



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr N Spencer-Edwards

v

John Lewis plc

Heard at: Watford, by telephone

On: 28 July 2023

Before: Employment Judge Hyams, sitting alone

Appearances:

For the claimant:

Not present and not represented

For the respondent:

Ms Georgia Hicks, of counsel

JUDGMENT

The claimant's claims of unfair dismissal within the meaning of the Employment Rights Act 1996 and of wrongful dismissal are dismissed.

REASONS

- 1 In these proceedings, the claimant claims that he was dismissed unfairly and wrongfully.
- 2 The hearing of 28 July 2023 was a preliminary hearing for case management purposes. If the claim had been a simple claim of unfair and wrongful dismissal, then that would have been unusual. However, the details of the claim (which were pleaded very briefly) were expanded by the appending to the ET1 claim form of several documents which the claimant had written when appealing internally against the decision to dismiss him, and in those documents there were many references to illness suffered by the claimant. It therefore appeared that the hearing of 28 July 2023 had been listed in part in order to see whether or not

the claimant was making a claim of a breach of section 15 of the EqA 2010, read with section 39 of that Act, or of sections 20 and 21 read with section 39.

- 3 The hearing might also have been listed as a case management hearing because the claim form had been presented outside the primary time limit for its presentation. The claimant's employment with the respondent started on 1 April 2019 and ended on 18 October 2022. The claim form was presented on 13 February 2023, and the period of early conciliation started on 9 February 2023 and ended on 13 February 2023. The claimant wrote in the ET1 that he was not aware of his dismissal until 25 October 2022, as, he wrote, he was only then "first informed" that he had been "dismissed in absentia". Even if the date of dismissal were taken to be 25 October 2022, the early conciliation period had been commenced more than 3 months after the claimant's dismissal, so it did not extend the period of limitation.
- 4 The claimant's dismissal was stated by him (and agreed by the respondent) to have occurred after a lengthy period of continuous absence from work because of sickness. The claimant was employed to work 12 hours a week as a Supermarket Assistant at the respondent's Newmarket Waitrose store. He started a period of absence because of sickness (quoting his own document at page 14 of the bundle prepared for the hearing of 28 July 2023 which I conducted; any reference below to a page is to a page of that bundle) "at the end of January 2020/beginning of February 2020".
- 5 During May 2020, the claimant wrote in that document (at page 15) that he had returned to work briefly but it was (as he wrote there) "premature" and as a result he "had to follow medical advice and desist from working as per [his] contract". Between May 2020 and the date of his dismissal in October 2022, the claimant was prevented from working by illness.
- 6 The hearing of 28 July 2023 was notified to the parties on 30 April 2023 (the notification being at pages 51-52). The claimant wrote to the tribunal on 25 July 2023, asking for the postponement of the hearing of 28 July 2023. He did so by email, in the following terms.

"To whom it may concern,

Due to illness, I request a postponement of the preliminary hearing scheduled for 10:00 on 28th July 2023.

(If such flexibility exists, my current medical treatment plan comes to an end in the week commencing Monday 21st August, meaning that my availability from that date onwards is broader.)

I look forward to hearing from you and thank you for your assistance in advance."

- 7 That request was put before Employment Judge Graham, who refused the application for a postponement of the hearing of 28 July 2023. The letter stating that refusal, and the reasons for it, was dated 26 July 2023 and was in these terms.

“Employment Judge Graham has considered your request to postpone the hearing and has refused it.

The Judge’s reasons for refusing the request are; The claimant is to provide medical evidence (such as a GP Letter) confirming why he is unfit to attend the preliminary hearing by telephone listed for 28 July 2023.

The case remains listed for hearing on 28 July 2023.”

- 8 As I say above, I conducted the hearing of 28 July 2023. A search was carried out for any further email correspondence from the parties which had been received since the sending of the letter of 26 July 2023 to which I refer in the preceding paragraph above, and none had been received by the start of the hearing. I called the claimant first to start the hearing. I did so at just before 10.00am. He did not respond. I then called Ms Hicks. She also did not respond. I then called the respondent’s solicitor, Ms Hayes, of Burges Salmon. She did respond. I asked her what time she had been given for the start of the hearing. She said that it was 10.00am, and that Ms Hicks was instructed to appear for the respondent. I then called Ms Hicks again and this time she did respond. She told me that she had been ready to start the hearing from well before 10.00am and that she had not received the call that I had made. I then called the claimant again, and again he did not respond.

- 9 In the circumstances, rule 47 of the Employment Tribunals Rules of Procedure 2013 (“the 2013 Rules”) applied. That provides:

“If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party’s absence.”

- 10 I decided to proceed with the hearing in the absence of the claimant.

- 11 I then spent nearly an hour discussing the claim with Ms Hicks. It appeared to me that the claimant might well be able to satisfy a judge that it was not reasonably practicable to make the claim within the primary limitation period. That was because of his health difficulties, which he described in the following passage, which are the complete contents of box 8.2 of the claim form, stating the details of his claim.

“Please find attached my appeal, submitted to the respondent (John Lewis & Partners’) following the termination of my contract of employment.

I submit it to serve as my claim, as it contains all relevant and necessary information.

Also attached are my subsequent calls to redress that which was overlooked, in writing.

I went through my previous employer/the respondent’s appeals process and provided irrefutable evidence and reasoning. However, the ‘head of appeals’ for the respondent upheld my dismissal without explanation and told me that my only option was to make a claim via the Employment Tribunal (on 4th January 2023).

While the official date of my dismissal was 18th October 2022, I was first informed on 25th October 2022 that I had been dismissed in absentia.

Furthermore, I was wholly unaware that one must claim via gov.uk’s Employment Tribunal until the aforementioned ‘head of appeals’ referred me to the Employment Tribunal on 4th January 2023. Until then, I thought that one simply had to appeal to the respondent directly, via internal channels.

I requested a certificate from Acas on 9th February 2023, five weeks after I was referred to the Employment Tribunal for the very first time.

(Not only this, I have complex medical needs, which limit how much I am able to engage with such procedures. It took all my energy to fight the matter (to no avail) via the respondent’s appeals process.)

I claim that I was dismissed unfairly (including constructive dismissal) and dismissed wrongfully.”

- 12 However, those health difficulties were such that the claimant’s claim of unfair dismissal looked to me to be unlikely to succeed. Although no claim of a breach of sections 15 and 39 of the EqA 2010, or of sections 20, 21 and 39 of that Act, was made, even if one had been made, then it was also in my view unlikely to succeed given the severity of the claimant’s ill-health and the fact that he had by the time of his dismissal been absent for nearly two and a half years continuously in circumstances in which there was little to no hope of him being able to return to work.
- 13 Nevertheless, the respondent had not said in its ET3 form or the document appended to that form that it had given the claimant notice pay. Given the terms of sections 86-88 of the Employment Rights Act 1996 (“ERA 1996”), it was possible that the claimant had a viable claim of wrongful dismissal.
- 14 During the discussion which I was having with Ms Hicks, at about 10.30am, I again called the claimant. He again did not respond to the call. I then continued my discussion with Ms Hicks, and at 11.02am I adjourned the hearing in order to allow her to take instructions on the question whether the respondent had given

the claimant notice pay, in compliance with section 88 of the ERA 1996. I adjourned the hearing until 11.30 to allow her to do that. At 11.30, I called the claimant again. Again he did not respond. I then called Ms Hicks again and resumed the hearing at 11.32. She said that she had instructions to the effect that, and had been sent documents showing that, the claimant had been given three weeks' notice pay, which was the amount of his entitlement under sections 86-88 of the ERA 1996.

- 15 In those circumstances, I concluded that the right and just approach was to dismiss the claims of unfair dismissal and wrongful dismissal. In coming to that conclusion I took into account the fact that the claimant had not pressed his claim by coming to the hearing of 28 July 2023, and that it appeared that he had no medical evidence justifying his non-attendance at that hearing.
- 16 If the claimant had a genuinely good reason for not attending (whether in person or by a representative) the hearing of 28 July 2023, then he can apply for a review of my above judgment, but even if he puts before me cogent evidence to show why he did not attend the hearing, in order to persuade me that the interests of justice require the revocation of my above judgment, he will have to say precisely on what basis he asserts that his dismissal was unfair or (if he asserts it) otherwise legally wrongful. He will also have to say, if it is the case, that he was not paid notice pay. Otherwise, an application for reconsideration will be likely to have no chance of success and will therefore be liable to be dismissed.

Employment Judge Hyams

Date: 29 July 2023

JUDGMENT SENT TO THE PARTIES ON

13 September 2023

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FOR THE TRIBUNAL OFFICE