



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss L Giffard

v

British Airways Plc

Heard at: Watford

On: 8 July 2020

Before: Employment Judge Smail

Appearances

For the Claimant: In person

For the Respondent: Mr S Margo - Counsel

JUDGMENT

1. The claimant withdrew this case by email dated 3 June 2020.
2. The claim is dismissed upon withdrawal.
3. The respondent's application for costs is refused.

REASONS

1. By a claim form presented on 21 September 2019, the claimant claimed unfair dismissal. Her length of service was between 16 April 2017 and 20 April 2019, so just over the two years required to bring a claim of unfair dismissal. She was a Flight Attendant. She was dismissed for unsatisfactory attendance.
2. The claim form disclosed an intention on the part of the claimant to upload a document. She indicated on the claim form that this had not happened. It contained the grounds for her claim; otherwise she had simply ticked the unfair dismissal and other payments box.
3. By email dated 10 December 2019 to the Tribunal, the claimant, I am satisfied, sent a copy of the details of complaint described as a witness statement. Regrettably, whilst that document was emailed into the Tribunal it was never forwarded either by the Tribunal or the claimant to the respondent. That generated a series of applications by the respondent to have sight of what amounted to the grounds of complaint. There also was

no compliance by the claimant with the directions issued by the court to serve a remedy statement or a list of documents or for that matter a witness statement until the eve of the Tribunal hearing. It may be that the claimant placed reliance on UNITE the Union's solicitors, whom she appears to have believed were representing her. However, they never came on the record and all the Tribunal's correspondence has been with the claimant directly.

Withdrawal

4. By email dated 3 June 2020 sent at 18:32, addressed to the Tribunal only, the claimant wrote an email which contained the following passages:

“It is with great frustration that I shall have to withdraw my application for unfair dismissal.

Due to the Covid 19 outbreak and the unprecedented pressures and work that my legal team are currently facing with BA staff they are unable to fully commit and assist me during these times. As I am not legally trained and unable to represent myself throughout I shall have to withdraw. Believe me, I have read mass amounts regarding employment law and is not something I am finding easy. It is a shame and a great sadness that I have to let BA win. I have spoken in great lengths to my union who have said my case is very unusual and would have been very strong and they are sad that I shall not be fighting more towards them.”

5. There then follow a series of paragraphs representing what the claimant's case might have been.
6. Towards the end of the email she writes the following:

“I really regret to have to withdraw however without any legal knowledge at all and strict deadlines that I will be unable to meet I am left with no choice.

Thank you for your assistance throughout and help. It is greatly appreciated. I hope someday soon another employee of BA shall be able to proceed and take the matter all the way.”

7. By an email dated 29 June 2020 at 12:36, the Tribunal wrote to the claimant copying in the respondent's solicitor asking the question whether the claimant would confirm that she wished to withdraw the entirety of her claim. In some respects that request was misconceived because only the unfair dismissal had been accepted by the Tribunal. A claim for unpaid payments was not accepted because it was unparticularised. In truth, the whole claim had been unparticularised but Employment Judge Jack accepted the unfair dismissal claim on the basis that the burden is on the respondent to show a potentially fair reason for dismissal. It was that email from the Tribunal which alerted the respondent to the fact that the claim had been withdrawn. They maintained the position throughout in correspondence that the claim had been withdrawn; all other communications were subject to that point being taken.
8. The claimant replied to the email of 29 June that same day. She said she would like to provide the following comments in relation to correspondence

from the respondent: in relation to a complaint by the respondent that the claimant had failed to engage with the respondent's many attempts to prepare for the case, she commented that, as the respondent's solicitors well know, she is a lay person who was not aware what to do. She wrote, "although I have told you I do not know how to do what I am being asked and I cannot prepare them and shall not be providing". She went on later in the document to complain that she had no assistance from the respondent's solicitors. She mentioned that she had provided details to her previous legal team who were no longer handling the matter because of furlough. The claimant stated she gets upset and does not know how to fight her own battle. She goes on to say she would like to attend the court on 8 and 9 July.

9. On 3 July 2020 the respondent wrote to the claimant with a costs warning pointing out that, in their judgment, the case had been withdrawn.
10. On 6 July 2020 the respondent wrote to the claimant saying the case was not ready for hearing. A bundle had not been prepared and witness statements had not been exchanged. This was without prejudice to the respondent's position that the claim had been withdrawn.
11. The file was passed to Employment Judge Lewis on the question of whether the claim had been withdrawn, notwithstanding indications from the claimant that she in fact wished to proceed with the claim and whether the hearing should proceed.
12. On 30 June 2020 Employment Judge Lewis ordered that the hearing should take place and that there were no other directions.
13. The claim came before me listed as a 2-day full merits hearing for unfair dismissal and, understandably, the respondent took the preliminary point that the claim had been withdrawn.
14. I was directed by Mr Margot to the judgment of Mrs Justice Simler, as she then was, in Campbell v OCS Group UK Limited and Mr J Moffat UK EAT/0188/16/DA (2017). In that judgment it was made clear that if there has been an unambiguous withdrawal then under Rule 51 the claim comes to an end without any further judicial determination. Unless there is good reason not to dismiss the claim following withdrawal, then it was a proper exercise of judicial discretion to dismiss the claim. In my judgment, the email of 3 June 2020 from the claimant is a clear and unambiguous withdrawal. She withdrew the case. The withdrawal was not with view to starting a claim elsewhere. Indeed, unfair dismissal can only be claimed before an employment Tribunal and if a fresh claim were presented, it would plainly be out of time having been reasonably practicable to present a claim in time, as this one was.
15. Accordingly, I have little hesitation in dismissing the claim upon withdrawal.

Costs

16. The respondent applies for the brief fee of Mr Margot today in the sum of £2,500. They submit that having withdrawn the claim it was unreasonable of the claimant to indicate an intention to attend today. They also point to the lack of compliance by the claimant with the orders as to service of a remedy statement; disclosure of documents; and witness statements save for the eve of the hearing. There is considerable force in the respondent's position.
17. The claimant claimed she was unhappy to withdraw her claim. She felt let down, she says, by the union, who, she says, were representing her. As I say, they have never come on the record and I do not know the terms of engagement between them.
18. The Tribunal had not confirmed the withdrawal of the claim. On the contrary, she says, the Tribunal listed the hearing and required her attendance, at the very least by telephone calls setting up today's hearing. I do have some sympathy with the claimant's position here. The Tribunal did not determine at the end of June, whether or not the claim had been withdrawn. Indeed, it is not an unusual response to such a question to order a hearing to determine the matter. The claimant, it is clear to me, has been totally out of her depth in seeking to prosecute this case. It seems she has relied upon solicitors even though they have not come formally on the record. Having been told to attend the Tribunal, by the Tribunal, I do not find it unreasonable for her to have attended today.
19. This is a finely balanced decision bearing in mind considerable criticism of the claimant can be and has been made by the respondent. She has been out of her depth in attempting to handle this matter. I have read the witness statement she intended to attach to the claim originally. I do not engage with consideration of the merits but it is clear to me that there were matters that the Tribunal would have needed to consider had it entertained the merits. Because she has withdrawn, the Tribunal will not subject the respondent to close scrutiny for its decisions. The respondent has won.
20. However, having been told by the Tribunal to attend, I do not find it unreasonable for her to be here today. Accordingly, I do not order the respondent's Counsel's costs of today against her.
21. Further, a brief enquiry as to her means does not suggest she has any spare money in reality. I further rely on her lack of means as a reason for not ordering costs. Whilst her take home monthly pay is £1,460, she tells me that is taken up by normal living expenses. Her rent is £550 a month and she shares other bills with her partner who is presently furloughed. She tells me she had to borrow money for the petrol to attend court today. The couple have a child to care for, the child is young and is jointly cared for by the claimant notwithstanding she is not the birth mother.

22. Further still, I would not have allowed the full brief fee of £2,500 claimed by the respondent on behalf of Mr Margo. It seems to me, that following authority, the respondent had a safe case that the matter had been withdrawn. An appropriate brief fee would be one to cover the time taken in dealing with the preliminary submission that the claim had been withdrawn. I would have allowed £750, not £2,500.

23. However, first I find there is no basis upon which to exercise a discretion to award costs in that the claimant, by attending today, has not behaved unreasonably in the circumstances. Secondly, her means are such that a substantial payment of costs is not realistically feasible.

Employment Judge Smail

Date: 2 October 2020.....

Sent to the parties on: 8th Oct 2020...
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For the Tribunal Office