Neutral Citation Number: [2022] EAT 134

Case No: EA-2021-000990-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31st May 2022

Before:

HIS HONOUR JUDGE BEARD

- -

Between:

MR N STUBBS	**Appellant**
v -	
GRAFTERS LTD	**Respondent**

- -
- -

Nathan Stubbs the **Appellant** in person
The Respondent neither present nor represented- relied on written submissions

Hearing date: 31st May 2022

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JUDGMENT

SUMMARY

Practice and Procedure

The claim form which alleged unfair dismissal contained an indication of a claim of unfair dismissal pursuant to section 103A Employment Rights Act 1996 (ERA). The strike out was made on the basis that the Appellant had insufficient continuity of employment to pursue an unfair dismissal claim. This was correct in respect of the claim insofar as it related to a claim of unfair dismissal pursuant to section 94 ERA, because of the restriction in section 108(1) ERA. However, that was not the case in respect of a claim pursuant to section 103A which is made an exception to section 108(1) in section 108(3) ERA. The claim was remitted to the employment tribunal to process the claim, which was struck out before the provision of a response.

HIS HONOUR JUDGE BEARD:

Introduction:

1. This is an appeal against the decision of Employment Judge Cadney on 21st October 2021 striking out the appellant's claim. That strike-out was the subject of a review by EJ Midgley on 29th October 2021, who did not reverse the decision.

2. The appellant's grounds of appeal were set out as:

   a) the law of exemptions to the 2-year rule, which had not been taken into account; and

   b) the law of reasonably feasible had not been taken into account.

3. At the sift, His Honour Judge Shanks permitted the matter to advance to this full hearing. It appeared to him that there was a claim of unfair dismissal pursuant to section 103A of **The Employment Rights Act 1996**, based on the appellant having made a protected disclosure and which had not been considered by the employment judge, the two-year limit on making such a claim not applying under section 103A.

4. The history of this claim has been somewhat opaque: there are two claim forms in the appeal bundle. These were both presented to the employment tribunal ("ET") on the same date. The first has been given the case no. 1400804/2021. This is a claim form against The Lucky Onion. There is a response to that dated 10th April 2021, and it appears obvious, therefore, that that claim was accepted prior to that date. However, there is a second claim form, with the respondent named as David Wilce, dealing with employment that ended in October 2017. No claim no. has been allocated onto the claim form itself. It seems apparent, however, that this has been given the claim no. 1400805/2021, as there is a letter from the Employment Tribunal accepting that claim, dated 20th August 2021. The striking out refers to that claim number, and it appears, on that basis, that this is the claim that is subject in this appeal and not

that involving The Lucky Onion.

5. The appellant sets out his dates of employment with the respondent as 1st March 2017 to 2nd October 2017. The Early Conciliation Certificate in the bundle relates to the Lucky Onion claim and it shows receipt of notification as 6th August 2020 and an issue of certificate date as 10th August 2020. I take it that, because the claim forms were presented at the same time, similar dates were on the earlier notification certificate, however, I cannot be sure of that.

6. The claim form was presented on 11th February 2021. The claim should have been subject to Early Conciliation and that should have taken place prior to 1st January 2018. Therefore, the claim presented was, on its face, out of time. However, as part of the claim form, the appellant has set out that he did not become aware of his legal rights until July of 2020 and that he was then evicted in August 2020 remaining in an unstable position with accommodation until 4th February 2021. It is clear, therefore, that he was seeking to demonstrate that it had not been reasonably practicable for him to present his claim earlier.

7. The claim names David Wilce as the employer. At some point (it is unclear from the documents I have seen), the name of the employer was changed to Grafters Ltd. The appellant has indicated before me that is the correct organisation. The complaint is one of unfair dismissal, however, the claim form also refers to dismissal on the grounds of having made a protected disclosure. Although further facts are set out in the ET1, it is not explained how those facts connect to the protected disclosure complaint. It is not surprising that the protected disclosure complaint was overlooked given the structure of the ET1.

8. On the same date as accepting the claim, the employment tribunal wrote to the appellant indicating that a judge had indicated that consideration was being given to striking out the

claim because the claimant (the appellant here) had been employed for less than two years. It stated that, as part of the document:

> "You have until the 27th of August 2021 to give reasons in writing why the claim should not be struck out."

There is no response on the bundle, and I take it, on that basis, that the appellant did not send a written response. In any event the matter was decided upon on 6th October 2021 with the judgment being sent on 21st October 2021.

9. The reasons given for striking out were that: the complaint was one of unfair dismissal; s 108 of **The Employment Rights Act 1996** requires a claimant to have not less than two years' service to make such a complaint; the claimant was employed by the respondent for less than two years and that he was, therefore, unable to bring the proceedings. That decision was upheld on review by EJ Midgley on 29th October 2021 on the basis there was no reasonable prospect of the decision being changed.

10. The appellant was asked by me to explain the protected disclosure element of his claim. His explanation is that it relates to facts within the ET1 where he informed his employer that he taken into a fridge by a manager who closed the door on him, confining him in there along with the manager. He argues that discussion with his employer is a protected disclosure because it relates to health and safety matters.

11. However, today, the claimant also advanced a further argument on ordinary unfair dismissal. This argument relates to the two years requirement before a claim for unfair dismissal can be made. The appellant contends that, because he was an agency worker, it is impossible for such a worker to achieve the two years qualifying time in order to make a claim. He contends,

therefore, that the two years' requirement should be disallowed in some way. It is on that basis that he argues that the ordinary unfair dismissal claim should also not be struck out.

12. The respondent to this claim has not taken part, save for providing a skeleton argument. The skeleton argument points to what must be an intended response to the claim. Rather than dealing specifically with the question of protected disclosure, it indicates that, in its view, Mr Stubbs was not an employee and that, as a worker, he was not dismissed but just not offered further assignments. It advances the same argument in respect of the two years' service requirement, that unfair dismissal does not apply at all because the claimant was a worker not an employee.

13. **The Employment Rights Act 1996**, s103A provides:

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

The length of service requirements for making a claim of unfair dismissal are dealt with under s108 of **The Employment Rights Act 1996**. Dealing with ordinary unfair dismissal, it provides, under s108(1):

> "(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination."

However, section 108 (3) provides:

(3) Subsection (1) does not apply if—

…

(ff) section 103A applies,"

In short, the two years' continuous service is required for an ordinary unfair dismissal, but no continuous service period is required to make an unfair dismissal complaint pursuant to s103A.

14. In bringing a claim of unfair dismissal based on having made a protected disclosure s108(3) applies not s108(1). Therefore, striking out that claim because the appellant had insufficient continuous service was an error of law. However, I also have to consider whether the claim has any prospects in any event. It seems to me that it would be wrong, at this stage, for me to indicate that there is strength or weakness in the protected disclosure claim. I have heard no evidence; the claimant contends that he was taken into a large refrigerator, that he complained to his employer about that and was shortly afterwards dismissed. It seems to me therefore, that I am in no position (unlike the tribunal below hearing evidence) to draw conclusions on that factual issue. The claim should not have been struck out insofar as it related to a claim pursuant to s103A.

15. However, I then move to the ordinary unfair dismissal, the only complaint mentioned in the order. This point was not part of the appeal allowed to proceed by His Honour Judge Shanks. However, I deal with it for completeness. The appellant argued that he could not possibly attain the two years' service required by 108(1). I draw no conclusions as to whether that assertion is correct or how that section might affect agency workers. However, that argument is a matter for Parliament and politicians; judges interpret the law as it is written and are not permitted make or rewrite the law. The section is quite clear, s108 requires an employee to have been in continuous employment for a minimum of 2 years to make a complaint of ordinary unfair dismissal. It is clear on the face of the claimant's claim that he did not have sufficient continuous employment to make that claim. That being the case, the judge was correct to strike out that aspect of the claim, he could not have done otherwise.

16. The claimant's late presentation of the claim and whether it was reasonably practicable for him to present his claim at an earlier stage, is a decision for the employment tribunal and not for the employment appeal tribunal. It will have to be considered by hearing evidence.

17. I should, for the sake of clarification, deal with a practical matter raised the appellant before me. He is confused as to why there was no response ET3 from the respondent. It appears to me (although I cannot say for certain) that it is likely that the employment tribunal did not require a response from the respondent in circumstances in which it was considering striking out. In terms, it was waiting for a response from the claimant, to make a decision about striking out, before requiring the respondent to prepare a response. I say that is likely; I cannot say for certain that that is what happened, but it appears to me that is the most obvious reason for absence of a response.

18. Insofar as this appeal succeeds, the claimant's claim for unfair dismissal based on making a protected disclosure under s103A of **The Employment Rights Act 1996** is remitted to the employment tribunal. The claim pursuant to section 98(4) of **The Employment Rights Act 1996** was correctly decided by the employment tribunal. It was not the subject of this appeal; however, I make it clear the claim on that basis remains struck out under the terms of Judge Cadney's order.