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EMPLOYMENT TRIBUNALS

Claimant: Mrs S Karumazondo

Respondent: South Essex Partnership University NHS Foundation Trust

Heard at: East London Hearing Centre

On: 29 June 2018

Before: Employment Judge Russell (sitting alone)

Representation
Claimant: Miss W Edwards (Daughter)
Respondent: Mr T Cordrey (Counsel)

JUDGMENT

- 1) The claim previously dismissed for non-payment of a fee is reinstated.
- 2) The complaints of age and race discrimination are dismissed upon withdrawal.

REASONS

1 The Claimant was employed as a Support Worker by the Respondent from July 2001 until her summary dismissal for gross misconduct on 8 October 2013. She presented a claim form on 29 December 2013 complaining of unfair dismissal, age and race discrimination. At that time ACAS early conciliation did not apply and the claim was presented within the primary time limit which expired on 7 January 2014.

2 At the time that the claim was presented, there was in place a fees regime for Tribunal claims. The Claimant made an application for remission and submitted documents in support. Her application was rejected on 29 January 2014 on grounds that the documents provided were not original but there were missing pages and that no bank statements were provided. Miss Edwards tells me today that in fact those documents had been provided.

3 In any event on the same day the Claimant was sent a notice to pay requiring

her to pay £250 by 12 February 2014. The same day the rejection letter on the remission also informed the Claimant that she could appeal if she wished to do so. The Claimant's explanation given today but not set out in her witness statement provided in advance was that she was not sure whether to provide the information or to pay. The Claimant's decision at that point was that the sum of £250 was unaffordable given limitations upon her means, the pressures of rent, payment of utility bills and her daughter's medication. There is scant evidence to support the extent of those difficulties but I take into account that the Claimant had lost her job summarily on 8 October 2013 and while she started new employment relatively swiftly thereafter it was from January 2014. In other words during the relevant limitation period she was without income.

4 The Claimant now applies to have her claim reinstated following the judgment of the Supreme Court, given on 26 July 2017, in **R (on the application of Unison) v Lord Chancellor** [2017] UKSC 51. The Supreme Court decided that employment tribunal fees were unlawful and struck down the legislation which introduced them. Lord Reed held that the fee regime put people off making or continuing claims when bringing low value claims not only where the fees were unaffordable but also where they may render it futile or irrational to bring a claim. In his opinion, no sensible person will bring a claim unless he can be virtually certain of success, that the award will include reimbursement of fees and that the award would be paid in full, and that "if those conditions are not met, the fee will in reality prevent the claim from being pursued, whether or not it can be afforded."

5 The Supreme Court decision in Unison and the abolition of fees was widely publicised and generated considerable press coverage.

6 On 18 August 2017, Guidance issued by the President of the Employment Tribunal stated that applications for re-instatement of claims rejected for non-payment of fees, should be made in accordance with administrative arrangements to be announced by the MOJ and HMCTS. All other claims or applications brought to the Tribunal on reliance upon the Unison case, would be considered judicial in accordance with the appropriate legal and procedural principles. Explanatory notes to the Guidance make clear that re-instatement of claims rejected for non-payment of fees will generally be dealt with administratively and almost certainly without need for judicial intervention or decision.

7 In the recent case of **King v Barking Havering and Redbridge University Hospitals NHS Trust** UKEATPA/0470/17/DM, the Employment Appeal Tribunal considered the effect of the fees regime, albeit on application to lodge an appeal out of time rather than to restore a claim which had been brought but then dismissed for failure to pay the fee. At paragraph 24, Soole J analysed the **Unison** decision and whether fees effectively prevented access to justice, quoting part of the Judgment which made clear that fees must be affordable not in a theoretical sense but in the sense that they can reasonably be afforded. When households on low to middle incomes can only afford the fees by sacrificing ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees regime cannot be regarded as affordable. The EAT considered that the correct approach was to require evidence that throughout the whole period of delay, the true reason for failure to lodge the appeal was the fees order and the fact that the

appellant could not reasonably afford the fees or had reasonably concluded that it was futile or irrational to do so.

8 Unlike King where the EAT was considering the failure to bring a claim at all due to fees, here the Claimant brought her claim within time and clearly intended to pursue it until she encountered the problems obtaining remission and was issued with a notice to pay. Mr Cordrey submits that the real effective and material cause of the claim not continuing was not affordability of fees but the Claimant's inability to deal with the forms properly, a failure which he describes as inexcusable. I do not agree. The fees regime and remission process which came with it was found by many to be confusing and complicated. The experience of this Tribunal is that it was not an infrequent occurrence that applications were refused even when the appropriate documents had been provided. Moreover, the need to apply for remission only arose because there was at the time a fees regime which has since been held to be unlawful. For those reasons, justice requires that the claim be reinstated.

9 Having decided to reinstate the claim, I then considered the Respondent's application to strike out the claims on the basis that a fair hearing was no longer possible due to the passage of time. I clarified the circumstances of the case with the parties in order to assess what evidence was still available and how it may have been affected by the passage of time. Each of the Respondent's decision makers is still available to give evidence, namely Ms Jappie (investigation), Ms Stewart (dismissal) and Ms Lennard (appeal). There was a detailed contemporaneous investigation into the alleged misconduct which was documented and minutes of all relevant hearings which appear to verbatim. Whilst there may be some missing documentation, Mr Cordrey fairly accepts that it is not of such magnitude as to render a fair hearing no longer possible on the unfair dismissal claim.

10 I was concerned about the race discrimination and age discrimination claims as these did not form part of the Claimant's defence in the internal disciplinary process. As such they were not considered contemporaneously. The Claimant has in fact withdrawn both such claims today. For the avoidance of doubt, part of the Claimant's case on unfair dismissal is that a colleague, Ms Laura Sanger, was treated more leniently.

CASE MANAGEMENT SUMMARY & ORDERS

11 Having given judgment on the application to reinstate, I went on to consider with the parties the case management required to bring the claim to hearing without further delay.

12 It was agreed that the Issues to be determined are as follows:-

- 12.1 What was the reason for dismissal? The Respondent relies upon conduct.
- 12.2 Was that belief reasonably held following a reasonable investigation? In particular whether the Respondent should have investigated the duty rosters on the day of the incident.

12.3 Was dismissal fair in all of the circumstances of the case? The Claimant says that the sanction of summary dismissal was unduly harsh having regard to her length of service and/or inconsistent treatment of a colleague Ms Laura Sanger and the Claimant's personal mitigating circumstances.

12.4 In the event the dismissal was unfair could a fair dismissal have occurred in any event, further or in the alternative did the Claimant contribute to the dismissal by her conduct?

13 The final hearing of the claim will take place at East London Hearing Centre on **5 October 2018** at 10.00am with a time estimate of one day.

ORDERS

1. Documents

1.1 On or before **27 July 2018** the Claimant and the Respondent shall send each other a list and copies 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.

2. Final hearing bundle

2.1 By **10 August 2018**, the Respondent must provide the Claimant with a paginated and indexed bundle of documents for use at the hearing.

2.2 By **24 August 2018** the Claimant must notify the Respondent of any additional documents she wishes to be included in the bundle.

2.3 The bundle should only include documents relevant to any disputed issue in the case and should only include copies of the pleadings, any Tribunal Orders and those documents to which the Tribunal will be referred at the final hearing. 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.

3. Witness statements

3.1 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 **7 September 2018**.

3.2 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.

4. Final hearing preparation

- 4.1 The Claimant must provide to the Respondent by **7 September 2018** 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 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.
- 4.3 The Respondent is ordered to prepare a short, neutral chronology for use at the hearing.
- 4.4 These documents should be agreed if possible.

5. Other matters

- 5.1 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.
- 5.2 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.
- 5.3 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.
- 5.4 **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.

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. **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) making 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; (c) striking out the claim or the response, in whole or in part, in accordance with rule 37; (d) barring or restricting a party’s participation in the proceedings; and/or (e) awarding costs in accordance with rule 74-84.

- 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 Russell

24 August 2018