EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote hearing not objected to by the parties. The form of remote hearing was by CVP (Cloud Video Platform). A face to face hearing was not held because it was not practicable and no-one requested the same."

Claimant		**Respondent**
Mr Jayesh Naik	v	Mr Ronak Patel

PRELIMINARY HEARING

Heard at: **Watford (by CVP)** **On:** **24 November 2021**

Before: **Employment Judge Bloch QC**

Appearances:

For the Claimant: **In person**
For the Respondents: **Mr D Bunting, Counsel**

JUDGMENT

1. The claimant's claim for (constructive) unfair dismissal is struck out as having no reasonable prospects of success;

2. The claimant's claims of unlawful deduction from wages are dismissed upon withdrawal, the claimant accepting that all such sums claimed have now been paid.

3. The claimant's application to amend the ET1 by adding a claim for discrimination on the grounds of his marriage status is refused.

REASONS

1. The claimant was employed by the respondent from 18 November 2019 as a carer. According to the grounds of resistance the respondent is a service user

who suffers with Duchenne Muscular Dystrophy, a serious heart condition which involves use of a ventilator at night and he is completely wheelchair bound.

2. The claimant was employed by the respondent, however the respondent's mother assists with administrative duties that the respondent cannot undertake. In particular she makes use of a payroll services company in relation to the provision of payroll services for carers providing care services to the respondent.

3. According to the ET1 the claimant gave his effective date of termination as 19 April 2020. However, before me he said that that date had been taken from the form P60 which had been provided to him by the respondent and that his last date of employment was around 3 or 4 May 2020. This is consistent with what he says in paragraph 8.2 of the ET1.

4. Paragraph 8.2 of the ET1 is short and worth quoting:

> "I had flu symptoms on 16/03/2020 and reported to respondent parent (mother), following week (23/03/20) also had to stay home. I requested if I can start from 30/03/2020. By that period Covid-19 was spreading rapidly and I was asked to stay home. Following week on 5/04/2020 when contacted I was told by respondent (Ronak's) mother that your agency staff had symptoms and office was disinfected so stay home. Then I was told by the respondent's mother that this Covid-19 is very scary and at the moment my partner also at home we are only asking one carer to continue which is not true. Respondent's mother stated your wife also works in the hospital and Ronak [the respondent] says underlying health condition. I had to tell them that let me know when you are ready as I felt that they are trying to delay.
>
> On 3 May at night I was asked if all well at home, I can start from 4 May 2020 where I asked for clarification if I am going to get anything for time lost. I was told that no you are not entitled to receive any money. I had to tell them that if Employer can't look after the employee then I have no interest to return to work. I was told that you will receive your P45. My request to consider government "Furlough scheme" was also ignored. I hand delivered letter to inform that I will take Tribunal actions if no reply."

5. In the grounds of resistance the respondent averred (amongst other things) that the tribunal did not have jurisdiction to hear a claim for ordinary unfair dismissal as the claimant was not a qualifying employee in that he had not had two years' service as an employee of the respondent. This was a reference to s.108 of the Employment Rights Act 1996 ("ERA"). The grounds further stated that the claimant asserted that he had been discriminated on marital grounds. However, the respondent submitted that the claim form showed no cause of action concerning the status of marriage or that it was the effective cause of his complaints.

6. On 7 February 2021 the Tribunal issued a Strike Out warning referring to s.108 ERA and giving the claimant until 1 March 2021 to give reasons in writing why the claim should not be struck out. The letter noted that although the claimant had ticked the box for discrimination: marriage or civil partnership, he might not have explained in his claim form why he had ticked that box. That meant that he might not have validly presented a complaint of breach of the Equality Act. The letter went on to say that

> "If your unfair dismissal claim is struck out [the employment judge] is considering listing a hearing to deal solely with your claims for notice pay and for arrears of pay. If you disagree with that course of action and if you do wish to pursue a complaint of discrimination: marriage

> or civil partnership, then you must write by 1 March 2021 to: (1) Explain what parts of your claim form explain why your claim [is] for discrimination; and/or 2. Submit an application to amend your claim to add [an] allegation of discrimination: marriage [or] civil partnership."

7. By email dated 3 March 2021 the respondent's solicitor pointed out that the claimant had failed to acknowledge or respond to the tribunal's strike out warning. Although the respondent contended that the claimant's claims were submitted out of time and should be struck out pursuant to Rule 37(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 it also alleged that the claimant's claims for notice pay and arrears of pay should be struck out on grounds that they were scandalous vexatious or had no reasonable prospects of success.

8. The claimant accepted before me that after the claim had been issued he had received all sums that were due in respect of holiday pay, arrears of pay and/or notice pay and accordingly this part of the claim was dismissed upon withdrawal.

9. The respondent eventually responded substantively to the Tribunal's letter by his letter of 9 March 2021 in which he said:

> "The respondent's mother clearly stated after 2 weeks that because your wife also works in the hospital and you have an aged mother too. I can't take the risk to allow you to work. In May 2020 asked me to return but without any payment for the lost period and was not willing to consider the government scheme despite I tried to draw attention."

10. Also by his further letter of 9 March 2021 the claimant stated:

> "Herewith I request to add claim of discrimination also mentioned circumstances in the ET1. In April I was asked not to return to work as my civil partner works for the NHS in North Middlesex University Hospital who may be exposed to Covid-19 virus and bring it home and you will bring it to us. Out of 3 employees only I was asked not to return to work. No payment was made, my request to consider "Furlough Scheme" was not looked into."

11. There followed a Notice of a Preliminary Hearing dated 28 August 2021 at which Employment Judge Lewis directed there should be a preliminary hearing to determine the following issue:

    11.1 The claimant's applications to amend
    11.2 Whether the claim(s) should be struck out or made the subject of a deposit order on grounds of having little or no reasonable prospect of success.

12. In resisting the claimant's application to amend Mr Bunting took me to the familiar decision of the Employment Appeal Tribunal in Selkent Bus Company v Moore [1996] ICR 836. This case is extremely well known and it is not necessary to quote from it in detail. Suffice it to say that it has been applied in many cases and in the more recent cases there has been an emphasis on the broad principle set out at page 12.(4) of the judgment of the Employment Appeal Tribunal (Mummery J) rather than performing a tick box exercise in relation to the factors or circumstances referred to in paragraph 5 following that paragraph. I shall quote from those two paragraphs:

> "(4) Whenever the discretion to grant an amendment is invoked the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
>
> (5) What are the relevant circumstances. It is impossible and undesirable to attempt to list them exhaustively but the following are relevant."

13. Sub-paragraphs (a)-(c) follow and are headed:

    (a) The nature of the amendment
    (b) The applicability of time limits
    (c) The timing and manner of the application

14. The Employment Appeal Tribunal has held that the doctrine of "relation back" applied in High Court cases does not apply to amendments in the Employment Tribunal so that questions of limitation can be held over to the full merits hearing (on the basis that any amendment operates from the date of the application to amend or the date the application succeeded) and not the date of the original presentation of the claim form.

15. As to the nature of the amendment I accepted Mr Bunting's submissions that it was a substantial amendment and not a "re-labelling" amendment. It was based on new factual allegations and new legal submissions. It was not a minor amendment and the fact that the box referring to discrimination on grounds of marital status had been ticked did not take the matter further, given the absence of any substantial pleading of the point.

16. As to the time limits, given for the claimant's correction of the position regarding his effective date of termination of employment, Mr Bunting was unable to say that the application to amend was out of time.

17. As regards the timing and manner of the application, the application made on 9 March 2021 was only made after the employment tribunal had written to the respondent on 7 February 2021 and even then the claimant did not comply with the time limits set by the tribunal.

18. Turning to the more substantive principle behind the Selkent decision (the balance of justice and hardship) he submitted that the new claim was not only out of time but it was a claim without merit. The essence of this part of the claim was this. The claim was one of direct discrimination under s.13 of the Equality Act 2010 and under sub-section (1): "A person (A) discriminates against another (B) if, because of a protected characteristic, (A) treats (B) less favourably than (A) treats or would treat others". The relevant protected characteristic was that described by s.8 of that Act: "A person has the protected characteristic of marriage and civil partnership if the person is married or is a civil partner."

19. Put quite simply and taking the claimant's case at its highest, he was not alleging that the respondent discriminated against him because of his marital status or the fact of being married. Put differently, the comparator for the purpose of s.13 was someone who co-habited with the claimant in the same proximity as a married person with a person who was working for the NHS but to whom he was not married (or in a civil partnership). The point is emphasised by the fact that on the

claimant's own case the respondent had difficulty with the claimant having a mother who was aged (presumably who was living with him in close proximity) and that was another reason for their being concerned about his caring for the respondent who was obviously a highly vulnerable person. Even on the claimant's own case it is therefore clear that there was nothing about his marital status which the respondent found difficult but only his physical proximity to those who might be more vulnerable than average to contracting Covid-19. Support for this approach is to be found in the case of Hawkins v Atex Group Ltd and Others [2012] IRLR 807 to which I drew the parties' attention. In this case the EAT (Underhill P presiding) disagreed with the approach in the earlier case of Dunn v Institute of Cemetery and Crematorium Management UK ET/0531/10. The EAT in Hawkins explained that the key question in a case such as this is whether the claimant suffered the treatment complained of because she was married to the man in question. The relevant comparator was a person who was not married but whose relevant circumstances were otherwise the same as those of the claimant. That would usually be someone in a relationship with the claimant's husband that equated to marriage but was not a "common law" spouse. Applying that test the EAT concluded that the tribunal had been right to strike out Mrs Hawkins' marriage discrimination claim: on the facts she was not realistically going to be able to establish that her employer had been motivated to dismiss her specifically because she was married to the company's chief executive rather than simply because she was in a close relationship with him. In the present case similar considerations apply, in my judgment. The respondent (or rather his mother on his behalf) was concerned about his contracting Covid-19 and not about the claimant's marital status. The fact of his being married was only a circumstance which caused him (in the eyes of the respondent's mother) to be more vulnerable to contracting Covid-19. There was nothing about marriage per se which was a cause of any conduct about which complaint is made on the part of the respondent. I consider that on the basis of what the claimant has said (in the correspondence quoted above) as confirmed by him during the hearing there was no realistic basis on which the claimant could succeed in his intended discrimination claim. (Nor would the outcome be effected by any reversal of the burden of proof which might apply, either because the burden would not shift or because if - which I do not believe would be the case - it did shift, there is here, even taking the claimant's case at its highest, a clear explanation for what occurred, untainted by any (marital status) discriminatory intent or conduct).

20. In my judgment, applying the overall test of the balance of injustice and hardship it would not be just to allow an amendment which would, if made, be susceptible to being (and would be) struck out for the reasons to which I have referred. The other set of factors relied upon by Mr Bunting, including the nature of the amendment and the timing and the manner of the application are in my judgment also relevant. Both the first factor and the second set of factors (whether the first factor and the second set are taken together or separately) indicate greater hardship to the claimant in having at this stage to face a new claim of discrimination. This in my judgment would outweigh the hardship (in the form of the inevitable prejudice of not being able to pursue this claim) to the claimant by my refusing the amendment.

21. The claimant then raised a further point which to judge from the grounds of resistance and from Mr Bunting's reaction took the respondent by surprise. I was equally surprised by it. The claim was that the ordinary time limits of s.108 ERA did not apply because the reason for the dismissal was the assertion of a statutory right, namely the right to be paid and not have an unlawful deduction made from his pay.

22. S.104 ERA provides:

> "(1) An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee – (b) alleged that the employer had infringed a right of his which is a relevant statutory right."

23. S.108 disapplies the qualifying period on the bringing of an unfair dismissal claim by virtue of sub-section (1)(g).

24. It is not entirely easy to apply these two sections to a constructive dismissal. Put simply (as Mr Bunting submitted) the reason or one of the reasons for the claimant's decision to walk out from his employment (on the basis of a repudiatory breach of contract by the respondent) was that he had not been paid for the time he was working. There is a difference between a breach of a statutory right (if that is what it is) and an assertion of a breach of a statutory right for which the employer "punishes" (for want of a better word) the employee. Even taken at its highest there is nothing to support the notion that the repudiatory breach of contract which the claimant "accepted" was a reaction or some act or omission on the part of the respondent arising from the claimant's assertion of his right to be paid. Even if the complaint in the ET1 is to be construed as an actual unfair dismissal (as opposed to a constructive unfair dismissal) again there is nothing to suggest that he was dismissed because he asserted a right to payment. Paragraph 8.2 makes clear that given the non-payment of what he believed he was entitled to, the claimant decided to leave his employment.

25. In all the circumstances therefore the claim fell to be struck out as an ordinary unfair dismissal on the basis that the claimant does not have the necessary qualifying period of employment under s.108 ERA and given the withdrawal of the unlawful deduction from wages and claims for other payments and the refusal of the proposed amendment, the claims are struck out in their entirety.

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Employment Judge Bloch QC

30.12 .2021

Sent to the parties on:

14/1/2022

For the Tribunal: N Gotecha