EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing on the papers which has been consented to / not objected to by the parties. The form of remote hearing was video by CVP. A face to face hearing was not held because it was not practicable and no-one requested the same or it was not practicable and all issues could be determined in a remote hearing. The documents referred to are summarised below.

Claimant		**Respondent**
Mr N Chowdhury	**v**	**Marsh Farm Futures**

Heard at: Watford **On**: 25 February 2021

Before: Employment Judge R Lewis
Ms S Johnstone
Mr R White

Appearances

For the Claimant: Did not take part
For the Respondent: Ms S Clarke, Counsel

JUDGMENT

1. The claimant's application for an order for reinstatement or re-engagement is refused.

REASONS

Procedure

1. The tribunal gives these reasons of its own initiative, as the claimant did not take part in this hearing and it is in the interests of justice that he understand the reasoning of the tribunal.

2. This judgment should be read in sequence with our judgments and orders made at the hearing on 24 and 25 November 2020. Regrettably, due to an error within the tribunal office, they were not sent to the parties until 3 February 2021.

3. After the end of the hearing on 25 November the claimant had written to the tribunal, setting out a number of concerns. His letter concluded:

> "I also found strange that you decided to delay the hearing for reinstatement.
>
> Considering your partiality toward respondent and bias against me I have decided not to attend your tribunal on 25 February 2021.
>
> I will take necessary measures to get justice."

4. On 24 February 2021, in response to the tribunal's CVP notification, the claimant emailed the respondent and the tribunal as follows:

> "With reference to my previous emails, Bias of ET panel of Judge R Lewis and the attached email I wouldn't be able to attend the hearing."

5. At the start of this hearing, we asked the tribunal clerk to telephone the claimant and remind him that he was free to change his mind and to take part. The clerk reported that the claimant had reiterated his previous decision, and we therefore proceeded in his absence.

6. The respondent had prepared a bundle for this hearing, which included two statements from the claimant, each of 10 pages, with some overlap. We took these as setting out information to be considered on behalf of the absent claimant in accordance with Rule 47.

7. The respondent had submitted a brief witness statement of Mr Rafi. He adopted the statement on oath and gave brief additional evidence, as well as being questioned by the tribunal. We then heard submissions from Ms Clarke in support of her written submissions, and after an adjournment of 35 minutes gave judgment.

8. After giving judgment the judge asked that the respondent's solicitors inform the claimant by email of the outcome, as he anticipated that there would be some delay in these reasons being sent. We take the opportunity to apologise for the delay, which has come about because the tribunal has insufficient typing support.

Framework

9. This was an application for re-employment made in accordance with s.113-116 Employment Rights Act 1996.

10. S.114(1) provides:

"An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed."

11. S.115(1) provides:

"An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment."

12. S.116(1) provides:

"In exercising its discretion under s.113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account (a) whether the complainant wishes to be reinstated, (b) whether it is practicable for the employer to comply with an order for reinstatement, and (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement."

13. S.116(3) repeats the above in relation to re-engagement, with some modification as appropriate. Ms Clarke addressed us in relation to each of the three limbs of s.116(1).

The claimant's wishes

14. Ms Clarke submitted that although the claimant had made the application, the emotion which he used to express his views of the respondent and those leading it was so negative that it begged the question as to whether he truly wanted to return to a workplace from which he had been absent for nearly five years, and where he had plainly been in prolonged conflict with many colleagues.

15. We agreed that that would have been interesting territory for cross-examination if the claimant had been available. In the absence of the claimant, the tribunal felt unable to express a view or make a finding on whether the claimant genuinely and in good faith wishes to be reinstated or re-engaged. We therefore give him the benefit of the doubt, and proceed on the basis that he wishes to be reinstated or re-engaged.

Practicable to comply

16. On the question of practicability, Ms Clarke in helpful written submissions referred to a number of authorities, notably Port of London Authority v Payne [1994] IRLR 9, and Kelly v PGA European Tour [2020] UK EAT 0285/18.

17. She submitted that when scrutinising the respondent's reasons for opposing a return to work, the tribunal must not set too high a standard, and should not expect the employer to show that re-employment is impossible. In particular she submitted that we should have in mind guidance in Kelly that the question is whether reinstatement is capable of being carried into effect

with success as between this employer and this employee. She submitted further that the tribunal should consider whether the respondent's opposition to re-employment was both genuine and had an objective rational basis, and must take care to avoid considering a breakdown of trust and confidence as a mantra which answered all points against it.

18. The tribunal finds that the respondent has shown that it is not practicable to re-employ the claimant for the following reasons, which are not set out exhaustively, or in order of priority, and which apply equally to an order for reinstatement or re-engagement.

    18.1 Mr Rafi gave evidence, which the tribunal accepts, that early in 2017 the finance and HR services provided by the claimant had been outsourced at an annual cost of about £5,500 plus VAT. That cost is significantly less than the claimant's salary (let alone the costs of any person assisting him). We note two separate points: that the claimant's post disappeared from the respondent four years ago through outsourcing; and that the financial saving to the respondent has been significant each year as a result.

    18.2 Secondly, we accept that that the respondent organisation was, before March 2020, a community based organisation, whose premises offered various forms of public accessibility to community groups and others. We accept that large portions of the organisation have ceased to function as a result of the lockdown, and that their future is uncertain and insecure. Certainly, there can be no guarantee that they will re-open, or when, or on which terms.

    18.3 We accept that the financial consequences of lockdown in terms of income and external funding have been significant. We accept that the respondent has experienced redundancies as a result. Accordingly, we attach considerable weight to the diminution in the scale of the organisation, which has in turn further reduced the need to devote resource to HR and finance services.

    18.4 A third point is that re-employment can be made to work when parties who have been in conflict rebuild a working relationship with a view to the future. The claimant's statements for this hearing, and his address to us in November, were a prolonged reiteration of his perception of the events of 2013 to 2016. The gist was that he had done nothing wrong, that faults lay with everyone else, and that he he should not have been dismissed, and should be entitled to significant compensation. When we consider practicability, we note that the claimant shows no indication of being able to rebuild a new working relationship from 2021 onwards, and gives rather every indication of being trapped in a series of fixations about past events. We find that if he were to return to the respondent, the claimant would take the opportunity to reopen past disputes with his colleagues and with the respondent. That being so, his return could not be successful.

18.5 The final and perhaps largest single element in our consideration has been the manner in which the claimant has expressed his views about the respondent as an organisation, Mr Rafi as an individual, his colleagues and the board of trustees. There was an ocean of relevant material and Ms Clarke referred us to a summary of it.

18.6 She reminded us of the observations and findings made in the following paragraphs of our first judgment: 64, 65, 69, 70.6 and 70.7, 177, 204, 205, 212 and 215. For our part we noted, and repeat our approach at paragraphs 41, 42 and 58.

18.7 The witness statements which were before us today from the claimant were mined extensively by Ms Clarke, who quoted the following:

> "I've always done my work sincerely and ethically and contributed significantly."
>
> "The dismissal was not my fault."
>
> "The respondent was not reasonable as they didn't care about the grievances."
>
> "The respondent made my work very difficult… influenced staff not to help and send work even when I was in sick leave."
>
> "The respondent ignored my requests for help regarding my health and stress."
>
> "Often other staff were not doing their part or making mistakes and I was rectifying those."
>
> "I lost hope of getting justice when I realised that [the respondent] had teamed up."
>
> "Disciplinary meeting chair was teasing and making fun of me."
>
> "The chair and CEO has misled the tribunal… this fraudulent action should be judged by ET to establish whether the falsification of evidence is a criminal action."
>
> "The respondent deliberately didn't inform me any issues which would be treated as misconduct."
>
> "Chair… did conspiracy to create division."
>
> "CEO was desperate to hold on to everything/all powers."
>
> "Chair gave significant attention for CEO's health but discriminated me while I was ill."
>
> "The respondent perverted the course of justice by giving false statements."
>
> "Because of CEO's grudge and chair's personal interest they took various unethical actions against me."

18.8 That was all written in November 2020, three and a half years after dismissal, with a view to securing a return to working with those referred to. In our judgment of November 2020 we noted that a number of the individuals whom the claimant attacked remained employed by the respondent, or active as a trustee.

18.9 We find that the relationship of trust and confidence between these parties broke down years before this hearing. We accept that the above, which is no more than a selection, indicates that it is incapable of repair. The claimant has repeatedly and customarily used language about Mr Rafi which has bordered on undisguised contempt.

18.10 We find in particular that the claimant's deep personalised hostility towards Mr Rafi renders it inconceivable that he could return to work with him in an organisation of now five employees. There would be no prospect whatsoever of the claimant accepting the legitimacy of Mr Rafi's professional line management.

Contribution

19. When we come to the third limb for consideration, Ms Clarke relied heavily on British Airways v Valencia [2014] IRLR 683 in which the EAT overturned the tribunal's re-employment order in a case where the tribunal had also found contribution to be 80%. We accept Ms Clarke's submission that in a case where a claimant has contributed 100% to dismissal, it cannot be just to order the employer to re-employ that person. The present case is something of a paradigm on its facts, in that (as we have said before) the respondent's failings have been solely procedural, and we have found that all other wrong doing was that of the claimant. We add to this factor the effect of the claimant's steadfast denial of any wrong doing, and his unshakeable conviction that all fault has rested with the respondent and his former colleagues.

Costs

20. After we had given judgment, Ms Clarke applied for costs, limited to her brief fee for attendance at this hearing. Before hearing her application we asked whether the claimant had been put on notice of it and Ms Clarke said that he had not. That being so, we declined to hear the application. It would not have been just to do so. The claimant might well have been present if he had been alerted to being at risk of a costs order. It is open to the respondent to apply at a later stage, and if it does, it should do so by complete submission, and advising the tribunal whether it applies for the matter to be determined on paper and without a hearing; even if the matter proceeds in person, it is of course open to the respondent not to attend and to rely only on written submissions, as the claimant did today.

____
Employment Judge R Lewis
14 April 2021
Date: …………………………………..
20 April 2021
Sent to the parties on: ....

....
For the Tribunal Office