EMPLOYMENT RIGHTS TRIBUNAL

ERT/2018/316

Shikeila Johnson **CLAIMANT**

v.

Ian Griffith Mortuary Service **RESPONDENT**

DATE: **30th April 2019**

BEFORE: Christopher Blackman Esq. GCM; Q.C; Chairman

John Williams Esq, Member

Frederick Forde Esq, Member

Appearances: Mr. Caswell Franklyn for the Claimant

Mrs. Sheena Mayers-Granville, Executive Director,
Barbados Employers Confederation for the Respondent

DECISION

[1] The issue for determination in this matter is whether there was compliance with the provisions of Section 31 of the Employment Rights Act (The Act)

[2] The claimant's claim is that of unfair dismissal as she refused to accept a reduction in salary on being asked to be the Receptionist. She has sought reinstatement of her job as a mortuary assistant, the position held prior to going on maternity leave.

[3] Mr. Ian Griffith the Respondent stated the position of mortuary assistant had been made redundant and that consequently, reinstatement was not an option.

[4] Both Mr. Franklyn and Mrs. Mayers-Granville focused their submissions on the provisions of Section 31 of the Employment Rights Act. Mr. Franklyn submitted that section 31(4) required that certain consultations and actions are required before an employer may dismiss for reasons of redundancy, and that failure to comply with the statutory obligations, rendered the dismissal unfair.

[5] Mrs. Mayers-Granville, in rebuttal submitted that "The intent behind the legislation is for consultation to occur where significant numbers are impacted and **NOT** where a single individual is made redundant."

[6] The significance of the foregoing submission has however been undermined by the statement at page 9 of 13 in the Submissions, in red, that "In the UK, there is no statutory requirement for collective

consultation where the redundancies involve less than 20 employees." The Barbados legislation offers no such concessions. We think it appropriate to observe that the legislature should provide that a minimum number of employees are required before the Act may be invoked.

[7] A great deal of what has been said of the Respondent in the submissions, may well be true, and were it not for non-compliance with the statutory requirements, the termination may well have been fair. We are obliged however to hold that as the Respondent failed to carry out the consultations required by section 31 (6)(b), the dismissal was unfair.

[8] The Tribunal now considers what remedy is due to the claimant in the circumstance that the claimant has expressed a wish to be reinstated, or failing that, to be re-engaged.

[9] Section 33 (3) of the Act provides that "In exercising its discretion under subsection (2) the Tribunal shall first determine whether to make an order for reinstatement of the employee and, where the Tribunal determines that it is not appropriate to make such an order, the Tribunal shall determine whether to make an order for his re-engagement."

Section 33 (4) (b) further provides that the Tribunal shall take into account whether it is practicable for the employer, or his successor, to comply with an order for the reinstatement or re-engagement, as the case may be.

[10] The case of ***Central & North West London NHS Foundation Trust v. Abimbola*** [2009] UKEAT 0542/08, was concerned with an order for reinstatement made by an **Employment Tribunal** in favour of Mr. Abimbola, a Psychiatric Nurse following a finding that Mr. Abimbola had been unfairly dismissed from his employment by the Respondent, the Central & North West London NHS Foundation Trust.

[11] On appeal to the **Employment Appeal Tribunal**, Judge Peter Clark, sitting with Mr. Harris and Mr. Warman, set aside the order for reinstatement. Such an order would have required the employer to re-employ him in a female ward, where there had been complaints, albeit unproven, of sexual misconduct made against him. In such circumstances and noting the other allegations, **Employment Appeal Tribunal** held that the Employment Tribunal failed to take into account the cogent factors which undermined the NHS Foundation Trust's trust and confidence so to re-employ him.

[12] Judge Peter Clark noted at paragraph 14 of his judgment that although orders for reinstatement or re-engagement are the primary remedy for unfair dismissal…historically only about 3 per cent of successful unfair dismissal claims resulted in an order for re-employment in one or other of these forms, a situation after more than a dozen years after the enactment of the Employment Rights Act of 1996. In the two matters considered by this Tribunal since the Act of 2012 came into force, ***Cutie Lynch v. National Conservation Commission and Anderson Chase v, National Conservation Commission*** it was not considered practicable to make such orders.

[13] Section 116 (1) of the UK ERA is in similar terms as section 33 (4) (b) of the Act and the English authorities have held that practicable means more than possible. In ***Coleman v. Magnet Joinery Ltd*** [1975] 1CR 46, where re-engagement of the unfairly dismissed employees, although possible, would have led to industrial strife, the Court of Appeal held that re-engagement was not practicable.

[14] In the circumstances of the instant case, having regard to the small number of employees (7), and the nature of the previous personal relationship which had existed between the claimant and the respondent, the Tribunal is of the view that an order for re-employment whether by way of reinstatement or re-engagement, would be impracticable. (See ***Enessy Co SA (t/a The Tulcan Estate v. Minoprio*** [1978] 1RLR 489 where Lord McDonald said obiter :

"In our view it was not realistic to make an order of this nature in a case where the parties involved were in close personal relationships with each other such as they were in the present situation. It is one thing to make an order for reinstatement where the employee works in a factory or other substantial organisation. It is another to do so in the case of a small company with a few staff."

[15] The Tribunal is now obliged to consider what award for compensation, determined in accordance with section 37 of the Act, should be paid by the employer to the employee. Section 37 (1)(a) provides that where neither an order for the reinstatement of an employee nor for his re-engagement is made, the Tribunal shall make an award for compensation to be calculated in accordance with the

Fifth Schedule to the Act. In the matter of ***Abimbola*** referred to at [10] above, the **Employment Appeal Tribunal**, remitted the matter for assessment of compensation.

[16] At the time of her dismissal, the claimant's salary was $540.00 per week and she had worked for just over 6 years. The entitlement is two and a half weeks wages for each year where the period is 2 years or more but less than 10 years. The calculation is therefore 2.5x540.00x6=$8100.00. In addition, pursuant to s.37 (2)(c)(ii) and paragraph 1 (b) of the Fifth Schedule and in the circumstances of this case, we order that the respondent pay the claimant 26 weeks wages, which equates to $14,040.00, a total payment of $22,140.00. From that sum must be deducted $6453.18 which was paid to the claimant on termination, leaving a balance of $15,686.82.

[17] The Respondent Ian Griffith is ordered to pay the Claimant Shikeila Johnson the sum of $15,686.82 by 30th September, 2019.

Dated this 23rd day of August 2019

Christopher Blackman

Chairman

John Williams
Employer's Representative

Frederick Forde
Employee Representative