



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs S Jahan

v

Holroyd Howe Limited

Heard at: London Central Employment Tribunal **On:** 24 January 2018

Before: Employment Judge Davidson

Representation

For the Claimant: Mr M Alam, claimant's husband

For the Respondent: Mr S Gill of Counsel

JUDGMENT

The judgment of the tribunal is:

- 1. The claimant's complaint of unfair dismissal fails and is dismissed.**
- 2. The claimant's claim for notice pay fails and is dismissed.**

Employment Judge Davidson on 29 January 2018

REASONS

Introduction

- 1 This is a claim brought by the claimant arising out of her dismissal by the respondent. The respondent asserts that the dismissal was fair as it was based on the information received from the Home Office 'Employers Checking Service' (ECS) stating that the claimant did not have the right to work in the United Kingdom. The claimant asserts that the information was wrong and that she did have the right to work in the United Kingdom.

The Issues

- 2 The issues in the case were as follows:
 - 2.1 What was the reason for the dismissal? The respondent relies on breach of an enactment and/or 'some other substantial reason of a kind such as to justify dismissal' (sosr).
 - 2.2 If the respondent has shown a valid reason, the tribunal must determine whether the respondent followed a fair procedure?
 - 2.3 Was the respondent's decision within the range of reasonable responses?
 - 2.4 If the claimant was unfairly dismissed for procedural reasons, would she have been dismissed in any event had a fair procedure been followed?
 - 2.5 Is the claimant owed notice pay?

Evidence

- 3 The tribunal heard evidence from Liane Quarterman (Operations Manager) and James Stacey (Operations Manager) on behalf of the respondent and from the claimant on her own behalf. In addition, there was a bundle of documents before the tribunal running to some 250 pages.

The facts

- 4 Having considered the evidence before it, the tribunal found the following facts on the balance of probabilities:
 - 4.1 The respondent is a contract caterer supplying food services to independent schools and colleges.
 - 4.2 The claimant started working with the respondent's predecessor company on 4 April 2008 and transferred to the respondent under TUPE on 1 October 2015.
 - 4.3 The claimant is a national of Bangladesh and is subject to immigration control. Her immigration history shows that she was first granted leave to

enter the United Kingdom on 12 March 2008 with leave to remain granted until 2014, which was subsequently curtailed to 30 May 2012. She applied for further leave to remain on 30 May 2012 which was refused on 1 November 2012 and again on 8 September 2014 (after an appeal). She then appealed against the refusal on 8 September 2014 but withdrew her appeal by letter dated 31 March 2015. The immigration tribunal confirmed the withdrawal by notice dated 10 April 2015. On 4 April 2015, the claimant made a fresh application which was refused on 1 September 2015. This refusal letter included a summary of her immigration history which referred to her withdrawing her appeal on 31 March and submitting the new application on 4 April 2015.

- 4.4 She appealed against that refusal although she did not specifically challenge the dates set out in the 'Immigration History' section of the reasons for refusal letter as that was not relevant to the substance of her appeal. A hearing took place on 17 June 2016 at the First Tier Immigration Tribunal. At the time of the claimant's dismissal, the claimant had not heard the outcome of this appeal.
- 4.5 The claimant found out in January 2018 that her appeal had been allowed on 27 January 2017 but this had not been notified to her or the Home Office. The Home Office has confirmed that outcome by letter dated 17 January 2018 but the Secretary of State has not yet granted further leave to remain.
- 4.6 In 2014, when the claimant was employed by the predecessor employer, they carried out a check on her right to work in the United Kingdom with the Employer Checking Service (ECS) and they received a negative verification notice. This led to her dismissal on 19 September 2014.
- 4.7 The claimant appealed against the decision and provided her relevant documents and explained her circumstances. The appeal manager agreed to explain the situation to ECS and to carry out another check. The follow up ECS check in October 2014 returned a positive verification notice with an expiry date of 15 April 2015. She was then reinstated.
- 4.8 A further positive verification notice was received in August 2015 with an expiry date of 16 February 2016.
- 4.9 On 31 March 2017, the respondent received a 'Visa Expiry Alert' from its payroll service. Although the alert refers to a 'visa' expiring, it is common ground that it refers to the expiry of the ECS verification certificate.
- 4.10 On receipt of this alert, Liane Quarterman contacted the claimant's manager, Chris Weber, and asked him to obtain evidence from the claimant of her right to work. The claimant submitted a copy of her passport and correspondence between her immigration lawyers and the immigration tribunal.

- 4.11 On 5 May 2017, the respondent submitted a check to ECS which returned a negative verification notice dated 12 May 2017. The information given by the respondent to ECS appears to have been incomplete in relation to the claimant's TUPE history. The reason for the negative response given by ECS was that the claimant's current application for leave was submitted after the expiry of her previous leave.
- 4.12 The respondent gave the claimant an opportunity to provide satisfactory evidence of her right to work by 26 May and warned her that her employment was at risk if she was unable to satisfy the respondent that she had the right to work. The claimant said that she had an ongoing case relating to her immigration status.
- 4.13 On 25 May 2017, the claimant raised a grievance based on her allegation that she was being treated unfairly because of the respondent's mistake not her own. Her position was that she had previously received a positive verification check from ECS and, since that check, nothing had changed in relation to her immigration status and that therefore she should be given another positive verification report.
- 4.14 The respondent terminated the claimant's employment on 26 May 2017 on the grounds that she had not provided sufficient evidence of her right to work in the United Kingdom.
- 4.15 The respondent treated the claimant's grievance as an appeal against dismissal and convened a hearing for 1 June 2017 to be conducted by James Stacey.
- 4.16 The claimant attended the appeal hearing with Mr Stacey who raised the issue of the gap in her status. She did not explain to him that there was an issue surrounding which date should be regarded as the correct date of withdrawal of the previous application. She made a representation that the correct documentation and reference should be given to ECS and a further check requested.
- 4.17 Mr Stacey agreed to do this and asked his HR team to action this. The reference details given by the claimant were submitted to ECS and a further check requested. This check came back with a negative verification notice. Mr Stacey therefore upheld the dismissal.

The Law

Employment issues

- 5.1 Under section 98 of the Employment Rights Act 1996, the employer must show a valid reason for dismissal. The potentially valid reasons include where it would contravene an enactment for the employer to employ the employee or where there is some other substantial reason justifying dismissal.

- 5.2 Where the employer has shown the reason for dismissal, the tribunal must consider whether the respondent has acted reasonably in treating that as grounds for dismissal.
- 5.3 Where the employer relies on breach of an enactment, the employer must show that the employee's continued employment would actually contravene a statutory enactment.

Immigration issues

- 5.4 The leave of a person who has limited leave to remain in the United Kingdom who makes an application for variation of that leave before the leave expires is extended where there is an appeal pending (Section 3C Immigration Act 1971).
- 5.5 An appeal is 'pending' until it is determined, withdrawn or abandoned (Section 104 Nationality Asylum and Immigration Act 2002).
- 5.6 A person is disqualified from working on grounds of immigration status if their leave has ceased to have effect.
- 5.7 It is unlawful for an employer to employ a person who does not have the right to work in the United Kingdom.
- 5.8 Rule 17 of the Tribunal Procedures (First-tier Tribunal) (Immigration and Asylum Procedure) Rules 2014 provides:
 - (1) A party may give notice of the withdrawal of their appeal—
 - (a) by providing to the Tribunal a written notice of withdrawal of the appeal; or
 - (b) orally at a hearing, and in either case must specify the reasons for that withdrawal.
 - (3) The Tribunal must notify each party in writing that a withdrawal has taken effect under this rule and that the proceedings are no longer regarded by the Tribunal as pending.

Determination of the issues

- 6 I determine the issues as follows:
 - 6.1 The reason for the claimant's dismissal was the respondent's understanding that she did not have the right to work in the United Kingdom.
 - 6.2 In determining whether this understanding was actually correct, I must consider the position in light of the relevant immigration statutes. I take into account the claimant's representations that her situation had not changed since an earlier positive verification. I also take note of her submission regarding the relevant date for regarding the appeal as

withdrawn. Having regard to the Rule 17 of the rules of procedure in particular, I find that there is no provision that requires the tribunal to notify the parties of the withdrawal of an application for that withdrawal to take effect. I note that the equivalent provision in the rules of procedure of the Upper Tribunal require the Upper Tribunal to give consent for the withdrawal to take effect (Rule 17 Rules of Procedure (Upper Tribunal) 2008). There is no equivalent requirement in the rules of procedure of the First Tier Tribunal and I therefore find that the relevant date of withdrawal of the claimant's appeal was 31 March. I accept the dates as set out in the Home Office's summary of the claimant's immigration history in its letter of 1 September 2015. I have no information on which to explain why the ECS had given earlier positive verification reports but it is clear from the 2017 verification reports that they were aware of the gap in the claimant's immigration history.

- 6.3 I am aware that the claimant has now found out that her appeal was successful but have disregarded this information as I find it is not directly relevant to the issue before this tribunal. This is because, even if as a matter of fact her appeal had succeeded at the time of the dismissal, she had not yet been granted leave to remain with the right to work.
- 6.4 I therefore find that the respondent had a valid reason for dismissing the claimant under section 98(2)(d) Employment Rights Act in that continued employment would be in breach of an enactment.
- 6.5 If I am wrong about the actual position regarding the claimant's right to work, I accept that the respondent genuinely and reasonably believed that the claimant did not have the right to work in the United Kingdom based on the documentation she had provided to them and, more significantly, the two ECS checks.
- 6.6 I find that it was reasonable for the respondent to rely on the ECS checks and to base its decision on that information. I find that the respondent gave the claimant an opportunity to provide information which would satisfy the respondent's duty to establish she had the right to work and she failed to do so.
- 6.7 I find that the respondent acted reasonably in the circumstances by submitting further information to the ECS and requesting a further check. I do not accept the claimant's submission that the respondent should have challenged the ECS outcome by referring to the earlier positive reports. In any event, the claimant had not explained the issue surrounding the relevant date of withdrawal of the earlier appeal by the claimant and the respondent would not have known what specific question to ask.
- 6.8 While it appears that the information provided to ECS by the respondent with its request may have been incomplete, there is no evidence before me that this had an impact on the outcome of the verification check.

- 6.9 I therefore find that the dismissal of the claimant was fair as the circumstances fall within 'sossr' under section 98(2)(e) Employment Rights Act.
- 6.10 Neither party made submissions regarding the breach of contract issue. Based on my findings set out above, I also find that the claimant was not entitled to notice or payment in lieu of notice as she did not have the right to work in the United Kingdom. This effectively brought the employment contract to an end as it could not be continued without breaching an enactment.

Conclusions

- 7.1 The claimant's complaint of unfair dismissal fails and is hereby dismissed.
- 7.2 The claimant's claim for notice pay fails and is hereby dismissed.

Employment Judge Davidson on 29 January 2018