EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108062/2021 Preliminary Hearing by Cloud Video Platform on 17 February 2022

Employment Judge: M A Macleod

Megan Crouch	**Claimant In Person**
Stagecoach	**Respondents Represented by Mr S McLaren Solicitor**
John Thomson	
Western Buses Limited	

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. **Western Buses Limited shall be added as a respondent to these proceedings;**

2. **The claimant's dismissal has not been excised by the appeal decision, and accordingly the Tribunal has jurisdiction to hear her claim of unfair dismissal; and**

3. **The claimant's claims of discrimination on the grounds of sex relating to the events of 1 June 2018 are dismissed for want of jurisdiction, being time-barred.**

REASONS

1. The claimant presented a claim to the Employment Tribunal on 7 March 2021 in which she complained that she had been unfairly dismissed, discriminated against on the grounds of sex and age discrimination and unlawfully deprived of payments of notice pay, holiday pay, arrears of salary and other pay.

2. The respondent presented an ET3 in which they resisted all claims made by the claimant.

3. A Preliminary Hearing was listed to take place on 17 February 2022 in order to determine 3 preliminary issues in this case.

4. The claimant appeared in person at the Employment Tribunal Office in Glasgow. The respondent's solicitor appeared by CVP, as did the Employment Judge.

5. The Hearing suffered from a number of difficulties throughout - audible interference was notable for the early parts of the hearing, the respondent's solicitor's connection with the hearing was lost and required to be recovered and additional documents were produced by both parties which held up the progress of the hearing. However, I was satisfied that with the willing compliance of both the claimant and Mr McLaren the Tribunal was able to hear the arguments advanced by both parties and that the interests of justice were duly served.

6. The three issues to be addressed in this case were set out in the Notice of Hearing:

   (a) The identity of the claimant's employer ("Western Buses Limited" or "Stagecoach")

   (b) Whether the claimant was reinstated, in which case it is agreed that the unfair dismissal case must be dismissed

   (c) Whether the allegations of discrimination dating from 1 June 2018 are out of time, such that the Tribunal has no jurisdiction to hear them. The Tribunal will consider whether they were capable of being part of other "conduct extending over a period" and, if necessary, whether it would be just and equitable for those allegations to proceed if presented late.

7. The parties made submissions on each of these matters. Mr McLaren produced, shortly after the commencement of the Hearing, a skeleton submission, with copies of the authorities referred to therein, and spoke to that submission.

8. I will take each of the 3 headings separately and set out the points made on behalf of both parties, before issuing my decision in relation to each.

Identity of Employer

9. The claimant has presented her claim against 2 respondents: Stagecoach, and John Thomson.

10. The respondent's position is that the claimant was employed by Western Buses Limited, which is one of the companies which acts as an operator for Stagecoach. Mr McLaren pointed to the claimant's contract of employment (51) which is headed up with the name "Stagecoach West Scotland". He pointed to the grievance and disciplinary procedures which were relied upon here as being headed "Western Buses Engineering Staffs Agreement".

11. He acknowledged that the matter is confusing, and that the respondent has not helped. The claimant insisted that all of her payslips refer to Stagecoach, and that HMRC refer to her former employers as Stagecoach.

12. I am inclined to the view that the claimant was in fact employed by Western Buses Limited, but until evidence is heard from the respondent to confirm precisely the relationship between them and Stagecoach, and to explain why the claimant's payslips and contract of employment referred to Stagecoach, I am not in a position to make an ultimate determination on this point. No evidence was presented by the respondent on this point, other than the documents which simply highlight the dispute.

13. As a result, I directed that Western Buses Limited should be added as the 3rd respondent in this case, in order to protect the claimant's interests by ensuring that the company which admits itself to be her former employer is a respondent in these proceedings. While I appreciate that this means that the Tribunal which ultimately requires to hear this case must determine that matter finally, they should be in the advantageous position of having heard evidence upon which they may reach a conclusion.

Reinstatement

14. The claimant's position is that she was not effectually reinstated following her dismissal, and as a result, her dismissal remains in place and she has the right to make a claim of unfair dismissal.

15. The respondents' position is that the claimant was effectively reinstated, and that the case law supports their argument that, whether the claimant accepted that offer of reinstatement or not, the dismissal is wiped away, and without a dismissal, the Tribunal cannot hear an unfair dismissal claim.

16. Mr McLaren set out the history of the matter, referring firstly to the disciplinary procedure (53-55). He said that in the respondent's procedures, if an employee were to be reinstated on appeal, there would be no provision for payment from the time of dismissal to reinstatement. A trade union representative would be in a position to give evidence to this effect.

17. In the letter following the first appeal hearing, on 27 January 2021, the respondent's Mr Chris Medine confirmed to the claimant that he wished to reinstate the claimant "under the below conditions" (145), which were:

"To start at Wagon Road Ayr as a back shift cleaner working 5 over 7. Starting on the 1st February 2021. You will not be paid from the time of your dismissal. A live final written warning will remain on your file for a further 6 months from the 1st February 2021."

18. Following the second appeal hearing, Mr Ryan Willis wrote to the claimant on 8 March 2021 (155) to confirm that he wished to reinstate the claimant under the following conditions: *"To start work at Ayr Depot, Waggon Road, from Monday 15th March as a backshift cleaner working 5 over 7 shift. "*

19. That was highlighted in bold font. The letter then confirmed that following a successful trial at Ayr and pending investigation findings at Ardrossan the respondent may consider clearing her disciplinary record completely. He confirmed, further, that a live final written warning would remain on her file until the follow up meeting (in 6 months' time), and that she would not be paid from the time of her dismissal.

20. The claimant refused the offer, and, as noted by Employment Judge MacLean in her Note at paragraph 8, the claimant found new employment on 14 December 2021 (175). She had been dismissed on 9 December 2020. Mr McLaren accepted that the respondent has been unable, despite searching all relevant places, to locate a copy of the letter of dismissal.

21. He pointed out that the outcome of both appeals was an offer to reinstate the claimant to her job as a shift cleaner but at a different place of work to the one where she had previously been employed.

22. Mr McLaren postulated two possible interpretations of the facts.

23. Firstly, he suggested that since there was no acceptance of the offer to reinstate the claimant, there was no agreement to employ the claimant beyond 9 December 2020.

24. Secondly, however, and by contrast, he said that by referring to the decisions by the Court of Appeal in ***Roberts v* West *Coast Trains Ltd [2004] IRLR 788,*** and of the Employment Appeal Tribunal in ***Salmon v Castlebeck Care (Teeside [2015] IRLR 189,*** the law appears to suggest a different interpretation.

25. In ***Roberts,*** the facts were similar to those in the present case, and it was found that the effect of a successful appeal in that case was that his employment continued. Mr McLaren suggested that the case supports the proposition that the effect of a decision to reinstate on appeal is to revive retrospectively the contract of employment terminated by the earlier decision to dismiss so as to treat the employee as if she had never been dismissed.

26. He then referred to **West *Midlands Co-operative Society Limited v Tipton [1996] ICR 192* per Lord Bridge *at page 198F to H,*** in which Lord Bridge approved the following statement of principle:

"In our view, when a notice of immediate dismissal is given, the dismissal takes immediate effect. The provisions of this contract as to the appeal procedure continue to apply. If an appeal is entered, then the dismissed employee is to be treated as being 'suspended' without pay during the determination of his appeal, in the sense that if the appeal is successful then he is reinstated and he will receive full back pay for the period of the suspension. If the appeal is not successful and it is decided that the original decision of instant dismissal was right and is affirmed, then the dismissal takes effect on the original date. In our view, that is the date on which the termination takes effect for the purposes of the Act"

27. Mr McLaren sought to point out that the Union/Management Agreement, incorporated into the individual contract of employment, provided for no pay during the appeal process.

28. His argument was, essentially, that the parties enter into an appeal process on the basis that they will be bound by its outcome, and that the success of the internal appeal did not constitute an offer which the claimant could

accept or reject, nor did it give rise to an option for him to continue with his employment or not **(Patel v Folkestone Nursing Home Ltd [2018] IRLR 924).**

29. He submitted that the claimant's employment therefore came to an end at some point after 8 March 2021, when it became apparent that she had rejected the offer contained in that letter. Once that rejection became clear, an implied resignation and not a dismissal took effect.

30. The claimant's response was that in the first appeal, the outcome letter said that she did not have to accept the terms offered to her, and she refused them because they were unreasonable. There was no indication to her of what the warning was related to. She also believed that she was supposed to be paid as part of the appeal process.

31. She also maintained that she was unaware of the second appeal outcome, and therefore did not understand how it could have been suggested that she had been reinstated.

32. 1 have reflected upon the submissions made on this point. Mr McLaren quite candidly accepted that the decisions in this area may not be intuitive but they must be followed, a principle which the Tribunal of course accepts.

33. It is noted that the respondent insists that the contract of employment incorporated the terms of a Union/Management Agreement which provided that if an employee were reinstated, there was no requirement for management to pay the claimant to the date of dismissal. However, while Mr McLaren promised that a trade union witness could be brought in order to confirm this, no such witness was in fact presented to me; and no copy of the Union/Management Agreement has been lodged with the Tribunal in the voluminous set of productions for this Hearing.

34. As I understand it the suggestion appears to be that if the respondent wishes to reinstate on the basis of leniency, they may do so without making up the employee's pay up to the date of the appeal. The difficulty I have is that the precise terms of the provision, if there is such a provision in the claimant's contract - and it is her position that she understood that she would be given backpay - are simply unknown to the Tribunal, and as a result, it is not possible to give effect to the respondent's submission on this point.

35. It is plain from the authorities that the lodging of an appeal with an employer involves a commitment from both parties that the outcome of that appeal will be accepted as binding by both parties.

36. It is also clear that there may be conditions attached to reinstatement, but that a successful appeal is one where the claimant is found to have succeeded, and if she does not accept the conditions that does not undermine the finding that reinstatement has taken place.

37. What makes this situation so difficult is that a general understanding of reinstatement means that the employee is allowed to return to employment with the respondent, as if dismissal had never taken place. While that may imply that certain conditions can be attached to the decision to restore the employee - such as, for example, the imposition of a final written warning in place of dismissal, as a lesser sanction which still recognizes wrongdoing on the part of the employee - there is, in my view, something fundamental in the two points of difference which characterize the claimant's position in this case.

38. Firstly, the claimant was not reinstated to the position which she had previously held but with a warning attached. She was offered the opportunity to start afresh by moving to the Ayr depot, a significant change to her terms and conditions of employment.

39. Secondly, she was not to be paid for the period between her dismissal and the apparent reinstatement. As a result, it can in no way be said that the claimant was placed in the position she would have been in, had she never been dismissed. In my judgment, that is so significant as to undermine outcome of the appeal, and to make clear to the claimant that she was, in effect, being re-employed but on a new contract. There is no mention in either of the appeal outcome letters of her qualifying service commencing on the date upon which her earlier contract of employment began, and therefore restoring to her the rights to which that contract would have entitled her. In other words, she was not, in this regard, placed in the same position as she would have been if she had not been dismissed. On the information before me, the respondent had not sought to reinstate her but to offer her an alternative to dismissal, which she was, given the terms of that offer, entitled to reject without losing the right to make a claim of unfair dismissal.

40. Accordingly, it is my decision that the claimant's dismissal has not been excised, and that the Tribunal does have jurisdiction to hear her claim of unfair dismissal.

Time Bar

41. The only issue for determination under this heading is whether or not the allegations of unlawful discrimination relating to 1 June 2018 are time-barred or form part of an extended course of conduct over a period of time.

42. There are two incidents referred to on that date: firstly, that Mr Thomson, on seeing the claimant, said “They didn’t say they were sending a child”; and secondly, that Mr Thomson failed to give the claimant a key to the ladies’ toilet.

43. Mr McLaren observed that the alleged comment by Mr Thomson makes no reference to the claimant’s sex but may relate to her age, a head of claim which has now been withdrawn.

44. The claim was lodged on 9 February 2021, some 2 years and 8 months after the date upon which these acts are alleged to have taken place. The only other alleged instances of sex discrimination relate to events in March and April 2020, as well as some point after July or August 2020. There is, he submitted, no apparent continuity of events alleged by the claimant and these allegations stand alone.

45. The claimant said that the main reason she raised the Tribunal claim was the unfair dismissal. She believed that that happened because Mr Thomson wanted her out of the organisation at that point.

46. She submitted that she had not discussed with the trade union representative the possibility of raising Tribunal proceedings in June 2018. She pointed out that she raised her formal complaint to the respondent in August 2018 (97). She said that at that time she had "no idea" about Tribunals, but she believes that one of her trade union representatives, Tam Watson, had raised it with her. It was a new idea to her and she only thought about it when things started to become serious. She felt that the appeal process had lasted 3 months so wanted to raise the harassment claim. She had by then researched the law and knew that she had 3 months.

47. She believes that 1 June 2018 was the beginning of a lot of the issues which then continued. Over time, Mr Thomson refused to allow her to use the staff toilet, and she was never told where to collect a key for the female toilet. She was never given a key to the female toilet. She felt that there was a pattern to the events which took place.

48. In my judgment, this is a straightforward matter. The claimant makes two relatively minor (though important in her own thinking) allegations about events which took place on 1 June 2018. I am not persuaded, on the information provided, that either of these amounted to acts extending over a period of time. They were one-off events. It is simply unclear to what extent they were repeated. Certainly, the remark by Mr Thomson has no apparent connection to any later events, and while it may be relevant as background

evidence for the claimant to present, I do not consider it to be part of an ongoing series of incidents. So far as the key is concerned, the claimant has alleged that she should have been provided with a key on that date, but was not. That is the unlawful act alleged, and in my judgment it has no continuing series of acts following on from it.

49. The length of the delay is very significant - well over 2 years have passed between 1 June 2018 and the date upon which the claimant presented her claim to the Tribunal. The reason for the delay is entirely unclear. It appears that the claimant simply decided to add it to the more important claim of unfair dismissal which she was motivated to make against the respondent. She had the benefit of trade union membership and advice throughout this period, and accordingly could have had access to that advice well within the three month period during which the claim in relation to 1 June 2018 should have been presented. It is plain that the claimant is an articulate individual who has had recourse to trade union assistance very frequently over the course of her engagement with the respondent, and there is no reason why she could not have obtained their assistance and advice on this point, had she considered it appropriate to do so.

50. Given the relatively minor nature of the allegations, the respondent would be placed in a more prejudicial position in having to bring evidence about events which took place in June 2018, which by the time of any Tribunal hearing on the merits of this case is likely to be more than 4 years in the past. The claimant, on the other hand, may lose the right to make a separate claim about these matters, but will retain the more significant claims she makes about discriminatory conduct at later stages in her employment, and accordingly, in my judgment, will not be prejudiced in any way.

51. In my judgment, it would not be just and equitable to extend the period of time within which the claimant should be permitted to raise this particular claim, and accordingly it is my conclusion that the claim of discrimination on the grounds of sex relating to the events of 1 June 2018 is time-barred and falls outwith the jurisdiction of the Employment Tribunal.

Employment Judge: Murdo Macleod
Date of Judgment: 25 February 2022
Entered in register: 03 March 2022
and copied to parties