



EMPLOYMENT TRIBUNALS

Claimant

Mr A Edwards

Respondents

F5 Networks Ltd

Heard at: London Central

On: 26 August 2020

Before: Employment Judge Lewis

Representation

For the Claimant: Represented himself

For the Respondent: Mr G Baker, Counsel

JUDGMENT

The claim is struck out because it has no reasonable prospects of success.

REASONS

1. This was a remote hearing with the consent of the parties. The form of remote hearing was V (conducted by CVP). I heard from Mr Edwards and from Mr Baker. There was an agreed electronic file of 192 pages and Mr Baker also provide a written skeleton argument.

2. The claimant worked as a Territory Account Manager. He was dismissed on 30 January 2020 after less than one year's service for alleged poor performance. According to the claimant, he was called to a meeting on another pretext and dismissed without warning.
3. The claimant did not have sufficient length of service to claim unfair dismissal. In his tribunal claim form, his claim is for 'wrongful dismissal as breach of contract of the implied terms'. The attached appeal letter states 'the appeal is based on wrongful dismissal as a breach of contract of the implied term relating to the dismissal process'. At the preliminary hearing on 24 July 2020, EJ Quill identified the issue in the case as this:

'Was there an implied term in the Claimant's contract which required the Respondent to take specific steps prior to dismissing an employee. [The Claimant alleges that he ought to have been given warning that his performance needed to improve and time to attempt to achieve improvement. However, he does not allege that any express written contractual terms have been breached.]'
4. The claimant confirmed to me again at the start of the strike-out hearing that he was not suggesting there was an express term. His argument is that there was an implied term that the respondent was required to follow the steps in its Capability and Performance Policy before it could dismiss him.
5. The Capability and Performance Policy sets out various stages which may be followed if an employee is not achieving the required performance. The claimant says none of these stages were followed. No formal Performance Improvement Plan was put in place and no KPIs were set. The respondent disagrees that no process was followed at all. But for the purpose of the strike-out application, it was agreed that I would work on the basis that the claimant was correct and that the facts in his ET1 were true (aside from the legal arguments).
6. The Capability and Performance Policy states that its aim is to provide a fair and consistent method of dealing with individual performance for the benefit and protection of all employees. Under 'Scope' it says:

'This policy applies to all UK employees of the Company, regardless of length of service. It does not apply to agency workers or third party contractors.'
7. It says at the end that 'the Company reserves the right to make changes at its discretion to this policy'.
8. Under the heading 'Termination and Suspension', the claimant's contract states:

'The Company reserves the right in its absolute discretion at any time lawfully to terminate this contract with immediate effect on the date on which it notifies you that the Company is exercising its right under this clause. '

9. The claim is for 6 months' salary and the claimant refers to loss of sales opportunities and commission.
10. I asked the claimant on what basis he said it was implied that the Capability and Performance Policy was contractual and that he could not be dismissed without it having been followed. The claimant's only argument was that it was a detailed statement and that it says it applies to all employees.

The law on wrongful dismissal

11. As a result of Johnson v Unisys Ltd [2001] UKHL 13, an employee is not allowed to bring a wrongful dismissal claim relying on the implied term of trust and confidence to recover damages for loss arising from the unfair manner of his or her dismissal. This is covered by the statutory right to claim unfair dismissal, which has various restrictions on how is eligible to claim, time-limits, the amount that can be awarded and so on. An employee is not allowed to circumvent the statutory rules by seeking compensation for the unfairness via a wrongful dismissal claim.
12. The Supreme Court in Edwards v Chesterfield Royal Hospital NHS Trust [2012] IRLR 129 said this principle does not only apply to wrongful dismissal claims based on a breach of the implied term of trust and confidence in the manner of dismissal. It also applies where compensation is claimed for breach of an express contractual disciplinary procedure.

The law on strike out

13. Under Schedule 1, rule 37(a) of the ET Rules of Procedure 2013, the tribunal can strike out all or part of a claim on the grounds that it is scandalous or vexatious or has no reasonable prospect of success. A strike out should only take place in the most obvious and plainest case.

Conclusions

14. I find that the claim has no reasonable prospects of success, even if the claimant proves that he was treated in the way he describes. I therefore strike out the claim.
15. The claimant does not suggest there is any express term that the employer cannot dismiss him without having gone through the Capability and Performance Policy. The claimant says this is an implied term. The only basis suggested by the claimant for it being an implied term is that

the Capability and Performance Policy is detailed and states that it applies to all employees regardless of length of service.

16. In my view, the fact that a policy is stated to apply to all employees is not enough in itself to suggest that it is a contractual Policy. Employers tend to have many policies and procedures applicable to all employees, some of which are contractual and some of which are not. The general application of a policy or procedure does not mean it is contractual.
17. Even if the Capability and Performance Policy was contractual, this would not help the claimant because of the Johnson and Edwards cases. The Supreme Court has said that an employee cannot claim compensation as part of a wrongful dismissal case for the unfair manner of dismissal, even where this involves breach of a contractual disciplinary procedure which leads to dismissal. The reason is that such matters are covered by unfair dismissal law, and the claimant should not be allowed to circumvent the fact that, for example, he cannot claim unfair dismissal because he does not have two years' service.
18. I am aware that the claimant in this case is referring to a capability policy, but I can see no reasonable prospect of success in any argument that the Johnson and Edwards principle would not apply. I would add that no such argument was made to me by the claimant, but I appreciate that he is a litigant in person.
19. In so far as the claimant argues that there is an implied contract term that he will not be dismissed unless and until the respondent has followed the stages in the Capability and Performance Policy. I can see no basis at all for implying such a term. Again, it is not sufficient simply that the Policy is detailed and applies to all employees. It is a leap to say that it might prevent dismissal if not followed.
20. Moreover, the claimant's contract explicitly states that the respondent reserves the right in its absolute discretion at any time lawfully to terminate the contract with immediate effect (paying notice in lieu except for gross misconduct or gross incompetence). So even if there was a basis of implying the term suggested by the claimant, which there is not, this could not be done because there is an express term to the contrary.

Employment Judge Lewis

Dated: 26 August 2020

Judgment and Reasons sent to the parties on:

26/08/2020

For the Tribunal Office - OLU