Case Number: 2401178/16

EMPLOYMENT TRIBUNALS

Claimant: Mrs R Radford

Respondent: Blackburn with Darwen Borough Council

HELD AT: Manchester **ON:** 4 May 2017

BEFORE: Employment Judge Porter

REPRESENTATION:

Claimant: Mr D Flood of counsel
Respondent: Mr J Holden, solicitor

JUDGMENT ON RECONSIDERATION having been sent to the parties on 9 May 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Written reasons are provided pursuant to the written request of the claimant's representative by letter dated 10 May 2017.

2. For the purpose of these reasons the claimant's former representative is referred to as "Mr B".

Issues to be determined

3. This is an application by the claimant for reconsideration of the decision to strike out the claim of unfair dismissal on the grounds that it has no

reasonable prospect of success. That judgment was made on 28 November 2016 and sent to the parties on 2 December 2016.

Submissions

4. Counsel for the claimant made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

   4.1 the claimant apologises without reservation to the respondent's representative for remarks made by her previous representative, Mr B. It is accepted that Mr B's conduct was vexatious;

   4.2 Mr B failed to plead the claimant's case with any real precision;

   4.3 the claimant was in the worst possible position, put at a significant disadvantage, because she was represented by Mr B, who had been a registered legal representative with experience in employment law;

   4.4 the claimant would have been better to represent herself as a litigant in person, when she would have been assisted by the employment judge in the presentation of her claim;

   4.5 the request for reconsideration is not a criticism of the decision made by the tribunal because the claimant accepts that the decision to strike out her claim was the proper decision at the time. The claimant's case for reconsideration relies solely on her assertion that her claim of unfair dismissal was not presented in its true light by her representative at the time, Mr B;

   4.6 the claimant concedes that the redundancy process arose from a genuine redundancy situation. However, the claimant asserts that against the factual backdrop from 2012 onwards, her exit from the business was inevitable and was only a matter of time. The selection of her for redundancy was not fair;

   4.7 the claimant had suffered some ill-health in the past. In early 2013 she returned to the workplace and worked in the legal department for a short time. She was again off ill in July 2014. Following her return to work the claimant had an increasing feeling that she was out of the loop, no longer part of the strategic thinking, and she raised her concerns with senior managers. The respondent was struggling to find a role for the claimant and she was given a role in transactional services. She found a number of significant problems

relating to payroll and pensions and she made protected disclosures in relation to those problems;

4.8 as a result of those protected disclosures the claimant was marginalised, she became more trouble than she was worth. There was a causal link between the protected disclosures and the manner in which the redundancy was dealt with. This was set out in the list of detriments (page 55) prepared by Mr B;

4.9 the claimant was the only member of the HR department who was effectively put at risk of redundancy;

4.10 the claimant's email dated 15 December 2016 (page 103) sets out her challenge to the fairness of the redundancy procedure, which can be summarised as follows:

4.10.1 the claimant was employed as a trouble-shooter, she was moved from assignment to assignment to sort out problems as and when they arose. She was therefore not easy to slot in to any vacancies following the cut in resources and reduction in posts;

4.10.2 as a trouble-shooter the claimant put other people's noses out of joint;

4.10.3 the claimant was at grade K and there were four grade Js, a lower grade than the claimant, all of whom were HR professionals;

4.10.4 the respondent's policies say that in a restructure a person can apply for the job or new job at their existing grade. If they are unsuccessful the Workforce Management group would give that employee at risk status, giving them priority for any other job for which they make application. Any employee should only apply for a job immediately above or below their grade;

4.10.5 in this case, the restructure went against that policy because the claimant, as a K Grade, was put in the same pool as the 4 grade J's underneath her. Those 4 grade J's did not report directly to the claimant;

4.10.6 the claimant's job was re-designated in such a way that it was decided that the holder of that post had to be MICPD qualified. The claimant did not have that qualification and therefore could not even apply for the new job at her grade.

She was thereby locked out from that post by imposition of new criteria;

4.10.7 The Workforce Management group did not designate the claimant as being at risk;

4.10.8 two of the 4 grade J's did have MICPD qualifications and applied for the post. One was successful and promoted to Grade K;

4.10.9 in the new structure there was that one K Grade and 6 Grade J's. It follows that the Grade J's were never at risk;

4.10.10 One Grade I applied for the post and was successful, even though there were performance issues;

4.10.11 There were three vacancies at the J Grade. People at the H grade successfully applied for the J grade posts. That was contrary to policy;

4.11 the claimant applied for one Grade J post but was not given the job at interview because she was not given the "at risk" status;

4.12 there were a number of material irregularities in the redundancy process. This is not simply a case of errors. This was a deliberate act motivated by the perception that the claimant was a troublemaker because of the protected disclosures she had made and her marginalisation in the years previously;

4.13 in considering an application to strike out the tribunal should adopt a two-stage approach, as confirmed in the cases of **HM Prison Service v Dolby [2003] IRLR 694** and **Hasan v Tesco Stores Ltd UKEAT/0098/16/BA.** The tribunal must consider whether the claim has no reasonable prospect of success and, if so, must decide whether to exercise its discretion to strike out, whether it is appropriate in all the circumstances of the case;

4.14 the claimant was effectively unrepresented throughout, her representative acted in a wholly unreasonable manner, and did not put the claimant's case to the tribunal correctly when opposing the application to strike out. The claimant has no right of action against Mr B as he was not acting for reward. It is in the interests of justice that the claim be reinstated.

5. Solicitor for the respondent made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

    5.1 the claimant is simply seeking a second bite of the cherry, raising the same points which had been raised by Mr B at the earlier hearing;

    5.2 the claimant has raised no new evidence to support her application to set aside the order for strike out;

    5.3 it is not in the interests of justice for the decision to be overturned simply because Mr B was not up to scratch;

    5.4 the respondent did everything it could to get the necessary information from the claimant to clarify the nature of her claim;

    5.5 the arguments remain the same: the claimant was unpopular because she was a trouble-shooter and there followed a grand conspiracy to remove her from employment;

    5.6 this is a straightforward redundancy, with a complicated procedure for at risk employees to find alternative employment;

    5.7 the claimant was made redundant because she failed the interview process for one job and failed to apply for any other roles.

Evidence

6. No evidence was heard.

7. An agreed bundle of documents was presented. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Background

8. The claimant originally claimed unfair dismissal, automatically unfair dismissal under s 103A Employment Rights Act 1996 and detrimental treatment under s47B Employment Rights Act 1996 ("ERA 1996").

9. The claims under s103A and s47B ERA 1996, relating to alleged protected disclosures, were dismissed on withdrawal.

10. The claim for unfair dismissal was pursued and listed for a 4 day hearing.

11. The respondent made application for the claim to be struck out on the grounds that it had no reasonable prospect of success. That application was listed for hearing.

12. From the outset, the claimant was represented by Mr B, a previously qualified solicitor, who describes himself as a specialist employment lawyer with many years experience. Mr B acted for the claimant for no financial reward. He did not have a Practising Certificate when acting for the claimant. In tribunal he described himself as a pro-bono representative.

13. Mr B, at the earlier hearing, in opposing the application to strike out, made a number of submissions, some of which were difficult to follow. EJ Porter asked for clarification on certain points. In essence Mr B asserted that:

    13.1 the claimant was a trouble-shooter, she upset people, ruffled some feathers;

    13.2 as a result certain senior officers in the Council turned against the claimant. As set out in paragraph 8 of the Particulars of Claim, they decided they wanted the claimant to leave the organisation and they used the redundancy situation and the HR Review to achieve that end;

    13.3 a 4 day hearing is required because only by "plodding through the mind-numbing detail" of the way the claimant behaved can the tribunal see how the respondent turned against her;

    13.4 David Fairclough, chair of the interviewing panel, and Mandy Singh, who conducted the HR Review, were the conspirators;

    13.5 The claimant did 80% of the role and should have been slotted in to the role without a competitive interview. The successful candidate was subordinate to the claimant and had performance issues highlighted in 1-1 appraisals conducted by the claimant;

    13.6 The claimant was the only one made redundant. The respondent rigged the process to ensure that only the claimant lost her job.

14. After considering submissions from both representatives the claim was struck out on the grounds that it had no reasonable prospect of success. Reasons were given orally at the hearing. Neither party requested written reasons.

15. By her email dated 15 December 2016 the claimant set out what she described as the facts of her case (page 104), which included the following:

1. The HR service review did not follow the existing HR policies and procedures because:

1.1 Employees were allowed to apply for roles 2 grades above their current Grade i.e. Grade H's were allowed to apply for grade J's. The Council's actual policy is that employees can apply for roles one grade higher or lower;

1.2 Phase 1 was ring fenced to Grade K (me) and 3 Grade J's and all posts were "disestablished" in theory. In reality it was only the grade K post that was disestablished. It was only me who was ever going to be put at risk because there were more grade J posts in the new structure therefore the 3 Grade J employees were always going to retain their Grade J status. Albeit some roles and responsibilities had been realigned.

2. "Ring fencing" the Grade K with the Grade J's was against the Council's policy. The policy that should have been followed was that I should have been interviewed first and if unsuccessful then the Grade J's should have been interviewed for the Grade K post ….

4.1 The only post that I applied for was HR, Payroll and Systems Manager at grade J. In my opinion I should have been slotted into the role because I had been delivering in excess of 60% of the role since January 2015. Under the Council's policy a slot in should have applied. It was not despite my challenge. A clear breach of council policy.

5. I was the only employee to be made redundant from 60 plus staff and a budget in excess of £2 million…..

9. ……(Head of HR) tried to persuade me to apply for the Health, Safety and Well-being manager post at Grade J. I stated that I would have thought the existing Health & Safety manager at grade I would be a front runner in view of his qualifications and experience.

The response was "no way". He was not appointed to the role another grade I colleague was. This in my view, confirms the process was rigged.

10. I was so confident that I would be made redundant that met with the regional TU representatives the week prior to the first HR Service review and stated my views.

11. I challenged the process throughout. So much [so] that in the end I received an e-mail from Regional TU representative saying she could no longer support me [because of] a 'conflict of interests'.

The 'conflict of interest' was because I was challenging why the TU's approved the LJNCC report referred to at the hearing because many aspects of the report and the process was breaching the Council's HR policies.

From a TU perspective I suspect that they would live with one redundancy if it meant the other 60 plus employees were saved.

The Law

15. Rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that a tribunal may, on the application of a party, strike out all or part of a claim on the grounds that it has no reasonable prospect of success.

16. In considering an application to strike out the tribunal should adopt a two-stage approach. The tribunal must consider whether the claim has no reasonable prospect of success and, if so, decide whether to exercise its discretion to strike out, whether it is appropriate in all the circumstances of the case.**HM Prison Service v Dolby [2003] IRLR 694**

17. Rule 70 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that a Tribunal may on the application of a party reconsider any judgment where it is necessary in the interests of justice to do so.

18. The tribunal has considered the authorities referred to in submissions.

Determination of the application

19. Firstly, the tribunal is grateful to the claimant and her counsel for the apology provided for the admittedly inappropriate conduct of Mr B.

20. Secondly, the tribunal accepts the argument that the representation of Mr B did not assist the claimant. The tribunal agrees that in her email dated 15 December 2016 (page 103) the claimant put her case more concisely than Mr B.

21. The tribunal would also agree that Mr B was extremely poor in expressing himself - he clearly found it very difficult to explain the claimant's case.

22. However, the question is whether it is in the interest of justice to revoke the previous decision to strike out the claim. The tribunal has considered whether the claimant's right to a fair hearing was prejudiced by the representation of Mr B.

23. The claimant does not allege that the respondent in any way contributed to the failure of Mr B to argue the claimant's case properly.

24. The tribunal has considered its reasons for the decision to strike out.

25. It is noted, in particular, that at the earlier hearing, Mr B asserted that:

    25.1 the claimant was a troublemaker; she had raised issues of non-compliance by other employees;

    25.2 as a result she became unpopular;

    25.3 for that reason the redundancy exercise was engineered to ensure that she would lose her job;

    25.4 the claimant was the only employee in the HR Review who lost their job.

26. Mr Flood makes the same points more eloquently. In addition, he asserts that the claimant was isolated because of previous ill-health absences and that she was viewed as a troublemaker because she had made protected disclosures.

27. In reaching the decision at the earlier hearing the tribunal took into account all the circumstances including the following:

    27.1 the respondent stated that, as part of the HR review, 8 posts were disestablished, one of the posts being that held by the claimant. The holders of those disestablished posts, including the claimant, were invited and indeed encouraged to apply for the new roles created as part of the HR review, and for any other available job vacancies;

    27.2 to argue that the respondent conducted such a wide sweeping exercise solely to secure the dismissal of the claimant would require the claimant to lead some evidence to show that the persons responsible, Mandy Singh and/or David Fairclough, had reached the decision to remove the claimant from office before that review had taken place.

28. The claimant did not, at the earlier hearing, or today, seek to challenge the statement as set out at paragraph 26.1 above.

29. The claimant did not, at the earlier hearing, or today, raise any specific allegation of unfair treatment of the claimant by Ms Singh or Mr Fairclough prior to the HR review taking place, made no reference to any evidence to support the assertion that the decision to remove the claimant from office had been taken before the HR review/restructure had taken place.

30. At the earlier hearing Mr B, on behalf of the claimant, argued that she had no chance of retaining her employment because, after her post was disestablished:

30.1 The respondent wrongly decided not to allocate her to one post without the need for a competitive interview;

30.2 She was unsuccessful in her application for that post, which was given to a subordinate of hers who had previously been criticised by the claimant for poor performance in a lower grade role;

30.3 one role was wrongly allocated the essential criteria of MICPD, which the respondent knew would exclude the claimant from applying.

31. Again Mr Flood has made similar arguments, more eloquently, today.

32. However, the claimant's argument that she had no chance of securing any alternative post was, at the earlier hearing, and today, severely damaged by the fact that:-

32.1 the claimant was interviewed for one post but was unsuccessful following a panel interview;

32.2 the claimant did not apply for any other post;

32.3 the claimant has not referred to any documentary or other evidence to support her assertions that

32.3.1 she should have been slotted in to one post without the need for competitive interview;

32.3.2 one role was wrongly allocated the essential criteria of MICPD.

33. Although today the claimant does not specifically argue the so called conspiracy theory, it is clear that she calls into question the honesty of several senior members of staff involved in the HR review. She persists with the main argument that the HR review was rigged to secure her removal from office.

34. As noted at the earlier hearing, for the claim of unfair dismissal to be successful there would have to be some findings of fact from which the tribunal could draw the appropriate adverse inference that the respondent had engineered the dismissal of the claimant via the redundancy exercise/HR review, that there had been a pre-determined decision by a number of senior managers to secure the claimant's removal from office.

35. The claimant has today emphasised a number of alleged procedural irregularities in the selection process. However, as indicated at paragraph 4.12 above, these allegations are made to support the main assertion that the HR Review, the restructure/redundancy exercise, was engineered to secure the removal of the claimant.

36. Mr B raised, less eloquently, broadly similar allegations of procedural irregularities – for example, that the claimant should have been allocated the post without competitive interview. However, neither Mr B, nor Mr Flood, have referred to any documentary evidence to support the allegations of procedural irregularity and, in particular, the assertions that:

    36.1 the HR review was contrary to policy, or an agreed redundancy procedure;

    36.2 the respondent had an established policy which would give the claimant the right to be "slotted in" to the post without competitive interview;

    36.3 the HR review procedure breached established policy whereby any employee could only apply for a job immediately above or below their grade

37. Neither Mr B nor Mr Flood has drawn the tribunal's attention to any such document. No application has been made for disclosure of any specific document to support this application for reconsideration.

38. Neither Mr B not Mr Flood has drawn the tribunal's attention to any other relevant evidence to support the assertion that this restructure exercise, the HR Review which led to the claimant's dismissal, was contrary to established policy, and/or that the restructure exercise countered any pre-existing redundancy policy agreed with the Unions, and/or was a breach of any agreement reached with the Unions or the workforce. To the contrary, the claimant's email dated 15 December 2016 indicates that the restructure exercise, the HR review, was agreed by the claimant's trade union.

39. The claimant has again indicated that it would be necessary to conduct a close examination of all the documentary evidence at a full hearing, to elicit the real reason for the dismissal. The claimant has, at the earlier hearing and today, failed to draw the tribunal's attention to any documentary evidence to demonstrate how such a close examination could support the claimant's assertions.

40. .In all the circumstances the tribunal agrees with Mr Forbes that it is not in the interests of justice to revoke the earlier decision. No new evidence has been presented, the claim has been put more precisely and more eloquently. However, in essence the claim is still the same, the arguments essentially the same. The claimant's right to a fair hearing was not prejudiced by the poor representation and unreasonable conduct of Mr. B.

41. In any event, having considered Mr Flood's submissions, the tribunal concludes that:

41.1 the argument that the entire reorganisation, the HR review, was engineered to remove the claimant from office because she was seen as a trouble maker, was unpopular, ruffled feathers, remains without merit. It is simply not credible that the respondent would go to such lengths, involve so many people, with the amount of management time and cost arising from the exercise, simply to target the claimant. It is noted in particular that there is no assertion of any other unfair treatment of the claimant, of any threat to the claimant's employment, no example of any disciplinary action taken against the claimant, prior to this HR review and restructure taking place;

41.2 the tribunal has not been referred to any evidence to support the assertion that there were procedural irregularities, that the reorganisation, the HR review, was in breach of the respondent's policies, in particular, the assertion that the claimant should have been slotted in to the vacancy without competitive interview;

41.3 the claim of unfair dismissal has no reasonable prospect of success;

41.4 it is appropriate in all the circumstances of the case to strike out the claim. The claimant has had ample opportunity to put forward the merits of her case. She has failed to do so. It is not appropriate, not in the interests of justice, to allow this claim to proceed to a 4 day hearing in the claimant's hope that a detailed examination of the documentary evidence may provide support for her assertion that she was unfairly selected for redundancy.

42. In all the circumstances the tribunal refuses the application and confirms the earlier decision to strike out the claim

Employment Judge Porter
Date: 20 June 2017

JUDGMENT SENT TO THE PARTIES ON
6 July 2017

FOR THE TRIBUNAL