



EMPLOYMENT TRIBUNALS

Claimant
Mr A Jones

and

Respondent
Langland Advertising Design and
Marketing Limited

PRELIMINARY HEARING

Heard at: Reading **On:** 23 November 2018

Before: Employment Judge Vowles (sitting alone)

Appearances:

For the Claimant In person

For the Respondent Mr T Coghlin QC, counsel

PRELIMINARY HEARING JUDGMENT

1. The Claimant's application to reinstate claims of Age Discrimination is refused.
2. The remaining claim for wrongful dismissal will proceed to a full merits hearing and a case management order has been made separately in respect of that claim.
3. Reasons for this decision were given orally at the hearing. Written reasons are attached at the request of the parties.

REASONS

Background

1. This is a preliminary hearing and the issue to be considered is the Claimant's application to reinstate his claim of age discrimination. The background to the case is set out in a chronology which has been agreed between the parties. The main and relevant events in that chronology are as follows.
2. The Claimant was employed by the Respondent from 8 June 2015 as an HR Director until his dismissal on 26 January 2016.
3. On 9 May 2016 the Claimant presented a complaint to the Tribunal alleging age discrimination, wrongful dismissal and unpaid holiday pay.

4. On 9 September 2016 at a preliminary hearing, the issues were identified and the case was listed for a 5 day hearing on 24-28 April 2017.
5. On 28 November 2016 the Claimant's claim for indirect age discrimination was dismissed on withdrawal and his claim for holiday pay was struck out as having no reasonable prospect of success.
6. On 29 March 2017 the Claimant withdrew the remaining claims of age discrimination citing his inability to pay the Tribunal fee and indicated that he intended to continue just with his claim of wrongful dismissal. He wrote:

"Apologies the payment fee of currently £530 has not as yet been paid in relation to the above employment tribunal hearing. I understand the current payment due is £530. For your information, I made an application to help with fees on 3 December 2016 and received a reply on 20 December 2016 reference number as per the above application hearing number. I do not have any legal representation. Given I am not able to currently afford this tribunal fee Category B, I am regrettably forced to amend my current application to the tribunal to Category A application. My current application relates to wrongful dismissal and discrimination protected characteristic age. Given the penal tribunal fee related to the discrimination claim, I am forced to drop this specific aspect of the application. Please confirm a switch from an Application B to only an A type can be made or what the procedure for making this application may be. I will of course inform the Respondent upon your agreement of this amendment to the application. On this basis, can you please now confirm the revised amount owed to the Tribunal office as a fee and an immediate payment will be made and by no later than 2 April 2017 as you have requested."

7. The full merits hearing listed for 24-28 April 2017 was postponed on the Claimant's application due to ill health. On 11 May 2017 the age discrimination claim was dismissed by a Judgment sent to the parties on 17 May 2017.
8. On 26 July 2017 the Supreme Court gave Judgment in the case of R (Unison) v Lord Chancellor [2017] ICR 1037. The Tribunal fees regime was found to be unlawful and was thereupon abolished.
9. On 27 July 2017 the Claimant wrote to the Tribunal to ask for his claim for age discrimination to be reinstated in the light of the Unison judgment as follows:

*"Dear Sirs
Tribunal Fees in the Supreme Court
Unison v Lord Chancellor 9EHRC intervening)*

I would be most grateful for consideration by a Tribunal Judge as to the Claimant's original claim in relation to discrimination/victimisation on the rounds of age be reinstated (additional to the remaining claim of breach of contract/wrongful dismissal).

The Claimant's request is based on the decision by the Supreme Court dated 26 July 2017 that the Employment Tribunal and Employment Appeal Tribunal Fees Order 2013 (Fees Order) prevented access to justice and was therefore unlawful.

As the Claimant asserted at the point in time when withdrawal was requested and in the email below dated 10 April 2017 to the Tribunal Office:

"The Claimant confirms as per the email dated 29 March 2017 that he wishes to withdraw the claim for discrimination or victimisation on the grounds of age. The sole reason for this application for withdrawal is the Claimant's inability to pay the penal employment tribunal fee in relation to discrimination applications".

Thus far the Claimant has therefore been denied, via the application of fee orders, his constitutional right of access to the courts which is of course an essential element of the rule of law.

The Claimant understands that the Fees Order was unlawful under both domestic and EU law and "since it had that effect as soon as it was made, it was therefore unlawful ab initio and must be quashed" (Lord Reed)

Additionally the Supreme Court concluded that the Fees Order were indirectly discriminatory against those with protected characteristics and therefore as per this specific aspect of the claim that was regrettably withdrawn.

Whilst the Claimant has no desire to cause any inconvenience to the tribunal in the administration of this case, the Claimant does nonetheless feel strongly that the decision to withdraw the application in relation to discrimination/victimisation on the grounds of age was entirely determined on what has now been confirmed by the Supreme Court as unlawful legislation.

With respect the Claimant now seeks consideration to reinstate this original claim in its entirety.

The Claimant would point out the re-scheduled date for the tribunal hearing has not to date been confirmed by the tribunal office."

10. On 11 October 2017 it was directed that the question of reinstatement of the claim should be considered at a preliminary hearing and the Notice of Hearing contained the following.

"The Employment Judge has directed that the case be listed for a one day preliminary hearing before an Employment Judge to consider the application and to make any necessary case management orders. The Claimant will be required to provide evidence regarding his circumstances including his financial circumstances between 9 May 2016 when the claims were presented and 29 March 2017 when the Claims were withdrawn."

11. Thereafter, there were a number of unfortunate delays and postponements and the preliminary hearing has only now come before me to be heard today.

Evidence and Submissions

12. During the course of this hearing, I heard evidence on oath from the Claimant and oral submissions from both the Claimant and Mr Coghlin for the Respondent. I also read documents provided by both parties and a skeleton argument on law and fact was provided by the Respondent.
13. The Respondent submitted that no mechanism exists by which a claim which has been withdrawn under Rule 51, and then dismissed under Rule 52, can be reactivated. The Respondent said the only means by which the age discrimination claim can now be pursued is by reconsideration and revocation of the dismissal judgment and a fresh claim being brought by the Claimant. That claim would be out of time and would then need to be considered applying the usual and well-known principles including whether it was just and equitable to extend time, whether a fair trial was possible and the balance of prejudice.
14. Whatever means or mechanism is available to reactivate the age discrimination claim, one factor which would be relevant to any such course, and one might say the main factor, is the veracity of the Claimant's assertion that he withdrew the discrimination claim because he could not afford to pay the fee of £530 as at 29 March 2017. Indeed, had the Claimant not so asserted, there would be no grounds whatsoever for the withdrawal or the later dismissing judgment to be questioned or revisited at a preliminary hearing or elsewhere.
15. My start point in this hearing therefore has been to consider whether I find as a fact that the Claimant was unable to pay the £530 fee as at 29 March 2017 and whether that was the reason for his withdrawal of the age discrimination claim.
16. In his evidence before me, the Claimant said that after his dismissal in January 2016 he was left financially wanting. He described his various employments after January 2016. From 26 January 2016 to 4 June 2016 – he was in receipt of Jobseeker's Allowance at £51.85 per week. From 5 June 2016 to 3 January 2017 – he was working part time at Waitrose with an income of £186 per week. From 4 January 2017 to 29 December 2017 – he was employed at Waitrose on a 12-month secondment and was receiving £3,228 per month gross.
17. He said that he could not afford the fee of £530 and that it was in the interests of justice for his claim to be reinstated. He said if that is not possible, then he wishes to present a new claim. He produced his bank account statements with Metro Bank from September 2016 to March 2017. He said it was his only bank account and that he had closed an account with Santander in September 2016. He said that his salary was paid into his wife's account and that it why it did not show up on his Metro bank account statements. He also provided

some of his payslips. He said that he and his wife had been evicted from their house and were in rental accommodation with rent of £1,750 per month that was paid by him and his wife. He said council tax was £230 per month and that he had extensive debts to utilities and credit cards and for loans and general living expenses. He also said that he was made bankrupt in August 2016 and produced a copy of the bankruptcy order. He said his wife's income was £1,400 per month net and that they both shared their living expenses and the paying off of debts. He said he had no other income other than that he had referred to.

18. The Claimant was asked questions by Mr Coghlin and said that he was sure he did not pay any fee to the Tribunal at any stage. It was put to him that he had been ordered to provide information at this hearing regarding his financial circumstances and that he was required to provide a full and fair picture. He said that he thought he had done so.
19. He was asked why he had paid his salary into his wife's account and he said "*because she was co-ordinating payments for both of us*". He repeated that he only had one bank account. When he was taken a reference in his bank statements to an "*account to account*" transfer of £1,250 to another bank account in his name, he said that he did not know what that account was and that he had no recollection of it. It was put to him that his evidence was untrue and he said: "*No I have no recollection of such an account*". It was put to him that he had withheld evidence from this Tribunal and from the Respondent and he said: "*not deliberately so*".
20. It was suggested to him that as at March 2017 his income was £38,744 per annum gross. He said yes, but added that at that point he had only been paid the salary for 3 months.

Decision

21. It may be possible, in theory, for a Claimant to find money to pay tribunal fees but I have been mindful of what the Supreme Court said in the Unison case. The question of whether the relevant fees order effectively prevented access to justice was to be decided according to the likely impact of those fees on behaviour in the real world, which meant looking at whether fees could reasonably be afforded rather than whether fees were affordable in a theoretical sense. In other words, was paying the Tribunal fee reasonably affordable for the Claimant in the light of his financial circumstances at the time.
22. So far as the Claimant's evidence was concerned, the Notice of Hearing required him to provide evidence regarding his financial circumstances. On the basis of the Claimant's evidence and the documents provided by him today, I am not satisfied that the £530 fee was not reasonably affordable by him as at 29 March 2017. On the contrary, the evidence that I have heard and read supports a conclusion that paying the fee was reasonably affordable.

23. As at 29 March 2017 the Claimant was earning the equivalent of £38,000 gross per annum. Although he said it had only been received for 3 months at that point, in fact the contract was due to continue for a further 9 months to the end of December 2017.
24. He was paying his salary into his wife's account and she was earning £1,400 per month net. They were thereby jointly paying the family outgoings and presumably also servicing the family debts and the Claimant's debts. On a rough calculation, their joint gross earnings were just short of £60,000 per annum.
25. The Claimant said he only had one bank account and produced his Metro Bank statements for the period May 2016 to March 2017. They show very low closing balances of £100 or less each month, but the Claimant was unable to explain the reference to another account in his name in the January 2017 statement. He said he did not recollect having another account. I found that explanation implausible.
26. Despite being on notice that he had to provide evidence of his financial circumstances from May 2016 to March 2017, the Claimant failed to provide documents regarding his outgoings. Those are documents which must exist and which it is reasonable to expect the Claimant to have provided. He failed to produce his wife's bank statements into which his substantial salary was paid or statements from what was clearly another account of his into which money was paid in January 2017. There was no documentary evidence whatsoever of his outgoings - no details of debts, loans, credit card accounts, rent statements, council tax bills and so on and so forth. "Financial circumstances" includes both income and outgoings and any reasonable person would understand that to be so.
27. I am not satisfied that the Claimant has provided a full and frank documentary account of his financial circumstances which he knew he was required to provide, nor has he provided a full and frank account in his evidence before me today. The matter of which I can be sure is that, as at 29 March 2017, he and his wife had between them a substantial income.
28. I find that, whatever the extent of the Claimant's debts, the sum of £530 was not unaffordable and that the reason for withdrawal of the discrimination claim cannot have been an inability to pay the outstanding fee of £530.
29. I am not required to enquire as to what other motive the Claimant may have had for withdrawing the age discrimination claim. I am only required to satisfy myself as to the whether the real reason for the withdrawal was his inability to pay the fee. For the reasons I have given, I am not so satisfied.
30. This application for reinstatement of the age discrimination claim, by whatever mechanism or means, therefore fails and I shall now go on to list the remaining claim of wrongful dismissal for a full merits hearing.

Employment Judge Vowles

Date: 28.11.2018

Sent to the parties on:

30.11.18.....

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For the Tribunals Office