EMPLOYMENT TRIBUNALS

Claimant: Mr R Biernat

Respondent: Cumbria, Northumberland, Tyne and Wear NHS Foundation Trust

VIDEO PRIVATE PRELIMINARY HEARING

Heard: Remotely (by video link) **On:** 21 January 2021

Before: Employment Judge S Shore

Appearances
For the claimant: No appearance
For the respondent: Mr L Carroll, Solicitor

JUDGMENT

1. The claimant's continuous period of employment with the respondent was from 19 November 2018 to 28 February 2020. He therefore did not have two years' continuous employment at the date of his dismissal. The Tribunal has no jurisdiction to hear his claim of unfair dismissal pursuant to sections 94 and 98 of the Employment Rights Act 1996. That claim is struck out.

2. The claimant's claim of unfair dismissal for the reason or principal reason that he made a protected disclosure has no reasonable prospect of success and is struck out.

REASONS

Introduction

1. The claimant was employed as an Activities Facilitator by the respondent from 19 November 2018 to 28 February 2020, which was the effective date of termination of his employment following dismissal for the stated reason of gross misconduct. The claimant started early conciliation with ACAS on 19 February 2020 and obtained a conciliation certificate dated 5 March 2020. The claimant's ET1 was presented on 29 May 2020. The respondent is a Hospital Trust employing approximately 6,000 staff.

2. The claimant presented claims of:

    2.1. Unfair dismissal (contrary to section 94 of the Employment Rights Act 1996), and;

    2.2. Unfair dismissal for the reason or principal reason that he had made a protected disclosure contrary to section 103A of the Employment Rights Act 1996.

3. On 31 July 2020, Employment Judge (EJ) Sweeney made a case management order which, amongst other things, listed the case for a telephone preliminary hearing on 26 August 2020 and required the claimant to answer 12 questions about his section 103A clam.

4. At the telephone preliminary hearing before EJ Aspden on 26 August 2020, the claimant attended and said he had not received EJ Sweeney's case management order, but he was asked to look at his email inbox and found it there. He subsequently supplied answers to the questions asked [pages 39-40 of the bundle prepared by the respondent for this hearing].

5. I note that EJ Aspden's case management order arising from the telephone preliminary hearing was sent to the parties on 17 September 2020, but both parties were in attendance to hear EJ Aspden make the orders in person. The Tribunal has no record of any notification indicating that either the case management order or the notice of today's hearing had been returned as not received by the claimant.

6. Mr Carroll advised me that he had heard nothing from the claimant since the previous telephone preliminary hearing. The claimant had not provided any documents for the bundle or any witness evidence for today's hearing. He had not responded to any correspondence from the respondent.

7. The claimant did not log in to today's video hearing. At 10:00am, I asked our clerk to telephone the claimant to see if he was having difficulties logging in. She advised me that she rang the claimant twice on the telephone number he had given on his ET1 and that the call rang out on both occasions. The calls did not divert to voicemail. I waited until 10:15 to start the hearing. By that time, I was not made aware of any attempt by the claimant to log in or contract the Tribunal office to advise of any difficulties that he was having in connecting to the hearing.

8. Given that the claimant had received EJ Sweeny's case management order and attended the telephone preliminary hearing on 26 August 2020 and had failed to answer two telephone calls to the number he had given the Tribunal, I find that he had received notice of today's hearing and that it was in furtherance of the overriding objective to proceed in his absence.

<u>Purpose of Preliminary Hearing</u>

9. This preliminary hearing was listed to determine the following Issues:

9.1. To decide whether the claimant was continuously employed by the respondent for a period of two years ending with the effective date of termination;

9.2. To consider any application made by respondent for strike out or for a deposit order as a condition of pursuing any particular allegations;

9.3. To consider any application made by the respondent for an order under Rule 50; and

9.4. To discuss the claims and to make case management orders should any claim be permitted to proceed.

10. As I struck out both the claimant's claims, I did not consider points 9.3 or 9.4.

Housekeeping

11. The claimant provided no documents or witness evidence.

12. The respondent produced a bundle of 48 pages. If I refer to a pages in the bundle, the page number(s) will be in square brackets. Mr Carroll submitted a skeleton argument and copies of **Broecker v Metroline Travel Ltd** UKEAT 0124/16/DM and **Royal Mail Ltd v Jhuti** [2017] EWCA Civ 1632.

13. No witness evidence was filed. I had read all the case papers, the respondent's bundle and Mr Carroll's skeleton argument before the hearing started.

Documents and Submissions

14. As I was not presented with any evidence, I had to make my decisions on the papers before me.

Continuous Employment

15. The respondent's bundle contained a letter dated 11 April 2016 from Northumberland, Tyne and Wear NHS Foundation Trust (which I assumed to be the previous name of the respondent) to the claimant [41-43] welcoming him to the organisation's nurse bank. The salient parts of the letter are:

15.1. It specifically stated that the claimant was not an employee of the Trust;

15.2. He was offered work on a short-term basis;

15.3. No period with the NHS could count as continuous service;

15.4. There was no obligation for the Trust to offer him work;

15.5. There was no obligation on the claimant to accept work offered; and

15.6. He could be prevented from undertaking duties at any time.

16. The respondent also produced details of the claimant's work rotas from 5 February 2018 to 6 November 2018 [44-48]. These show that his hours varied and that there

were long gaps between shifts (up to six weeks). His shifts varied in length from 3.12 hours to 13.5 hours

17. I had no representations or evidence from the claimant to rebut the evidence in the documents produced by the respondent.

18. The respondent avers that the claimant was not continuously employed for a period of 2 years for two reasons:

    18.1. Only C's service as an employee – i.e. under his employment as an Activity Coordinator - counts towards continuous service. C's service with the Nurse Bank does not count because it is service as a worker under a discrete contract.

    18.2. In the alternative, should the ET conclude that work undertaken with the Nurse Bank should count, there are several gaps in service so as to break continuous employment.

19. It was submitted that, pursuant to s211(1)(a) ERA, an employee's period of continuous employment "begins on the day on which the employee starts work" (our emphasis in bold). Following this, s212(1) goes on to say that any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the period of employment. The respondent avers that this must be by reference only to the period that the claimant was an employee, engaged under a contract of employment.

20. In line with the definition of employee under s230(1) ERA, the claimant was not engaged under a contract of service until he commenced employment as an Activity Coordinator from 19 November 2018.

21. The respondent avers that the claimant was not engaged in a contract of service when undertaking work on the Nurse Bank.

<u>Section 103A Automatic Unfair Dismissal</u>

22. I find that the claimant's responses to the questions asked in EJ Sweeney's case management order [39-40] were vague and lacking in much detail at all. The acts he says he complained to managers about were very vague, did not name the alleged victims of the conduct complained of and did not include any dates when the acts were supposed to have taken place.

23. He gave no dates of when his verbal disclosures were made to managers. No written evidence was produced to corroborate his allegations. His response to the question about how his disclosures were linked to his dismissal mentioned:

    23.1. A four-month gap between his alleged misconduct and the disciplinary process;

    23.2. The disclosures had taken place in the 4-month gap;

    23.3. The allegation made against him did not warrant dismissal;

23.4. There was a "strange need to remove [him] from the Trust and there for to make sure [he was] not part of an investigation which would make allegations to be dismissed much more easily.";

23.5. The Trust was under pressure from the CQC; and

23.6. His complaint would potentially reveal that nothing had actually changed and the place was not managed effectively.

24. He says his disclosures were about two staff who were then witnesses in his own disciplinary.

25. The respondent's case is that the Tribunal does not have to concern itself with the question of whether it acted reasonably or fairly in dismissing the claimant; the central issue is whether the sole or principal reason for the dismissal was because the claimant made a protected disclosure (see **Broecker v Metroline Travel Ltd** (§ 70)).

26. Mr Carroll submitted that the reason for claimant's dismissal was that the respondent concluded that he had misconducted himself by making inappropriate postings on Facebook and dismissed him on that basis. This was evident from the fact that the claimant admitted to posting information about Patient A on social media and separately shared distasteful jokes about those with dyslexia. Whilst there was some dispute about the content of the posting referring to Patient A, the claimant did not dispute that the respondent concluded he had made the posting, within the ET1 (and such allegation does not feature in the further particulars). In fact, the only claim made by the claimant in his ET1 is that his colleagues had alerted the respondent to the fact that he had made a posting because he had complained about his colleagues.

27. It was submitted that the claim is misconceived and appeared to try to argue that the arrangements which led to the dismissal were influenced by the fact of an earlier disclosure, not that the dismissal was because of him having made a protected disclosure; sole reason for dismissal was C's misconduct.

28. It was submitted that the claimant's case at its highest is that the respondent was manipulated, by way of alleged false evidence, to conclude that the claimant misconducted himself, by co-workers. Whilst the respondent denies this, it is averred that such a claim in this scenario would fall squarely into the first of the four scenarios expressed by Underhill LJ in the Court of Appeal case of **Royal Mail Ltd v Jhuti** [2017] EWCA Civ 1632, paragraph 60:

> "...a colleague with no relevant managerial responsibility for the victim procures his or her dismissal by presenting false evidence by which the decision-taker is innocently (and reasonably) misled. In such a case the dismissal is plainly not unfair within the meaning of the 1996 Act, whether by way of the manipulator's motivation being attributed to the employer for the purpose of section 98 (1) (or sections 98B- 104G), or by his knowledge being used to impugn the reasonableness of the decision to dismiss under section 98 (4). The employee has no doubt

suffered an injustice at the hands of the Iago figure and may have other remedies... but the employer has not acted unfairly."

29. In the circumstances the respondent avers that the claimant's claim had no reasonable prospect of succeeding and should be struck out.

Assessment and Conclusions

Continuous Employment

30. In order to present a claim for unfair dismissal a claimant must have been continuously employed for a period of 2 years (s108(1) Employment Rights Act 1996). As it is agreed that his employment ended on 28 February 2020, he must show that he was continuously employed from 28 February 2018.

31. I find that the claimant has not met the standard of proof required to show that he was an employee of the respondent from 28 February 2018, or at any period after he was appointed to the respondent's bank.

32. I make this decision because the letter of 11 June 2016 states:

    32.1. It specifically stated that the claimant was not an employee of the Trust;

    32.2. He was offered work on a short-term basis;

    32.3. No period with the NHS could count as continuous service;

    32.4. There was no obligation for the Trust to offer him work;

    32.5. There was no obligation on the claimant to accept work offered; and

    32.6. He could be prevented from undertaking duties at any time.

33. I find that there was no mutuality of obligation between the claimant and respondent. I also find that his working hours whilst on Bank varied between 3.12 hours and 13.5 hours, which indicates that the respondent had the right to end a shift early if there was no more work for the claimant.

34. It therefore follows that I find that the claimant does not have two yeas' continuous service with the respondent and the Tribunal has no jurisdiction to hear his claim of unfair dismissal under sections 94 and 98 ERA.

Strike Out/Deposit – Section 103A Claim

35. Rule 37 of the Employment Tribunals Rules of Procedure 2013 provides:

    "(1) At any stage of the proceedings, either on its own initiative or on the application of a party, the 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..."

36. Rule 39 of the Employment Tribunals Rules of Procedure 2013 provides:

> "(1) Where, at a Preliminary Hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an Order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument."

37. The power to strike out should only be exercised in rare circumstances (**Tayside Public Transport Company Limited (t/a Travel Dundee) v Reilly** [2012] IRLR 755. Cases should not, as a general principle, be struck out where the central facts are in dispute (**Tayside and North Glamorgan NHS Trust v Ezsias** [2007] EWCA Civ 330); and, as a general principle, that discrimination cases should not be struck out except in very clear circumstances (**Anyanwu v South Bank Student Union** [2001] UK HL14). I regard the principles in discrimination cases as applying to public interest disclosure cases.

38. With regard to the making of Deposit Orders, I reminded myself that a Tribunal may have regard to the likelihood of a party being able to establish the facts essential to his case and to reach a provisional view as to the credibility of the assertions being put forward, albeit the Tribunal must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.

39. In **Anyanwu** Lord Steyn said:

> *"From my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive, and their proper determination is always vital to our pluralistic society. In this field perhaps more than any other the bias and favour of a claim being examined on the merits or demerits with its particular effects is a matter of high public interest."*

40. In **Ahir v British Airways Plc** [2017] EWCA Civ 1392 (§16), which is a case in which the Court of Appeal upheld an Employment Tribunal's decision to strike out claims of less favourable treatment as a fixed term employee, Lord Justice Underhill said:

> "*Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically*

that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'."

41. In this case, I find that there is no reasonable prospect of the claimant establishing the facts necessary to liability being established. I make this finding because of the vague nature of his further information and his inability to set out a cogent link between his alleged protected disclosures (which I find he has no reasonable prospect of establishing on a factual basis based on the information he has provided) and his inability to link the alleged disclosures to the decision to dismiss. On that issue, I agree with the submissions made by Mr Carroll: the scenario outlined by the claimant falls squarely into the first of the four scenarios expressed by Underhill LJ in the Court of Appeal case of **Royal Mail Ltd v Jhuti** [2017] EWCA Civ 1632, (§ 60) as set out in paragraph 28 above. I therefore strike out the claimant's claim for unfair dismissal for the reason or principle reason that he made a protected disclosure.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
21 January 2021