EMPLOYMENT TRIBUNALS

Claimant: Miss H Jones

Respondent: British Telecommunications PLC

Heard at: Manchester **On:** 16 March 2018

Before: Employment Judge Holmes

REPRESENTATION:

Claimant: In person (assisted by her father)
Respondent: Mr Ward, Solicitor

JUDGMENT ON PRELIMINARY HEARING

It is the judgment of the Tribunal that the Tribunal has no jurisdiction to entertain the claim that the claimant seeks to advance by way of reinstatement in a claim form forwarded to the Tribunal on 15 January 2018 , as the claims she seeks to make have already been determined by the Tribunal , and constitute res judicata.

REASONS

1. The Tribunal this morning has been considering whether it can accept, by way of reinstatement a claim which the claimant seeks to present to the Tribunal and did so in a claim form sent to the Tribunal on or about 15 January 2018. The claimant has appeared in person and has been assisted by her father, and Mr Ward, a solicitor, has appeared on behalf of the respondent. The Tribunal has been provided with a file of documents from the respondent which sets out some of the relevant documentation, and previously the claimant had supplied to the Tribunal a bundle of documents of her own dated 12 February which was received on 14 February 2018 and which has also been considered. Additionally the Tribunal has the documentation which was sent to it by the claimant when the claim was first begun and indeed some further email correspondence from her. No evidence has been taken, and indeed did not need to be taken, and the parties have made their submissions to the Employment Judge which have been considered and this ruling is now given upon them.

2. The claims that the claimant seeks to make are set out initially in what has been termed the “new claim form” i.e. the most recent, and that is the one received

on or about 15 January 2018. In that the claimant has ticked two boxes: one for unfair dismissal and one for disability discrimination, and in the details of the claim at section 8.2 she has said this:

> *"Please could my appeal made on 4 February 2014 for unfair dismissal be reinstated for the following reasons:*
>
> *(1) I was unable to afford legal representation and application fee as stated in a letter from the Central Employment Tribunal dated 24 November 2017 but because of Supreme Court decision can now apply for claim to be reinstated.*
>
> *(2) Tribunal Judge Buzzard said that I was not allowed to appeal as no application fee had been paid.*
>
> *(3) My appeal submitted to Judge Buzzard included many points including statutory law, rule of assertion, section 104 Employment Rights Act and discrimination in relation to disability etc.*
>
> *(4) My claim was made in good faith.*
>
> *(5) I was dismissed partway through Tribunal hearing for issues that the Tribunal were dealing with.*
>
> *(6) The claim has had and continues to have a major impact on my finances and health and career."*

3. That ,in essence, is the content of section 8.2 in the "new" claim form, and as indeed is clear from that claim form , it is a reference to the fact that the claimant had previously brought a claim against the respondent, her former employer, under Tribunal case number 2412155/2012 .

4. The relevant history of the matter is as follows. The claimant brought that claim whilst still employed by the respondent, and that claim form was presented to the Tribunal on 30 August 2012. In it, (which is before the Tribunal , fortunately) the claimant claimed disability discrimination, and only that , at that time because she remained employed by the respondent. That claim proceeded and indeed was heard initially by a full Tribunal presided over by Employment Judge Buzzard and two lay members on 12 August 2013. The claims could not be heard fully that day and the Tribunal therefore had to adjourn , what is called "part heard". There then seems to have been some delay in getting the matter relisted, perhaps because of the non availability of one of the respondent's witnesses, but whatever the reason the resumed hearing could not be held until 8 and 9 May 2014.

5. In the meantime, however, on either 29 or 30 November 2013, the date seems to differ but does not greatly matter which, the claimant was actually dismissed by the respondent. This, of course, was during the course of her existing Tribunal claim.

6. What appears to have happened thereafter, although this Tribunal has not seen the relevant claim form, is that on or about 4 February 2014 the claimant presented a claim to the Tribunal in which she complained of that dismissal alleging that her dismissal at that time and in those circumstances was unfair. Somewhat

handicapped by the absence of a copy of that claim form, the Tribunal no longer having a copy of it and indeed the claimant not being able to present a copy of the claim form at that time to this Tribunal, the claimant has confirmed that in that claim form she sought to bring a further claim of unfair dismissal arising out of her dismissal at the end of November 2013.

7. At that time because of the fee regime that was then in place, which has subsequently been declared unlawful by the Supreme Court in the judgment in ***Unison v The Lord Chancellor's Department***, a fee of £250 was payable upon issue of that claim form. The claimant was therefore required either to pay that sum or to successfully obtain remission from the requirement to pay it. She did neither and consequently , on a date which is unclear , but is clearly before May 2014, probably around about 19 February 2014 (but again the claimant has been unable to present the Tribunal with the documents in which she was informed of this), clearly around about that time , as one would expect under that regime, by reason of the non payment of fee , and non application, or successful application, for remission, the subsequent claim form presented on or about 4 February 2014 was rejected.

8. Consequently, at that time the claimant would not have been able to pursue that claim. However, because the original proceedings had been adjourned part heard , and in circumstances which are not totally clear from the judgment that eventually was promulgated by the Tribunal, by the time the claims were resumed on 8 and 9 May 2014 , the further claim of unfair dismissal that the claimant had wished to make by way of a separate claim form in February 2014, was in fact included amongst the claims that the Tribunal then considered. That is clear from the judgment of the Tribunal which is before this Tribunal, the first paragraph of which actually deals with her unfair dismissal claim , which was dismissed as not being well-founded. It is clear from the very first sentence of that judgment that the claim of unfair dismissal was considered, and indeed when one looks at paragraphs 2 and 3 of the judgment , it is clear that these matters were before the Tribunal.

9. The claimant, of course, was, as she is today unrepresented, and is not legally qualified, and the Tribunal dealing with the original claim took that into account, as indeed has this Tribunal. But it is clear from paragraphs 2 and 3 of the judgment of the Tribunal that , not only that the Tribunal did consider the claimant's claim of unfair dismissal in the determination of the claims before it in May 2014, but perhaps went even wider , in that, given that the claimant was unrepresented and she had made a number of claims under the Equality Act 2010, with which she may not have been familiar , the Tribunal, said this at the end of paragraph 2 of its judgment:

"given her continued and consistent claims the Tribunal have considered the claims in the way in which they were pleaded, pursued at the hearing and addressed in submissions"

which this Tribunal takes to be an indication that the Tribunal did not limit the claimant to what she had actually set out in her claim form ,or her documents , but had basically considered all claims that she either made or indeed could have made on the facts that she alleged before the Tribunal.

10. It is certainly right that , in terms of the evidence before the Tribunal on that occasion , the evidence of the dismissing officer was heard, that being Sonia Kelly,

and the Tribunal in its findings on unfair dismissal went through in some detail the potential issues in relation to the fairness of that dismissal. So in terms of whether that claim was before the Tribunal and was determined, it is crystal clear that the Tribunal on that occasion did indeed have that claim in front of it , and did indeed determine it after a full hearing. The likely route by which that was achieved was probably, technically , an amendment, and it is perhaps unfortunate that the Tribunal's judgment does not record that as such, but that perhaps is academic. What matters is whether the claim was before the Tribunal and the respondents clearly were content to deal with that claim in that hearing, and there was no issue taken as to whether the claimant could include that claim.

11. The claimant was therefore perhaps in a slightly better position than a person who only had one particular claim in February 2014 , and did not have any ongoing Tribunal claims to which an unfair dismissal could then be added by way of amendment. Had that been the case, and had that been her only claim then there would not then have been a determination of those claims because they would not have been heard, but it was fortunate from that point of view that the Tribunal was also seized of the disability discrimination claims , and , not unnaturally, because it is very common that amendments do include matters that have arisen since the original claim was made are granted, that the Tribunal then included the unfair dismissal claim.

12. The judgment of the Tribunal was in fact reserved , and was subsequently sent to the parties on 27 August 2014. Following the judgment the claimant sent an email on 11 September 2014, a letter dated 8 September actually but sent on 11 September 2014, in which made various comments upon the judgment. That is a fairly lengthy letter. The opening paragraph says this:

> *"I the claimant am an ordinary working class person of no legal training of background. I do fully appreciate that the Tribunal has allowed me to state my case. I may not have presented the case as well as anticipated due to my immune deficit flu like symptoms or simply being nervous on the two day hearing on 8 and 9 May 2014 to which I appreciate the Tribunal gave recognition."*

13. That is something that was mentioned by the claimant's father in terms of how she dealt with the hearing in May 2014, and the degree to which she was able to do so given her health issues.

14. The claimant makes that point, but thereafter she goes through the Tribunal's judgment, the full reasons having been sent to the parties by them, and makes various comments upon the findings that the Tribunal has made in relation to he disability discrimination claims , and also in relation to her unfair dismissal claims. She refers to the fact on page 4 of that seven page letter that there is a finding of unfair dismissal; she has a heading that says "harassment and victimisation equals unfair dismissal", and on page 5 of that document there is reference again to something that has been mentioned by the claimant's father today, about an injury being caused by a ball being thrown at the claimant. The claimant at the bottom of page 5 refers to the unfair dismissal and that incident and the degree to which the Tribunal did or did not take it into account in assessing the fairness of her dismissal.

15. At the conclusion of this letter on page of it (page 44 of this bundle) the claimant says the following:

> *"Judgment – it is in the interests of the law to protect the claimant forthcoming environment and also to prevent any further intrigue. The claimant does have a right to know who is responsible for writing this document especially when the respondent relies upon the document or would use this in appeal".*

That is reference to a particular document, but then she carries on this way:

> *"I amicably agree at this point to disagree with some of the judgments and do not wish to pursue an appeal as I feel I do not have enough emotional energy, financial investment or indeed legal knowledge to continue any further with such legality. If the respondent insists then the claimant can offer further witness statements and will be happy to provide bona fide medical opinion to the chamber.*
>
> *Due to the respondent's conduct I have lost so much including my job/livelihood that it will continue to have a negative impact on my future. It would be so difficult for me to put a price or a cap on my losses but I ask the Tribunal to do so as I originally stated in the ET1."*

16. The claimant then sets out four different headings:

> *(1) PCP – the claimant does not intend to pursue an appeal;*
>
> *(2) Harassment – the claimant does not intend to pursue an appeal;*
>
> *(3) Victimisation – the claimant accepts the judgment in her favour, it being the case of course that the Tribunal did find that one of her complaints of victimisation was made out; and finally*
>
> *(4) Unfair dismissal – the claimant does not intend to pursue an appeal.*

17. The Tribunal in those circumstances wrote back to the claimant asking her by a letter of 2 October (page 48 of the bundle) to clarify what her letter of 11 September meant because, as the Tribunal pointed out, the letter attached to the email did not appear to apply for anything specific or request any action to be taken in relation to the claim. It was pointed out, as had by then happened, that the matter was listed for a remedy hearing on 28 November , in relation to the victimisation claim. The claimant was invited, if she was intending to make an application, to confirm this in writing to the Tribunal within 14 days.

18. The claimant's response to that was to provide a document to the Tribunal which was in the form of a witness statement dated 19 October 2014 which starts at page 50 of this bundle. That is a lengthy document which sets out a lot of matters in relation to the claims that the claimant had made in relation to the disability discrimination, her health issues, mental health issues, and a lot of issues in relation to what might be termed "the merits of the case". She does, at paragraph 73 onwards (page 55 of the bundle) raise matters that again she has raised today about the conduct of the hearing, the listing of it on 12 August 2013, it going part heard and the various events that occurred in the course of the hearing, and it is right that she had repeated those today, particularly in relation to what was said about whether or

not the claimant could make any application under any payment of fees. At the end of this section of her witness statement the claimant says this at paragraph 92:

> *"I do not intend to challenge the Tribunal on the decisions made in the reserved judgment but this does not mean that I give up my right to have an opinion. With that I do/will refer in summary to the principle often used in trade union disputes, assertion of statutory rights (section 104 ERA 1996) in relation to the topic of capability of unfair dismissal."*

At paragraph 95 she says this:

> *"Although I disagree and I am not happy with some of the Tribunal decisions I have stated in the letter dated 11 September 2014 my reasons for not wanting to challenge the Tribunal decision or pursuing further legal proceedings in relation to the reserved judgment."*

19. The claimant went on to say that she was happy to accept the victimisation that the Tribunal had found ,and then sought , in relation to remedy , that the Tribunal take into account various matters that she had suffered.

20. There was then a remedy hearing before the Tribunal on 28 November 2014 and it may be that at that hearing it perhaps was that the claimant claims that she sought to make an application for reconsideration, and it was at that hearing perhaps rather than the previous one , at which there was some discussion, she alleges, as to whether she could do so, she not having paid any fee, which would of course be right at the time, and had she sought to make an application on notice in writing before then, then she may well have been required to do so, but she accepted that the application that she sought to make was made at the hearing and in those circumstances she would not have paid a fee and indeed would not have been required to do so. In terms of what actually happened at that stage, the Tribunal has no further information , but accepts for these purposes what the claimant says happened.

21. Thereafter the Tribunal made an award in respect of the victimisation that had been found and there was then further communication to the Tribunal. That is dated 18 December and appears to be that which is perhaps erroneously referred to in the Tribunal's reply as being on 19 December, but in any event on 18 December at page 64 and 65 of this bundle the claimant does say that she had told the respondent she was not willing to accept the award. She had returned a cheque that they had sent in settlement of it. She does refer to being told she had 14 days in which to request the Tribunal reconsider the award, and she did say in an email on 18 December that she intended to take the matter further.

22. Consequently, whilst the letter refers to correspondence of 19 December and there may be something else, but basically whatever it was, it was referred to Employment Judge Buzzard and the Tribunal sent a reply dated 28 January 2015 in which it was clear that the correspondence that had been received was treated as an application for reconsideration, whether it was or was not, whether a fee was paid or payable or not, it was nonetheless treated that way, and the determination was that as it had no reasonable prospect of success . The Employment Judge dismissed that application at that stage, he being entitled to do so without a further hearing, and that is where matters lay.

23. They so lay until , out of the blue, as it was put, as indeed it would have been, the claimant , in common with many other claimants in these similar circumstances, received a letter from the Employment Tribunal Central Office in Leicester dated 24 November 2017 referring to the judgment of the Supreme Court in the ***Unison*** case on 26 July 2017, pointing out that records showed that the claimant had had a Tribunal claim rejected because she had not paid fees or obtained remission, and therefore inviting her to make an application for reinstatement. Having been so invited the claimant , not unnaturally did so, and her application was sent in on 5 December 2017 , and the claim form, which in fact in effect is a substitute for the original claim form of February 2014, was sent to the Tribunal on 15 January 2018.

24. That is how this Tribunal today comes to deal with the matter, and it does so because the respondents in their response to this, which has been given a new claim number but which is in effect an application to reinstate a previous claim which never got as far as getting a claim number, take the Tribunal through the history of the previous claim, the 2012 claim, and assert , in essence , that the Tribunal cannot accept this claim as a reinstated claim because the matters that it seeks to raise have been determined already by the Tribunal. That therefore is said to constitute a breach of the principle of finality in mitigation. In Latin it is called *res judicata*. It is also sometimes referred to as the rule in ***Henderson v Henderson*** which the claimant herself did refer to in her email to the Tribunal of 1 March 2018, so she clearly has some awareness of it, and indeed one notes from her submissions in other documents that she does quote caselaw, and things of that nature and has clearly been able to do some research on some fairly complicated issues that have arisen in the course of her claims. The claimant is not a lawyer, of course, and we do not expect in those circumstances familiarity with all these issues, but she clearly in her email of 1 March says that she is aware of that principle. What the claimant says in that email is that she is aware of that principle , and she does not deny the claim has already been heard , and she has requested “an appeal”, but she goes on to say that this “appeal”, as she put it, was denied at the remedy hearing due to non payment of the application fee. She goes on to say that the “appeal” may now be heard , according to the change in the law because of the ***Unison*** decision in the Supreme Court.

Discussion and ruling.

25. The Tribunal today has firstly to consider what exactly it is that it is being asked to do and what is before it. From the claimant's email of 1 March it may have been thought that what the claimant was seeking to do was to reinstate an application for reconsideration that had been refused by reason of non payment of the application fee, and given that a hearing fee was applicable to applications for reconsideration as well , it is perfectly feasible that that may have happened. But it is clear from an examination of the history of this matter, and in particular the information form the Leicester Central Processing Unit, that the only fee the claimant has ever been asked for , and did not pay was the £250 issue fee in February 2014. That, of course, cannot have been in respect of any reconsideration, not least of all because the judgment in the 2012 case had not been made at that time, it was some three months before that judgment actually came out. So the only requirement for a fee to be paid in February 2014, as indeed the amount of the fee confirms, must have been in respect of a claim, and the claimant has confirmed that she did indeed seek to make a claim , and that claim was of unfair dismissal. So the Tribunal today is not concerned with the dismissal of an application for reconsideration of the

Employment Tribunal's judgment in 2014; it is concerned with an application to reinstate a claim that the claimant sought to make in February 2014, that claim being a complaint of unfair dismissal.

26. It is clear in these circumstances that that claim of unfair dismissal nonetheless, and fortuitously perhaps for the claimant in these circumstances, went on to be heard. It was heard in the context of her 2012 claim. It was permitted to be heard and evidence was called from both sides in relation to it in the Tribunal hearing on 8 and 9 May 2014, and it was determined. Clearly in those circumstances if this reinstatement is permitted this would permit the claimant to seek to re-litigate and reopen that which has already been determined by the Tribunal in relation to her unfair dismissal claims. The rule is very clear. The effect of a judgment of an Employment Tribunal is binding between the parties to prevent them from litigating the same issues over again in any future legal proceedings. That is known as the legal doctrine of *res judicata*. It is a doctrine that applies not only where , in cases such as this, there has been an actual determination after a full hearing, but even applies in cases where there has not been a full hearing, but, for example, a claim has been struck out. This is an even stronger case of *res judicata,* however, because the Tribunal actually heard the claims at the time and ruled upon them, so there is no doubt in this Tribunal's mind but that to allow the reinstated case to go forward would be to require it to seek to re-litigate the very same matters that the Tribunal's judgment previously determined, unfortunately against the claimant. So on that basis the doctrine of *res judicata* would apply and consequently it would not be a correct use of procedure, it would an abuse of process in fact to allow the claim to be reinstated for this purpose.

27. To the extent that the claimant had issues in relation to the hearing in 2013 and 2014, and may have sought, or may still seek, reconsideration of any parts of the judgment at that stage, that is a matter that cannot be dealt with in this application. That is a matter for an application for reconsideration which the claimant at the time expressly did not make but which, if she wishes to pursue, she may seek to do so , although obviously it would be considerably out of time, but that is the only avenue for her if she wishes to revisit the findings of the Employment Tribunal in May 2014 i. This Tribunal cannot allow her to do so by effectively reinstating a claim of unfair dismissal that has already in fact been determined by the Tribunal and which this Tribunal therefore has no jurisdiction to entertain.

28. This new claim form must therefore be dismissed.

Postscript.

29. Following this judgment, the Tribunal has received further correspondence from the claimant dated 17March 2018. The Tribunal is unclear what the purpose of this documentation is, and what , if anything , the claimant is seeking from the Tribunal. The claimant has raised with the respondent's solicitor , as she did after the hearing, an enquiry as to the identity of the author of a document referred to in the previous proceedings. That is not a matter for the Tribunal, and in relation to this claim, presented on 15 January 2018, the Tribunal cannot accept it, and will now close its file.

Employment Judge Holmes

Dated : 23 March 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON
4 April 2018

FOR THE TRIBUNAL OFFICE