



EMPLOYMENT TRIBUNALS

Claimant: C

Respondent: Active Northumberland

Heard at: Newcastle

On: 12 December 2022

Before: Employment Judge Atkinson

Representation

Claimant: In person

Respondent: Ms Clayton of counsel

JUDGMENT

1. The claim for unfair dismissal is not well founded and is dismissed.
2. The claim for breach of contract is dismissed upon withdrawal of the claim by the claimant.

REASONS

Introduction

1. By a claim form dated 1 May 2022 the claimant complained of unfair dismissal and breach of contract. He maintained that he had been an employee of the respondent from 16 October 2019 until 14 December 2021. He claimed that he had been unfairly dismissed by the respondent and that he had not been paid notice pay that was due to him.
2. By a response form of 15 June 2022 the respondent resisted both claims. The respondent's case was that the claimant had never been an employee, that his length of service was less than two years, and that his dismissal was not unfair.
3. At the beginning of the hearing the claimant made an application for an anonymisation order under rule 50(1) and 50(3)(b) of the Employment Tribunal Rules of Procedure 2013. The claimant set out that the case related to allegations that he had committed various acts of sexual harassment or misconduct. He submitted that these allegations had the potential to damage his future prospects. He also claimed that as a result of these allegations he had been assaulted and the police were involved. He submitted that any publication of these allegations could put him at further risk of harm.

4. The respondent did not oppose the claimant's application, but reminded the Tribunal of the weight that must be attached to the principle of open justice.
5. In *British Broadcasting Corporation v Roden* [2015] ICR 985 the EAT highlighted that the principle of open justice was of paramount importance and that only when strictly necessary in the interests of justice should there be any derogation from it. In that case the EAT was also dealing with allegations of sexual misconduct. Simler J held that the risk that the public would conclude that the allegations were true was not a relevant consideration.
6. This case does not, however, only engage the article 8 rights of the claimant. The evidence in this case includes the nature of the relationships the alleged victims had or have with the claimant. This creates a real risk of 'jigsaw' identification of those women.
7. Having carefully balanced the article 8 rights of the claimant, the complainants of the alleged sexual harassment/misconduct, and the principle of open justice, I am satisfied an anonymity order is necessary to protect the article 8 rights of the complainants.
8. I order, therefore, that there shall be omitted or deleted from any document entered on the register, or which otherwise forms part of the public record any identifying matter which is likely to lead members of the public to identify the claimant.

Issues

9. The following issues were identified by the parties:
 - a. Was the claimant employed by the respondent?
 - b. If so, when did that employment begin?
 - c. When was the effective date of termination?
 - d. Was the respondent's dismissal of the claimant fair?
 - e. Did the respondent breach any contract of employment with the claimant by dismissing him without notice?
10. The respondent invited the Tribunal to deal with the issue of length of service as a preliminary issue, as there was no dispute between the parties regarding the relevant facts, the issue could therefore be dealt with without oral evidence, and a ruling on this issue had the potential to shorten the hearing. The claimant indicated he agreed with this approach.

Evidence

11. The claimant provided a witness statement on his own behalf. The respondent provided witness statements from Mr Lee Paris, Ms Leanne Beattie and Mr Robert Knox. A 149 page bundle was provided by the parties.

Relevant Legal Framework

12. Section 108(1) of the Employment Rights Act 1996 ('ERA 1996') provides that the right not to be unfairly dismissed does not apply unless an employee has been continuously employed for a period of not less than two years ending with the effective date of termination ('EDT').
13. Under section 211(1) of the ERA 1996 the period of continuous employment

“begins with the day on which the employee starts work”.

14. In ***General of the Salvation Army v Dewsbury* [1984] ICR 498**, the EAT held that “starts work” did not refer to the undertaking of the full duties of employment, but to the beginning of the employment under the contract of employment.
15. In ***Stella v Regard Partnership* UKEAT0614/06**, the EAT considered the situation in which an employee entered into a contract of employment with her employee, conditional on her passing a vetting process. The employee attended an unpaid training day before the vetting process was completed. It was held that the employee did not start work until after the vetting process was successfully completed.
16. In ***Koenig v The Mind Gym* UKEAT/0201/12** held that “work” meant work done under and not collateral to the contract of employment. In that case the employee attended a client meeting prior to starting her full duties. Her attendance at the meeting was unpaid. It was held that attendance at the client meeting did not constitute starting work for the purposes of section 211.
17. Section 97(1) of the ERA 1996 provides that where an employee’s contract of employment is terminated without notice, his EDT is the “date on which the termination takes effect.”
18. In ***Newham London Borough v Ward* [1985] IRLR 509**, the Court of Appeal held that an employee’s P45 “has nothing whatever to do with the date on which the employment terminates.”
19. In ***Newman v Polytechnic of Wales Students Union* [1995] IRLR 72**, the EAT held that the EDT has to be decided in a practical and common sense manner, having regard to what the parties understood at the time of dismissal.

Findings of Fact

20. The evidence on the issue of length of service was not in dispute. The respondent operates a number of leisure facilities in Northumberland, including one located within a school known as Cramlington Learning Village.
21. On 16 October 2019 the respondent offered the claimant work as an attendant at the Cramlington facility. The offer of work was conditional upon the respondent receiving satisfactory references. This is clear from the correspondence between various members of the respondent’s staff and from paragraph 1.1 of the claimant’s witness statement.
22. The claimant undertook 2 hours of unpaid job shadowing whilst awaiting the references being received by the respondent.
23. The final satisfactory reference was received by the respondent on 15 January 2020 and the claimant commenced his first shift the next day; 16 January 2020.
24. On 13 December 2021 Mr Paris spoke with the claimant via telephone. During that conversation he told the claimant that he would not be offered any further shifts by the respondent due to issues brought to his attention by Cramlington Learning Village. This is set out in paragraph 1.3 of the claimant’s witness statement and paragraph 24 of that of Mr Paris.
25. The claimant completed no work for the respondent after the conversation.
26. The claimant’s P45, issued by the respondent, shows a leaving date of 30 April 2022.

Submissions

- 27. The claimant contends that his employment commenced on 16 October 2019 and that his EDT was 14 December 2021.
- 28. The respondent submitted that any employment commenced on 16 January 2020 and that the EDT was 13 December 2021.

Analysis and conclusions

- 29. As the offer of work to the claimant on 16 October 2019 was conditional on the respondent receiving satisfactory references, the claimant did not start work on that date. The condition on which the contract was offered was not satisfied until 15 January 2020 and so it cannot be that the purported employment under that contract commenced prior to this date.
- 30. The unpaid job shadowing completed by the claimant was collateral to the conditional contract between the parties. It was not work completed under the contract. For this to have been work under the contract would have required an amendment to the contract, as it would have removed the condition regarding satisfactory references. There is no evidence that the parties intended to vary the contract in that manner. Had they done so, the claimant would have been paid for period spent job shadowing and the respondent would have ceased waiting for references before offering any shifts to the claimant.
- 31. The claimant started work, for the purposes of section 211(1) ERA 1996, on 16 January 2020.
- 32. The termination of the contract between the claimant and the respondent was communicated to the claimant on 13 December 2021 and took effect from that point. This was the effective date of termination.
- 33. The claimant's length of continuous service was less than two years. It follows that the claim for unfair dismissal must fail. This claim is therefore dismissed.

Breach of contract

- 34. Following the delivery of my decision on length of service and a period of discussion between the parties, the claimant indicated that he wished to withdraw his claim of breach of contract. This claim is therefore dismissed.

Employment Judge Atkinson

Date: 16 January 2023