



EMPLOYMENT TRIBUNALS

Claimant

Mr E McHenry

v

Respondent

Kingfisher Country Club Ltd

Heard at: Bury St Edmunds (CVP)

On: 16 February 2024

Before: Employment Judge S Moore

Appearances

For the Claimant: No appearance or attendance

For the Respondent: No appearance or attendance

JUDGMENT

- (1) The Respondent's application for an adjournment is dismissed.
- (2) The claims for unlawful deduction of wages, for notice pay and for holiday pay are dismissed.
- (3) The claim is dismissed in its entirety.

REASONS

Background

1. The Claimant was employed by the Respondent from 3 August 2020 as a Night Porter, commencing a period of training on 10 August 2020.
2. On 29 October 2020 he issued a claim complaining of automatic unfair dismissal, age, race, and religion/belief discrimination, and claiming notice pay, holiday pay, arrears of pay, other payments, breach of contract and breach of statutory rights.
3. On 9 March 2022 there was a Preliminary Hearing (PH). The Claimant did not attend. (He later said he had been involved in a car accident.) The Respondent was ordered to send the Claimant a request for further

information about his claims on or before 23 March 2022 and the Claimant to respond to that request on or before 6 April 2022.

4. By email of 11 April 2022 the Claimant stated that he now only wished to pursue claims for automatic unfair dismissal, breach of contract and breach of statutory employment rights, and that his other claims were retracted.
5. A telephone PH was listed for 1 June 2022.
6. At the Claimant's request the PH was postponed and re-listed for 7 July 2022.
7. Due to lack of judicial resources the PH was again postponed and re-listed for 17 October 2022.
8. At the Claimant's request the PH was again postponed and re-listed for 15 February 2023.
9. On 15 February 2023 the telephone PH took place. The Claimant did not attend. EJ Laidler noted that from the Claimant's correspondence his claims were not clear: although he was bringing a claim for automatic unfair dismissal on the ground of asserting a statutory right, he had not identified that statutory right. Further it was not clear which contractual terms and which statutory rights he alleged had been breached. In addition, he still appeared to be bringing a claim of discrimination on grounds of religion/belief. He was ordered to provide particulars about those matters and about other aspects of his case (including an apparent claim in respect of asserting health and safety rights) within 21 days of the date the Case Management Summary (CMS) was sent to the Claimant.
10. The CMS was sent to the Claimant on 1 March 2023. On 22 April 2023 the Tribunal wrote to the Claimant stating he had been required to comply with EJ Laidler's orders by 22 March 2023 but had failed to do so. He was required to write to the Tribunal by 15 May 2023, providing all the information required by the orders or else supply what information he could and explain why he could not answer the other questions.
11. It appears the Claimant provided some information to the Tribunal on 22 April 2023 and 16 May 2023, although that correspondence is not on the Judicial Case Manager system.
12. On 28 May 2023 a telephone PH was listed for 2 August 2023.
13. On 2 August 2023 the telephone PH took place and both parties attended. At the hearing it was recorded that the Claimant had withdrawn the majority of his complaints and the only complaints that remained were for unpaid wages, holiday pay and notice pay.

14. A judgment was issued dismissing the Claimant's other complaints on withdrawal.
15. A final hearing was listed for 15 and 16 January 2024 via CVP and Case Management Orders were made, including disclosure of documents by 15 September 2023 and the compilation of an agreed bundle by the Respondent by 27 October 2023. Since the date of termination of the Claimant's employment was unclear the Claimant was not required to produce a schedule of loss until after disclosure had occurred.
16. On 27 October 2023 the Respondent was informed that an employment judge was considering striking out the response because the Respondent had not complied with the Tribunal's orders.
17. On 11 December 2023 EJ Ord issued a judgment striking out the response for failing to comply with the Tribunal's orders and because it had not been actively pursued and stating that the hearing would be converted to a one-day hearing before a judge sitting alone pursuant to rule 21 of the Employment Tribunals Rules of Procedure.
18. On 2 January 2024 the parties were informed that on 15 January 2024 there would be a public remedy hearing by video. The reference to the hearing being a remedy hearing was in fact incorrect because no judgment had been given in respect of the Claimant's remaining claims (of holiday pay, notice pay and unpaid wages).
19. In any event, on 12 January 2024 that hearing was postponed at the request of the Claimant and the parties were informed that the hearing had been re-listed and the *claim* would be heard by CVP on 16 February 2024.
20. On 15 February 2024, Nick Jamoo for the Respondent sent an email timed at 18.36 asking for the hearing to be postponed because the previous owners were no longer there.
21. On 16 February 2024 the Claimant sent an email timed at 03.46 to the Tribunal stating that he had just been going through his correspondence from the tribunal and had read that his response had been struck out and that he would be appealing any decision made if not satisfactory.
22. The Claimant sent a further email timed at 04.18 stating that he was owed £672 holiday pay, £1480 September pay, £1680 October pay, £1680 November pay and £1680 notice pay, making a total of £7,192.00 and that he would look to the county court to recover any monies not recovered.
23. The Claimant sent a further email timed at 08.50 stating that as he was not allowed to take part in the hearing, he would make his stance clear, namely that as it had been 3 years since his claim was lodged if the tribunal did not award his losses in full he would seek the monies owed via the county court. He then stated that he would not accept anything less than 50% of total money owed.

24. Neither the Claimant nor the Respondent attended the hearing.
25. Between 10am and 11am many attempts were made to contact the Claimant by telephone and by email. A voicemail was also left on the Claimant's answerphone and he was sent an email at 10.18 informing him that the response had been struck out, not the claim form, and that he was required to join the hearing immediately by video call. These efforts were to no avail.

Findings

Preliminary Matters

26. Since the response has been struck out and the Respondent has no right to participate in the hearing in any event, I refuse the Respondent's adjournment request.
27. As regards, the Claimant's non-attendance, I consider it appropriate to proceed with the matter in his absence and determine the issues on the papers.
28. First, I do not consider he can reasonably have believed that his claim or case had been struck out and that he was not allowed to take part in the hearing.
29. In this respect the judgment of 11 December 2023 striking out the response made clear that the response (not the claim) was being struck out because the Respondent (not the Claimant) had not complied with orders of the Tribunal and that the Respondent (not the Claimant) would only be entitled to participate in any hearing to the extent permitted by the Employment Judge.
30. Further as at 12 January 2024 the Claimant had plainly understood that his claim had not been struck out and that he was entitled to participate in the hearing because he requested the hearing listed for 15 January 2024 to be adjourned and re-listed (which it was).
31. Finally, the Claimant had plainly received a CVP link by email inviting him to attend today's hearing because his email today timed at 03.46 replies to that email.
32. Secondly, I consider it is in accordance with the overriding objective of dealing with matters fairly and justly within the meaning of rule 2 of the Employment Tribunal Rules of Procedure 2013, taking account of the matters set out in paragraphs 2(a)-(e), that this matter be brought to a conclusion. The claim was lodged more than three years ago and relates to a period of work lasting less than two months. This is the eighth hearing

that has been listed, three of which have been postponed at the Claimant's request and three of which he has failed to attend (including this hearing). To postpone the matter again, in circumstances in which the Claimant's reason for his non-attendance is at best unreasonable and at worst disingenuous, would be out of all proportion to the complexity and importance of the issues and entirely contrary to the objectives of avoiding delay and saving expense.

The Claims

33. It appears from the claim and the response that the Claimant commenced employment with the Respondent as a Night Porter on 3 August 2020. He worked 30 hrs per week at a £10.75 per week. It is unclear how many days per week he worked.
34. On or about 24 September 2020 he failed to arrive at work. The Claimant says he was victim of an assault while the Respondent says the Claimant was arrested. The Claimant was then suspended while the Respondent carried out an investigation before the suspension was lifted and the Claimant was invited back to work. The Claimant says that after a week he received a letter asking him to return to work or resign and that he was unpaid while he was suspended. The Respondent says the suspension lasted from 25-27 September 2020 during which time the Claimant was paid and that when the suspension was lifted, he failed to attend a back to work meeting and became absent without leave. It appears to be common ground that the Claimant never returned to work following his suspension. The Respondent also alleges that the Claimant had previously failed to attend work on 22 September 2020.
35. As regards the claim for unlawful deduction of wages, on the basis of the information before me I find that the Claimant's employment came to an end on or about 30 September 2020 by reason of the Claimant's resignation. By that time he had failed to return to work following the lifting of his suspension and by his conduct had thereby communicated the resignation of his employment to the respondent.
36. It follows that he is not entitled to any wages for October 2020 or November 2020 or to any notice pay. Further, as regards the claim for unpaid wages in respect of September 2020 the Claimant has not discharged the burden of proving that he was not paid during his period of suspension or that he worked any days in September 2020 for which he was not paid.
37. It follows that the claims for unlawful deduction of wages and for notice pay are dismissed.
38. As regards the claim for holiday pay, the Claimant was employed between 3 August and 30 September 2020, which is approximately one sixth of a year, meaning that the Claimant was entitled to one sixth of his annual leave allowance (see regulation 14 of the Working Time Regulations

1998). The Claimant's annual leave allowance of 5.6 weeks expressed in hours is 168 hrs, assuming he worked an average of 30 hrs per week as he states in his claim (5.6 x 30). One sixth of that number of hours is 28 hrs.

39. The Respondent states that the Claimant was given paid holiday on 10, 11 and 31 August 2020 but does not state for how many hours the Claimant was paid on those days and I do not have any information before me as regards the Claimant's normal working pattern. I note, however, that if, as a Night Porter, the Claimant worked 10hr shifts it would follow that payment of 3 days holiday would amount to payment for 30 hrs work and the Claimant would not be entitled to any further holiday payment.
40. In short, on the information before, I am not satisfied that the Claimant is entitled to any outstanding holiday pay and the claim for holiday pay is dismissed.

Employment Judge S Moore

Date: 16 February 2024

Sent to the parties on: 5 March 2024

T Cadman
For the Tribunal Office