THE EMPLOYMENT TRIBUNALS

Claimant Ms Ann Murray

Respondent Ms Penelope Woodhead

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at Middlesbrough ON 29th August 2017
EMPLOYMENT JUDGE GARNON
Appearances
For the claimant Mr N McDermott - Consultant
For the respondent Mr I Woodhead - Husband

JUDGMENT ON RECONSIDERATION

Under rule 70 of the Employment Tribunal Rules of Procedure 2013, I confirm the Rule 21 Judgment of Employment Judge Shepherd sent to the parties on 28th June 2017. The respondent will be entitled to participate in a hearing only on the question of remedy. The parties must, by 11th September 2017, send unavailable dates in October/November 2017 for a one day remedy hearing to the Tribunal.

REASONS

1. Introduction and Issues

1.1. The claimant was born on 26th August 1961. Her continuous employment as a personal carer to the respondent started on 1st November 2009. She worked 45 hours per week latterly paid £324 per week which is the National Minimum Wage.

1.2. The respondent has Multiple Sclerosis (MS). She has full mental capacity and is helped by her husband, Ian, in dealing with her financial and other affairs. The Local Authority has statutory duties as to the care of vulnerable people in its area. A commonplace arrangement many Authorities use is to provide funding for carers by paying money to the person in need of care who then becomes the legal employer of the carer. I have even seen cases in other Authorities where the person in need lacks the mental capacity to enter into contracts at all. Such people are "cast in the role" of employer when they unaware of the duties the law imposes on them. They usually, however, can ask a social worker for advice on how to deal with employment issues.

1.3. The claimant's pleaded case is that on about 1st or 2nd December she was asked to pick up the respondent's grandson from nursery on 7th December to enable his mother and the rest of the family to attend the funeral of a close relative. She initially agreed but changed her mind and so told the respondent on 5th December. On 6th December the respondent's husband, in his wife's presence, said the claimant had let them down. He said to the claimant

"*nice to have known you Ann, nice to have had you working for us*". When the claimant asked what he meant he replied "*Just leave now*". The respondent did not dissociate herself from her husband's words.

1.4. The claimant contacted the social worker responsible, who told her to go back to work on 8th December, the day after the funeral. She did and was met by Mr Woodhead who said "*I thought we had parted company, so please leave*", and closed the door. The claimant contacted the social worker again. That person responded later that Mr Woodhead would be in touch with her to arrange for her to return to work.

1.5. On 9th December the claimant received a call on her mobile from Mr Woodhead. At the time the claimant was out with her sister. He asked if she would like to return, she said she would and asked when. He replied "Now" and said he was recording the conversation. The claimant did not feel able to return. She "resigned" on 22nd January 2017, commenced Early Conciliation (EC) on 1st March, received an EC Certificate on 15th April, and presented her claim on 5th May 2017.

1.6. Secton 95 of the Employment Rights Act 1996 (the Act) includes:
(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—
(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

1.7. Martin –v- MBS Fastenings held, whatever the respective words and actions of the employer and employee at the time, the question remains, "Who really terminated the contract?" If the respondent's words and conduct show she, via her husband, did, that will be dismissal under 95(1)(a). On the above facts the claimant was in my judgment actually dismissed on 6thor 8th December 2015 with no notice. The claimant's alternative would be to say s. 95 (1) (c) applied, which is an equally strong argument.

1.8. The claim was served on 8th May. A response was due by 5th June. The case was listed for a one day full hearing on 29th August and directions were given. The claimant's representative applied on 9th May to vary the dates and copied his application by first class post to the respondent. On 18th May Mr Woodhead telephoned the Tribunal saying ACAS had been in touch with him until when he knew nothing about the case. I cannot accept ACAS did not make contact during the extended EC period. The service address was correct. Even if the service documents went astray in the post, Mr McDermott's letter should have arrived. The Tribunal clerk said she would send the papers again by e-mail. He replied he does not have a computer. They were sent by first class post on 19th May. The claimant still had over two weeks in which to respond. By 26th June no response or further communication having been received Employment Judge (EJ) Shepherd issued a Rule 21 judgment on liability only , converted the hearing to a remedy hearing and informed the respondent she could partake on remedy only . The judgment was sent to the parties on 28th June.

1.9. On 13th July, the claimant submitted her schedule of loss. The basic award is correctly calculated at £3402. Her loss of statutory rights claim at £300 is realistic. However, she claims 52 weeks loss of earnings up to and beyond the date of hearing.

1.10. On 19th July Mr Woodhead wrote to the Tribunal saying his e-mails to his legal expenses insurer were "misdirected". I accept Mr Woodhead is not very computer orientated, neither am I, but any prudent person would check to see if the insurer had safely received what it needed in good time. The insurer later refused cover because the response was out of time. When Mr Woodhead asked his wife to be allowed to defend, EJ Buchanan directed a letter be sent which fully explained the options, emphasised the urgency and urged the respondent to take advice. This was sent on 3rd August.

1.11. On 16th August Mr Woodhead telephoned the Tribunal complaining no ET3 form was enclosed with the letter, he had no access to the internet and was going on holiday until 27th August. On 21st August an ET3 was received at the Tribunal saying the claimant resigned and the respondent wished to defend the claim. Although it disputes the tone of the words used, the response is not significantly different from the claimant's pleaded case as to the events of 6th 8th or 9th December.

1.12. The respondent applied for a reconsideration of a judgment on liability only. I was appointed by Regional Employment Judge Reed to deal with that in the absence of EJ Shepherd. If I refused it, I would then deal with remedy .On the last working day before the hearing the claimant applied for a postponement. She, for a very sound reason, could not attend today. I held a telephone hearing with the parties and agreed her attendance was not necessary for the reconsideration part of the today's hearing, but would be for the remedy hearing. It was agreed only the reconsideration would proceed. The issue is whether the judgment should be confirmed, varied or revoked.

2. Relevant Law and Conclusions

2.1. Under Rule 71 an application for reconsideration has to be made within 14 days of the date upon which the reasoned judgment was sent to the parties. The first contact from the respondent was well after that.

2.2. The only ground for a reconsideration is whether one is necessary in the interests of justice. Quite apart from having no basis on which to extend time for making the application, it is not in the interests of justice to allow a party who has no reasonable excuse for not presenting a response in time to do so late. Nothing Mr Woodhead says comes close to explaining why he did not simply follow the instructions which accompany service of a claim. Contacting an insurer and assuming they would deal with everything was not enough, in my view. Even when he contacted the Tribunal and was given advice he did not follow it promptly, or in some respects at all.

2.3. In any event, I see no arguable defence on liability**.** Section 98 the Act provides:
"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
(a) the reason (or if more than one the principal reason) for dismissal
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it relates to.. the conduct of the employee."

2.4. Thomson-v-Alloa Motor Company held a reason relates to conduct if, whether the conduct is inside or outwith the course of employment, it impacts in some way on the employer/employee relationship. It is hard to see how the claimant refusing to do a favour, outside the scope of her employment, impacts on the employment relationship.

2.5. Assuming the respondent can rely on conduct, as to fairness, section 98(4) says:
"Where an employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
(a) depends on whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee
(b) shall be determined in accordance with equity and the substantial merits of the case."

2.6. In Polkey v AE Dayton Lord Bridge of Harwich said:
..an employer having prima facia grounds to dismiss .. will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus; …in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or an explanation or mitigation; …

No such procedure was followed at all. Lord Bridge continued:
If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Industrial Tribunal is not permitted to ask in applying the test of reasonableness proposed by section 98(4) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section 98(4) this question is simply irrelevant. …… but if the likely effect of the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation as Browne-Wilkinson J puts it in Sillifant's case

"There is no need for an "all or nothing" decision. If the.. Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment".

Remedy
2.7. Under the Act, a Tribunal must explain to the claimant the power to order the respondent to re-instate her in her old job or re-engage her in a similar one. These powers are explained in s 113 to 117. She does not request either.

2.8. There are two elements to compensation: the basic award which is an arithmetic calculation set out in s 122, and the compensatory award explained in s 123 which as far as relevant says:

(1) … the amount of the compensatory award shall be **such amount as the tribunal considers just and equitable in all the circumstances** having regard to the loss sustained

by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales..

(6) Where a tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant , it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding .

2.9. Section 123(6) as explained in Nelson-v-BBC empowers a Tribunal to reduce a compensatory award if the conduct of the claimant caused or contributed to the dismissal. Section 122(2) empowers a Tribunal to reduce the basic award on account of the conduct of the claimant before the dismissal, if it thinks it just and equitable to do so.

2.10. Although decided under the 2004 Rules, DH Travel Ltd -v-Foster held the respondent who has not entered a response is entitled to be heard on remedy. I must emphasise, as the Employment Appeal Tribunal did in DH Travel, this is not an opportunity to run arguments about the fairness of the dismissal. However, as for the remedy claimed, the respondent may challenge mitigation of loss even by saying the dismissal was in the heat of the moment, the claimant unreasonably refused an offer to return so it is not just and equitable she should be compensated. The respondent may argue she should have found another job and even argue contributory conduct. I cannot advise if and how any of these arguments should be run. However, I have no difficulty in concluding that although a defence on liability would be hopeless, arguments on remedy are not.

EMPLOYMENT JUDGE GARNON
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
29th August 2017

SENT TO THE PARTIES ON
5 September 2017

P Trewick
FOR THE TRIBUNAL