



EMPLOYMENT TRIBUNALS

Claimant: Mr J Goodenough

Respondent: Ministry of Defence (DE&S)

Heard at: Bristol

On: 27 July 2023

Before: Employment Judge Oliver

Representation

Claimant: Mr P Phillips

Respondent: Mr S Tibbitts, counsel

JUDGMENT having been given orally 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. The Respondent made an application to strike out some of the claims on the grounds they have no reasonable prospect of success, and in the alternative for a deposit order on the grounds they have little reasonable prospect of success.

2. The applications for strike out are made under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:

(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...

3. In accordance with **Cox v Adecco and others** UKEAT/0339/19 I have made a reasonable attempt to identify the claims and issues, and I have taken the

Claimant's case in relation to each claim at its highest.

Breach of contract

4. I strike out the claim for breach of contract on the grounds it has no reasonable prospect of success. The Tribunal has no jurisdiction to hear this claim because the Claimant remains employed.

5. Under the Extension of Jurisdiction Order 1994, Employment Tribunals have jurisdiction to hear claims for breach of contract, but only where employment has ended. A claim can only be brought if it "*arises or is outstanding on the termination of the employee's employment*" (Article 3(c)).

6. The Claimant's case is that I can look at a breach of contract in the context of fire and rehire. I disagree. The Claimant has not been dismissed by the Respondent, and his employment has not ended. The law is very clear. An individual can only claim breach of contract in the Employment Tribunal as opposed to the courts if the claim is made after termination of employment.

Unauthorised deduction from wages

7. I strike out the claim for unauthorised deduction from wages on the grounds it has no reasonable prospect for success. The Claimant's case does not show that there has been a deduction from his wages.

8. The Claimant complains that he was subject to a pay freeze and put on a new pay scale with no headroom to progress. On 18 July 2023 the Claimant was sent an email by the Respondent confirming that he was being given backdated pay protection from April 2022. The Respondent's explanation is that this was not due to a legal obligation. It was in recognition that the Claimant had lost out because, due to health issues, he had joined the Respondent after regrading of the role he was due to take up. The Respondent says it is under no contractual obligation to pay the Claimant at this higher rate.

9. Under section 13 of the Employment Rights Act 1996 there is a deduction from wages where the total wages paid on any occasion by an employer to a worker is less than the net amount of the wages "properly payable" on that occasion. "Properly payable" means something that is payable as a legal entitlement. There is nothing in the Claimant's case, put at its highest, which shows he was legally entitled to be paid at a higher rate during his employment. He was paid in accordance with his contract at the time. He lost out on pay protection because he joined the Respondent too late. The Respondent intends to correct this, but not because it has a legal obligation to do so.

Failure to consult under section 188 TULRCA

10. I strike out the claim for failure to consult because it has no reasonable prospect of success.

11. Under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), where an employer proposes to dismiss 20 or more employees at one establishment as redundant within 90 days, the employer must inform and consult with the affected employees or their representatives.

12. Section 189 of TULRCA sets out who can make a claim for failure to consult:

(1) Where an employer has failed to comply with a requirement of section 188 or section 188A, a complaint may be presented to an employment tribunal on that ground—

(a) in the case of a failure relating to the election of employee representatives, by any of the affected employees or by any of the employees who have been dismissed as redundant;

(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related,

(c) in the case of failure relating to representatives of a trade union, by the trade union, and

(d) in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant.

13. There are two significant problems with this claim.

14. Firstly, the effect of section 189 is that an individual employee cannot bring a claim if there are trade union representatives and there has been a failure to consult with those representatives (section 189(1)(c)). There are recognised unions at the Respondent's workplace. The Claimant's claim is based on a failure to consult with the unions about proposed dismissals. Any claim for failure to consult in these circumstances must be brought by the union and not an individual employee. The Tribunal has no discretion on this point.

15. Secondly, under section 188, the obligation to consult only applies where the employer is proposing to dismiss 20 or more employees. There was no proposal to dismiss here. There was a regrading process in 2017 and 2022. However, there was no actual fire and rehire process. Based on the submissions and documents, at no point did the Respondent propose to dismiss employees during the regrading process. There was also not such a significant change that the employees could be treated as having been dismissed and re-engaged. The Claimant referred me to various cases, but they all involved actual proposals to dismiss by the employer.

16. I therefore find that the Tribunal has no jurisdiction to consider this claim under section 189 TULRCA. Even if it did have jurisdiction, the claim has no reasonable prospect of success because the Respondent made no proposals to dismiss.

Direct disability discrimination

17. The Claimant clarified his claim as being that he was put into a particular business support team because he is disabled. Putting the Claimant's case at its highest, this is a legally valid claim, and the Respondent conceded that it would

not be appropriate to apply for a strike out.

18. The Respondent applied for a deposit order on the basis that this claim has little reasonable prospect of success. The application is made under Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

19. The Respondent submitted that the Claimant was already in a business support role, the structure changed while he was in another role, there was one business support team for each domain, and the Claimant moved into this when his role supporting training did not work out. The Respondent says it is a weak argument to say that the Claimant moved to the business support team because of his disability when the team had been restructured in this way.

20. The Claimant’s position is that many disabled people are put into this role, and he believes he was put there deliberately with limited opportunities and the consequence that later on he was graded lower.

21. This may not be an obviously strong claim. However, it seems there is some dispute about the facts and how they should be interpreted. I find there is sufficient dispute that the issue needs to be examined at the final hearing. I was provided with lots of facts by the Respondent’s representative, but these facts were not tested. I am not in a position to make a finding that the claim has little reasonable prospect of success on what I have heard today. I therefore make no deposit order for this claim. I note that there are also potential time limit issues with this claim which will need to be decided at the final hearing.

Employment Judge Oliver

Date: 5 August 2023
Reasons sent to the Parties on 21 August 2023

For the Tribunal Office