



EMPLOYMENT TRIBUNALS

Claimant: Mr A Hussain

Respondent: BMW Hams Hall Motoren GMBH

Heard in Birmingham

On: 08th of August

Before: Employment Judge Codd

Appearances

For the Claimant: Mr Hussain (unrepresented)

For the Respondent: Mr Wayman (counsel instructed by Lewis Silkin Solicitors)

JUDGMENT

1. The claimant's effective date of termination was the 3rd of August 2023.
2. The Tribunal is satisfied that it has Jurisdiction to hear the claim for unfair dismissal pursuant to S111(3) of the Employment Rights Act 1996.
3. The respondent's application for strike out is refused.

Employment Judge **Codd**

08.08.24

Reasons

The claim

1. This is an application brought by Mr Hussein against BMW Hams Hall Morton GmbH for unfair dismissal and race discrimination as well as wrongful dismissal.
2. Today's hearing was listed for a preliminary hearing in order to determine whether the Tribunal has Jurisdiction to hear the claim for unfair dismissal and further case management.

Background

3. The claimant's employment commenced on 1st of April 2015. He was supported with management training and promoted a number of times.
4. Subsequently, in late 2022 or early 2023, a number of employees utilised an anonymous whistleblowing helpline to raise complaints against the claimant.
5. The claimant was made subject to an internal investigation for allegations of misconduct on the 4th of January 2023, where he was suspended on full pay. He attended a disciplinary meeting on the 9th of February 2023, when he was given notice that he would be dismissed.
6. In accordance with the claimant's contract of employment (collectively agreed employment terms for all employees), this then engaged an internal process of appeals. During this time the contract operated so that that dismissal action would be suspended provided that the claimant complied with the time limits for lodging appeals. There is no suggestion that the claimant has done anything other than comply with the terms of the contract and issued the relevant stages of his appeals within time.
7. On the 15th of February 2023 he lodged an appeal against the dismissal decision and a hearing took place on the 14th of March 2023. The appeal upheld the original decision.
8. The claimant was then entitled to lodge a further appeal, known as an EPC referral. The claimant issued that referral on the 24th of March 2023 (in time). At

a hearing on 3rd of August 2023 the appeal was refused and the claimant dismissed, having exhausted his appeal rights.

9. Throughout the period of his suspension he was provided with full pay and shift enhancements. It is said that he was also provided with a payment in respect of what was said to be accrued but untaken holiday pay, to cover the year to the 3rd of August 2024.
10. The claimant had engaged with a ACAS early conciliation on the 2nd of May 2023 until the 13th of June 2023. He lodged an ET1 claim claiming unfair dismissal, wrongful dismissal and race discrimination on the 10th of July 2023.
11. The respondent subsequently applied to have the claim for unfair dismissal struck out, on the basis that the ET1 pre-dated the dismissal and therefore the Tribunal had no jurisdiction to hear the claim. This application comes before me today for a preliminary hearing to determine the effective date of termination and whether the Tribunal has Jurisdiction to hear the claim for unfair dismissal.

The law

12. S111 of the employment rights act deals with statutory time limits for lodging a claim.

111.— Complaints to employment tribunal .

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination ...

(3) Where a dismissal is with notice, an employment tribunal shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination.

13. S97 1(a) and (b) deal with the statutory provisions for an effective date of termination:

97 (1) Subject to the following provisions of this section, in this Part “the effective date of termination”—

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

14. In respect of the interpretation of contractual provisions these are to be assessed in accordance with common law principles of contract and are a matter to be determined on their facts.

15. The standard of proof to be applied to all matters is the balance of probabilities.

Preliminary issues

16. During the initial submissions Mr Wayman, has supplied a helpful and succinct skeleton argument. He also drew my attention to the decision of **The Governing body of Wishmorecross School and Malado UKEAT/0199/11/CAE**.

17. Mr Wayman identified that the contractual provisions and factual history in that case, were identical to those of the claimants, and that the determination was favourable to the proposition that the Tribunal did have jurisdiction to hear this matter if the date of termination was either the 9th of February 2023 (as the claim was issued in time) or the 3rd of August 2024 in accordance with S111(3) ERA.

18. As a consequence it was only necessary for me to hear limited submissions from the parties.

Findings and Conclusions

19. Whilst the claimant was told on the 9th of February 2023 that he was dismissed, under the terms of his contract, he had engaged the relevant provisions. Action was suspended pending appeal and he was paid in full until the 3rd of August 2023, when his contract appears to be rescinded.

20. There can be little dispute that all parties treated the contract as continuing until the 3rd of August 2023, and that the contractual payments were provided to the claimant up to that date. At page 4 of the ET1 issued on the 10th of July 2023, the claimant confirms that his employment was continuing.

21. On a straight reading of the facts it appears the claimant had issued his claim prematurely. There was a legitimate question as to whether the Tribunal had jurisdiction to hear the claim under section 111 ERA.

22. The respondent had argued that the effective date of termination was the 3rd of August 2023 and therefore the ET1 was issued prematurely.
23. Mr wayman has pointed my attention to the case of **The Governing body of Wishmorecross School and Malado UKEAT/0199/11/CAE** a case decided by Lord justice Underhill president then of the EAT.
24. I have considered the Judgment in that matter in full and I agree that case is identical with the circumstances of the claimant's case. Namely that the claimant had access to an appeals process which suspended action regarding his dismissal and resulted in his dismissal being deferred until that action had been exhausted, after he had received a notice of dismissal.
25. I find (as was the case in **Wishmorecross**) that in effect a notice of dismissal had been given at the disciplinary meeting on the 9th of February 2023 but that the effective date of termination did not take place until the 3rd of August 2023, when the contractual appeals process was exhausted. It was in effect a dismissal on notice.
26. In accordance with that authority where a claim is issued between the serving of a dismissal notice and the effective date of termination, it is within the jurisdiction of the employment tribunal within the context of section 111(3) ERA.

Conclusions

27. It follows that I find that the Tribunal has the correct jurisdiction to hear a claim of unfair dismissal pursuant to S111(3) ERA. The effective date of termination being the 3rd of August 2023.
28. The application for strike out of the claim for unfair dismissal is refused.
29. That is my Judgment

Employment Judge **Codd**

08.08.24