Case Number: 1806457/2023

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Wignall	v	GAP Group Limited and Mr K Keenan

Heard at: Sheffield (by CVP) **On**: Monday 15 January 2024

Before: Employment Judge A James

Representation

For the Claimant: In person

For the Respondent: Mr S Brochwicz-Lewinski, counsel

JUDGMENT

(1) The claim against the respondent GAP Group Limited is struck out because it has no reasonable prospects of success (Rule 37 Employment Tribunal Rules of Procedure 2013).
(2) The claim against Mr Keenan is struck out because a claim for breach of contract can only be made in the Employment Tribunal against the former employer, not an individual working for the employer.

REASONS

The proceedings

1. Acas Early Conciliation took place between 7 and 11 September 2023. The claim form was issued on 4 October 2023. The claimant makes a claim for breach of contract.

2. On receipt of the claim, it was listed for a final hearing for two hours. The respondent subsequently argued in the response form and in correspondence with the tribunal that the claim should be struck out because it has no reasonable prospects of success. On 11 January 2024, Employment Judge Wade directed that the respondent's application for strike out would be considered at the outset of today's hearing.

The hearing

3. At the commencement of the hearing, the Judge asked the claimant a series of questions, to see whether there was broad agreement about the key facts relevant to his claim. There is, and that is reflected in the fact findings below. Further, in the claim form, the claimant sets allegations in six Facts. The Judge took the claimant to each of those and the claimant confirmed that he was not making a claim for compensation in relation to the first five Facts, just in relation to the sixth Fact – which relates to the termination of his employment on 7 September 2023.

4. Counsel for the respondent confirmed that in the light of the discussion that had taken place, he was unlikely to have many questions for the claimant if the hearing did proceed to a full hearing. In contrast, the claimant confirmed that he did not think he would have sufficient time to ask Mr Keenan, who was the sole witness for the respondent, the questions that you would want to ask him in relation to his case. The Judge was not convinced that lengthy questioning of Mr Keenan would be justified in the circumstances of the case, but wanted to avoid a situation where the claimant was interrupted in relation to his questioning of Mr Keenan, because the Judge not consider that the questions were relevant to the claim before the tribunal.

5. In those circumstances, the Judge decided that the most proportionate way of proceeding was to consider the application for strike out first. If the decision had been that the claim should not be struck out, further consideration would have been given as to how to ensure it was dealt with in a reasonable amount of time. In the event, it was not necessary to do so.

6. The tribunal heard submissions first from Mr Lewinski, counsel for the respondent. After an adjournment, the tribunal heard from the claimant. The Judge then adjourned to make a decision, and that was delivered verbally at the hearing. The claimant subsequently asked for written reasons.

Agreed background facts

7. The following facts have been established from the discussion with the claimant at the commencement of the hearing, the relevant documents, and the claim form.

8. The claimant commenced employment with the respondent, a UK wide equipment hire company, on 1 November 2021. He was employed as a Service Driver - 26T. The role required the claimant to make deliveries for the respondent using a 26 tonne lorry.

9. The claimant had a written contract of employment with the respondent, dated 24 September 2021. The contract contains the following provisions:

    • *Notice*

    During the first year of your employment either party may terminate this contract on giving one week's notice in writing. Thereafter the Company may terminate the contract on giving you one week's notice for each complete year of service subject to a maximum of twelve weeks….

    Other Policies

    The Employee Handbook contains a number of policies, all of which regulate your employment and must be complied with.

> • *Employee Handbook*
>
> *On commencement of your employment you are required to read the Employee Handbook which includes details of all policies and procedures regulating your employment and with the exception of the disciplinary /grievance and Capability rules, is contractually binding on both parties. … [Judge's emphasis]*

10. The Employee Handbook states on page 2:

> *This Employee Handbook (normally referred to as the "Handbook") is designed both to introduce you to the Company and to be of continuing use during your employment with the Company. It illustrates our intention to treat all employees fairly and consistently and to follow the law as regards employment practices.*
>
> *Together with your offer letter and your contract of employment, the Handbook sets out the terms and conditions of your employment, guidance on the high standards of conduct that are expected of you and some of the main employee benefits which may be available to you.*

11. The Employee Handbook contains a provision entitling the Respondent to lawfully terminate the Claimant's employment by making a payment in lieu of notice. The paragraph states:

> *1.24 NOTICE PERIOD*
>
> *The period of notice on termination of employment is detailed in your individual contract of employment/engagement letter. This may be varied or waived by mutual agreement. The Company reserves the right to place an employee on garden leave during the period of notice or to pay an employee in lieu of notice.*

12. The claimant wrote to the respondent on 22 July 2023 explaining that he could not continue to work due to problems with his shoulder. He said that as a result of the shoulder problems he could not wear a seatbelt, could not drive the vehicle safely, and could not concentrate fully whilst driving due to pain in his shoulder, neck and constant headaches. He said he was due to visit his GP on the Monday and would contact them after that. The email anticipated that the claimant would be provided with a fit note confirming he was not fit for work. In the event, the claimant self certified for the first week, and was provided with a fit note after that, for one month, starting 1 August 2023 confirming that he was not fit for work due to 'R sided shoulder pain'. The fit note was renewed on 23 August for 10 weeks and was due to expire on 31 October 2023.

13. The claimant told the respondent that his shoulder injury had initially been caused by an accident at a client site on 1 November 2022, when he injured his shoulder whilst carrying a hosepipe. The claimant subsequently took three days sickness absence for that shoulder injury between 2 and 4 November 2022 inclusive. He returned to the workplace on 7 November 2022.

14. On the claimant's case, whilst he continued to work, he continued to experience pain and discomfort in his shoulder, which he continued to consult his GP about. He was due to be referred for further investigation /physiotherapy. However, the respondent believed that the claimant had suffered an injury to his shoulder on 13 July 2023, whilst cutting wood he had

received from a customer when visiting the customer's site and subsequently loading the planks of cut wood onto the roof of his car so he could take it home for his own use. I note that there is no suggestion by the respondent that the claimant acted improperly in that respect. However, the respondent did not believe that the claimant was absent for reasons related to the initial injury in November 2022. It is not necessary for the purpose of the decision on strike out, to determine whether that suspicion was unfounded.

15. The respondent invited the claimant to an absence welfare meeting on 7 September 2023. This was conducted by Mr Keenan, Head of Tanker Services. The Claimant was shown CCTV footage from the Respondent's depot on 13 July 2023 showing him loading large planks of wood onto the roof of his car. The Claimant was asked whether he had sustained his shoulder injury during this activity on 13 July 2023. The Claimant maintained that his shoulder injury was caused on 1 November 2022 and not on 13 July 2023.

16. Mr Keenan did not accept the Claimant's explanation and believed the Claimant had been dishonest regarding the cause of his sickness absence. Mr Keenan therefore wrote to the Claimant on 7 September confirming his dismissal, on notice. The letter states:

> *As previously discussed with you during our meeting, the business has concerns over the validity and accuracy of information you have provided to the business regarding your ongoing absence. I have provided you with evidence which suggests your absence is disingenuous and we believe the reasons you have given for this absence to be dishonest. The business therefore deems your conduct to be unacceptable and constitutes gross misconduct.*
>
> *As an alternative to gross misconduct disciplinary proceedings, where your employment may have been terminated by reason of summarily dismissal with no eligibility for any notice pay, the business has ended your contract on the grounds of your unsuitability for the role. We will pay you 1 weeks' notice in line with the terms of your contract of employment, which you are not required to work.*

17. It is not in dispute that the claimant was paid in his final salary, a week's pay in lieu of notice.

Relevant law

18. The principles applying to the termination of a contract of employment which is terminable on notice are set out in the case of *Janciuk v Winerite Ltd [1998] IRLR 63*. At paras 6 to 8 the EAT stated three principles as follows:

> *6 (1) Where a contract of employment is terminable upon notice, the measure of damages to which the employee is entitled on summary dismissal is the amount which the employer would have been bound to pay had his contract been terminated lawfully, less any receipts by the employee during that period earned by way of mitigation of his loss. The employee is entitled to be put into the position he would have been in had the contract been performed. It is assumed for this purpose that the employer would have dismissed the employee by notice given at the very moment that the summary dismissal was effected.*

7 (2) When, for the purposes of calculating compensation, the court considers what would have been the loss had the contract been performed, the court assumes that the contract breaker would have performed the contract in a way most favourable to himself. This principle prevents the employee from recovering a windfall payment. If there were two lawful ways of performing the contract, the employee will be compensated on the basis that the employer will have chosen to perform the contract in the way which was least burdensome to him: Lavarack v Woods of Colchester [1967] 1 QB 278. Therefore, in a simple wrongful dismissal case, the court does not ask what might have happened had the employer known that he had no right to determine the contract summarily, and then calculate compensation on a loss of a chance basis. The assumption is that the employer would have chosen to have terminated the contract lawfully at the very moment that he had brought [or sought to bring] the contract to an end unlawfully in breach of contract.

8 (3) Some contracts of employment require the employer to follow a disciplinary procedure before notice of dismissal can be given. In other words, the disciplinary procedure acts as a brake on the giving of notice. In such a case, the employer would be acting in breach of contract if he gave notice terminating the contract without first having followed the correct procedure. The measure of the loss for that breach is based upon an assessment of the time which, had the procedure been followed, the employee's employment would have continued. Again, that does not require an analysis of the chances that had the procedure been followed the employee might never have been dismissed.

19. Compensation (strictly speaking, 'damages') cannot be claimed in a claim for breach of contract in relation to the manner of the dismissal – see para 40, *Edwards & ors v Chesterfield Royal Hospital NHS Foundation Trust & ors [2012] IRLR 129*.

Strike out

20. Rule 37(1) of the Employment Tribunal Rules of Procedure 2013 provides:

> *(1) An employment judge or tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on any of the following five grounds:*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success; ……*

21. Before making a strike out order in any of these situations, the tribunal must give the party against whom it is proposed to make the order a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing (r.37(2)). An application by a party for such an order should be made in accordance with the provisions of r.30.

22. The striking-out process requires a two-stage test (see *HM Prison Service v Dolby [2003] IRLR 694, EAT*, at para 15; approved and applied in *Hasan v Tesco Stores Ltd UKEAT/0098/16 (22 June 2016, unreported*). The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to

decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid.

23. HHJ Tayler stated in *Cox v Adecco*, at para 28(1) "*No-one gains by truly hopeless cases being pursued to a hearing*" (see also the authorities cited at *Malik* at paras 32-33 which make the same point).

Conclusions

24. In arriving at the following conclusions on the issues before the Tribunal, the law has been applied to the agreed facts.

25. In the case before this tribunal, in contrast to the facts in *Janciuk*, the contract specially confirms that the disciplinary and grievance procedure is non-contractual. Therefore, in order to lawfully terminate the contract, the respondent simply had to give the claimant the notice he was entitled to under the contract. It is not in dispute that since the claimant had less than two complete years' service, he was only entitled to notice of one week. Further, the employment contract entitles the respondent to make a payment in lieu of notice.

26. In these circumstances, the respondent lawfully terminated the claimant's contract of employment by informing him of the termination of his employment on 7 September 2023 and making a payment in lieu of notice. There was nothing else, under the contract, the respondent was required to do; or required to pay to the claimant on termination.

27. The Judge recognises that the claimant will feel a sense of injustice and frustration, if his claim is struck out. Further, the Judge understands that the claimant was hoping to use these proceedings to 'clear his name' in relation to the suggestion by the respondent that he had acted dishonestly. He also wanted to be given the opportunity to argue that he had been subjected to bullying by Mr Keenan and to question Mr Kennan about that.

28. Article 3 of the *Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994* entitles a claimant to bring proceedings before an Employment Tribunal for the recovery of damages or any other sum (other than a claim for damages, or other sum due, in respect of personal injuries). However, the claimant has confirmed that he is not making a claim for compensation in respect of the allegations that he had been bullied, contrary to the respondent's bullying and harassment policy (see Facts 1 to 5 of the claim form). In any event, it is difficult to conceive what compensation could be claimed, in the absence of the claimant's health having been damaged by the alleged bullying.

29. The tribunal having concluded that the claimant has received all payments due to him on the termination of his contract, which was lawfully terminated in line with the contractual terms, the claimant's claim has no reasonable prospect of success. There is no breach of contract at all, in relation to the termination of his employment. If this was an unfair dismissal claim, issues in relation to the procedure adopted by the employer would clearly be relevant. The claimant and recognises however that he does not have the necessary service to bring an unfair dismissal claim. (Parliament having decided during

the coalition government between 2010 and 2015 that the length of service should be increased from one year to two years).

30. In the circumstances of this case, some other disposal of the case, such as the making of an unless order or a deposit order is not appropriate. The only possible outcome, the Judge having determined that the claim has no reasonable prospect of success, is that the claim should be struck out.

Costs

31. The respondent made an application for costs at the conclusion of the hearing. Counsel for the respondent confirmed that no cost warning letter had been sent. Nor had a note of the costs incurred, or likely to be incurred, been sent to the claimant. There was only about 10 minutes remaining of the two hours that had been allocated to the hearing and the Judge had another case to deal with in the afternoon which he needed to prepare for.

32. In fairness to the claimant, the Judge considered that the most appropriate way to proceed was to give the respondent an opportunity to make a written application for costs, setting out the legal and factual grounds for the claim, and a breakdown of the costs being claimed. The claimant will then be given an opportunity to respond in writing. Both parties agreed that, in order to minimise further cost and time to both parties, a decision should then be made by the Judge on the basis of the written representations received. Separate case management orders have been made to facilitate that process.

Employment Judge A James
North East Region

Dated 16 January 2024