



EMPLOYMENT TRIBUNALS

Claimant: Ms E Emovon

Respondent: London Borough of Barnet

Heard at: Watford (in private) On: 17 January 2019

Before: Employment Judge Daniels (sitting alone)

Appearances:

For the claimant: Mr C Emovon

For the respondent: Mr Lee (Counsel) and Ms Felicia Epstein (Solicitor)

JUDGMENT

- 1 The claimant's claim for unfair dismissal was brought out of time and the Employment tribunal has no jurisdiction to hear that claim. That claim was dismissed.
- 2 The claims for racial discrimination were brought in time as the Employment Tribunal determined it would be just and equitable to allow such claims to proceed in all the facts and circumstances.
- 3 The claim for unlawful deduction from wages (which the claimant accepted had been brought on the basis that she had thought that her employment had continued until her appeal), was struck out on the basis that such claim had no reasonable prospect of success in the light of the clear terms of the letter of dismissal ending employment (letter dated 2 August 2017).

CASE MANAGEMENT

Final hearing

1. All issues in the case, including remedy, will be determined at a final hearing before an Employment Judge sitting with Members at the Employment Tribunals, Watford, on 7 October 2019, for 3 days starting at 10 am or as soon as possible afterwards.
2. The claimant(s) and the respondent(s) must inform the Tribunal as soon as possible if they think there is a significant risk of the time estimate being insufficient and/or of the case not being ready for the final hearing.

The claim

3. The claimant was employed by the respondent, as a residential support worker, from 6 August 2014 until dismissal with effect from 31 August 2017, by purported reason of redundancy.
4. By a claim form presented on 4 February 2018, following a period of early conciliation, the claimant brought complaints of unfair dismissal, direct race discrimination, redundancy payment and unlawful deductions.
5. The claimant withdrew at the Employment Tribunal her claim for a redundancy payment.

The issues

6. The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

EQA, section 13: direct discrimination because of race.

- 4.1 Has the respondent subjected the claimant to the following alleged treatment:
 - a. Failing to ensure that the investigator of her disciplinary process and the investigation report dated July 2017 was conducted by a trained investigator as provided by clause 7.2 of the disciplinary process;
 - b. That appropriate witnesses were not called to give evidence at the hearing, including (1) Jessika Kanniban and/or (2) the Former Head of the Service (see deposit order issued in this respect);
 - c. That Jessika Kanniban was allegedly intimidated and/or pressurised by being questioned by Andrew Davies (the chair of the disciplinary process) on 9 August 2017;
 - d. By not allowing the claimant to put certain questions to Andrew Wilmore in the disciplinary process hearing;

- e. By Ms Ibe seeking to influence Andrew Davies in the hearing by the manner and content of her questions (see deposit order);
- f. By comments made about the claimant in the process, made by Mr Davies including about her standing up and extending her posture in a manner as if she was a senior person of authority and/or like she thought she was a teacher; and/or
- g. By dismissing her;

4.2 Was that treatment “less favourable treatment”, i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances? The claimant relies on hypothetical comparators.

4.3 If so, was this because of the claimant’s race and/or because of the protected characteristic of race more generally?

EQA, section 26: harassment related to race

4.4 Did the respondent engage in conduct as set out in 4.1 a to f above.

4.5 If so, was that conduct unwanted?

4.6 If so, did it relate to the protected characteristic of race?

4.7 Did the conduct have the purpose or (taking into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Remedy

4.8 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues that may arise and that have not already been mentioned include:

- a. if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?
- b. did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A

- of the Trade Union & Labour Relations (Consolidation) Act 1992 (“section 207A”)?
- c. did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?

Other matters

- 5 The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’, which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practicedirections/
- 6 The parties are reminded of rule 92: “Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of “cc” or otherwise)...”. If, when writing to the tribunal, the parties don’t comply with this rule, the tribunal may decide not to consider what they have written.
- 7 The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
- 8 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.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Applications

The respondent contended that certain claims be struck out as out of time. For the avoidance of doubt and set out in the Judgment of today’s date, the Tribunal concluded that the claimant’s claim for unfair dismissal was brought of time and the Employment tribunal has no jurisdiction to hear that claim. That claim was dismissed. The claims for racial discrimination were determined to be brought in time as the Employment Tribunal determined it would be just and equitable to allow

such claims to proceed in all the facts and circumstances. The claim for unlawful deduction from wages (which the claimant accepted had been brought on the basis that she had thought that her employment had continued until her appeal), was also struck out on the basis that such claim had no reasonable prospect of success in the light of the clear terms of the letter of dismissal ending employment (letter dated 2 August 2017).

2. Judicial mediation

2.1 The parties are referred to the “Judicial Mediation” section of the Presidential Guidance on ‘General Case Management’, which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practicedirections/. The respondent is not interested in judicial mediation. If they change their minds, they must inform the other party and the tribunal of this as soon as possible.

3. Complaints and issues

3.1 The parties must inform each other and the Tribunal in writing within 14 days of the date this is sent to them, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.

4. Statement of remedy/schedule of loss

4.1 The claimant must provide to the respondent by 30 April 2019 a document – a “Schedule of Loss” – setting out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant’s complaints and how the amount(s) have been calculated.

4.2 If any part of the claimant’s claim relates to dismissal and includes a claim for earnings lost because of dismissal, the Schedule of Loss must include the following information: whether the claimant has obtained alternative employment and if so when and what; how much money the claimant has earned since dismissal and how it was earned; full details of social security benefits received as a result of dismissal.

4.3 The parties are referred to: the Presidential Guidance on pension loss at www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidancepension-loss-20170810.pdf; If the claimant is claiming for loss of pension, the Schedule of Loss must include precisely how much is being claimed and on what factual and arithmetical basis.

4.4 The claimant will serve an updated schedule of loss on 30 September 2019.

5. Documents

5.1 On or before 30 April 2019 the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so.

6. Final hearing bundle

6.1 By 31 May 2019 the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files (“bundle”), and provide the claimant with a ‘hard’ and an electronic copy of the bundle by the same date. The bundle should only include documents relevant to any disputed issue in the case that won’t be in the remedy bundle referred to below] and should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response, any additional/further information and/or further particulars of the claim or of the response, this written record of a preliminary hearing and any other case management orders that are relevant. These must be put right at the start of the bundle, in chronological order, with all the other documents after them;
- documents that will be referred to at the final hearing and/or that the Tribunal will be asked to take into account.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally be simple chronological order.

7. Remedy bundle

7.1 The claimant must prepare a paginated file of documents (“remedy bundle”) relevant to the issue of remedy and in particular how much in compensation and/or damages they should be awarded if they win their claim and provide the respondent with a ‘hard’ and electronic copy of it by 31 May 2019. The

documents must be arranged in chronological or other logical order and the remedy bundle must have an up to date schedule of loss at the front of it.

8. Witness statements

8.1 The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before 30 June 2019.

8.2 No additional witness evidence will be allowed at the final hearing without the Tribunal's permission. The written statements must: have numbered paragraphs; be cross-referenced to the bundle(s); contain only evidence relevant to issues in the case. The claimant's witness statement must include a statement of the amount of compensation or damages they are claiming, together with an explanation of how it has been calculated.

9. Final hearing preparation

9.1 On the working day immediately before the first day of the final hearing (but not before that day), by 12 noon, the following parties must lodge the following with the Tribunal:

9.1.1 four copies of the bundle(s), by the respondent;

9.1.2 four hard copies of the witness statements (plus a further copy of each witness statement to be made available for inspection, if appropriate, in accordance with rule 44), by whichever party is relying on the witness statement in question;

9.1.3 three hard copies of any written opening submissions/skeleton argument, by whichever party is relying on them/it;

10. Other matters

10.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.

10.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.

10.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.

10.4 Public access to employment tribunal decisions

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

10.5 Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.

10.6 Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

Employment Judge Daniels

7 / 2 / 2019

Sent to the parties on:

12 / 2 / 2019

For the Tribunal:

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