



EMPLOYMENT TRIBUNALS

Claimant
Ms K Knox

Respondent
v London Borough of Lambeth

PRELIMINARY HEARING

Heard at: London South

On: 28 July 2017

Before: Employment Judge Elliott

Appearances:

For the Claimant:

Mr J Neckles, trade union representative

For the Respondent:

Ms S Boucher, solicitor

JUDGMENT

The claims against the second, third, fourth and fifth respondents are dismissed upon withdrawal by the claimant.

REASONS

1. By a claim form presented on 3 January 2017 the claimant Ms Karen Knox claims constructive unfair dismissal including for automatically unfair reasons of having made a public interest disclosure and/or for trade union reasons and/or under section 12 Employment Relations Act 1999, whistleblowing detriment, race discrimination including harassment and victimisation, breach of the statutory right to be accompanied and breach of contract for notice pay.
2. The claimant worked for the first respondent local authority as a Youth Offending Services Case Officer.
3. A telephone preliminary hearing took place on 5 May 2017 before Regional Employment Judge Hildebrand.
4. At that hearing the Regional Judge ordered that by 26 May 2017 the claimant set out a concise statement of the allegations made against each individually named respondent.

5. In response to that order the claimant sent 25 pages of amended particulars of claim deleting the second to fifth respondents as parties and not asserting a case against them. Mr Neckles for the claimant confirmed at this hearing that the effect of this was that the claimant withdrew against the second to fifth respondents and he agreed that the claims against those respondents should be dismissed upon withdrawal.
6. Mr Neckles raised by way of amendment and then withdrew during the course of this hearing a claim under the Employment Relations Act 1999 (Blacklists) Regulations 2010 (SI 2010/493).

CASE MANAGEMENT SUMMARY

The full merits hearing

1. The full merits hearing has already been listed for four days commencing on 19 September 2017.

The issues

2. I now record that the issues between the parties which will fall to be determined by the Tribunal are as follows:

3. **Constructive unfair dismissal claim or unfair dismissal**

- 3.1. Was the contract of employment terminated on 7 October 2016 by the claimant's resignation? If so, did the claimant resign as a result of a fundamental breach of her contract of employment?
- 3.2. Alternatively, was the contract terminated by the respondent on 19 October 2016? The respondent relies upon the decision of the Court of Appeal in *Sunrise Brokers LLP v Rodgers 2015 IRLR 57*.
- 3.3. If terminated on 7 October 2016, the claimant relies upon a breach of any term of the disciplinary procedure giving a right to be accompanied by a trade union representative and section 4.4 of that procedure in relation to postponements of hearings.
- 3.4. Did the claimant affirm the breach?
- 3.5. If the claimant was constructively dismissed on 7 October 2016, what was the reason for dismissal? Was it for a potentially fair reason under section 98 Employment Rights Act 1996?

4. **Public interest disclosure claim/s**

- 4.1. The claimant relies on disclosures made to the respondent on the following dates: 6 September 2016, 8 September 2016, 6 October 2016 and 7 October 2016.
- 4.2. The claimant is ordered below to set out the precise words she relies upon within in each of these communications which are all understood to be in

writing. She is also to say why those disclosures are said to be in the public interest.

- 4.3. In any or all of these, was information disclosed which in the claimant's reasonable belief tended to show one of the following? The claimant relies on section 43B(1)(b) and (d). The claimant in this hearing withdrew reliance on section 43B(1)(c) and (f).
 - 4.3.1. The respondent failed to comply with a legal obligation to which it was subject namely the failure to allow the claimant the statutory right to be accompanied under section 10 of the ERA 1999 and/or a contractual right to be accompanied under the terms of the disciplinary procedure and a legal obligation related to health and safety which is to be particularised.
 - 4.3.2. The health or safety of the claimant had been put at risk in that the respondent imposed a condition that she should attend the disciplinary hearing when she was unwell.
- 4.4. If so, did the claimant reasonably believe that the disclosures or any of them were made in the public interest?

Detriment complaints

- 4.5. If protected disclosures are proved, was the claimant, on the ground of any protected disclosure found, subject to detriment by the employer in that they:
 - 4.5.1. Failed to allow her to be accompanied by the representative of her choice.
 - 4.5.2. Did not postpone the disciplinary hearing.
 - 4.5.3. Did not review her suspension.
 - 4.5.4. Subjected her to the terms of the disciplinary procedure after termination of employment.
 - 4.5.5. Limited her choice of trade union representative.
 - 4.5.6. Failed to postpone the disciplinary hearing after receiving medical information.
 - 4.5.7. Failed to seek a medical opinion on the claimant.
 - 4.5.8. Refused to accept her resignation.

Automatically unfair dismissal complaints – protected disclosures and/or union membership or activities and/or exercising right to be accompanied

- 4.6. Was the making of any proven protected disclosure the principal reason for the dismissal?
- 4.7. Has the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure(s)?

- 4.8. Was the claimant's union membership/activities or that she proposed to make use of trade union services at an appropriate time, the principal reason for the dismissal?
 - 4.9. Has the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure(s) or the union activities as set out above?
 - 4.10. Was the fact that the claimant sought to exercise her statutory right to be accompanied, the principal reason for the dismissal?
 - 4.11. Has the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was because she sought to exercise her right to be accompanied?
 - 4.12. Has the respondent proved its reason for the dismissal, namely misconduct?
 - 4.13. If not, does the tribunal accept either of the reasons put forward by the claimant or does it decide that there was a different reason for the dismissal?
5. **Section 26: Harassment related to race**
- 5.1. The claimant describes her racial group as Black British of Jamaican origin.
 - 5.2. Did the respondent engage in unwanted conduct as relied upon for direct discrimination below?
 - 5.3. Was the conduct related to the claimant's race?
 - 5.4. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
 - 5.5. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
 - 5.6. In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
6. **Section 13: Direct discrimination because of race**
- 6.1. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, any of the acts below not found to have been harassment, namely:
 - 6.1.1. The dismissal.
 - 6.1.2. Failing to allow her to be accompanied by the representative of her choice.
 - 6.1.3. Not postponing the disciplinary hearing.
 - 6.1.4. Not reviewing her suspension.

- 6.1.5. Being subjected to a protracted suspension of almost a year.
- 6.1.6. Subjecting her to the terms of the disciplinary procedure after (on her case) the termination of employment.
- 6.1.7. Limiting her choice of trade union representative.
- 6.1.8. Failing to postpone the disciplinary hearing after receiving medical information.
- 6.1.9. Failing to seek a medical opinion on the claimant.
- 6.1.10. The refusal to accept her resignation.
- 6.1.11. Holding a “contrived retaliatory” disciplinary hearing.
- 6.2. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on the following comparators:
 - 6.2.1. In relation to the right to be accompanied and the failure to postpone the disciplinary hearing and holding a “contrived retaliatory” disciplinary hearing, the comparator is Ms Denise Sadarie who is said to be Black British of Nigerian origin.
 - 6.2.2. For all other matters and in the alternative, hypothetical comparators.
- 6.3. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the claimant’s race?
- 6.4. If so, what is the respondent’s explanation? Does it prove a non-discriminatory reason for any proven treatment?

7. Section 27: Victimisation

- 7.1. Has the claimant carried out a protected act? The claimant relies upon her resignation letter of 7 October 2016.
- 7.2. If there was a protected act, has the respondent carried out any of the treatment relied upon. The claimant is ordered below to identify the detriments relied upon which post-date the protected act of 7 October 2016. As presently drafted, the Grounds of Complaint rely on a list which includes matters predating the protected act.

8. Time/limitation issues

- 8.1. The claim form was presented on 3 January 2017. Accordingly and bearing in mind the effects of ACAS early conciliation, acts or omissions may potentially be out of time, so that the tribunal may not have jurisdiction.
- 8.2. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

8.3. Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

9. **Breach of contract**

9.1. There is a claim for notice pay. The notice period is one month.

10. **The statutory right to be accompanied – sections 10 and 11 Employment Relations Act 1999**

10.1. Did the respondent breach the claimant's statutory right to be accompanied at a disciplinary hearing?

11. **Remedies**

11.1. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

11.2. There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

11.3. Is the claimant entitled to any uplift as a result of an unreasonable failure to comply with the ACAS Code on Disciplinary and Grievance Procedures?

Judicial mediation

12. The parties are represented and do not seek judicial mediation.

Other matters

13. If the Tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.

14. I made the following case management orders by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. **Further information / Amended response**

1.1. On or before **11 August 2017** the claimant is to set out and send to the respondent the following further and better particulars of her claim:

1.1.1. On the whistleblowing claim she is to set out the precise words she relies upon within in each of the four communications which are all understood to be in writing.

- 1.1.2. Why those disclosures are said to be in the public interest.
- 1.1.3. What was the legal obligation related to health and safety with which the respondent failed to comply under section 43B(1)(b)?
- 1.1.4. The acts of victimisation relied upon which post-date the protected act and this must be by reference to the existing claim.
- 1.1.5. Which paragraphs of the ACAS Code are relied upon in relation to claim for an uplift in compensation and why?
- 1.2. On or before **11 August 2017** the respondent is to state whether it admits that the terms of its disciplinary procedure are contractual and if not, the reason(s) why?

2. Cast list and chronology

- 2.1. The respondent is ordered to prepare a cast list, for use at the hearing. It must list, in alphabetical order of surname, the full name and job title of all the people from whom or about whom the Tribunal is likely to hear.
- 2.2. The respondent is also ordered to prepare a short, neutral chronology for use at the hearing.
- 2.3. These documents should be agreed if possible. If they are not agreed, the party preparing the document shall state within it the items that are not agreed. The parties do not have leave to submit separate documents.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Elliott
28 July 2017