EMPLOYMENT TRIBUNALS

Claimant: Mr P Judge

Respondent: Schindler Limited

Heard at: Liverpool **On:** 13 and 14 December 2018

Before: Employment Judge Buzzard
Mr G Pennie
Mrs J C Ormshaw

REPRESENTATION:

Claimant: Mr B Henry, Counsel
Respondent: Mr W Clayton, Solicitor

JUDGMENT having been given orally at the hearing and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Issues

1. The claimant in this claim made a single claim of unfair dismissal. The claimant argued his dismissal was unfair on two alternative grounds:

1.1. that his dismissal was automatically unfair because the reason for his dismissal was that he had performed activities which at were part of his role as a trade union representative; or

1.2. if his dismissal is not automatically unfair, it was procedurally and substantively unfair.

2. The reason for the decision in favour of the claimant was on the basis of the first ground at 1.1 above. Accordingly, the Tribunal did not go on to consider the procedural or substantive fairness of the claimant's dismissal.

Relevant Law

3. It is not denied by the respondent that the claimant was dismissed. Accordingly, the first question that must be addressed is what the reason for the dismissal was.

4. s98 (1) Employment Rights Act 1996 states:

> *"In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."*

5. Thus, to defend a claim of unfair dismissal successfully a respondent has to present evidence to establish to the Tribunal that the reason for the dismissal fell within the scope of s98(1)(b).

6. In the case before us the respondent submitted the reason for dismissal was that the claimant committed an act of gross misconduct. The respondent dismissed the claimant because he posted information which he had received as a participant in collective pay bargaining onto a social media platform accessible to trade union members. The misconduct specifically was argued to be that such a posting was a breach of the respondent's social media usage policy, as the information was confidential and commercially sensitive.

7. Subsection (2) (b) of Employment Rights Act 1996 states:

> *"A reason falls within this subsection if it –*
> *…..*
> *(b) relates to the conduct of the employee,*
> *….."*

8. Accordingly, if the respondent can establish that the claimant was dismissed in response to an act of misconduct, this will be a potentially fair reason for dismissal.

9. The claimant in this case did not accept that there was a potentially fair reason for his dismissal. There was no dispute as to the factual events that resulted

in his dismissal. However, the claimant contested that his actions argued to be misconduct were properly done as part of his his role as a trade union representative. S152(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A") states as follows:

> *"For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—*
>
> *….*
>
> *(b) had taken part, or proposed to take part, in the activities of an independent trade union…."*

10. The respondent did not dispute that the claimant was a trade union representative. It is clear, however, that the TULR(C)A does not protect all acts which a trade union representative does. Whilst statute provides no further clarification, there is a wealth of case law which provides a guide to Tribunals tasked with determining whether an act falls within the scope of the protection. Some of that case law was referred to by the parties.

11. The EAT has been clear (**Dixon and anor v West Ella Developments Ltd** 1978 ICR 856 and **Chant v Aquaboats Ltd** 1978 ICR 643) that the term 'union activity' must not be interpreted narrowly. In **Lyon and anor v St James Press Ltd** 1976 ICR 413 the EAT suggested that where conduct is wholly unreasonable it would lose protection, which should not operate "*as a cloak or an excuse for conduct which ordinarily justify dismissal; equally, the right to take part in the affairs of a trade union must not be obstructed by too easily finding acts done for that purpose to be a justification for dismissal.*"

12. Whilst the burden to establish a fair reason for dismissal falls on the respondent, the burden to establish an automatically unfair reason for dismissal falls on the claimant. In this case the Tribunal found the claimant had met that burden, so did not go on to consider fairness further.

13. The respondent submitted that, in the event that the claimant was found to have been unfairly dismissed, they would argue that the principle in **Polkey v AE Dayton Services Ltd** [1987] ICR 301 should be applied to any remedy. This established that where the unfairness of a claimant's dismissal was procedural, a reduction of the award should take into account the chance that, if a fair procedure had been followed, the outcome would be the same. This is giving effect to the just and equitable test in s123 ERA.

14. The respondent further argued that applying the just and equitable test to the determination of any remedy should result in a reduction in any compensation in order to account for the contribution of the claimant to his own dismissal. Case law in relation to this is clear, that such a reduction should only be made where there is a finding that there has been blameworthy conduct by a claimant.

Relevant Facts

15. The Tribunal heard evidence from the claimant on his own behalf. For the respondent evidence was heard from Mr Govett, the dismissing officer, and Mr Wepener, the disciplinary appeals officer. The Tribunal also had the benefit of a substantial bundle of documents to refer to.

16. The claimant's dismissal arose out of a set of events, the majority of which were not in dispute. The pertinent found facts were as follows:

16.1. The claimant was an employee of the respondent. The claimant was also a trade union representative.

16.2. The respondent had a social media policy which applied to the claimant as an employee. This policy quite clearly states that employees should not post confidential information onto social media sites such as Facebook. The reason for this restriction is stated to be that such sites should not be relied on to have adequate security and/or to be a good way of keeping information contained, even if available privacy settings are used.

16.3. In his capacity as trade union representative the claimant attended a meeting that formed part of a collective pay and terms bargaining. There were a number of other representatives and trade union officials at the meeting.

16.4. There was no evidence presented to suggest that there had been any applicable written terms of reference for collective consultation between the respondent and the claimant's union. The suggestion from the parties was that no such written terms of reference existed.

16.5. As part of the meeting, a presentation was made to the trade union representatives by the respondent. The presentation was delivered via power point (or similar software) and the claimant, along with all the others trade union representatives, was given a handout to take away. The handout was before the Tribunal and the evidence was that it consisted of no more than hard copies of the slides which formed the presentation.

16.6. The contents of the handouts included some partial information on payments which staff currently were paid and could be paid under future proposals. The slides included, at times, different proposals with the clear implication that the views of the union representatives were to be sought on the options on offer. The evidence of both the respondent's witnesses was that the information regarding the options should not have been shared until the conclusion of the negotiation. Neither was able to explain how the union representatives could seek the views of their members if they could not share the information until that point.

16.7. The handout did not appear to contain sufficiently comprehensive information to allow a reader to determine the full remuneration and benefits of the respondent's staff. Further, it did not appear to contain any information about

the financial performance of the respondent or details of prices charged to customers. Both the respondent's witnesses expressly stated that it was their belief that there was information on the slides which was price sensitive and, therefore, clearly confidential.

16.8. The claimant was, as with all those present, permitted to retain the handout at the end of the meeting. There was no evidence presented to suggest any desire or attempt by the respondent to retain the handouts.

16.9. The handout bore nothing which could be interpreted as an indication that the respondent believed the contents were confidential, or that they wanted them to be treated as such. Further, there was nothing to suggest that the contents should not be shared with members of the union within the workforce.

16.10. The respondent accepted that they had, in previous negotiation meetings with the union, adopted a different approach. Whenever documents had been provided which contained information that was confidential or that the respondent wanted to be treated as confidential, this had been expressly stated on the documents. Further, those providing the information had drawn the recipients' attention to the fact that it was confidential and should be treated as such.

16.11. The claimant's evidence was that, when he was given the document he was not told that the information in the document was considered to be confidential. During the claimant's disciplinary process this was initially disputed by the respondent, the dismissing officer finding that the claimant along with all present at the relevant meeting had been told the information in the handout was confidential. However, the claimant appealed, and, for reasons that are not pertinent to this decision, the respondent conducted a full second investigation of the alleged misconduct. Following this second investigation the appeals officer accepted that the respondent had not stated at the meeting that the handout contained confidential information or that it should not be shared with the union membership.

16.12. The respondent's position was that the omission to mark the handout as confidential and to clearly state to those given it that it was confidential was an oversight which the claimant should not be allowed to exploit.

16.13. Following this meeting, the claimant posted to a Facebook group a copy of the handout. This was a group specifically set up to communicate with members of the union employed by the respondent. There was no suggestion that members of the public could access or view the group. The evidence of the claimant was that this group could only be viewed by individuals who are members of the union either as national officials or as members of the respondent's workforce. This was not disputed by any evidence presented by the respondent.

16.14. It was agreed that the respondent had a number of Codes of Practice and policies governing how employees should handle confidential information.

16.15. The claimant was dismissed following a disciplinary process. That disciplinary process was initially recognised as flawed and, as a result, as part of the appeal there was a full second investigation undertaken. The clarity of the appeal officer's evidence was of great assistance, as was the appeal outcome letter, which was in the bundle. From this evidence it was clear that the claimant was dismissed for two things, namely:

16.15.1. disclosing confidential information, contained in the handout, to the union members he represented; and

16.15.2. using a social media site to effect that disclosure.

16.16. Evidence was presented that showed the claimant had sent an email two or three weeks later which was less than complimentary about the respondent. Whilst this had been considered as part of the disciplinary process, based on the evidence of the appeals officer, the email did not contain any information that could be seen as commercially sensitive and this was not the reason for the claimant's dismissal.

Conclusions

17. Did the claimant disclose confidential information?

17.1. The Tribunal had the benefit of viewing the slides. It is clear that they contain information that was not available to the public. Some of this information was about the current position, and some related to the potential future position.

17.2. In relation to the current position, the information related to the pay given to staff. In general an employee is free to tell anyone they like how much they earn, albeit many choose not to. The respondent made no submission which pointed to any legal obligation that could prevent an employee from freely telling others (including competitor employers from whom they may be seeking alternative employment) what they earn. This is probably because, unless there are potentially exceptional circumstances which the Tribunal could not specifically envisage, and which clearly would not apply here, such a restriction could not be lawfully or fairly placed on employees. For this reason, whilst the information may be confidential, it cannot be viewed as obviously highly confidential information of the nature of a trade secret.

17.3. In relation to the future position, this was at times expressed in the form of options to be considered. The clear implication was that the respondent wanted the union to offer a view on the options on offer, on behalf of their membership. Implicit in that, unless the contrary was stated, would be that the union would consult their membership before offering that view. This would inevitably require them to inform the membership of the options, albeit that those options contain confidential information. That noted, the view of the Tribunal was that the future information was no more than a variation on the

previous information, and, once implemented, would be available to employees on the same basis as the current position information given above. As such, it is difficult to view these future options as obviously highly confidential information of the nature of a trade secret.

17.4. The handouts were not marked as confidential. In the past, where documents containing confidential information were given out, the respondent marked them as confidential. Whist the respondent states this was an error or oversight, the fact remains that the absence of such a marking was a notable difference. As such it could reasonably lead the recipient of this document to the belief that it was not confidential.

17.5. The claimant was not told the handout was confidential, in line with the final conclusion of the respondent itself which was found after a second investigation. Given the handout appeared to invite the union to consult the membership, a reasonable viewer of the presentation could conclude not only that the contents of the document could be shared, but that they positively should be shared.

17.6. The conclusion of the Tribunal is that the documents did contain information which the respondent viewed as confidential, but that designation could not be obvious to the claimant. The respondent could have made their views clear but did not do so until it was too late. The absence of any assertion of confidentiality was conspicuous on this occasion compared to previous occasions, and, as such, clearly suggested that the information was not on this occasion to be treated as confidential. The information in the slides is not inherently obviously highly confidential information to the extent that it should have overridden this inference.

18. Was the disclosure of information a trade union activity?

18.1. The claimant was a trade union representative. As part of pay bargaining, potential options were highlighted to him to seek the views of the union. He proceeded to circulate the handout to the members of the union.

18.2. Submissions were made at length by the claimant's representative in relation to the importance of trade unions being independent. This is a persuasive submission. The entire purpose of trade unions would be undermined if employers were able to restrict that independence.

18.3. If there was no question that the information was confidential, it is beyond doubt that the circulation of the information would be a legitimate trade union activity. It is because the information was confidential that the respondent argues the disclosure of the information using Facebook is not protected as a trade union activity. This argument relied on the premise set out by the EAT in **Lyon and anor v St James Press Ltd**, that the protection of s152 TULR(C)A should not be "*an excuse for conduct which ordinarily justify dismissal".* Here the evidence shows that the respondent has policies which cover the posting of confidential information on services such as Facebook,

which the claimant was found to have breached, and which would ordinarily justify dismissal.

18.4. This is, however, a selective reading of the judgment in the case. It is clear that there is a balance to strike in that "*the right to take part in the affairs of a trade union must not be obstructed by too easily finding acts done for that purpose to be a justification for dismissal."*

18.5. The claimant was communicating with the union membership. The modern workplace cannot be isolated from the digital age. Permitting an employer to stipulate to a recognised trade union that they cannot use social media platforms to communicate with their members, even if available privacy settings are used correctly, would be placing an unreasonable obstruction on the activity of an independent trade union. That is not to say that a union is free to do anything they like when it comes to communication with members. For example, asking them to take reasonable steps to ensure that confidential information is adequately protected would not amount to an unreasonable obstruction. In this case, however, it is not disputed that the claimant when posting the information to Facebook did so only to a group with appropriate privacy restrictions such that only members of the union could access the information. Accordingly, the Tribunal finds that the claimant was, when he posted the information, acting appropriately in his role as a trade union representative.

19. For these reasons the claimant's dismissal is found to be automatically unfair. The Tribunal did not go on to consider the evidence and submissions heard regarding substantive fairness of the claimant's dismissal.

Adjustments to Remedy

20. The respondent made submissions that in the event the claimant was found to have been unfairly dismissed, any compensation awarded should be reduced. This was on two basis:

20.1. applying the principle from **Polkey v AE Dayton Services**; and/or

20.2. to reflect the claimant's contribution to his dismissal.

21. The principle in **Polkey v AE Dayton Services** relates to procedural defects in a dismissal. This dismissal was found to be automatically unfair, not procedurally unfair, and, accordingly, no adjustment under this principle is appropriate.

22. In relation to contributory fault, the conclusion of the Tribunal was that the claimant had not done anything that could be labelled as blameworthy. He was reasonably discharging his duties as a union representative in a way that, in the circumstances, he was entitled to conclude was appropriate. The information was not obviously highly confidential, and was, unlike on previous occasions, not identified as confidential. He did not do anything reckless, malicious or

unreasonable. He did not post in a way that left the information accessible to the wider public or competitors. Accordingly, given an absence of any blameworthy conduct, there cannot be contributory fault.

Employment Judge Buzzard

Date: 6 February 2019

REASONS SENT TO THE PARTIES ON

20 February 2019

FOR THE TRIBUNAL OFFICE