



EMPLOYMENT TRIBUNALS

Claimant: Miss. N V Pavel

Respondent: Alive Digital Limited

Heard at: London South Employment Tribunal – by CVP

On: 30 January 2023

Before: Employment Judge C M Macey

Representation

Claimant: No appearance or representation

Respondent: No appearance or representation

JUDGMENT

1. The claimant has less than 2 years' continuous service with the respondent at the date of her dismissal and, pursuant to section 108 of the Employment Rights Act 1996 the Employment Tribunal has no jurisdiction to entertain a claim of unfair dismissal as presented.
2. Accordingly, the claimant's claim of unfair dismissal is struck out on the basis that the claim has no reasonable prospects of success.
3. The claimant's claims for unlawful deductions from wages and breach of contract for failure to pay notice pay are dismissed under Rule 47 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 due to the claimant not attending the hearing.

REASONS

1. The claimant presented a claim for unfair dismissal, unlawful deductions from wages and breach of contract for failure to pay notice pay on 18 August 2021.
2. The claimant's ET1 states that her employment dates with the respondent were from 18 December 2019 until 16 August 2021.

3. The Tribunal sent a strike out warning letter to the claimant dated 26 August 2021 informing the claimant that under section 108 of the Employment Rights Act 1996 claimants are not entitled to bring a complaint of unfair dismissal unless they were employed for two years or more except in certain specific circumstances. The claimant was given until 23 September 2021 to give reasons in writing why her complaint of unfair dismissal should not be struck out. The claimant did not provide any reasons in writing to the Tribunal why her complaint of unfair dismissal should not be struck out.
4. The claimant's claims for unfair dismissal, unlawful deductions from wages and breach of contract for failure to pay notice pay were listed for a hearing by video (CVP) on 30 January 2023 and 31 January 2023. The Notice of Hearing was sent to the parties on 21 April 2022. It was sent to the correct contact details of both parties.
5. On 27 January 2023 both parties were also emailed the log-in details of the hearing by video (CVP). This was sent to the correct contact details of both parties.
6. The hearing was due to start at 10 AM. I logged into the CVP hearing room at 10 AM and neither the claimant nor the respondent were present. The claimant had not provided a telephone number on her ET1 so, I instructed the Tribunal clerk to email the claimant and to keep checking the CVP hearing room until 10.30 AM.
7. At 10.30 AM neither the claimant nor the respondent had attended. As it was a two-day hearing I instructed the clerk to keep the CVP hearing room open until 3.00 PM and to keep checking the CVP hearing room and the emails for a response from the claimant. I also instructed the Tribunal clerk to check the waiting rooms just in case either party had attended in-person. Neither had.
8. Rule 47 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that where a party fails to attend or be represented at a hearing the Tribunal may dismiss the claim or proceed in the absence of that party. Before doing so it is necessary for the Tribunal to consider any information which is available to it after any enquiries that may be practical about the reasons for the party's absence. I took the view that the claimant's failure to attend was entirely unexplained. Had she thought the hearing was either in person or by telephone or had she had been having technical difficulties I would have expected her to attempt to contact the Tribunal.
9. I took into account the following when dismissing the claimant's claims for unlawful deductions from wages and breach of contract for failure to pay notice due to the claimant's non-attendance:
 - a. The Notice of Hearing dated 21 April 2022 was sent to the correct contact details provided by the parties.

- b. The Tribunal's email dated 27 January 2023 notifying the parties of the log-in details was sent to the correct contact details of the parties.
 - c. The Tribunal contacted the claimant by email on the morning of the hearing and there was no response prior to 3.00 pm on 30 January 2023.
 - d. No reason was provided by the claimant in advance of non-attendance.
10. I also took into account the above reasons (in paragraph 9) when deciding that I would consider whether or not the claimant's claim for unfair dismissal should be struck out in her absence.
11. I considered whether I should simply postpone the hearing but decided that I should not. It would take many months before a further hearing could be listed. The effect of postponing a hearing always impacts upon other tribunal users and the Tribunal system is overstretched at the moment.

FACTS

12. I am not at this stage concerned with the merits or otherwise of the claim of unfair dismissal and therefore restrict my findings to that which is strictly necessary to determine the question of whether the claimant had sufficient continuity of employment to present a claim of "ordinary" unfair dismissal.
13. In her ET1 the claimant states she was employed by the respondent from 18 December 2019 until 16 August 2021 as Head of Digital, Wordpress Developer. In its ET3 at paragraph 4.1 the respondent disputes that the claimant was an employee of the respondent and that she merely held the office of Director. In its Grounds of Resistance attached to its ET3 the respondent states that the claimant set up the respondent with Mr. Kershaw and Mr. Wood on 18 December 2019. The respondent also states that the claimant did leave the respondent but does not provide a date. Regardless of whether the claimant was an employee or a worker, or simply holding the office of Director, I find that she was at the respondent in some capacity from 18 December 2019 until 16 August 2021.

LAW

14. The right to claim unfair dismissal is provided by section 94 of the Employment Rights Act 1996 ("ERA"). However, that right is qualified by section 108(1) which states that section 94 does not apply to a dismissal of an employee unless she has been continuously employed for a period of not less than two years ending with the effective date of termination. Section 108(2) of the ERA reduces the period for continuous employment to one month if an employee has been dismissed by reason of any requirement or recommendation as is referred to in section 64(2) of the ERA (suspension on medical grounds).
15. Section 108(3) of the ERA states section 108(1) does not apply in specific circumstances and section 108(3) lists all of these specific circumstances.

CONCLUSIONS

16. As the claimant was only engaged with the respondent from 18 December 2019 until 16 August 2021 I conclude that she does not have the necessary two years' continuous service required to bring a claim of unfair dismissal.
17. In addition, her ET1 does not refer to any of the circumstances specified in section 108(2) or section 108(3) ERA. Nor has the claimant provided reasons in writing to the Tribunal why her claim for unfair dismissal should not be struck out. I conclude that the specific circumstances in sections 108(2) ERA and 108(3) are not applicable to the claimant.
18. As I have dismissed the claimant's claims for unlawful deductions from wages and breach of contract for failure to pay notice pay due to the claimant's non-attendance the only claim remaining is for unfair dismissal. That claim cannot succeed for the reasons given above. I shall therefore strike out the claim for unfair dismissal as having no reasonable prospect of success pursuant to rule 37 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
19. When the claimant receives this judgment, it will be accompanied by a leaflet explaining that she can challenge the judgment either by way of reconsideration or an appeal (if there is any error of law). If the claimant had good reasons for not attending the CVP hearing, then that would provide the basis for an application for a reconsideration. However, there would be little point in asking for a reconsideration of the decision that the unfair dismissal claim cannot proceed unless the claimant has some factual or legal argument to suggest that my conclusions are wrong. I would therefore ask the claimant to carefully consider what I have written above before thinking about making a reconsideration application in respect of the unfair dismissal claim even if her failure to attend was beyond her control.

Employment Judge Macey

Date: 30 January 2023

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