



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss C Verdier

v

The Bridge Renewal Trust

Heard at: Watford

On: 14 June 2019

Before: Employment Judge Andrew Clarke QC

Appearances

For the Claimant: Mrs A Akusu-Ossoai, Counsel

For the Respondent: Mr D Bansal, Solicitor

JUDGMENT

1. Upon time being extended to 10 May 2019 for the claimant's application to set aside the Unless Order of 15 April 2019, that Unless Order is set aside in the interests of justice and the claimant permitted to give evidence in this case.
2. The claim for unfair dismissal is dismissed.

REASONS

The Unless Order

1. The claimant having failed to provide a witness statement in accordance with the directions given on 30 January 2018 she was debarred from giving evidence at this hearing by an Unless Order dated 15 April 2019 made by Employment Judge Lewis unless she had provided her witness statement by 26 April 2019.
2. On 10 May 2019 an application was made to the tribunal for "relief from sanction" in respect of that Unless Order. Having considered the contents of that application and having heard submissions from the respondent, I have extended the period of time specified in Rule 38(2) for the making of such an application and granted that application.

3. I consider both actions to be in the interests of justice. A caseworker employed by the claimant's solicitors had submitted a witness statement on her behalf. Doubtless due to a lack of understanding or training, the case worker had produced the statement in the form of a statement by him of what he had been told by the claimant. The witness statement which accompanied the application for relief from sanctions was in substantially identical terms to that originally submitted, but had been turned into a statement from the claimant herself. The application was copied to the respondent. Hence, the respondent knew what the claimant intended to say (albeit via a statement intended to be given by her solicitor) several weeks prior to the application to the tribunal which led to the Unless Order. Furthermore, the respondent had the witness statement in an appropriate form over a month before the hearing of this matter. The Unless Order had been addressed to the self-same case worker who, it appears, had done nothing about it prior to leaving the claimant's solicitor's employ. As soon as it came to the attention of a partner at that firm, the appropriate work was done on the statement and an appropriate application immediately made. In those circumstances it was my view that the interests of justice were best served by allowing the claimant to give the evidence in question.

Background

4. The respondent is a registered charity. Among its activities is the provision of various healthcare and welfare activities and facilities in three locations in North London. It has some 22-employed staff and also uses the services of approximately 7 self-employed individuals together with volunteers.
5. The claimant was employed initially as a Footcare Therapist and principally remained a Footcare Therapist throughout the entirety of her employment. Ashe provided a toenail cutting service at one location in London to begin with. Her employment commenced on 26 July 2010. Over time her role broadened a little to encompass an outreach footcare service and she also conducted some relaxation workshops at care homes but on a self-employed basis.
6. In January 2014 her job title was recorded in a proposed revised contract of employment as being Footcare Therapist/Project Officer. It was said in an accompanying email that this revised set of terms and conditions of employment were being introduced after a job evaluation scheme. The contract document referred, at one point, to her being guaranteed 16 hours of work and at another point to her being guaranteed 8 hours of work. The claimant queried this and other matters and it was acknowledged that there was confusion and that 8 hours was the correct position. That was corrected and other minor corrections made in response to queries from her and a revised contract of employment issued in January 2015. The claimant did not sign that revised contract but worked under it from January 2015 onwards.
7. The revised contract of employment referred (see above) to her being a Project Officer. Although the project of which she was a Project Officer was

anticipated to provide at least another eight hours of work per week, the minimum guarantee was not varied. The respondent had received external funding for one year to enable it to use the foot related services (from the claimant) as a way to get onto various sites (such as sheltered housing) in order to gauge the resident's needs for activities designed to avoid isolation and to encourage participation. Further funding was thereafter provided but only so as to finance the provision of the activities identified during that first year of funding. It could not be used for the footcare activities which had to be funded by a combination of the respondent's own resources and such fees as it might charge for those services to its clients.

8. In August 2015 a volunteer made an allegation that the claimant had made various remarks to her which were highly derogatory of the respondent, its staff and volunteers. In accordance with the respondent's disciplinary policy she was suspended whilst this matter was investigated. That suspension lasted from 6 August to 1 September 2015. It was found that the claimant had no case to answer and suspension was then lifted. The claimant raised a grievance relating to the handling of that suspension. It was heard by the respondent's Chair of Trustees together with another Trustee and, after due investigation, rejected. None of the respondent's witnesses were cross examined about this matter (in particular as to its potential impact on the decision to make her redundant) and I regard it as irrelevant to that decision.
9. The claimant alleges that the respondent unfairly suspended her and thereafter was "cold" towards her. Undoubtedly, she was concerned and upset by the allegations made by the volunteer. However, I consider that the respondent handled them appropriately. Again, the contrary was not put to any of its witnesses and no suggestion was made in evidence or in submission that these matters were relevant to the decision to dismiss for redundancy.
10. The claimant was absent from work in spring 2016 as she underwent surgery. She returned to work in May 2016. She was concerned about her workload, given her then state of health. At a Return to Work meeting her Line Manager (Mr King) made clear that she should manage her bookings and should cancel appointments if necessary and that a volunteer would be provided to assist her with carrying equipment.
11. At this time the respondent was concerned at the cost of its employment of the claimant. Those who received her services were charged by the respondent at the rate of £10 for toenail cutting and £15 for that plus a foot massage. For a time (see above) grants had covered some of the cost of providing the claimant's services, but after they had ceased and the "loss" was being met by the charity's general funds. As part of a wide-ranging review by its CEO (Mr Ocen) approved by its Trustees, it was recommended that this "loss" making situation could not continue. Consideration was given to increasing charges, but its clients were considered to be vulnerable, mostly elderly and of very limited means. Hence it was decided, after due consultation, that this was not possible. The decision was made then to seek to move the services performed by the claimant to being

performed by an outside contractor (on a self-employed basis) a model used for various other care services provided by the claimant. Indeed, as noted above, the claimant was herself a provider of one such service on that basis.

12. Consequently, the respondent warned the claimant of the risk of redundancy in May 2016 and consultations began regarding the future of the foot related services which she provided. It was never disputed then (and is not disputed now) that those were very well worthwhile services, valued by the respondent's clients and carried out to a high standard by the claimant. However, as a charity the respondent had to consider whether it could sensibly continue to have them provided by the claimant as an employee when this at a significant cost to itself.
13. One possibility which the respondent recognised was that the claimant might wish to be the person who would provide the services as an independent contractor. The respondent was quite happy to have the claimant continue to provide the services on that basis, being paid a fee per client (rather than an hourly rate). What was proposed was that the claimant would charge a fee to the client, part of which would be retained by the respondent to cover administration costs. The respondent's hope and expectation was that whoever took on the work would be able to develop it by taking on extra clients, but the respondent was unprepared to commit itself to paying the claimant (or anyone else) for a fixed number of hours per week.
14. The claimant's line manager, Mr King, gave detailed evidence (supported by lengthy e-mails and notes) showing that the reasons for redundancy and the proposed way forward were both discussed with the claimant over several months. The claimant set out several sets of questions in writing (having taken advice) and Mr King answered each set of questions.
15. As the claimant was again absent ill for a long period of time from September 2016 to early 2017, the sequence of meetings which had started in May 2016 was interrupted, but the discussions recommenced in May 2017. Eventually, on 14 September 2017, the claimant was invited to a formal (and final) redundancy consultation meeting, the respondent having provisionally determined that it could no longer run the service employing the claimant. Immediately after that meeting, she was informed that her employment would be terminated by reason of redundancy on 7 November 2017.
16. During the course of that consultation the respondent was asked various questions designed to see whether what was proposed amounted to true self-employment. In answering those questions, it was made clear that the person undertaking the work (it was hoped that this would be the claimant) could accept or refuse such work as was offered to them, that they could use a substitute (subject to the respondent being satisfied of their suitability) and that all aspects of the mode of working for that person. It was emphasised that if the worker chose not to be available on certain days, at

certain times, or at certain places, then other contractors might have to be engaged alongside the worker in question.

The Law

17. The claim is for unfair dismissal hence the employer must show what was the reason in the mind of the dismissing officer and that it was one of the statutorily permissible reasons listed in section 98 of the Employment Rights Act 1978, one of which is redundancy.
18. If the reason (or the principle reason) was redundancy, then I must consider if it was fair in all the circumstances (see section 98(4) of the ERA) to dismiss the claimant. This being a redundancy case, I would need pay particular attention to whether there was reasonable consultation. That is, did the respondent explain to the claimant that she was at risk of redundancy, give her a reasonable opportunity to make representations and did the respondent consider those representations and respond to them appropriately (ie in a way that a reasonable employer might so respond). I also need to consider whether suitable alternative employment was appropriately considered.
19. Redundancy is a statutory concept. It involves the respondent showing that the needs of its business for employees of a particular kind has ceased or diminished or is about to cease or diminish. If the work done by an employee is thereafter to be done by a self-employed person, it is agreed between the parties that the law has established that the employee can be redundant. If, in fact, all that is changed is the type of employment, such that there is a greater or lesser degree of control after the change and different work procedures, then that would not amount to redundancy because the needs of the business for employees to carry out that work would not have ceased or diminished.
20. The submissions of the parties in these regards appears sufficiently from my conclusion set out below.

Conclusions

21. The claimant maintains that there was no redundancy situation in this case, but that if there was its existence was not the principle reason for her dismissal.
22. I considered that there was a redundancy situation. The respondent considered that it could no longer fund the difference between its income from fees and the costs (principally the claimant's wages and associated costs) of doing the work she undertook. It is not for me to second guess that business decision. The respondent wished to have the work undertaken by independent contractors, which could have been the claimant if she so wished. I am satisfied that her status after such a redundancy would have been one of genuine self-employment. This was not just a change of label. She was to run a business on her own account with the risk of loss and the chance of profit and the ability to sub-contract and to

refuse work offered to her. Indeed, I note that although this matter was advanced in the ET1, it was not a matter on which I was addressed in submissions.

23. Hence, it is my decision that the principle reason for dismissal in this case was redundancy. Having heard from Mr Ocen I am satisfied that this was his motive in suggesting the change of model to the board. It was not put to him (or to Mr King) that he or anyone else concerned with this matter was otherwise motivated other than by a desire to cease making a loss on this service.
24. There was extensive, detailed consultation with the claimant over a long period of time. Each of her numerous points were addressed, mostly in writing. Mr King was at pains to allow her every opportunity to reflect and to question. He would have been delighted to have her take up the offer of doing the work as an independent contractor and only brought matters to a head when the claimant (having taken advice) made it clear that she would not accept this. He carefully considered her various proposals for keeping her job which, put in various ways and variously justified, amounted to a series of suggestions as to how fees might be significantly increased. This, the respondent, had rejected having carefully considered it. The claimant complained that whilst her foot related work might have ceased (as an employee) her project work had not. I reject that. Her project work was either foot related work, or so closely related to it as to make the distinction impossible to draw in practice. In any event, the only work that she had guaranteed hours per week for was her foot related work.
25. It is agreed that the respondent had no suitable alternative employment to offer to the claimant. Despite that, the claimant maintains that this was not properly considered. On investigation this turned out to be another way of putting her case that fees should have been increased so as to enable her job to be saved. I have already dealt with that matter. In the circumstances, this claim for unfair dismissal must fail and is dismissed.

TWO PARAGRAPHS MISSED:

26. The claimant was dismissed ostensibly by reason of redundancy in September 2017 by notice to expire on 6 November 2017. She claims that this dismissal was unfair either because the redundancy was a smoke screen to hide the true reason for dismissal, or because there was no redundancy situation as a matter of law, or because the procedure adopted was unfair.
27. I heard evidence from the respondent's Chief Executive, Mr Ocen, the claimant's line manager, Mr King and from the trustee who heard her appeal against dismissal, Mr Birtill. For the claimant I heard from a colleague, dismissed for redundancy some months before the claimant and from the claimant herself.

Employment Judge Andrew Clarke QC

Date:27/06/2019.....

Sent to the parties on:

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For the Tribunal Office