



EMPLOYMENT TRIBUNALS

Claimant
Mr E Thompson

v

Respondent
Coventry City Council

CLOSED PRELIMINARY HEARING

Heard at: Birmingham

On: 7 March 2017

Before: Employment Judge Dimbylow

Appearances:

For the claimant: Ms F Babalola, solicitor

For the respondent: Ms G Carter, solicitor

JUDGMENT

BY CONSENT: the claim against Mr A. Walster is dismissed upon withdrawal by the claimant.

CASE MANAGEMENT SUMMARY

Listing the hearing

1. After all the matters set out below had been discussed, we agreed that the hearing in this claim would be completed within 6 days. It has been listed at Birmingham Employment Tribunal to start at 10am or so soon thereafter as possible on 30 June, 3, 4, 5, 6 and 7 July 2017. The parties are to attend by 9.30 am. The hearing may go short, but this allocation is based on the on the claimant's intention to give evidence and call no further witnesses and the respondent's to call 4. On the first day, the first hour will be used for housekeeping and any applications; and thereafter the tribunal will read the witness statements and any key documents in the absence of the parties. It was agreed by the parties that the respondent would go first and the first witness for the respondent will be taken at 2pm on the first day. The rest of the time will be used as follows: -
 - 1.1. A maximum further 3 days for oral and other evidence on liability and remedy (it was agreed that there would be one day for the claimant to give his evidence and a further two days for the respondent's witnesses in addition to the half a day on the first day);

- 1.2. A maximum total of 2 hours (half each) for submissions on liability and remedy;
- 1.3. Approximately 1 day for the Tribunal to determine the issues which it has to decide and reach its conclusions;
- 1.4. Approximately half a day for the Tribunal to give judgment, with reasons if possible.
- 1.5. There will be a further closed preliminary hearing by telephone at 10am on 15 June 2017 with a time estimate of one hour to check that the directions given below have been complied with and the hearing is ready to proceed. Any Judge may hear it, but preferably the Judge allocated the hearing.

The complaints

2. By a claim form presented on 4 November 2016, the claimant brought complaints of unfair dismissal and race discrimination. The respondent defended the claims in a response form presented at the tribunal office on 14 February 2017. Regrettably, the claim form was not served until 17 January 2017, owing to an administrative error, for which an apology was made to the claimant. There was a claim against the dismissing officer personally; but that was dismissed by me upon withdrawal by the claimant today. In essence the claims arise out of the claimant's dismissal and his assertion that the process was tainted by his ethnicity which he described as "Black African". There are no time points arising.

The background and issues

3. The claimant was born on 14 August 1956 and is now 60 years of age. He commenced work for the respondent on 12 September 2011 and the effective date of termination of his contract of employment was on 10 June 2016. The claimant was employed as an escort. It was his job to assist the driver during the transportation of children from home to school and collecting them from school and returning them home. He worked 15 hours a week and was paid £500 per month before tax, and took home £348. He was in the respondent's pension scheme. Whilst working for the respondent the claimant had a full-time night job working 37 hours per week as a security guard. He has been looking for work to replace that which he did for the respondent, but has been unsuccessful so far. The short chronology is that the claimant was suspended from work on 18 June 2015 following an allegation that the claimant's conduct was inappropriate for an employee working with children. An allegation was made by a female student that the claimant had behaved in a sexual way towards her and in an inappropriate manner towards some of the students on the bus. A police enquiry took place which lasted some 10 months but in the end the allegations were not pursued. Once the outcome of the police investigation was concluded the respondent commenced its disciplinary investigation. A disciplinary hearing was convened on 9 June 2016 and it concluded the following day when the claimant was summarily dismissed for gross misconduct. The claimant appealed against the decision and this was held on 9 September 2016 before a panel of the respondent's councillors; but the claimant was unsuccessful. I discussed with the parties whether I should make an order so that the identity of the student was not revealed in the proceedings. However, they indicated it was unnecessary

because the student has not been named, and would not be named in any of the documents and witness statements produced to the tribunal. Furthermore, the student is not being called to give evidence. I now record that the issues between the parties which will fall to be determined by the Tribunal are as follows:

4. **Unfair dismissal claim**

- 4.1. What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.
- 4.2. Did the respondent hold that belief in the claimant's misconduct on reasonable grounds? The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:
 - 4.2.1. The investigation was wholly inadequate and biased; and the HR Officer Lesley Hunter was not impartial.
 - 4.2.2. The investigation process was further flawed because it was based on the credibility of Jane Humphries.
 - 4.2.3. The investigating officer Julie Buchonko did not carry out an adequate investigation. In particular, evidence in support of the claimant's case was not considered by the investigating officer.
 - 4.2.4. HR failed to provide a correct transcript from an interview with Jane Humphries and this caused confusion in the disciplinary and appeal processes.
 - 4.2.5. The dismissing officer Mr Walster referred to an expired and unrelated verbal warning; and at the outset of the disciplinary hearing adopted a tone that suggested there was a foregone conclusion of the claimant's guilt.
 - 4.2.6. The investigation did not follow the disciplinary procedure and process.
 - 4.2.7. Findings of fact were made in the disciplinary process which were not put to the claimant.
 - 4.2.8. The dismissing officer took matters into account which were not subject to the investigation.
 - 4.2.9. The claimant's grounds of appeal were not reasonably considered in the appeal.
 - 4.2.10. The dismissing officer was racially motivated.
- 4.3. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?
- 4.4. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?

- 4.5. Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

5. Section 13: Direct discrimination because of race

- 5.1. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act 2010, namely the dismissal?
- 5.2. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparator? The claimant relies on the comparator Jane Humphries. She is White British and was on the minibus at the time of the allegation made against the claimant. She was not suspended until about June to September 2016. She was disciplined and given a written warning (although the exact level of this was not known). She was not alleged to have assaulted the student. I took the view that this was not the correct comparator; and that a hypothetical comparator was required. This would be: a White British escort, undertaken the same journey, faced the same allegations as the claimant, was suspended at the same time, went through the same investigation, disciplinary and appeal processes; and who faced a police enquiry which eventually was not pursued to the point of either a caution or a charge. Ms Babalola will consider the position and advise the respondent and the tribunal her views as soon as possible.
- 5.3. 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 protected characteristic of race?
- 5.4. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

6. Remedies

- 6.1. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.
- 6.2. There may fall to be considered reinstatement (which is what the claimant would currently desire as the outcome), re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, and/or the award of interest.

Judicial mediation

7. I raised the possibility of this case being considered for an offer of judicial mediation. I explained how the process operates and provided a note giving a
8. The claimant expressed interest in this matter being dealt with by way of judicial mediation; but the respondent did not.

Other matters

9. 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.
10. I pointed out to the parties the wisdom of settlement (and negotiations which come to nothing not to be mentioned to the Tribunal).
11. I made the following case management orders by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. Disclosure of documents

- 1.1. The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list and copy documents so as to arrive by 4pm on 4 April 2017. This includes, from the claimant, documents relevant to all aspects of any remedy sought.
- 1.2. Documents relevant to remedy include evidence of all attempts to find alternative employment: for example, a job centre record, all adverts applied to, all correspondence in writing or by e-mail with agencies or prospective employers, evidence of all attempts to set up in self-employment, all pay slips from work secured since the dismissal, the terms and conditions of any new employment.
- 1.3. This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.
- 1.4. The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

2. Statement of remedy/schedule of loss

- 2.1. The claimant is ordered to provide to the respondent and to the Tribunal, so as to arrive by 4pm on 21 March 2017, a properly itemised statement of the remedy sought (also called a schedule of loss).

3. Bundle of documents

- 3.1. It is ordered that the respondent has primary responsibility for the creation of the single joint bundle of documents required for the hearing.
- 3.2. To this end, the claimant is ordered to notify the respondent by 4pm on 11 April 2017 of the documents to be included in the bundle at his request. These must be documents to which he intends to refer, either by evidence

in chief or by cross-examining the respondent's witnesses, during the course of the hearing.

- 3.3. The respondent is ordered to provide to the claimant a full, indexed, page numbered bundle to arrive by 4pm on 25 April 2017.
- 3.4. The respondent is ordered to bring sufficient copies (at least five) to the Tribunal for use at the hearing, by 9.30 am on the morning of the hearing.

4. Witness statements

- 4.1. It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.
- 4.2. The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.
- 4.3. The facts must be set out in numbered paragraphs on numbered pages, in chronological order.
- 4.4. If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.
- 4.5. It is ordered that witness statements are exchanged so as to arrive by 4pm on 16 May 2017. The parties shall bring 5 copies of each to the hearing.

5. Other matters

- 5.1. 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. The first draft will be served upon the claimant by 4pm on 23 May 2017. The final version shall be agreed by no later than 4pm on 6 June 2017.
- 5.2. The claimant is ordered to prepare a short, neutral chronology for use at the hearing. The first draft will be served upon the respondent by 4pm on 23 May 2017. The final version shall be agreed by no later than 4pm on 6 June 2017.
- 5.3. The parties shall mutually exchange skeleton arguments by 4pm on 13 June 2017.
- 5.4. The parties shall bring five copies of the documents referred to in the three previous paragraphs to the hearing.

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.

Signed by Employment Judge Dimbylow

On 8 March 2017

Sent to the parties on:

9 March 2017.