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EMPLOYMENT TRIBUNALS

Claimant: Ms D Dorrington
Respondent: Tower Hamlets GP Care Group CIC
Heard at: East London Hearing Centre
On: 14 February 2019
Before: Employment Judge C Hyde (sitting alone)

Representation

Claimant: In person
Respondent: Mr N Ashley (Counsel)

OPEN PRELIMINARY HEARING JUDGMENT

The Judgment of the Tribunal was that:

1. The Claimant was not entitled to bring a complaint of “ordinary” unfair dismissal under section 98(4) of the Employment Rights Act 1996 and that complaint was dismissed forthwith.
2. A further open preliminary hearing was fixed for two hours on 16 April 2019 commencing at 10am before any Tribunal (Judge Sitting alone), to determine:
 - a. whether the Claimant could bring a Whistle Blowing claim, having regard to the contents of her claim form; and
 - b. if so what was the detailed nature of this complaint?
3. Further, the Claimant was directed to provide clarification about her statement in response to Employment Judge Brown’s enquiry that she alleges that the reason for dismissal was whistle blowing, by reference to the facts set out in her claim form and the relevant law under Section 42A and the following Sections of the Employment Rights Act 1996, by 14 March 2019 to the Tribunal with a copy at the same time to the Respondent.

REASONS

1. This case had been listed for an open preliminary hearing to determine whether the Claimant had sufficient length of service to bring a claim of unfair dismissal. If an employee is bringing a claim under Section 98(4) of the Employment Rights Act 1996 ("the 1996 Act"), they need to have two years' service under section 108 of the 1996 Act.
2. The Claimant had been in further correspondence with the Tribunal in order to clarify the position in relation to her claim and she had recently indicated in writing that her main belief in relation to the reason for the dismissal was that this was a case of a Whistle Blowing dismissal.
3. The Tribunal remained uncertain however whether the Claimant wished to bring an Ordinary Unfair Dismissal claim also under section 98(4) of the 1996 Act, so it was necessary to make a determination as to whether she had the qualifying had two years' service.
4. The Respondent had prepared a bundle of documents which I marked [R1] which consisted of about 80 pages. The Claimant also presented a bundle of documents which I marked [C1]. The Tribunal heard representations from both parties.
5. In addition, during the Claimant's representations she referred the Tribunal to a letter dated 15 August 2016 which was sent to her in relation to returning from retirement.
6. The outline factual background is relatively simple. In essence, the Claimant had been working for the NHS for a considerable number of years. The Tribunal needed to ascertain in relation to an effective date of termination in relation to her service manager post on 9 May 2018, whether she had two years service which would take it back to the 8 May 2016.
7. It was not in dispute that on 1 April 2017 the Claimant's employment was TUPE transferred from Bart's Health Trust to the current Respondent, Tower Hamlets GP Care Groups CIC. The contentious issue however was the effect of a retirement break that the Claimant took between 15 July and 15 August 2016. There is no criticism of the Claimant's reasons for taking this. The issue is what effect, if any this had on her continuity of employment.
8. Mr Ashley referred the Tribunal to pages 45, 48 and 49 of the bundle which included at pages 48 and 49 a new starter form which was filled out by the Claimant on 15 August 2016 on her return to work after the retirement break. In it, she described that she had worked for Bart's Health as a Service Delivery Manager from September 2014 to 15 July 2016, which was the start date of her retirement break and that the first day back at work or the start date of her return to work was 15 August 2016.
9. In addition, the other page references (at pp44 and 45) were to the Bart's

Health NHS Trust document which set out the terms of the retirement break policy and in particular (at pp 45 paragraph 4.2 and 46 paragraph 5.10) these documents made it clear that a necessary element of the retirement and return was that a member of staff had to take a sufficient break in their employment and that it would not be treated as an agreed arrangement whereby they would come back if they took their retirement under this policy

10. The minimum time that was required by Bart's NHS at the time was a 14-day break, (paragraph 4.4 on page 44). It was not in dispute that the Claimant took a break of a month.

11. The Claimant made various representations to the Tribunal about what was said to her and the contemporaneous correspondence that she received and it was in that context that she referred the Tribunal to the letter of 15 August 2016. However, as Mr Ashley said this really confirmed the position that was set out in the policy document already referred to. The Claimant said she did not receive this letter until after she returned to work and that may well be right, not least because it was dated 15 August 2016. However, there was nothing in that letter which undermined the policy set out elsewhere in the documents. It was not disputed that the Claimant received payment of her pension during that time. There was thus no evidence any sort of overarching agreement that the retirement break would not constitute a break in her employment. The case of *Booth* to which I was referred appeared to be on all fours with the current situation. In reality, the Claimant's employment came to an end in mid-July 2016 and the circumstances did not fall within those in which a break of continuity of employment could be cured under Section 212 of the Employment Rights Act 2016.

12. I therefore found that the Claimant did not have sufficient continuity of service to bring an Ordinary Unfair Dismissal complaint under section 98(4) of the 1996 Act.

13. I then considered whether I should determine whether the Claimant could bring a Whistle Blowing claim, the Claimant having stated that this was the essence of her case, in answer to a direction for clarification made by Employment Judge Brown.

14. Employment Judge Warren directed that the Case Management Orders which had been issued by the Tribunal by letter dated 26 October 2018 in relation to the final hearing on 14 February 2019 were to stand as preparation for the preliminary hearing open, to determine whether the Claimant had sufficient service. The parties were informed of this by email, sent on 27 November 2018. At the open preliminary hearing there were no witness statements put forward.

15. The Tribunal decided not to determine the question of whether the Claimant was validly bringing a Whistle Blowing claim at this hearing. The Tribunal took into account that the Claimant was a litigant in person and had come to the hearing expecting only to deal with the issue of whether she had sufficient service to bring a claim of Ordinary Unfair Dismissal.

16. In reaching this decision, the Tribunal also took into account that bringing a claim of Whistle Blowing is a legally complex matter and it did not appear that the

Claimant was really prepared to address that. The Tribunal considered that it was fairer to allow her time to consider her position and to list a further open preliminary hearing to determine if she was able to pursue such a claim but also for her to provide clarification of what that claim was.

17. The Tribunal in reaching this decision took into account the Respondent's submissions that this unduly involved the incurring of additional costs of attending a further open preliminary hearing and that the Tribunal should require the Claimant at this hearing to state what her protected disclosures were.

18. Whilst, the Tribunal was sympathetic to this submission and took into account that the Respondent was a public body, in all the circumstances overall fairness lay in favour of allowing the Claimant the opportunity to reflect on this position and the Tribunal emphasised to her that it may be that the appropriate course was to send confirmation to the Tribunal that she did not wish to pursue the Claim.

19. The further open preliminary hearing was fixed for two hours on 16 April 2019 commencing at 10am before any Tribunal to determine the issues set out in the Judgment above.

20. The Respondent reserved its position in relation to costs. The Tribunal explained to the Claimant what this meant in the sense of the Respondent indicating that if this were not a well based, well founded complaint that they might want to make an application for costs, either on the next occasion or the end of determination of any Whistle Blowing claim.

21. Other matters

21.1 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.

21.2 Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

21.3 Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

21.4 You may apply under rule 29 for this Order to be varied, suspended or set aside.

Employment Judge Hyde

13 February 2019

