CASE NO: 6000558/2023

EMPLOYMENT TRIBUNALS
At an Attended Preliminary Hearing

Claimant: Mr A Lacey

Respondent: Belfield Furnishings Ltd

Heard at: Midlands (East) Region in Nottingham
On: Thursday 24 August 2023
Before: Employment Judge R Broughton (sitting alone)

Representation
Claimant: In person
Respondent: Ms Cummings, Counsel

JUDGMENT

1. Following the Preliminary Hearing, the Judgment of the Tribunal is that the Respondent's application to strike out the Claimant's unfair dismissal claim succeeds.

2. The claim of unfair dismissal is struck out pursuant to Rule 37(1)(a) of the Tribunal Rules.

REASONS

Background

1. The Claimant issued a claim on 29 March 2023 of both unfair dismissal and age discrimination.

2. Today's hearing was listed in part to hear the Respondent's application, as set out in its letter of 28 April 2023, for an order striking out the claim of unfair dismissal on the grounds that the Claimant does not have the required length of service required by Section 108 of the Employment Rights Act 1996 to bring a claim of ordinary unfair dismissal and therefore the Tribunal does not have jurisdiction to hear the claim.

Today's hearing

3. The Respondent had prepared a bundle of documents running to 113 pages.

The Claimant confirmed that he had a copy of that bundle and that he had no additional documents that he wished to rely upon.

4. Ms Cummings for the Respondent had also produced a skeleton argument attaching the authorities of:

- *Robert Cort & Son Ltd v Charman [1981] ICR 816*
- *Kirklees Metropolitan Council v Radecki [2009] EWCA Civ 298*

Respondent's submissions

5. In summary, the Respondent submits that it is clear from the letter terminating the Claimant's employment on 21 November 2022 [100 – 101] that the Claimant's employment was terminated with immediate effect and without notice.

6. It is further submitted that the starting point for calculating the effective date of termination (EDT) for the purposes of determining the qualifying period is section 97(1)(b) and the EDT is the date on which the termination takes effect.

7. Applying the case law, it is submitted that the EDT is 21 November 2022 or, in the event the Claimant alleges a later date of knowledge, at the latest it is 24 November 2022, which was the date when the Claimant had written his letter of appeal [pages 103 – 104].

8. It is accepted that the EDT is extended by one week pursuant to section 86(1)(a) ERA but there is no basis from which the Tribunal can extend the EDT further to take into account the Claimant's contractual notice period and as such the Claimant's length of service falls short of the 2 year period required under Section 108 ERA.

Claimant's submissions

9. The Claimant submits that he believed he was being given his contractual 3 month notice period and that it was not explained what notice in lieu meant. He thought he could not work for 3 months; had it been explained, he would not have accepted the situation.

10. On being taken to the payslip in the bundle [pages 66], the Claimant confirmed that this was the payslip that he had received and that payment in lieu of notice was paid to him on 15 December 2022.

11. The Claimant accepts that the payment he received as per that payslip, equated in full to what he was entitled to under his contractual notice period.

12. The Claimant also confirmed that he had recently received the P45 which appears in the bundle [page 67]. That provides a leaving date of 21 November 2022. He confirmed that he had received that P45 and in terms of the leaving date on it, he informed the Tribunal: "*I didn't take much notice*".

13. The Claimant also confirmed that he had received the letter confirming the termination of his employment [pages 100 – 101]. (An earlier draft of the termination letter dated 14 November 2022 was contained within the bundle,

but it is not in dispute that the correct letter of termination which the Claimant received was dated 21 November 2022.) The Claimant confirmed that he had received this letter on around the date on the letter.

14. The Claimant also confirmed that the notes of the fourth consultation meeting in the bundle [pages 96 – 97] also recorded what had been discussed at that meeting and he confirmed that it was his signature at the foot of the consultation document.

15. The Claimant confirmed that the contract of employment within the agreed bundle [pages 56 – 65] is a copy of his contract of employment. He was unable to point to anything within that contract of employment that provided the Respondent with the right to put him on garden leave or reserved their right to do so, however, he explained that he had never actually read his contract of employment.

16. In terms of what led him to believe he was being placed on garden leave, there is a document in the bundle [page 49] which provides details of his start date, his age and salary and states:

"***Notice arrangement*** *Garden leave*"

17. There is no date on that document and he cannot recall during which consultation he received it but believes that it may have been the second or the third consultation meeting . He submits that this document was handed to him across the table and nothing else was said. He had a friend, Richard White, (not a union representative) who attended that consultation meeting with him.

18. The Claimant stated that he believed that during the contractual notice period, he could not work for anyone else. He considered it would be a conflict for him to take his knowledge while on garden leave to another company in the same industry in the area. However, he submits that he had never been told that he could not work for another employer during what would have been his notice period.

19. The Claimant confirmed that he is not asserting that he asked anyone if his understanding that he was on garden leave was correct.

The law

20. Employment Tribunals must look to the provisions of Rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 when considering whether to strike out a claim.

21. Rule 37 provides as follows:

"***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;

…"

22. A claim can have no reasonable prospect of success if there is no jurisdiction for a Tribunal to entertain it.

23. It is not sufficient in determining that the chances of success are fanciful or remote or that the claim, or part of it, is likely or even highly likely to fail. A strike out is the ultimate sanction and for it to be appropriate the claim, or the part of it that is struck out, must be bound to fail. As Lady Smith explained in ***Balls v Downham Market High School & College [2011] IRLR 217 EAT***, (paragraph 6):

… "the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. …"

24. The authorities on the striking out of an unfair dismissal claim were reviewed by the Inner House of the Court of Session in ***Tayside Public Transport Company Ltd (trading as Travel Dundee) v Reilly [2002] IRLR 755***:

"[30] … In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts (ED & F Mann Liquid Products Ltd v Patel (2003) CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (ED & F Mann Liquid Products Ltd v Patel, supra; Ezsias v North Glamorgan NHS Trust, supra). …

25. Pursuant to Section 108 Employment Rights Act 1996 (ERA), the qualifying period for ordinary unfair dismissal claim is 2 years ending with the effective date of termination (EDT).

26. The EDT is calculated in accordance with Section 97 of the ERA:

"***97 Effective date of termination****.*

(1) Subject to the following provisions of this section, in this Part "the effective date of termination"—

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the

termination takes effect, and

…

(2) Where—

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),

for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) "the material date" means—

(a) the date when notice of termination was given by the employer, or

(b) where no notice was given, the date when the contract of employment was terminated by the employer.

…"

27. By virtue of Section 86 of the ERA:

"***86 Rights of employer and employee to minimum notice.***

(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week's notice if his period of continuous employment is less than two years,

…"

28. ***Robert Cort & Son Ltd v Charman [1981] ICR 816***. The EAT considered the EDT in respect of an employee who had been dismissed summarily and whom the Respondent had made a payment in lieu of notice, for the purpose of calculating the qualifying period. In referring to the case of ***Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53*** the EAT held:

"*In our view, it is a clear decision binding on us that where there is an immediate dismissal with salary in lieu of notice, the effective date of termination is the date of dismissal, not the expiry of the period in respect of which the salary in lieu is paid for. …*"

29. The EAT went on to consider whether it is relevant whether the employee

accepts or affirms the contract following any repudiatory breach by the employer holding that:

"*If the identification of the effective date of termination depends upon the subtle legalities of the law of repudiation and acceptance of repudiation, the ordinary employee will be unable to understand the position. The Dedman rules fixes the effective date of termination at what most employers would understand to be the date of termination, ie the date on which he ceases to attend his place of employment. For these reasons we hold that where an employer dismisses an employee summarily and without giving the period of notice required by the contract, the purposes of Section 55(4) the effective date of termination is the date of the summary dismissal whether or not the employer makes a payment in lieu of notice.*"

Findings of fact

30. It is not in dispute between the parties that the Claimant's employment with the Respondent commenced on 3 January 2021. It is not in dispute between the parties that the Claimant was issued with a contract of employment. He may not have read it, but he does not dispute that this was the contract that he worked under and this is signed by him and dated 27 June 2022 [pages 56 – 65]. It is not the Claimant's case that the contract included any right to, or indeed any discretion, for the employer to place the Claimant on garden leave. The termination of provision at paragraph 18 [page 62] provides as follows:

"*18.2 … the Company reserves the right to terminate your employment at any time and with immediate effect by notifying you that it will make a payment in lieu of notice for all or any part of your notice period on the termination of your employment. This provision, which is at the Company's sole and absolute discretion, applies whether termination of this Agreement is by you or the Company. Any such payment will consist solely of basic salary (as at the date of termination) which you would have been entitle to receive this Agreement during the notice period referred to at clause 18.1 (or, if notice has already been given, during the remainder of your notice period) and shall be subject to such deductions of income tax and National Insurance contributions as the Company is required or authorised to make.*

…

18.4 The Company may pay any sums due under clause 18.1 in equal monthly instalments until the date on which the notice period referred to at clause 18 would have expired if notice had been given. You shall be obliged to seek alternative income during this period and to notify the Company of any income so received. The instalment payments shall then be reduced by the amount of such income.

…"

31. The contractual notice period which the Claimant was entitled to is agreed between the parties to be 3 months and this is set out in the covering letter

which was sent with his contract of employment and which sets out the basic terms and conditions of his employment [page 54].

32. It is not in dispute between the parties that there were redundancy consultation meetings with the Claimant.

33. The Claimant's case is that either in the second or third consultation meeting he was handed a document which had the words 'garden leave' on it next to notice arrangements. He does not assert that anything else was said to him about garden leave or that he made any enquiries about that document or specifically about notice or garden leave.

34. It is not in dispute between the parties that at the final consultation meeting on 21 November 2022, the Claimant was told the following:

"*Therefore the decision has been made to terminate the role of Technical Development Manager by way of redundancy, therefore your employment will terminate as from today's date, Monday 21st November 2022.*

You have less than 2 years service, so there is no entitlement to a redundancy payment.

You are contractually entitled to 3 months notice which will be paid to you on the 15th December 2022, this payment will be subject to the usual tax and NI deductions.

…

This payment is in full and final settlement of your employment at Belfield Furnishings Ltd."

35. It is not in dispute between the parties that on or around 21 November 2022, the Claimant received the letter confirming termination of employment and that it contains the following:

"…

Regretfully, the decision was therefore taken to terminate your employment with the Company on the grounds of redundancy, your termination date with the company will be Monday 21st November 2022.

The following payments and terms apply to the termination of your employment:

Termination Date

Your last day of employment will be 21st November 2022.

Redundancy Payment

As you have less than 2 years' service, you are not entitled to a redundancy payment.

Notice

You are contractually entitled to three months' notice. The payment for this notice period will be paid to you on 15th December 2022. This notice payment will be full and final settlement of your employment with Belfield Home and Leisure and is subject to the normal tax and NI deductions. Your P45 will follow shortly afterwards.

…"

36. It is not in dispute between the parties that the P45 was issued, and the Claimant accepted he received it, albeit he paid little attention to the leaving date on the form, which is also the 21 November 2022.

37. The Claimant also accepts that he received his payslip and on 15 December 2022 he was paid £10,140 by way of what is clearly described as a payment in lieu of notice.

38. The Claimant's case is that he understood that as he had knowledge of the Respondent's business, he was not able to work for a competitor in the area during the period of what would have been his notice period. He does not assert, however, that anyone had told him that or that there was any provision to this effect in his contract of employment. He does not assert that he had clarified his understanding with the Respondent. This understanding on his part, appears to be an assumption he made because of his past experiences in this industry.

39. Whilst he received a document that said 'garden leave', after the date this document was provided to him (at the second or third consultation meeting) it was made very clear to him that his employment terminated on 21 November. Whilst the Claimant states that had he known his employment was going to be terminated before the end of his 3 month contractual notice period he would not have been happy about that because he would not have accrued two years' service, it is not in dispute and it the date of the 21 November was confirmed in the last consultation meeting when he was also told that he did not have 2 years' service and was therefore not entitled to a redundancy payment and he does not assert that he challenged that at any stage.

40. The Tribunal find that although he had been given a document that states garden leave (the Respondent's position is that he was on garden leave during the consultation period) which may have made him think that he was on garden leave during the notice period, it was made abundantly clear to him that his employment would terminate on 21 November in the last consultation meeting, in the notice of termination letter and by the follow up P45 and payslip that he received.

41. The general rule is that unambiguous words of dismissal may be taken at their face value without the need for any analysis of the surrounding circumstances: ***Sothern v Frank Charlesly & Co [1981] IRLR 278 CA***.

42. The test as to whether ostensibly ambiguous words amount to a dismissal is an objective one. All the surrounding circumstances, both preceding and following the incident and the nature of the workplace in which the misunderstanding arose, must be considered. If the words are still ambiguous, the Tribunal should ask itself how a reasonable employer or

employee would have understood them in light of those circumstances.

43. In ***Chapman v Letheby and Christopher Ltd [1981] IRLR 440 EAT***, the EAT held in relation to the interpretation of a letter which the employee received in that case:

"*First, the construction to be put on the letter should not be a technical one but should reflect what an ordinary, reasonable employee in Mr Chapman's position would understand by the words used. Secondly, the letter must be construed in the light of the facts known to the employee at the date he received the letter.*"

Conclusions

44. The Tribunal conclude that if a reasonable employee were to ask himself "from what date am I dismissed", he would rightly look to the part of the letter of termination which tells him that expressly: "*Your termination date with the Company will be Monday 21st November 2022*" [page 100].

45. The letter of termination was not in the least bit ambiguous. It made clear the date his employment would end twice within that letter and also explained that he did not have 2 years' service and would not get a redundancy payment and that payment for his notice would be paid on 15 December 2022.

46. In terms of any surrounding circumstances which may create ambiguity, the Tribunal take on board that a document referring to garden leave was given to him at some point during the consultation period however, during the last consultation period it was again made perfectly clear to him and it was unambiguous and recorded in the consultation notes [page 97], that his employment would terminate from Monday 21 November 2022; that he had less than 2 years' service and that he was entitled contractually to 3 months' notice, which would be paid on 15 December 2022 in full and final settlement of his employment.

47. The contract of employment did not include a garden leave provision nor did it include any post termination restrictions. It had a very clear payment in lieu of notice provision within it.

48. The words used by the employer in the termination letter evinced a clear intention on the part of the Respondent to terminate the contract at once, with wages being paid in lieu of proper notice.

49. Even if one week's notice was added on to the termination date of 21 November 2022, it would still mean that the Claimant fell short of accruing the necessary 2 years' service .

50. Taking the Claimant's case at its highest, the Tribunal find that the claim has no reasonable prospect of success and that it should exercise its discretion to therefore strike out the unfair dismissal claim and the claim is therefore struck out.

Employment Judge R Broughton

Date: 30 August 2023

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.