JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mrs P Saleem**

Respondent: **London Borough of Newham & Others**

Heard at: **East London Hearing Centre**

On: **19 June 2018**

Before: **Employment Judge Russell**

Representation
Claimant: **In Person**
Respondent: **Ms S King (Counsel)**

JUDGMENT

1. The Claimant's application to have the claims re-instated succeeds.

2. The race discrimination claim was presented out of time. It is not just and equitable to extend time.

3. The victimisation claim has no reasonable prospects of success and is struck out.

4. The Respondent's application to strike out the unfair dismissal claim as a fair trial is no longer possible fails. That claim will proceed to a final hearing.

REASONS

1. The Claimant was employed by the Respondent as a primary school teaching assistant from September 2005 until 28 May 2015, when she was summarily dismissed over an alleged safeguarding incident involving a child in her care. The Claimant presented a claim to the Employment Tribunal on 17 October 2014. The unfair dismissal claim was presented in time; the claim form also included complaints of unfair dismissal, race discrimination and/or victimisation.

Application for reinstatement

2. At the time that the claim was presented, there was in place a fees regime for

Tribunal claims. The Claimant did not pay the fee required on issue and was not granted remission. The claim was rejected by the administration and was never heard.

3. 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. 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.**"

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

5. 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.

6. In deciding the re-instatement application today, I took into account the substantial causes of the initial rejection of the claim, the fact that the claim is now out of time and the relative prejudice to the parties. The Claimant presented her claim in time and wished to have the circumstances of her dismissal considered by the Tribunal. That claim was rejected purely for the failure to pay the fees; had it not been for the fees regime, this case would have been dealt with in the ordinary way in 2014. It is appropriate that it be re-instated now that the fees regime has been declared unlawful.

Time Points

7. The complaint of unfair dismissal was presented in time. The claim form also included a complaint of race discrimination. This claim was poorly particularised but essentially relied on seven detriments. Essentially the Claimant's case is that the former Headmistress of the school, Ms Ann Sheppard, targeted her and treated her less favourably because of her race. The decision to dismiss was not taken by Ms Sheppard but by a panel of governors. The reasons for dismissal are the incident with a child and not the circumstances which gave rise to the allegations against Ms Sheppard. They are in my view different subject matter and different decision makers. Today the Claimant confirmed that the last act of discrimination relied upon was in November 2013. In other words, approximately a year before the claim was brought.

8. As made clear in **CLFIS (UK) Ltd v Reynolds** [2015] IRLR 562, it is the motivation of the individual who did the act complained of which must be scrutinised. The Claimant does not suggest that there is a continuing act. Even if she did, there is no prima facie evidence of any link between the earlier acts of Ms Sheppard and the later decision of the governors to dismiss. The entirety of the race discrimination claim was presented out of time even in 2014.

9. Where claims have been presented out of time, the Tribunal retains a discretion to extend time in discrimination claims if it considers it just and equitable to do so. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles:

(1) Time limits in employment cases should be observed strictly and an extension is the exception not the rule, see Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576.

(2) The Claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended.

(3) The Tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late, weak claim and less prejudicial for a claimant to be deprived of the same.

(4) This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues.

(5) There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account, British Coal Corporation v Keeble [1977] IRLR 336.

10. Applying those principles to the facts of this case, the Claimant's complaints of race discrimination are made against Ms Sheppard. There is no allegation of race discrimination against the decision makers on the dismissal. Ms Sheppard left the Respondent's employment in August 2014. In a recent email, she has indicated that she is not prepared to attend as a witness at the East London Employment Tribunal. The complaints relied upon by the Claimant are vague and un-particularised and date back to 2009. The Claimant did not raise any contemporaneous grievance about the matters no relied upon as discrimination and, as such, there is no documentary record. The claim would rely entirely upon oral evidence. The passage of time and the reluctance of Ms Sheppard to attend Tribunal means that the Respondent will be significantly prejudiced if an extension of time were granted. The Claimant has given no good reason why she could not and did not present the race discrimination claims in time, for example, in late 2013 when she was not appointed to the post which she sought. Taking all these matters into account therefore, I do not consider it just and equitable to extend time to hear the race discrimination complaint.

Strike Out Applications

11. The Respondent applies to strike out the victimisation claim on grounds that it has

no reasonable prospect of success.

12. An Employment Judge can strike out a claim on the ground that it has no reasonable prospect of success under Employment Tribunal Rules of Procedure 2013 rule 37. The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances, **Teesside Public Transport Company Limited (T/a Travel Dundee) v Riley [2012] CSIH 46** at 30 and **Balls v Downham Market High School & College [2011] IRLR 217 EAT**. In the latter case, Lady Smith said:

> **"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral submissions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect".**

13. In deciding the application, the Claimant's case must be taken at its highest. It is not appropriate or the Tribunal to conduct a mini-trial. A case should not be struck out where there are relevant issues of fact to be determined **A v B [2011] EWCA Civ 1378.** This is particularly the case discrimination claims where there is a public interest in such claims being heard and resolved.

14. Nevertheless, Tribunals should not be deterred from striking out claims including discrimination claims which involve a dispute of fact, if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, **Ahir v British Airways plc** [2017] EWCA Civ 1392.

15. The protected act relied upon by the Claimant is a four-page grievance letter which she submitted on 22 February 2010. I was provided with a copy of the grievance and considered its contents. There was a disagreement between the Claimant and Ms Sheppard which arose out of the Claimant's decision to take her children into the school on an Inset day. The relevant passage relied upon by the Claimant is: "**first she harasses me then expects me not to inform anyone. I would call this bullying and harassment. However people knew I was upset and the children had left the school, so I just spoke the truth because why should I lie***".*

16. At no point in the grievance letter does the Claimant refer to race, discrimination or anything which could properly be construed as asserting a right under the Equality Act 2010. At its highest, the grievance makes only a generic reference to "bullying and harassment". I do not consider that the Claimant has any reasonable prospect of showing that this met the requirements for s.27 of the Equality Act 2010. Taking the Claimant's case at is highest therefore and having proper regard to the alleged protected act, I am satisfied that it is one of those rare and exceptional cases where the claim does have no reasonable prospect of success at all. For those reasons, it is struck out.

17. The Respondent then applied for the remainder of the claim to be struck out under Rule 37(1)(e) as it is no longer possible to have a fair hearing. The overriding objective in

ordinary civil cases, including employment claims, is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to "a fair trial within a reasonable period". This is an entitlement of both parties to litigation. A claim may be struck out on this basis even where, as here, the Claimant is not at fault. The Tribunal must consider the prejudice which has occurred to a party as a result of the passage of time, not just from the requirement of defending a claim. What the court is looking for is something more to do with the case itself, such a memories fading, documents and witnesses going missing. Whilst a Claimant has an Article 6 right to have their claim heard, equally however, allowing a case to proceed when a fair trial is not possible, would be a violation of Article 6 in itself. I had regard to the guidance given by the Court of Appeal in **Riley v Crown Prosecution Service** [2013] IRLR 966 in deciding such an application.

18. Four years have now passed since the Claimant's dismissal. This is a significant period of time and that is a potentially weighty factor in the Respondent's favour. However, I also take into account Ms King's proper concession that the decision makers on the dismissal still available to the Respondent to be called and give evidence. There is a significant bundle of contemporaneous documents generated in connection with the disciplinary process and the dismissal. There is a disciplinary investigation report with several appendices. There are detailed notes of a disciplinary hearing setting out the evidence heard by the panel of governors. There is a detailed decision letter explaining the reasons for dismissal. There is a letter of appeal and again, detailed notes of the appeal hearing before a detailed appeal decision letter which was sent. In other words, there is significant contemporaneous documentary evidence available from which the relevant witnesses may refresh their memory.

19. The Claimant accepts that the panel of governors genuinely believed that she had committed an act of misconduct. Her complaint is that they were misled by an unfair investigation, applied an unduly harsh sanction and failed to take into account her mitigating circumstances and the career ending consequences of dismissal. These are matters which were considered in the original disciplinary process. The Tribunal's role in an unfair dismissal case will be to consider whether or not dismissal was fair, in light of the information available to the Respondent's decision makers at the time. In such circumstances, I do not consider that the Claimant will be able to rely at trial upon matters which were not before the disciplinary or appeal panels.

20. For all of these reasons, I am satisfied that a fair trial of the unfair dismissal claim is still possible and I decline to strike it out. It will be heard by a Judge sitting alone on **17 and 18 October 2018**. The hearing listed on 19 October 2018 is vacated.

CASE MANAGEMENT SUMMARY

21. Having given Judgment on the various applications above, I then agreed the issues which will fall to be determined as follows:

21.1 Did the Respondent have a genuine belief she had committed an act of misconduct. The Claimant concedes that the disciplinary panel did.

21.2 Was that belief reasonable following a reasonable investigation? The

Claimant will say that the investigation was unfair insofar as: (a) it failed to include interviews of two teachers; and/or (b) notes of the interviews and investigation were not complete; and/or (c) it was improperly motivated by bias on the part of Ms Sheppard.

21.3 Was dismissal fair in all the circumstances of the case? The Claimant will say that: (a) it was an unduly harsh sanction; (b) it failed to take properly into account her mitigation and the impact of the decision upon her career; (c) a colleague, "Saji" was treated more leniently in respect of this or similar allegations of misconduct.

21.4 If dismissal was unfair, should any award be reduced for **Polkey** to reflect the chance that the Claimant would have been fairly dismissed in any event?

21.5 If the Claimant was unfairly dismissed, should any award be reduced for contributory conduct?

Other Matters

22. The Claimant must understand that the issues before the Tribunal are limited to those identified above. The Tribunal is not permitted to substitute its view for that of the employer but must consider the range of reasonable responses open to the employer. The Claimant should bear this in mind when considering the way in which she presents her case to the Tribunal. Evidence which is not relevant to the issues may be excluded.

23. The Claimant may wish to consider whether free legal advice may be available from the Citizens Advice Bureau, Law Centre or other local groups to assist her. The Claimant may also find it useful to sit in on another Employment Tribunal case in advance so that she may better understand the process which is likely to be followed in her own case.

24. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at:
www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/

25. The parties are reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal. The parties are also reminded that rule 92 requires them to copy any communication to the Tribunal to all other parties.

26. 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.

27. **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.

28. The following case management orders were made by consent. To the extent that time has passed in producing the written record of the hearing, I have of my own motion extended the time limits for compliance.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure 2013

1. Statement of remedy / schedule of loss

1.1 The Claimant must provide to the Respondent by **24 July 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.

1.2 If any part of the Claimant's claim relates to dismissal and includes a claim for earnings lost because of dismissal, the Schedule of Loss must include the following information: whether the Claimant has obtained alternative employment and if so when and what; how much money the Claimant has earned since dismissal and how it was earned; full details of social security benefits received as a result of dismissal.

2. Documents

2.1 On or before **31 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. They shall send each other a copy of any of these documents if requested to do so.

3. Final hearing bundle

3.1 By **14 August 2018**, the Respondent shall provide to the Claimant a bundle of paginate and indexed documents.

3.2 If the Claimant wishes further documents to be included, she must notify the Respondent by **28 August 2018.**

3.3 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.

- If there is any dispute about the relevance of any document, it should be included behind a separate divider in the trial bundle and the Tribunal hearing the case can decide on their relevance as the documents arise. Attempts to include significant numbers of documents which are not relevant to the issues identified, and/or which are not referred to in the course of the evidence, may be regarded as unreasonable conduct.

4. Witness statements

4.1 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 **19 September 2018.**

4.2 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.

5. Final hearing preparation

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.

5.2 The Respondent is ordered to prepare a short, neutral chronology for use at the hearing.

5.3 These documents should be agreed if possible.

6. Other matters

6.1 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.

6.2 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.

6.3 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.

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.**

1. **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.**

2. **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

10 July 2018