



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondents

Mr P Buthelezi

Royal Marsden NHS Foundation Trust

JUDGMENT AND ORDER ON PRELIMINARY HEARING

HELD AT: London Central

ON: 6 May 2022

BEFORE: Employment Judge A M Snelson (sitting alone)

On hearing the Claimant in person and Ms Y Genn, counsel, on behalf of the Respondents, the Tribunal adjudges and orders as follows.

JUDGMENT

The complaints of race discrimination are struck out as having no reasonable prospect of success.

ORDER

- (1) The Claimant's application dated 9 March 2022 and delivered under cover of an email of 11 March 2022 for permission to amend the claim form to add a complaint of breach of contract is refused.
- (2) The Claimant's application dated 29 April 2022 for permission to amend the claim form to add a complaint of unfair (constructive) dismissal is granted and the claim form is to be treated henceforth as containing that claim, and that claim only.
- (3) The Respondents' applications for a striking-out order, alternatively deposit order, in respect of the unfair dismissal claim added pursuant to para (2) above are refused.
- (4) No later than 20 May 2022 the Claimant shall deliver to the Respondents' representative and copy to the Tribunal further details of the grievances the conduct and/or outcomes of which are said to have amounted to or

contributed to the breach of contract on which he relies as having given rise to his alleged constructive dismissal, specifying in each case:

- (a) the relevant grievance;
 - (b) the date or approximate date of the act or omission complained of;
 - (b) a brief summary of the relevant conduct and/or outcome; and
 - (c) the person(s) responsible for the conduct and/or outcome.
- (5) No later than 20 May 2022 the Claimant shall deliver to the Respondents' representatives and copy to the Tribunal a schedule of all losses claimed in the proceedings.
- (6) No later than 3 June 2022, the Respondents shall deliver an amended response form setting out all grounds on which the complaint of unfair dismissal will be resisted.
- (7) No later than 24 June 2022 the parties shall exchange copies of all documents which are, or have been, in their possession or control and which are, or may be, relevant to any issue in the proceedings including, for the avoidance of doubt, any document which may not assist the disclosing party's case and/or may assist the opposing party's case.
- (8) The parties shall cooperate to agree a common bundle of documents for use at the hearing referred to below ('the hearing'), primary responsibility for its preparation resting with the Respondents. The form of the bundle shall be finalised no later than 15 July 2022 and a copy supplied at once electronically to the Claimant for his own use.
- (9) No later than 29 July 2022 the parties shall exchange witness statements in the names of all witnesses (including the Claimant) whom they intend to call to give evidence at the hearing. Every witness statement shall:
- (a) be typed in double line spacing;
 - (b) be laid out in short, numbered paragraphs;
 - (c) set out the relevant events in chronological order, with dates;
 - (d) contain all the evidence which the witness is called to give;
 - (e) exclude any matter not relevant to the issues to be determined;
 - (f) state the source of any information not acquired at first hand;
 - (g) be signed and dated.
- Except with the special permission of the Tribunal, no witness may be called at the hearing unless a statement in his/her name has been prepared and delivered to the opposing party in accordance with the above directions.
- (10) No later than 19 August 2022 the Claimant shall deliver to the Respondents' representative and copy to the Tribunal an updated schedule of loss.
- (11) No later than 25 August 2022 the Respondents shall send by email to londoncentralet@justice.gov.uk electronic copies of the papers to be presented at the hearing, including the trial bundle, the witness statements, skeleton arguments or written openings and any chronology or other

relevant document, or a link to a website from which they can be downloaded. The following points should be carefully noted:

- (a) all documents should be sent in pdf format;
 - (b) the index to the trial bundle should be sent as a separate document, so that the page numbers of the hearing bundle align with the thumbnail page numbers of the pdf;
 - (c) any late additions to the trial bundle must be inserted at the end, not in the middle;
 - (d) witness statements should be contained in a separate pdf bundle;
 - (e) chronologies, skeleton arguments and other sundry documents should be contained in a further, separate pdf bundle.
- (12) The final hearing of the unfair dismissal claim, to address all issues of liability and remedy, shall be held remotely by CVP (or such other video platform as may be specified) before an Employment Judge sitting alone at 10.00 a.m. on 24 August 2022, with three consecutive days being allocated.

NOTES:

- (1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.
- (2) The Employment Tribunals Rules of Procedure 2013 (to which any reference below to a rule refers) provide by rule 6 that if an Order is not complied with, the Tribunal may take such action as it considers just, which may include waiving or varying the requirement, striking out the claim or response (in whole or in part), barring or restricting a party's participation in the proceedings and/or awarding costs.
- (3) You may apply under rule 29 for this Order to be varied, suspended or set aside.
- (4) Where reasons have been given orally on any disputed issue, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

COMMENTARY

- 1. The matter came before me in the form of a public preliminary hearing.
- 2. By his claim form the Claimant complained of race discrimination. For reasons given orally I struck that claim out on the ground that it had no reasonable prospect of success.
- 3. That did not of itself bring the entire proceedings to an end since there were already before the Tribunal two applications by the Claimant to amend the claim form to add fresh claims. For reasons given orally I refused the first application but granted the second (Order, paras (1) and (2)). The effect of

that was that the proceedings survive and are limited to a single complaint: that, on or about 29 April 2022 (*ie* well after the claim form was presented), the Respondents constructively and unfairly dismissed the Claimant.

4. I place on record that, despite the terms of the written application of 29 April (which could have been interpreted as proposing other claims) the Claimant explicitly and unambiguously assured me, not once but twice, that he wished by that application to add a complaint of unfair dismissal *and no other claim*.
5. Ms Genn argued that the unfair dismissal claim was so weak that it should be struck out, alternatively made the subject of a deposit order. I did not accept her submissions, giving oral reasons. If I had thought that any unfair dismissal claim would have no reasonable prospect of success, I would not have exercised my discretion to allow it in by amendment. Nor was I persuaded that the lower threshold applicable to deposit orders was met.
6. The unfair dismissal claim raises three liability questions:
 - (a) Did the Respondents commit a repudiatory breach of the Claimant's contract of employment?
 - (b) If so, did the Claimant accept the repudiation by resigning without first affirming the contract as breached?
 - (c) If so, was the resulting (constructive) dismissal fair or unfair under the Employment Rights Act 1996, s98(4)?

In the usual case, of which this appears to be an example, the main contest arises under issues (a) and (b). Employers rarely argue, and even more rarely succeed in arguing, that they acted reasonably in repudiating their employees' contracts of employment.

7. After discussion it was agreed that the Claimant's case is put on the basis of an allegation that the Respondents repudiated his contract by breaching the core implied duty to preserve mutual confidence.
8. After further discussion Mr Buthelezi told me that he contends that the breach consisted of the Respondents' adverse treatment of him over time and that he would rely on three particular categories of allegedly unfair treatment which, he says, individually or collectively, broke the implied term of trust and confidence:
 - (a) treatment relating to his concerns about job evaluation and allegedly broken promises in that regard;
 - (b) the conduct and outcomes of grievances raised by him over time;
 - (c) treatment relating to Covid-19 rules and measures.

He added that he reserved the right to refer in his evidence to disciplinary action taken against him by the Respondents in the past, although he would not allege that such action entailed or contributed to any breach.

9. Given the marginal (at best) relevance of the disciplinary action, it will be for the trial judge to decide how much evidence to permit on that aspect. On any view, the central focus will be on items (a)-(c) listed in para 8 above.
10. I explained my Order, para (4). It is designed to ensure that the Respondents have a proper understanding of the 'plank' of the case that rests on grievances. The information to be supplied must be clear and concise. It may be convenient to set it out in table form.
11. We discussed and agreed the directions timetable. It is very important that each step is complied with fully and on time. The parties both have a duty to implement it so as to assist the Tribunal to do justice to the dispute.
12. The three-day listing is generous: two days should suffice. The parties must expect the trial judge to ensure that the hearing proceeds at a suitable pace and is focussed on the central issues.
13. I repeat my encouragement to the Claimant to seek independent assistance, perhaps from a CAB or law centre, where free help should be available.

EMPLOYMENT JUDGE – Snelson
19/05/2022

Judgment entered in the Register and copies sent to the parties on : 19/05/2022

For Office of the Tribunals