



EMPLOYMENT TRIBUNALS

Claimant

Mr T Dalton

Heard at: London Central

Before: Employment Judge Lewis

Respondents

Capita Employee Benefits (Cons)

On: 29 July 2021

v

Representation

For the Claimant: Representing himself

For the Respondent: Mr G Hayes, solicitor

PRELIMINARY HEARING JUDGMENT

The claimant's application to strike out the response is not upheld.

REASONS

Claims and issues

1. This preliminary hearing was conducted on the CVP video platform.
2. The claimant has brought an unfair constructive dismissal claim. The respondent has entered a response, defending the claim. The preliminary hearing was to decide the claimant's application to strike out the response on grounds that it has no reasonable prospect of success.
3. The basis for the claimant's contention is that the respondent's own grievance appeal process concluded that the disciplinary investigation, disciplinary process and grievance process were flawed. He says the respondent's contention in paragraph 16 of its grounds of resistance that 'It is denied that there were 'numerous problems' with the disciplinary investigation as alleged or at all' is misleading and unsustainable.

Fact findings

4. I set out here some background facts which are not in dispute.
5. The claimant was employed by the respondent as an Actuarial Consultant on 22 June 2015. He resigned by letter dated 29 September 2020, giving three months' notice of resignation. His letter of resignation did not state the reason why he was resigning.
6. In June 2020, the respondent started an investigation into the claimant's completion of time sheets.
7. The claimant took out a grievance about the disciplinary investigation process on 26 July 2020. He complained that the disciplinary process had been flawed in numerous ways, and that despite his bringing these flaws to the attention of relevant people at each stage, they had continued with the process regardless. He identified these alleged flaws:
 - 7.1 The disciplinary policy states that a disciplinary matter should begin with an informal process. His line manager had started this by exchange of emails and had suggested a call to discuss the matter further. Before this could take place, Mr West (Director, Pensions Consulting) had intervened and initiated disciplinary proceedings. The claimant was invited to an investigation meeting on 8 June 2020 before the informal process had been completed.
 - 7.2 The investigation guidelines say an investigation should be restricted to establishing the facts and should not prejudge the outcome. However, the investigation outcome letter concluded that the allegations were upheld and disciplinary action should be considered.
 - 7.3 That he was not provided with a statement of the allegations and all of the evidence at least three days before the hearing as required by the disciplinary policy. When he raised it at the disciplinary hearing, he was accused of bring 'churlish' and 'stalling' which revealed bias.
8. The grievance was initially rejected, and the claimant appealed on 9 September 2020. The claimant handed in his resignation before the appeal was concluded. The respondent did not then complete the disciplinary process. The outcome of the grievance appeal was contained in a letter dated 18 November 2020. It upheld the appeal regarding the disciplinary and grievance process, saying:

'We are confident that the informal process before disciplinary proceedings should have lasted longer to allow you to rectify the issue identified and that the investigating disciplinary and grievance managers were not

appropriately briefed on their roles which led to a flawed process in both instances. ‘

- 9 The letter went on to say that the disciplinary trigger was appropriate given the ongoing issues with completion of the claimant’s timesheets of which he was aware and had been warned about over a sufficient period of time. The claimant says that the disciplinary trigger was never the subject of his grievance or appeal. He accepted that an employer is entitled to investigate such matters (even though he denies he had done anything wrong). His complaint is about the process followed.
- 10 The grievance outcome letter offered the claimant 1 month’s salary as compensation for any distress the matter had caused and in full and final settlement of any claims he may have. This sum was never paid because the settlement agreement was proffered on a without prejudice basis and terms were never agreed.
- 11 The claimant agrees with me that the grievance outcome letter is difficult to understand fully because it uses different language and headings to that used by the claimant in his grievance. The claimant contends that it should be interpreted to mean that it accepts all his procedural points. However, it does not itemise these.

Law

- 12 Under rule 37 of the Employment Tribunal Rules of Procedure, a tribunal may strike out all or part of a response on various grounds, including that it has no reasonable prospect of success.
- 13 Mr Hayes provided me with written submissions which included some case law about strike out. The claimant only received these yesterday. I asked whether he wanted today’s hearing postponed, but he was happy to go ahead.

Conclusions

- 14 I do not feel I should strike out the response on grounds that there are no reasonable prospects of success. I can see that the claimant has some strong arguments, but I cannot say that the respondent has *no reasonable* prospects.
- 15 The matters which need to be considered in a constructive unfair dismissal claim are more complicated than for a purely unfair dismissal claim. To prove constructive dismissal, the tribunal would have to decide – amongst other things - (i) that there was a fundamental breach of contract (the claimant says the term of trust and confidence), (ii) that the claimant resigned at least in part because of that breach, (iii) that the claimant did not resign prematurely because his grievance appeal was not yet decided.

- 16 Regarding (i), it does not automatically follow that just because the respondent did not complete the informal process and because the investigating, disciplinary and grievance managers were not appropriately briefed on their roles, that there was a fundamental breach. It is very possible that will be a tribunal's conclusion, but a tribunal would need to look at more detail than is in the outcome letter. It is not clear, though I agree there is an argument it should be inferred, that the grievance outcome letter has completely accepted every procedural flaw described by the claimant. In turn, the description by the claimant may need further examination. For example, what evidence was and was he not sent prior to the disciplinary? To what extent had the allegations already been made clear to him?
- 17 Regarding (ii), I appreciate the claimant says he only looked for another job as a result of the breach, and thus his resignation was in part because of the breach. But the tribunal would need to make fact findings on that, having considered the evidence.
- 18 Finally (iii) is an arguable legal and factual point. The claimant says he resigned because the breach had already taken place and there was nothing which could happen on the appeal outcome which would change that fact. He says he had lost confidence in HR, because they had seen nothing wrong with all the flawed processes.
- 19 I cannot see any practical way to strike out part of the response either, in recognition that there were at least some acknowledged procedural flaws. However, I do think it would be wise for the respondent to consider admitting certain facts so as not to waste the tribunal's and parties' time in disputing what it has previously accepted internally. I accept this is not entirely straightforward and I agree with Mr Hayes' suggestion that this is best done by providing an amended response. The original response will still be visible and the claimant can make points about how it is drafted when he cross-examines.
- 20 I will send a separate letter regarding the Orders made.

Employment Judge Lewis
29/07/2021

Sent to the parties on:

30/07/21

For the Tribunals Office

