



EMPLOYMENT TRIBUNALS

Claimant: V Pareek

Respondents: (1) Secretary of State for Justice
(2) Cabinet Office

Heard at: London Central (by video)

On: 8 April 2024

Before: Employment Judge E Burns

Representation

For the Claimant: Did not attend

For the Respondents: Owain James, Counsel

JUDGMENT

DECISION

The decision of the Employment Tribunal is as follows:

- (1) The First Respondent is not the Ministry of Justice. It is as shown above.
- (2) The complaints against the First Respondent were not presented within the applicable time limit. It was reasonably practicable to do so. The complaints are therefore dismissed.
- (3) The complaints against the Second Respondent fail and are dismissed as the Claimant was not employed by the Second Respondent.

NOTES

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

REASONS

THE HEARING

1. The hearing was a remote video hearing. There was a bundle of 62 pages. There was no witness evidence. I note that the bundle did not contain a copy of the contract of employment but did contain the letter terminating his employment.
2. The Claimant did not attend at the start of the hearing. Unsuccessful attempts were made to contact him to find out why he was not present. I was told that he was believed to still be in India. If this was correct and I had not reason to doubt this, he would not have been able to give evidence at the hearing in any event. The Claimant had submitted a document to the Respondent a few days before the hearing to be included in the bundle, which was included at page 62 to which I referred.
3. I decided, with the agreement of Mr James, to proceed with the hearing in the Claimant's absence and to do a reserved judgment so that he would have the reasons for my decision without having to make a request. He will then have 14 days from receipt to be able to apply for a reconsideration if he does not accept the decision I have made.

THE ISSUES

4. The issues to be determined at the preliminary hearing were whether the Claimant's complaints were presented out of time and, if so, whether time should be extended.
5. The claim form was presented on 23 November 2023, following a period of early conciliation from 13 November to 15 November 2023.
6. In the claim form, the Claimant has ticked the boxes for unfair dismissal, notice pay and other payments. He has added the following detail:
 - Medical retirement not considered on 31 August 2023
 - Not paid for notice period from 28 April to 3 August 2023
 - No compensation paid

7. In box 8.2, he argues that the operation of section 97 of the Employment Rights Act 1996 means that his effective date of termination should be treated as 3 August 2023 and not 27 April 2003, as contended by the Respondents. He says that he is entitled to holiday pay between 27 April and 3 August 2023
8. In his additional document at page 62 of the bundle, the Claimant states in relation to ill health retirement that the decision not to award it to him was communicated to him on 19 September 2023 and adds that as his employment tribunal claim was submitted within three months less a day of this date, the claim is in time. He does not appear to provide any basis for this claim that brings it within the jurisdiction of the tribunal. By this I mean, he does not say whether the claim is being pursued as a claim of breach of contract, unauthorised deduction of wages or other type of claim.
9. In his document, the Claimant also reiterates his argument about the operation of section 97 of the Employment Rights Act 1996.
10. Finally, he says he has not been paid any compensation under the Civil Service Compensation Scheme.
11. Based on what he has said in his pleadings and additional documents, had the Claimant been present at the hearing I am confident he would have confirmed that he wished to pursue the following complaints:
 - 11.1 Unfair dismissal
 - 11.2 Notice pay for the period 27 April to 3 August 2023 as a breach of contract claim
 - 11.3 Holiday pay for the period 27 April to 3 August 2023, as either a breach of contract claim or a claim for unlawful deduction of wages
 - 11.4 Compensation under the civil service claim, as either a breach of contract claim or a claim for unlawful deduction of wages
 - 11.5 A complaint that he was not awarded
12. I have adopted the following issues:
 - 12.1 Does the tribunal have jurisdiction to consider the following:
 - (a) a claim for non payment of any compensation under the Civil Service Compensation Scheme
 - (b) any claim relating to the decision not to grant the Claimant ill health early retirement
 - 12.2 Which is the correct respondent for the Claimant's complaints?
 - 12.3 What was the Claimant's effective date of termination, for the purposes of determining whether his complaints of unfair dismissal, and notice pay were brought in time?

- 12.4 Did the Claimant present his complaints of unfair dismissal, for holiday pay or for notice pay within the normal time limits, as adjusted for the early conciliation period?
 - 12.5 If not, was it reasonably practicable for him to do so?
 - 12.6 If not, did he present the complaints within a reasonable further period?
 - 12.7 Should the claimant's claim for holiday pay for the period from 27 April to 3 August 2023 be struck out for lacking any reasonable prospect of success?
13. I appreciate that the first two and the last issues were not highlighted in the notice of hearing provided to the the parties prior to today's hearing (bundle page 22), but I consider it is line with the overriding objective for me to determine them. I rely on the provisions of rule 41 of the tribunal rules in doing so.

FINDINGS OF FACT

14. Although I did not hear any witness evidence, I have made the following findings of fact, on a balance of probabilities, based on the contents of the documents in the bundle including the pleadings. I reserve the right to amend these findings if I am presented with actual evidence that demonstrates they are unreliable at a reconsideration hearing.
15. The Claimant began employment as a member of the civil service on 15 December 2008. He moved to become a Legal Office (Tribunal Case Woker) in the Immigration and Asylum Chamber on 16 July 2019. He was an employee of the Ministry of Justice and therefore his employer was the Secretary of State for Justice.
16. While the claimant was on annual leave in India in December 2021, he became unwell. From 11 December 2021 to the purported date of his dismissal (27 April 2023) he was on sick leave and remained in India. The illness he reported was confirmed by the First Respondent's Occupational Health services.
17. The Claimant was paid sick pay initially, but this was exhausted with effect from 22 October 2022. This was confirmed to him in writing in advance on 19 September 2022 (bundle page 59).
18. The Claimant was invited to attend formal sickness review meetings in early 2023, but declined. He was also alerted to the possibility of applying for ill health retirement.
19. A final formal sickness absence meeting was conducted on 27 April 2023 in the Claimant's absence. The decision was taken to terminate his employment. The reasons are set out in letter of the same date that was sent to the Claimant that same day (Bundle pages 58-61).

20. Both parties agree that the Claimant was entitled to 14 weeks' notice. The letter of termination informed the Claimant that he was not required to work his notice period. It also explains that as his pay at this time was nil, his payment in lieu of notice was also nil. The letter informed the Claimant that he had a right to appeal against the decision to dismiss him. He did not submit an appeal.
21. The Respondent treated the Claimant's employment as ending on 27 April 2023. He was paid in lieu of accrued but untaken leave up to 27 April 2023.
22. The letter also stated the following:

"Departments have discretion to pay compensation in accordance with the Civil Service Management Code. I have recommended that you receive 100%. A quote has been requested as to what amount this is likely to be. Any quote provided will be subject to Delivery Director and HR Business Partner approval." (60)
23. To date, no payment has been made under the compensation scheme despite the recommendation. The reason given for this by the Respondents is that *"Due to an oversight, the approval process was not completed following the Claimant's dismissal."* In addition the Respondents say, *"No decision has yet been made on this. The First Respondent is in the process of completing the approval process and will confirm the outcome to the Claimant in due course."* (Bundle page 51).
24. Following his dismissal the Claimant contacted the Respondent to take forward an application for ill health retirement. He says the relevant papers were with his line manager by 14 July 2023. An application was submitted on his behalf on 23 August 2023. It was declined on 30 August 2023, as *"there were no exceptional circumstances to allow retrospective application"*. The decision was communicated to the Claimant on 19 September 2023.

THE LAW

Contract Law

25. Under contract law, which applies to employment contracts, the lawful termination of a contract depends on what the contract says. It is common for contracts to require a period of notice in order to be lawfully terminated.
26. It is also standard in employment contracts, to include a provision that enables the employer to terminate the contract lawfully by making a payment in lieu of notice. Where such a clause is relied upon, providing the payment is made in a timely way, the contract also comes to an immediate end.
27. If a contract which contains a notice provision is terminated without giving that notice, the contract does not subsist. Instead, the remedy is for the wronged party to be put in the position that they would have been in, financially, had the contract been terminated lawfully.

28. Employment contracts are not always dealt with purely in line with contract law. There are a number of provisions of statutes that override what the contract says. An example are the provisions that deal with statutory minimum notice in sections 86 to 90 of the Employment Rights Act 1996 (ERA).

Effective Date of Termination

29. The ERA uses the phrase “effective date of termination” in several places, including the section dealing with time limits for unfair dismissal claims.
30. The phrase “effective date of termination” is defined in section 97 of the ERA. It says the following:

“(1) Subject to the following provisions of this section, in this Part “the effective date of termination”—

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.

(2) Where—

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),

for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) “the material date” means—

(a) the date when notice of termination was given by the employer, or

(b) where no notice was given, the date when the contract of employment was terminated by the employer.”

Time Limits

31. The normal time limit for a claim of unlawful deductions of wages is found in section 23(2) of the ERA. That section provides that a claim must be brought before the end of the period of three months beginning with the date of the payment of wages from which the deduction was made.
32. The normal time limit for a claim of breach of contract is found in regulation 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623. It provides that claims must be brought (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim or (b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated.
33. The normal time limit for a claim of unfair dismissal is found in subsection 111(2)(a) of the ERA. That section provides that a claim must be brought before the end of the period of three months beginning with the effective date of termination of employment.
34. The normal time limit is extended, for all three types of complaint, to take into account the Acas early conciliation process.
35. In addition, for all three types of complaint, a tribunal may still consider them when presented outside the normal time limit if it is satisfied that:
 - it was not reasonably practicable for the complaint to be presented within the normal time limited and
 - the relevant claimant has presented it within such further period as the tribunal considers reasonable.

Definition of Wages

36. What constitutes wages for the purposes of an unlawful deduction of wages claims is defined in section 27 of the ERA. Section 27(1) contains a non-exhaustive list of the types of payments that can be recovered as an unlawful deduction from wages. Section 27(2) contains a list of payments which are excluded. One of these, in section 27(2)(c) is *“any payment by way of a pension, allowance or gratuity in connection with the worker’s retirement or as compensation for loss of office.”*

Strike Out

37. The tribunal’s power to strike out claims and responses is found in Rule 37(1) of the Tribunal Rules. The relevant parts of Rule 37(1) for the purpose of this hearing say the following:

“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 [the] grounds [it] has no reasonable prospect of success.”

ANALYSIS AND CONCLUSIONS

Does the tribunal have jurisdiction to consider a claim for nonpayment of any compensation under the Civil Service Compensation Scheme or in relation to the decision not to grant the Claimant ill health early retirement?

38. My decision on this issue is that the tribunal does not have jurisdiction to consider either of these claims.
39. Based on what I have seen, the compensation payment is a discretionary payment rather than a contractual entitlement. A breach of contract claim cannot therefore be brought in connection with nonpayment in the employment tribunal. In addition, the type of compensation is expressly excluded from the definition of wages for the purposes of an unauthorised deductions of wages claim.
40. The tribunal does not have jurisdiction over a decision not to award ill health early retirement as a stand alone claim. In the absence of the Claimant having set out any basis for such a claim, my decision is that it cannot proceed in the employment tribunal.
41. Although the tribunal does not have jurisdiction over these claims, it may be possible for the Claimant to bring the claims in other forums. I have therefore deliberately not struck them out. They cannot continue in the employment tribunal.

Which is the correct respondent for the Claimant's complaints?

42. The correct respondent to the complaints of unfair dismissal, for notice pay and for holiday pay is the Secretary of State for Justice because of the status as the employer.

The Effective Date of Employment

43. The Claimant's arguments about section 97 ERA are based both on a misunderstanding of its purpose and a misapplication of the section.
44. Section 97 ERA does not determine the effective date of termination of an employee for all purposes generally. Usual contractual principles apply.
45. Section 97 ERA operates however, to provide a definition of the phrase where it is used in the ERA itself, or in subordinate legislation such as the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. It is a statutory definition which applies where the relevant phrase is used in statute.
46. Section 97 does not contain a single definition of the phrase effective date of termination. It says different things about how the meaning of the phrase in different circumstances.

47. The phrase is used when considering time limits for unfair dismissal claims and breach of contract claims. The relevant provisions are section 111 of the ERA and article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. As time is at issue in this case, I do need to consider section 97 when determining the time points.
48. In both cases, applying section 97 to the Claimant's case results in an effective date of termination of 27 April 2023. The provisions of section 97(1)(b) apply because no notice was given. Under section 97(1)(b) the effective date of termination is the date on which termination takes effect which was, as clearly stated in the letter sent to the claimant, 27 April 2023. The provisions of section 97(2) do not apply. They would only apply if the question being asked was one involving sections 108(1), 119(1) or 227(3) ERA.

Did the Claimant present his complaints of unfair dismissal, holiday pay or for notice pay within the normal time limits, as adjusted for the early conciliation period?

49. It is relevant to notice that the holiday pay claim can be pursued as a claim for breach of contract or for unlawful wages, but the notice claim can only be pursued as a claim for breach of contract.
50. The normal time limit for an unfair dismissal claim or breach of contract claim was three months, less a day from 27 April 2023. This was 26 July 2023. To benefit from an extension under the early conciliation provisions the claimant would have needed to have commenced early conciliation by this date, but did not do so until 13 November 2023. The complaints were presented outside of the normal time limit. This includes the Claimant's complaints of unfair dismissal, for notice pay and for holiday pay pursued as a breach of contract claim.
51. The time limit for an unlawful deduction claim is three months less a day from the date the last payment was due. It does not tie in with the statutory effective date of termination. If the Claimant is right that he was entitled to holiday pay during what would have been his notice period, from 27 April to 3 August 2023, his claim for this would be likely to be in time. This is because time would have begun to run on the date when the August 2023 payroll would have been. I have not needed to resolve the issue of whether it was or was not in time however because I am striking the claim out for lacking reasonable prospects of success.

If not, was it reasonably practicable for him to do so?

52. In my judgment it was reasonably practicable for the Claimant to have presented his complaints in time. He has given no reason why he did not do so. Even if his ongoing illness was a factor, this did not prevent him submitting a claim for ill health early retirement in July 2023. If he was capable of doing this, it is likely he was capable of submitting a short claim form.

If not, did he present the complaints within a reasonable further period?

53. This issue does not fall to be considered in light of my decision above.

Should the claimant's claim for holiday pay for the period from 27 April to 3 August 2023 be struck out for lacking any reasonable prospect of success?

54. My decision on this issue is that it should. The reason for this decision is that holiday entitlement does not continue to accrue during a notice period where a contract has been lawfully brought to an end by making a payment in lieu of notice. This is what I find occurred in this case. No actual payment in lieu of notice was required to be made, because the Claimant was in receipt of nil pay.

55. No provision of statutory overrode this. Although there are provisions that entitle employees to full pay during notice periods, these were excluded in this case through the operation of either section 87(4) (because the Claimant's notice period was more than one week longer than the statutory minimum applicable to him) or section 191 ERA (because he was a Crown servant).

56. This decision assumes that the Claimant's contract, which I have not seen, contains an express clause enabling payment in lieu of notice claim. I consider this is a fair assumption based on my knowledge of Civil Service contracts of employment, but if this decision is wrong, it is open to reconsideration on sight of the Claimant's actual contract.

Employment Judge E Burns
9 April 2024

Sent to the parties on:

18 April 2024

.....
For the Tribunals Office