



EMPLOYMENT TRIBUNALS

JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON A PRELIMINARY HEARING

HELD AT North Shields **ON:** 18 October, 2019

EMPLOYMENT JUDGE: Mr J R Nicol (sitting alone)

Appearances:

For the claimant: Mr Graham, Solicitor

For the respondent: Mr Sadiq, Counsel

JUDGMENT

It is the judgment of the Tribunal that

- 1 The claimant's application that the respondent's response should be struck out in whole or in part and/or that the respondent should be ordered to pay a deposit is not well founded and is dismissed
- 2 the parties shall comply with the Order made following the case management discussion that took place after this preliminary hearing

REASONS

1 At the end of the hearing, the Tribunal gave its Judgment and Reasons for the Judgment. The claimant requested that the Tribunal should set out its Reasons in writing, which the Tribunal agreed to provide. Accordingly, these Reasons set out the Tribunal's findings in support of its Judgment. Whilst the wording and order may differ from the announced version, this is with the benefit of more preparation time and is not the result of further deliberations by the Tribunal.

2 These are complaints by Stewart Reader, the claimant, against South Tyneside Council ('the respondent'). The claimant alleges that he was unfairly dismissed by the respondent and that he was wrongfully dismissed. The respondent denies the allegations. The claimant was employed by the respondent from 1 September, 2001, until the effective date of termination of the claimant's employment on 26 March, 2019, when the claimant had been in continuous employment for seventeen complete years.

3 This was a preliminary hearing to decide the claimant's application under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations, 2013,

Schedule 1, that the respondent's response should be struck out on the ground that the respondent had no prospect of succeeding with its defence and/or its defence was being pursued vexatiously and/or unreasonably (the claimant abandoned the latter part of this allegation) or, in the alternative that the respondent should only be allowed to proceed with its defence if it paid a deposit as it has little prospect of succeeding. The full application is set out in letters from the claimant dated 19 August, 2019 and 16 September, 2018, which need to be read for their full terms and effect. The respondent resists the application. The task for the Tribunal to decide is whether the respondent does have any prospect of succeeding with its defence and, if so, the extent.

4 This Tribunal did not hear any evidence and was aware that, if the case was allowed to proceed, evidence would be heard at a full hearing so that this Tribunal should not make any finding of facts that might subsequently be shown not to be evidence based.

5 The Tribunal had before it a bundle of documents prepared by the claimant ('Exhibit C1'), to which was added a copy of the claimant's contract of employment, a large bundle of precedents and a skeleton argument prepared by the claimant. The Tribunal heard oral submissions from both parties, the claimant's by reference to the skeleton argument, and was able to ask questions during the submissions.

6 It was agreed that the claimant was employed as a headteacher at a school within the area of the respondent and that the respondent was his employer. Very briefly, after several years working at the school, eight accusations were made against the claimant and he was suspended from work. After a delay, the panel at a disciplinary hearing found all eight of the accusations to be well founded and summarily dismissed the claimant for gross misconduct. On appeal, the appeal panel found that only three of the accusations were well founded and decided that the claimant should be reinstated with reduced sanction of a final written warning. The respondent reinstated the claimant and then suspended him again before summoning him to a meeting where he was told, without a further hearing, that he was to be dismissed. The respondent relies on those earlier findings to show that the dismissal was for gross misconduct or was for some other substantial reason relating to the breakdown of trust and confidence, the perceived risk to children, reputational damage and the effect of the suspension on the budget of the school.

7 Between the disciplinary hearing and the appeal, the claimant commenced these proceedings. Following the reinstatement and the second dismissal, by agreement between the parties, the claimant amended his complaint to rely on the second dismissal whilst still referring to the first dismissal as part of the supporting circumstances.

8 The claimant referred to the difficulties that he was having in obtaining alternative employment because of the purported reasons for his dismissal. In consequence, he was looking for a speedy finding in his favour in the hope that this would show that the allegations against him should not have damaged his career. The respondent acknowledged this. The Tribunal accepted the claimant's predicament but did not consider that it was relevant to the application being made at this time. Even if it was the Tribunal's finding, the fact that he was unfairly/wrongfully dismissed would not necessarily show that the allegations against him were not well founded.

9 The detailed skeleton argument sets out the claimant's arguments in support of its application and needs to be read for its full terms and effect. The claimant appears to question the nature and quality of the investigation and the matters relied on before the first dismissal and the appeal. In essence, the claimant contends that the decision that the claimant should be reinstated was a final decision that the respondent was not entitled, in effect, to overrule by the subsequent dismissal of the claimant. In so far as the respondent relies on the claimant's conduct, the claimant contends that those issues had already been dealt with by those hearing the appeal. Further, the ground of some other substantial reason was a reworking of the facts relied on to support the dismissal on the ground of conduct and/or relies upon facts that it was not entitled to rely on. Also, the claimant was dismissed without a further hearing and without being entitled to put his case or any mitigation.

10 The respondent relies on authorities that it argues support its contention that it was entitled to dismiss the claimant, notwithstanding the decision of those hearing the appeal. It also has widened the grounds for dismissal by suggesting that there was some other substantial reason for the dismissal. Although this reason is largely based on the findings of those hearing the appeal, it is extended to include damage to the respondent's reputation and the effect on the respondent's budget of continuing suspensions. The actual reason for the dismissal, which is for the respondent to show, can only be established after hearing the evidence of the decision maker and this being tested in cross-examination. If only for the purposes of this application, the claimant did not dispute the findings of those who heard the appeal. Irrespective of whether the decision maker acted appropriately, at this time, it cannot be said that the decision maker did not have grounds which might justify dismissal.

11 Both parties recognised that for the application to succeed, there was a high threshold that needed to be reached before a striking out would be ordered, especially as the evidence has not been tested.

12 The Tribunal noted that the respondent had accepted the decision of those hearing the appeal and reinstated the claimant with the payment of back pay since his dismissal. Although not argued by the claimant, the Tribunal questioned whether the reinstatement amounted to an affirmation of the claimant's contract of employment, despite the alleged fundamental breach of that contract by the claimant. In the absence of further disciplinary offences coming to light before the second dismissal, could it be said that the respondent had waived any breach of the contract of employment? This required further examination and an investigation of the decision maker's thinking.

13 Most of the authorities quoted by the parties were not controversial in the context of this case. However, the decision in Kisoka v Ratnpinyotip (t/a Ryevale Day Nursery) [2013] UKEAT/0311/13, was the subject of some discussion. The issue relied on was the finding that an employer might, in appropriate circumstances, overrule the decision of an appeal panel. In that case, the employer was a small organisation without the resources of the current respondent and there were various other factual differences. However, it is relevant that it was found that there might be circumstances in which a decision of an appeal panel might not be followed by the employer. In the current case, on the face of it, the employer did follow the decision of those who heard the appeal by reinstating the claimant and then dismissed him. This requires an examination of the evidence to determine the precise sequence of events and whether there were factors that justified the respondent's actions.

14 The Tribunal finds that it cannot be said that there is not any prospect of the respondent's response succeeding. Whilst there are clearly difficulties that the respondent must overcome, they are not so great that the response can be struck out at this stage. There are clear findings that the claimant committed disciplinary offences which it would appear that the respondent considered put summary dismissal within the range of reasonable responses. This evidence in respect of this needs to be tested.

15 The Tribunal also finds that it cannot be said, at this time, that the respondent has little prospect of succeeding with its response. For the reasons set out above, the respondent may succeed in its defence if it can show that its actions were justified but, in any event, it has runnable arguments in relation to contributory fault, if only because of the findings of those hearing the appeal.

16 It may be that the second dismissal of the claimant will be found to have been procedurally unfair. However, this would raise the question of what might have happened if a fair procedure had been followed and this would require an examination of the evidence against the claimant. In particular, the respondent relies, in part, on findings by those hearing the appeal that the claimant had committed three disciplinary offences. Even if the claimant does succeed in showing that his dismissal was unfair, the question would then arise as to whether his conduct caused or contributed to his dismissal. This would require an examination of the case against him. Further, the claimant is seeking reinstatement which will require the Tribunal to consider whether it would be appropriate in all of the circumstances of this case, assuming that the respondent will oppose it. Also, in relation to the alleged wrongful dismissal, the Tribunal will need to consider whether the claimant did fundamentally breach his contract of employment so that the respondent was entitled to consider that his contract was at an end. Again, this would require an examination of the evidence concerning the claimant's conduct. It follows that, even if the matter only proceeded to a remedies hearing, it is likely that the same evidence would need to be considered as if a hearing on liability was taking place so that there would not be any saving in time.

17 Accordingly, these complaints should proceed to the full hearing, which has already been arranged, and the parties are to comply with the Orders previously made save to the extent that they are inconsistent with the Orders to be made at the case management discussion which will take place at the end of this hearing.

18 It be noted that the Tribunal is not in a position to and has not given any indication as to the eventual outcome of any part of these complaints.

Employment Judge Nicol
Date 25 October, 2019

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