mortgage and he pays £1200 per month. He has the children 50% of the time. His former partner works and he pays child maintenance of £250 per month in total.
33. Taking the claimant's means into account and the correspondence sent to the claimant in April the tribunal exercises its discretion to award the respondent £600 costs which is Counsel's brief fee for today. This hearing could have been avoided if the claimant had paid due regard to the detailed letters sent to him in

April setting out the risks he faced in pursuing these proceedings. How that amount is paid is a matter between the parties and is not for this tribunal.

Employment Judge **LAILER**

Date: 30 June 2023

SENT TO THE PARTIES ON

7 July 2023

GDJ
FOR THE TRIBUNAL OFFICE