Case No. 2215318/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr M O Leucuta

Respondent: Edwardian Pastoria Hotels Limited

HELD AT: London Central (In public; via CVP) **ON:** 23rd January 2024

BEFORE: Employment Judge Anderson

REPRESENTATION:

Claimant: In Person

Respondent: Mr Donaldson (Solicitor)

RESERVED JUDGMENT

1. The Claimant's claim of wrongful dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. This matter came before me today by way of a full hearing in respect of the Claimant's wrongful dismissal claim against the Respondent.

2. It had previously been directed that the first point to be considered during the hearing was the Claimant's application to amend his claim form, in respect of which there was a notable procedural history which I set out below. Depending on the outcome of the application, the second point to be considered was the full hearing of the wrongful dismissal claim. I refused the application to amend orally during the hearing, but record my written reasons for doing so below.

3. I then proceeded to hear the claim of wrongful dismissal. Due to a lack of time, it was necessary to reserve judgment.

4. I record that the correct title of the Respondent is: Edwardian Pastoria Hotels Limited.

The Application to Amend

5. This came before me in somewhat unusual circumstances. The key dates were as follows:

    a. The ET 1 was received by the Tribunal on the 18th September 2023.
    b. The ET 1 was sent to the Respondent on the 12th October 2023
    c. On the 30th October 2023, the Respondents solicitors wrote to the Claimant indicating that he lacked the necessary two years service to claim unfair dismissal.
    d. On the 5th November 2023, the Claimant wrote to the Tribunal seeking to amend his claim. He sought to add "discrimination, unequal opportunities, favouritism towards specific individual or ethnic groups, xenophobia, breach of contract, manipulation."
    e. On 17th November 2023, Employment Judge Baty refused the application to amend, accepting the submissions made by the Respondent in their letter of objection.
    f. On 1st December 2023, the Claimant sought reconsideration of this decision, providing a lengthy document with attachments.
    g. On 18th December 2023, Employment Judge Baty rejected the reconsideration under Rule 72(10) as it was considered that there was no reasonable prospect of the original decision being varied or revoked. At the end of this correspondence, EJ Baty noted that the document was in fact regarded as a fresh application to amend the claim. The Respondent was asked to write and indicate whether this was objected to. The Respondent did write in and oppose the application.
    h. On 19th January 2024, Employment Judge Khan wrote to the parties informing them that the application would be considered at the hearing on the 23rd January 2024.

6. There are some procedural points to note. Firstly, Rule 70 provides that a reconsideration may only be in relation to a Judgment. In respect of a case management order, that is an application to vary a case management decision. An application to vary engages the Serco v Wells [2016] ICR 768 principles, namely:
    a. that such a variation should only be granted where there is a material change in circumstances;
    b. or where there the original order was based on a misstatement;
    c. or rare and out of the ordinary circumstances.

7. In addition to the above, EJ Baty when undertaking refusing reconsideration directed that this would be considered today as a second application. The distinction between an application to vary and a second application appears to have the potential to confuse. If there has already been a refusal then the fact that correspondence continues, including lengthier correspondence then this is just a continuation of the same thread and amounts to an application to vary, engaging the Serco v Wells principles. Otherwise, a party would be able to circumvent these principles simply by making repeat applications. At the core of these principles is providing sufficient deference to finality in litigation and providing only specific escape routes to those principles.

8. Nonetheless, for the sake of completeness, I have sought to consider the application both as an application to amend and as an application to vary.

9. In respect of an application to amend, at the outset, I direct myself in accordance with the principles in Selkent Bus Company v Moore [1996] ICR 836. At its heart is a balance of prejudice test. I must take into account all relevant matters and decide where the balance of prejudice sits. The balance of prejudice also remains the key feature of the Presidential Guidance where it covers the issue of amendments. I also note the sheer volume and ever increasing numbers of authorities that now exist in relation to what should be a straightforward case management decision of amendment.

10. I further direct myself based upon TGWU v Safeway Stores (2007) UKEAT/0092/07 and the then President's approach to the classification of claims and the importance of this to understanding the scope of the amendment and thus the prejudice.

11. An amendment is a significant matter. The ET 1 is not simply a starting point to which additional points may be added: Chandhok v Tirkey (2014) UKEAT/0190/14/KN

12. In two recent decisions Michael Ford KC sitting as a Judge of the High Court considered the correct approach to be taken. Garcia v British Airways PLC [2022] EAT 14 at para 21 supports the contention that it is permissible to take into account the strength of a case when considering amendment. In Macfarlane v Commissioner of Police of the Metropolis [2023] EAT 111 in respect of the correct understanding of Selkent as it relates to all points, including time limits.

13. The starting point is that the application itself was not a relabeling exercise. These were new claims. They required significant new factual enquiry beyond that which is in the ET 1 and would turn what is a short and discrete trial on wrongful dismissal into a multi day hearing at a date significantly into the future (the working assumption would be one year) considering discrimination claims. The application itself spans many pages. The acts now sought to be relied upon are summarised in the Respondents most recent response at pages 140-141 of the bundle. The Claimant spoke to each of these regarding his application.

14. It would also necessitate an adjournment in respect of today. Further case management would be required. A significantly amended grounds of resistance and the cost associated with that is also a factor. There is a risk that the Claimant would be exposed to a costs application given the need for further redrafting. All of this must be balanced against the prejudice to the Claimant of not bringing claims that he now wants to bring.

15. I also note that this has already been the subject of judicial consideration by Judge Baty twice.

16. I also don't regard the amendments sought as giving rise to reasonably arguable points. Firstly, some of the jurisdictions mentioned are not known to the Tribunal. In respect of those jurisdictions, e.g. race discrimination that are within the Tribunal, nothing has been said to me today that would indicate that there is a cogent claim behind the amendment. The allegations are vague, lack cogency and would require significant further pleadings to ascertain specifics to create something to the level that it was an arguable claim.

17. For example, the suggestion that the Claimant was forced into signing a part time contract was an act of discrimination cannot sit alongside his email of the 3rd March 2023 stating "Following recent changes in my personal life would you please consider changing my contract from full time to part time as of the 6th March 2023? Thank you for your understanding"

18. There is a broad assertion of discrimination in respect of staff speaking in their own language. Beyond the fact of it, how this is said to fit within the Equality Act is not clear. If the point is that the Respondent should have intervened to stop it, then this act in itself is likely to have been controversial.

19. Secondly, I accept the Respondents submission that the timing of the first application arose as a direct result of the Respondent's correspondence regarding the Claimant lacking sufficient service to bring a claim of unfair dismissal. This is indicative of a scattergun rather than a proper basis for making allegations of discrimination.

20. In terms of time limits, these are a factor. The amendment relates to claims that would be out of time. The relevant extension of time regime would be the just and equitable regime. The burden is on the Claimant and the Claimant hasn't identified any factors that would relate to such an extension beyond his desire to claim. I accept that the Claimant acts in person and the regime is more permissive than reasonable practicability and allows me to consider any relevant factor. The fact that the extension would require significant new factual enquiry and significantly extend the length of the trial are factors against extension.

21. In the alternative, applying the Serco v Wells principles, I find that there is no material change in circumstance. Nor do any of the other exceptions identified

within the case apply. Simply making a longer application on top of one already rejected does not sit well with the principle of finality in litigation. Parties are entitled to regard orders as final, subject to the application of specific principles. The Tribunal must take particular care to avoid applications being granted through force of repetition. i.e. a party keep repeating and adding to an application in the hope that repetition or a different Judge leads to a different outcome. Parties should be expected to put the full grounds of their application in the first attempt.

22. Given the procedural points made at the outset, I have considered the application under both tests. Therefore, whether as a fresh application, it fails, applying Selkent principles, with the balance of prejudice being against the Claimant. As an application to vary, there is no material change in circumstance, nor do the merits result in an amendment. I refuse the application.

Wrongful Dismissal – Final Hearing

Introduction

23. I turn now to the claim of wrongful dismissal.

24. In terms of the issues to be decided, the Respondent accepted that the Claimant had been dismissed, with an effective date of termination of the 26th June 2023. However, based upon the Claimant's case it is possible that there was a different effective date of termination. Namely, it could be the 11th June, 26th June or 30th June 2023. The Respondent further accepted that the contract of employment contained a two week notice clause and that the Claimant had not been paid two weeks of notice.

25. In these circumstances, the key issue before the Tribunal was whether the Respondent was able to prove on the balance of probabilities that the Claimant was in repudiatory breach of his contract of employment so as to entitle the Respondent to dismiss without notice.

26. For the sake of completeness, I noted that the 'other payments' box on the ET 1 had been ticked. The Claimant had previously been ordered to give further information regarding what this claim was and had failed to do so either within the time ordered or at all. I asked the Claimant about this today and he said that this was about payments in consequence of him losing his job – i.e. compensation for unfair dismissal. The unfair dismissal claim had already been struck out and therefore I was satisfied that the only outstanding claim before the Tribunal was that of wrongful dismissal.

27. No party had been ordered to prepare a witness statement. A bundle of documents had been prepared. The Respondent agreed that there was no issue with the Claimant giving oral evidence in chief and then being cross-examined. The Respondent did not intend to call any live evidence and intended to prove its defence through documentation.

28. I made clear to the Respondent that in the absence of a live witness being called for the Respondent, any leading question asked in cross-examination must be based on a document or evidence the Claimant gave in chief. If a question was not based on this then it cannot be phrased as a leading question. The Respondent's solicitor had no difficulty with this and it did not present any problems during the hearing itself.

29. The hearing therefore proceeded, with the Claimant giving evidence in chief (in the form of being able to tell his version of events), before being cross-examined by the Respondent. I also asked the Claimant questions during his evidence in chief in order to ensure key events were covered. Both parties made closing submissions.

Findings of Fact

30. I made the following findings of fact on the balance of probabilities.

31. The Claimant commenced employment on 13th February 2023 at the Londoner Hotel. The Claimant's employer was Edwardian Pastoria Hotels Limited.

32. The Claimants' first contract is was signed by him on the 15th February 2023. The Claimant signed a second contract on the 13th March 2023. The difference between the two contracts was that the later contract was a part time contract.

33. The part time contract was entered into at the Claimant's request. i.e. to reflect the working pattern that the Claimant wished to work. I find that it was freely entered into. There is no basis for asserting that the Claimant was 'forced' to sign the contract, it was simply the contract that related to the hours the Claimant wished to work.

34. The Claimant's job title was "Meeting and Events Operations Waiter". Given that part of the case today may turn on the wording of the contract, I should note at this stage that there are criticisms to be made of the contract. The contract is lengthy, contains legalese and contains detailed clauses covering issues such as confidentiality and intellectual property. The contract goes far beyond what is necessary for the Claimant's job role and it leaves the reader with the impression of terms being imposed on an employee without much thought as to what is appropriate for that role or the enforceability of all of the terms. I note that notwithstanding that the role pays £11,960.00 per annum in return for two days of work at 10 hours per day, the contract contains a clause regarding devotion of working time and another clause consenting to work in excess of 48 hours per week and that if consent is withdrawn salary may be reduced. Another clause prevents discretionary international travel between 31st October 2020 and 30th May 2022, notwithstanding the contract being entered into in March 2023.

35. Having noted the above, I do record however that the contract states in simple terms "You must perform the duties, given to you." Furthermore, the position

clause includes the wording "…and you agree to serve us in that role, or any other role which may be necessary from time to time, under the conditions et out in this contract." It also contains a whole agreement clause.

36. It also contains a number of clauses under 3.b. These clauses seek to create a positive legal obligation to "Agree to changes to your job description….." and "Agree to changes to your role…." in circumstances that are then described in the contract.

37. On the 11th June 2023, the Claimant was working in the cloakroom area working on events. Part way through his shift, he was asked to go work in the restaurant.

38. The Claimant refused. He felt that there were two managers that were available to help and that and that because of their positions they were expected to go the extra mile and be more versatile than someone in his job role.

39. The Claimant went home. I do not have any live evidence from the Respondent. The Claimant says that he was told to go home by the Duty Manager, Mr. Manson. The subsequent text message from Mr. Sittikarn refers to "you decided to leave." Whilst I have doubts about the Claimant's general credibility in that there does appear to be some exaggeration, in the absence of a live witness from the Respondent, I find that the Claimant was sent home. I do not find that this was a dismissal. Rather, without the express word being used, it was more akin to a suspension.

40. At this point, it appears the Claimants more senior Manager (Mr Sittikarn) interpreted the Claimants position being that he had resigned. The Claimant was removed from the staff whats app group. I don't have any evidence of the communication between Mr Manson and Mr Sittikarn or whether this led to a miscommunication.

41. The Claimant did not attend work the next day. On the 12th June, Mr Sittikarn messaged him, referencing the incident and requesting that the Claimant submit his resignation. In the context of this message, which references the Claimant's leaving, this was a continuation of the thread as understood by Mr Sittikarn's that the Claimant had resigned, and not (and this hasn't been suggested) a requirement to resign. The Claimant did not respond.

42. The Respondent's Human Resources Department then became involved and contacted the Claimant via email. This included a reference to the incident but also to the Claimant not subsequently attending work.

43. The Claimant replies to this correspondence. He denied that he had resigned. He also raised a grievance. Receipt of the grievance was acknowledged by HR. However, the correspondence also asked the Claimant about his return to work. On the 16th June the Claimant replied stating "I'm afraid I no longer trust the Londer Hotel work environment so I won't be returning for any shifts at the M &

E nor other outlets of the hotel or the group. By this statement I do not forward my resignation. Let me know the outcome of your investigation."

44. The reply from HR noted the non-return statement and noted that if this were the case then it would be considered as the Claimant willingly abandoning his job, "which leads to termination."

45. The Claimant replied indicating that he had been 'sacked' by his manager and that he did not resign. HR again replied stating "…you are still officially working with us…". This email of the 19th June 2023 was a clarification email, seeking to address any confusion that existed over the Respondent's position.

46. No reply was received and on the 23rd June, the Claimant was emailed by HR. This stated "If you are not ready to come for the shift and not ready to work with the Londoner hotel anymore, then that means you are not continuing the job and then it will be considered as termination. If no further response received latest by Monday (26th June 2023)."

47. The Respondents position is that the Claimant was dismissed as of the 26th June 2023. I find that this was the case. If the Respondent were seeking to argue that the Claimant resigned by not replying to correspondence then utilising this date would have required greater thought. However, given the Respondent is accepting the fact of dismissal and given that dismissal is a unilateral act by an employer, it follows that if the Claimant had not been dismissed previously, then he was dismissed as of the 26th June.

48. The next correspondence from the Claimant was dated 30th June, stating that he had not yet received an answer to his grievance. The Respondent replied to this pointing out the Claimant was dismissed as of the 26th June. Further, multiple emails then ensued. This subsequent correspondence was post dismissal. I have read this correspondence and nothing additional turns on it.

The Law

49. It is for the Respondent to prove that the Claimant committed a repudiatory breach of contract. It is a positive defence.

50. A repudiatory breach is a fundamental breach of the contract of employment. It is in effect a party, through their own act or omission evidencing that they no longer consider themselves bound by the fundamental terms of the contract of employment.

51. Not all breaches of contract are repudiatory. The Tribunal must assess the seriousness of any breach and whether it is repudiatory.

Conclusions

52. Although there was a potential factual basis for arguing that the Claimant resigned from his employment, the Respondent conceded the fact of dismissal with an effective date of termination of 26th June 2023. There is an alternative effective date of termination of the 30th June 2023, but I find that it is the 26th. This was the intention of the Respondent.

53. For the purposes of the relevant test for wrongful dismissal, the key points are that a) the Respondent accepts that the Claimant was dismissed and b) accepts that it dismissed the Claimant without notice. Therefore, it falls to the Respondent to advance a defence and prove on the balance of probabilities that the Claimant was in repudiatory breach and thus not entitled to notice.

54. In making findings of fact above, I have recorded a number of points relating to the contract. I have done so because a wrongful dismissal case is in part a matter of contract and the Respondent has in part relied upon the wording of the contract as part of its defence.

55. I have no difficulty in finding that it is reasonable and lawful for an employer to give an events waiter an instruction to utilise their waiting skills in the main restaurant of a hotel. Where the contract provides for flexibility in the role, this is all the more so. I find that the contract does so provide. Clause 3a and/or clause 1a is sufficient in this respect.

56. However, I do criticise the Respondent for the additional clauses in the contract and for creating unnecessary complexity. I have decided that these criticisms do not ultimately deviate from the clear position at clause 3a/1a and also the general position at in law regarding the essential requirement of the ability of an employer to give lawful and reasonable instructions to an employee.

57. In reaching this conclusion, I also note that the Claimant was unable to explain why working in the restaurant was so detrimental that he would refuse to do it. For example, no financial detriment was identified (e.g. a reduction in overall pay could potentially be relevant the reasonableness of the instruction) and the Claimant simply resorted to the fact that working in the restaurant was not his role and was not something that he wanted to do. He clearly had a dislike for it and that dislike appears to be the basis on which he believed he had to consent to be instructed to undertake the work.

58. Some of the points made by the Claimant, for example the lack of a disciplinary hearing are related to the law on reasonableness as developed under s.98(4) Employment Rights Act 1996. However, the Claimants unfair dismissal claim was previously struck out due to the Claimant having less than two years of service. It is the intention of Parliament that two years service is required to make such point. More generally, it was a feature of the Claimant's case today that he referred to a number of bold legal entitlements that were doubtful when subjected to scrutiny, such as his right not to attend work whilst a grievance was pending.

59. In not attending work, the Claimant was voluntarily not complying with an essential element of his contract. In refusing to attend, he was also failing to comply with a lawful and reasonable management instruction. I do not find that there was any justification for not attending work. I do not find that the Claimant was entitled to await the outcome of his grievance before returning to work. There was no unusual circumstance, such as a threat to his safety that would justify adopting such a position I also note that the Claimants correspondence refers to not returning in stringent terms, whilst also expressly stating that he was not resigning.

60. In effect, there are two matters that are capable of amounting to the repudiatory breach, firstly the refusal of a reasonable and lawful instruction to work in the restaurant on the 11th June and the subsequent refusal to attend work when directed to by HR in correspondence. I find that both matters did amount to a repudiatory breach, either singularly or cumulatively.

61. These matters were fundamental to the contract. The Claimant was not sick. Without attendance at work, without lawful instructions, the employment contract couldn't operate.

62. This is not a 'heat of the moment' case. Both parties corresponded after the incident. The Claimant was fit for work and there was a dispute over an employee being given an instruction at work. The Respondent was entitled to expect the Claimant to return to work.

63. I have found that the effective date of termination was the 26th June as stated by the Respondent. If this is somehow in error, then I find in the alternative that the outcome of the case does not change if the effective date of termination changes. If it is the 30th June, then that simply makes the express dismissal a few days later. If the 11th June was itself an express dismissal as the Claimant was initially suggesting in his email correspondence, then conclusion would remain the same, albeit the gross misconduct would focus solely on the refusal to work in the restaurant. This, without the additional factor of subsequently refusing to attend work would still be sufficient, in isolation to amount to gross misconduct.

64. The claim of wrongful dismissal is not well founded and is dismissed.

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Employment Judge Anderson

12th February 2024

JUDGMENT SENT TO THE PARTIES ON

22 February 2024

FOR THE TRIBUNAL OFFICE

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