



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111740/2021

Held in chambers on 12 April 2022

Employment Judge P O'Donnell

Mr Sayd Shah

Claimant

The Scottish Ministers

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim of unfair dismissal under the Employment Rights Act 1996 is struck-out under Rule 37(1)(a) as having no reasonable prospects of success.

REASONS

Introduction

1. The Claimant has brought a range of complaints against the Respondent. The claim with which this judgment is concerned is the claim of unfair dismissal under the Employment Rights Act 1996 (ERA).
2. Two preliminary issues have been identified in relation to the unfair dismissal claim which go to the Tribunal's jurisdiction to hear the claim regardless of its merits:-
 - a. On the face of the ET1, the Claimant does not have two years' continuous service with the Respondent which is required under s108 ERA to be able to pursue an unfair dismissal claim and does not plead a case of "automatically" unfair dismissal for which the requirement for two years' service is disapplied.

- b. In the ET3, the Respondent raises the issue that there was no direct contract between them and the Claimant; the Claimant's services being supplied to the Respondent by a third party. They, therefore, assert that they are not the Claimant's "employer" for the purposes of a claim of unfair dismissal under ERA. The Claimant does not dispute the factual position and confirmed at a preliminary hearing in December 2021 that there was no contract of any kind between him and the Respondent.
3. In these circumstances, the Tribunal indicated that it was considering, of its own motion, striking out the unfair dismissal claim under Rule 37(1)(a) on the basis that it had no reasonable prospects of success. The Tribunal considered that this course of action would be in keeping with the Overriding Objective as it would avoid putting parties to the time, expense and delay of holding a preliminary hearing to determine these issues where, on the face of it, the Tribunal does not have jurisdiction to hear the unfair dismissal claim.
4. The Tribunal, at the hearing in December 2021, made directions for the Claimant to set out the basis on which he said the Tribunal did have the power to hear the unfair dismissal claim. This was intended to give the Claimant the opportunity to take legal advice and set out his position on these issues. The Claimant provided a response to these directions (along with a response to other directions made at the same hearing) by emails dated 21 February and 13 March 2022. Neither of these emails disputed the facts set out above and did not add anything in relation to these issues which was not set out in the ET1 or said by the Claimant at the December hearing.
5. The Tribunal proceeded to consider the question of whether to strike-out the unfair dismissal claim on the basis of the information available to it in the pleadings and provided subsequently by the Claimant.

Relevant Law

6. Section The Tribunal has power to strike-out the whole or part of claim under Rule 37:-

At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

...

7. A Tribunal should be slow to strike-out a claim where one the parties is a litigant in person (*Mbuisa v Cygnet Healthcare Ltd EAT 0119/18*) given the draconian nature of the power.
8. In considering whether to strike-out, the Tribunal must take the Claimant's case at its highest and assume he will make out the facts he offers to prove unless those facts are conclusively disproved or fundamentally inconsistent with contemporaneous documents (*Mechkarov v Citibank NA 2016 ICR 1121, EAT*).

Decision

9. The Tribunal bears in mind the draconian nature of its power to strike-out and that it should be slow to exercise this power especially where the Claimant is a party litigant.
10. However, the issues identified above are fundamental and go to the heart of whether the Tribunal has the power to hear this claim. Further, this is not a case where there is any dispute of fact in relation to these issues; the Claimant's own ET1 confirms that he has less than two years' service and does not set out a claim of "automatic" unfair dismissal for which this requirement is disapplied; he accepts that he did not have a contract with the Respondent.
11. In these circumstances, these issues would inevitably be determined against the Claimant and a finding would be made that the Tribunal had no jurisdiction to hear the claim of unfair dismissal.
12. The claim of unfair dismissal does not, therefore, simply have no reasonable prospects of success but, rather, has no prospects of success at all. There is

no basis on which it can be said that the Tribunal has the power to hear this claim.

13. The Tribunal, therefore, exercises its power under Rule 37(1)(a) to strike-out the claim of unfair dismissal as having no reasonable prospects of success.
14. For the avoidance of doubt, it is only the claim for unfair dismissal under the Employment Rights Act 1996 which is struck-out. The various claims of unlawful discrimination brought under the Equality Act 2010 are unaffected by the issues identified above and remain live.

Employment Judge: Peter O'Donnell
Date of Judgment: 13 April 2022
Entered in register: 13 April 2022
and copied to parties