



EMPLOYMENT TRIBUNALS

Claimant: Mr N Taylor

Respondent: Zinithya Trust

At an Open Attended Preliminary Hearing

Heard at: Leicester

On: 3 October 2018
26 November 2018 (In Chambers)

Before: Employment Judge Ahmed (sitting alone)

Representation

Claimant: Mr P Bergess, Friend

Respondent: Mr R Anderson, Consultant

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The complaints of disability discrimination, a claim as to a breach of the National Minimum Wage Act, constructive unfair dismissal and breach of contract are all struck out.
2. The complaint of an unlawful deduction of wages limited to a claim of 85 hours work is allowed to proceed to a final hearing.

REASONS

1. This is a long running case. The Claim Form was presented as long ago as 21 September 2016. It has not yet been listed for a final hearing nor at the point of this hearing is it even remotely ready for a final hearing on the complaints. There have been several preliminary hearings along the way on various issues together with a failed Judicial Mediation.

2. After such a long period of time since the start of proceedings, let alone the events in question, it was felt necessary to determine whether a fair hearing was still possible and/or whether any of the complaints should be struck out for

failure to comply with previous orders of the tribunal.

3. The Zinithya Trust is a registered charity that seeks to support those who have been the subject of physical or psychological abuse as well as those who run into financial difficulties.

4. Mr Taylor began his employment for the Respondent Trust in April 2014. At the time the Trust ran a small café. Mr Taylor was employed as a Catering Assistant. He resigned after an allegation of theft which was subsequently dropped with the Police not pressing any criminal charges.

5. The ET1 claim was very brief and gave very little details as to the nature of the claim and what types of complaints Mr Taylor was bringing. What was at least tolerably clear was that the Claimant resigned from his employment with the Respondent in circumstances where he felt he had been constructively and unfairly dismissed due to a false allegation of theft and was owed money in outstanding wages.

6. As I explained in one of the earlier preliminary hearings that I conducted in this case (there have been several others conducted by different Employment Judges), Mr Taylor is undeniably someone who has learning difficulties. However, I am satisfied that he is able to understand these processes and is able to make decisions on his behalf. He was able to hold down a job with the Respondent and whilst ideally he needs some assistance I am satisfied that he has understood what is being put forward in this case. He does not however rely on learning difficulties as the disability but dyslexia and depression.

7. The case was mired in difficulty from the outset because the Claimant was unable to conduct his own affairs. He did not start proceedings within the usual time limits because he was unaware of his legal rights let alone know how to issue proceedings. A chance meeting with a friend, Mr Gater, led him to submit a claim form. Unfortunately, Mr Gater, who does not have any legal qualifications, lodged a very defective Claim Form on the Claimant's behalf which failed to comply with a number of essential pre-issue procedural requirements. This led to a significant and substantial preliminary hearing application to deal with those difficulties not to mention several applications to amend the Claim to include complaints that the Claimant wanted to bring. Those amendments included additions of complaints of disability discrimination, breach of contract, an unlawful deduction of wages, non-payment of holiday pay and arrears of the national minimum wage. An application to include a complaint of whistleblowing was refused.

8. Unfortunately, as was explained at the previous preliminary, Mr Gater's whereabouts are now unknown and the Claimant has been without any legal or other assistance for some time. He clearly has learning difficulties but despite that he is also a carer for family members. It is fair to say that the tribunal has rightly taken a fairly liberal view of defaults by the Claimant is not progressing the Claim given his circumstances.

9. It was hoped that the agreement of the parties to engage in Judicial Mediation in April 2018 might resolve these issues once. Unfortunately, Judicial

Mediation (not before me of course) was unsuccessful. As that process is entirely confidential it is right that I know nothing as to the reason why.

10. At the commencement of this hearing, and having regard to the Tribunal duty to promote alternative dispute resolution at every stage, I made it clear that the Claimant should consider a negotiated settlement. I adjourned the hearing for a short while to see if agreement could not be reached, which was not possible.

11. At this preliminary hearing, and for the first time, Mr Taylor made a number of several very serious allegations which he has not made in the three years or so that the case has been proceeding. Mr Taylor makes allegations of being sexually abused by employees of the Respondent.

12. Not only do the Respondents say that the allegations come as a complete surprise but that they are completely untrue. The allegations are not particularised.

13. Mr Taylor would need, yet again, to amend his claim to progress such allegations in these proceedings. I do not understand him or his friend accompanying him today to be making any application to amend. If Mr Taylor wishes to pursue an amendment he will need to make the appropriate application. I say that not to be overly technical but because Mr Taylor will need to explain a number of matters such as why the application is made so late in the day when his claim has been amended several times earlier, who the allegations are against, when they occurred and so on in order for the Tribunal to consider an amendment applicaiton. As I am not dealing with any amendment application now I will say nothing more about that.

14. Rule 37(1) of the Employment Tribunal Rules of Procedure 2013 so far as is relevant states:

“ 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;
- (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
- (c) for non-compliance with any of these Rules or with an order of the Tribunal;
- (d) that it has not been actively pursued;
- (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).”

15. In coming to my decision I have taken into consideration the guidance in **De Keyser Ltd v Wilson** [2001] IRLR 324, **Bolch v Chipman** [2004] IRLR 140 and **Blockbuster Entertainment Ltd v James** [2006] IRLR 630.

The complaints

16. The extant complaints in these proceedings are presently as follows:

- 16.1 Disability discrimination;
- 16.2 Constructive unfair dismissal;
- 16.3 An unlawful deduction from wages;
- 16.4 Breach of contract;
- 16.5 Arrears of the national minimum wage;
- 16.6 Non-payment of holiday pay.

CONCLUSIONS

17. I coming to my decision I have considered whether the Claimant has behaved unreasonably, whether a fair hearing is still possible, whether there has been a persistent failure to comply and whether it is proportionate to do so.

Disability discrimination

18. The Respondent does not concede disability on either alleged impairment. There have been a number of case management orders requiring the Claimant to supply medical evidence. He has failed to supply such information. In the intervening period between the Preliminary Hearing and the date of the reserved decision in this case he sent some documents from the Leicestershire Partnership NHS Trust, Adult Mental Health and Learning Disabilities Unit. That Unit has commented on with the Claimant's historical learning difficulty issues but not the disabilities he relies on in these proceedings. He has still not provided an impact statement.

19. The Claimant has failed to disclose his GP records which I am satisfied he could do quite easily notwithstanding his learning difficulties. It is not a case of can not but will not. He appears very reluctant to provide this information for reasons which are not clear. It is therefore not possible to determine whether the Claimant had an impairment during the period of his employment.

20. In the circumstances, there is insufficient information to determine whether the Claimant is disabled. The Claimant has had numerous opportunities to provide the required information. He has breached previous case management orders requiring him to do so. There is no reasonable prospect of the Claimant ever complying with orders given his past history and no willingness that I detect to do so now. It is not possible to have a fair hearing if the Claimant will not co-operate. The information is difficult to obtain or to provide. Without it the Tribunal cannot decide the issue of disability. The Claimant has behaved unreasonably in failing to supply the relevant information. I take into account his learning disabilities but I do not regard that as the reason for compliance. The Claimant has had assistance at times but even without it I am satisfied he understands the

need to supply his GP records which he has failed to do. The claim of disability discrimination is therefore dismissed both because a fair hearing is not possible and because of repeated breaches of case management orders.

Constructive unfair dismissal

21. This complaint has not been particularised despite the length of time other than that the Claimant was falsely accused of theft. That as a matter of law is an alleged breach of the implied term of trust and confidence.

22. It has now been several years since the Claimant left the Respondent's employ. Memories will have faded. Relevant witnesses at the Respondent have left. It is not clear who it is that is supposed to have made the allegation if at all. The Respondent will not be able to properly defend the allegations. A fair hearing is not possible. It is not disproportionate to strike out under Rule 37(1)(e).

Breach of contract

23. The claim for breach of contract is tied in very much with the claim of constructive dismissal and for the same reasons it is also struck out.

Unlawful deduction from wages and holiday pay

24. The Claimant alleges that he worked for very many hours for which he was not paid. He has requested time sheets, 'end of day' sheets and food hygiene sheets.

25. The Claimant did not complete time sheets when he was employed so these do not exist. As for end of day sheets and food hygiene sheets neither of these will demonstrate how many hours the Claimant was working, even if it is possible to locate or reconstruct them.

26. Mr Taylor was asked at the hearing to specify how many hours he was claiming for. He said he was not sure but it was for at least 85 of work undertaken. This would be at £6.70 an hour totalling £569.50. As the Claimant appears to have kept a record so that he knows it is in the region of 85 hours, a record as yet undisclosed to the Respondent, this is a claim that can be allowed to proceed as the Respondent will have relevant wage records. It does not depend on memories but documents which the Respondent will or ought to have kept.

27. The Claimant has failed to specify his holiday pay claim. He has failed to do so despite several opportunities. It is still not clear some three years into the proceedings what he is claiming and for what period.

28. The Claimant's unlawful deduction of wages claim will therefore be allowed to proceed to the extent of 85 hours as claimed only and the holiday pay and any other part of the wages claim is struck out as it is no longer possible to have a fair hearing under Rule 37(1)(e).

National Minimum Wage complaint

29. This complaint is unspecified despite the number of previous hearings. It is unlikely that the Claimant will be able to produce any more information than he has so far which is practically none at all. His complaint is not that the Trust were not paying him the proper rate but that he worked a lot of hours for which he was not paid at all.

30. The only record the Claimant has produced of unpaid hours is the same for the previous complaint of 85 hours. I am satisfied those can be the only hours and not some different set of hours. The rest is struck out as it is no longer possible to have a fair hearing under Rule 37(1)(e).

31. This case will now be listed for one day final hearing with a time estimate of one day before an Employment Judge sitting alone. The parties should give dates of unavailability within 7 days of receipt of this decision.

32. The parties should disclose all relevant documents in their possession in relation to the only complaint which is now to proceed at least 42 days before the hearing. The Respondent should produce a bundle which is agreed at least 28 days before the hearing and witness statements should be exchanged at least 14 days before the hearing.

Employment Judge Ahmed
Date: 18 January 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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