EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Kilkenny	**v**	**Unite the Union**

Heard at: Watford **On**: 1 March 2019

Before: Employment Judge Bartlett (sitting alone)

Appearances

For the Claimant: Mr Bheemah, of Counsel
For the Respondent: Mr Potter, of Counsel

JUDGMENT

1. The claimant's amendment to his claim is permitted as follows:

   1.1 the emails on which the claimant relies includes the emails identified at paragraph 4(viii) and 4(ix) of the claimant's further and better particulars dated 10 June 2018.

2. None of the claimant's claims have been presented out of time.

3. None of the claimant's claims have no reasonable prospect of success and therefore they are not struck out.

4. None of the claimant's claims have little reasonable prospect of success and therefore no deposit orders are made.

REASONS

5. The preliminary hearing was listed to determine:

   5.1 whether or not some all of the claims have been presented out of time and, if so, whether time should be extended;
   5.2 whether or not some or all of the claims have no reasonable prospect of success and should be struck out;
   5.3 whether some or all of the claims have little reasonable prospect of success and deposit orders made.

6. In addition, the claimant had made an application to amend his claim in June 2018 and at the start of the hearing today Mr Bheemah sought to apply to amend to add an additional claim relating to an email dated 11 June 2018 sent by officials of the respondent.

Issue one – have some all of the claims been presented out of time and, if so, whether time should be extended?

7. At the start of the hearing I asked Mr Potter if the respondent pursued a claim that some or all of the claimant's claim out of time. Mr Potter stated that he was unaware of the early conciliation dates and therefore he was unable to state his position. I informed Mr Potter that the early conciliation certificate stated that early conciliation started on 31 May 2017 and ended on 1 July 2017. In addition the claimant's claim form was recorded as received by the Employment Tribunal on 31 July 2017.

8. I stated that I had reviewed the documents and had extracted relevant dates as follows:

   8.1 leaving aside the application to amend the dates of actions complained of in the claimant's further and better particulars related to the period 3 March 2017 to 16 March 2017;
   8.2 Day A is 31 May 2017;
   8.3 Day B is 1 July 2017;
   8.4 the primary time limit expires on 15 June 2017;
   8.5 the claim form was submitted on 31 July 2017;
   8.6 one month after Day B is 1 August 2017;
   8.7 the period between Day A and Day B is 31 days;
   8.8 applying section 207B(3) ERA (adding 31 days to 15 June 2017) results in 16 July 2017;
   8.9 applying section 207B(4) ERA (one month after Day B) results in 1 August 2017.

9. Mr Potter and Mr Bheemah agreed with these dates and as a result Mr Potter confirmed that the time limit issue was no longer pursued.

Application to amend

10. I have considered the application to amend at this stage in the judgement as if I had found that some of the claims were out of time, it could have an impact on my decision to allow the application to amend.

11. The appellant's application to amend in respect of the emails dated 21 April 2017 and 4 October 2017 were included in an document dated 10 June 2018. This was some 8 months before the preliminary hearing today and many months before the final hearing.

12. The application to amend in respect of the email dated 11 June 2018 was made in person at the hearing today. The email had not been provided to the respondent before that date and no correspondence concerning it had taken place between the parties.

13. I have considered the contents of the emails. I find that the email dated 21 April 2017 is a communication which continues comment about complaints to the certification officer about the respondent. I consider that it is in a very similar vein to the March 2017 emails. It is not disputed that it was sent by the respondent.

14. It is my discretion as to whether I allow the application to amend. I have considered the case of **Selkent Bus Company v Moore [1996] ICR 836** and the guidance set out therein. I consider that if the amendment were to be allowed almost the same evidence would be adduced by the respondent and the claimant in relation to this claim as would be adduced in respect of the March 2017 communications. This means that the respondent would not be put to greater expense or time in dealing with this allegation than it would if the allegation were not included. Allowing the amendment would not cause any delay to the final hearing and I do not consider it would result in anything more than the most minor increased expense. Therefore, weighing these considerations, I find that the balance of fairness means that I should allow this amendment.

15. I find that the same findings apply to the 4 October 2017 email and therefore I permit the amendment to the claimant's claim in this regard.

16. In relation to the 11 June 2018 email, I have given weight to the very late application for the amendment. I also note that this email does not refer to the claimant specifically and there is a very significant elapse of time between this email and the last of the claimant's other claims. In these circumstances I do not consider that it is just fair to allow the amendment.

Issue 2 and 3 – have some or all of the claims no reasonable prospect of success such that they should be struck out and have some or all of the claims little reasonable prospect of success such that a deposit order should be made?

17. Mr Porter and Mr Bheemah's submissions on these two issues were very similar and therefore I have decided to deal with these two issues together. I am aware that the tests for strike out and deposit orders are different and I have, as set out below, applied the relevant tests.

18. Mr Potter and Mr Bheemah relied heavily on **Mills v Unite the Union 3324903/2017** a Judgement of Employment Judge Bedeau issued on 3 September 2018. I was provided with a copy of this Judgement and Reasons and I have read it carefully. I was also referred to **National and Local Government Officers Association v Killorn [1990] IRLR 464** which I have read and considered carefully.

19. In essence the claimant's claim is that his right not to be unjustifiably disciplined has been infringed contrary to section 64 TULCRA 1992. He relies on a number of emails and a tweet.

20. The respondent conceded that a prohibited reason exists under section 65(2)(c) TULCRA in that the claimant brought proceedings against the respondent.

21. Mr Potter submitted:

21.1 that the respondent did not make a determination to discipline the claimant:

21.1.1 in **Killorn** there was a concession that the union had made a determination. In **Mills** there was clear evidence that by reason of Ms Mills pursuing a request for accounting records and litigating against the union there was a determination as to how to treat her.

21.2 there was no detriment or act of discipline:

21.2.1 in **Mills** there were findings that:

21.2.1.1. Ms Mills was named and blamed for causing unions to be adversely impacted, and she was isolated and targeted for attack;

21.2.1.2. the actions of the union crossed the boundary between engaging in public discourse and victimising a person;

21.2.1.3. the communications were a detriment because they increased the claimant's isolation from her colleagues and attributed bad motives to her in bringing the accounts case.;

21.2.2 the same cannot be said in this case as the claimant was not repeatedly singled out for criticism;

21.2.3 detriment is an evidential matter and here there is no direct evidence of such and what happened to Ms Mills is of a different order to what happened to the claimant;

21.3 only two of the documents relied on identified the claimant and the references to a "small group" were known by union members to refer to specific individuals, such as Mr Beaumont, Ms Freeman and Ms Mills and they did not include the claimant.

22. Mr Bheemah's submission was that:

22.1 the decision to send each email amounted to a determination to discipline the claimant. He relied on paragraph 152 of **Mills**;

22.2 the detriment the claimant suffered was that the way he was potrayed resulted in him being viewed as a troublemaker and ostracised by some colleagues which made his working life difficult;

22.3 the claimant was named in two emails and the other emails referred to a small group/ group/tiny minority and it was known that the claimant would fall within that definition;

22.4 the respondent's actions went beyond free-speech;

22.5 paragraph 152 of **Mills** sets out a finding that some of the same emails in which the claimant relies on amounted to a detriment in respect of Ms Mills and that a determination was made in respect of each email. Therefore it is not possible to say there were no or little reasonable prospects of success of the claimant's claim;

22.6 no evidence was presented about the claimant's means. It was submitted that he had very meagre financial means and had to borrow to pay for councils representative today.

23. Rule 37 sets out:

"Striking out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a)that it is scandalous or vexatious or has no reasonable prospect of success;

(b)that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c)for non-compliance with any of these Rules or with an order of the Tribunal;

(d)that it has not been actively pursued;

(e)that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)..."

24. Rule 39 sets out:

"Deposit orders

39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order…"

25. As set out above both parties relied heavily on the **Mills** case. Relevant paragraphs of reference are as follows:

"145.Section 64(2) 1992 Act states that an individual is disciplined by a trade union if a determination is made or purportedly made under the rules of the union or by an official of the union or a number of persons including an

official. We are satisfied, having regard to section 65(5), that the claimant's conduct was in her request for the disclosure of the Branch's accounts. She was asserting her right under section 30. Such conduct falls within section 65(2)(c) and (j).146. Mr Beatty told us and we found as fact that the email correspondence sent to the membership of the Branch, were drafted and sanctioned by the Branch Committee members and they included officers. We are satisfied that they took the decision on or around the 3 March 2017,to refer to the claimant's case and its impact on the union as well as on the trade union movement generally, in the email of the same date specifically targeting and blaming her for the "damage this will bring about to the entire Trade Union movement under this anti-Trade Union Government....They will be grateful to Ms Mills." Details of her case were also tweeted on 4 March 2017. There then followed further emails. In the emaildated 5 March 2017, the Branch Committee wrote, "Thanks to Ms Karen Mills the entire Trade Union movement is now under financial scrutiny from anyone. That is her legacy and something that only she can live with, regardless of her original intention(s). No-one else is to blame for the outcome of that ruling, except maybe those that for their own ends encourage her to do so."

147. In the email dated 13 March 2017, they wrote: "Ms Mills took a case to require branches to submit accounting records far in excess of the union to which they belong, in that she wished to inspect every aspect of expenditure behind the quarterly accounting figures. Individual receipts, bank accounts and reps' personal, financial information etc."

148. In the 14 March 2017 email the claimant was again referred to by name notwithstanding the fact that the Branch representatives accepted that she may not have been involved in disclosing information to the press. Her motives in calling the Branch to account were also questioned.

149. The emails were sent to the 9,000 membership and had the effect of isolating and blaming her for the lack of privacy protection afforded to trade union officers under the European Convention for the Protection of Human Rights and Fundamental Freedoms; for leaks to the press; for the weakening of the union, and for the weakening of the union movement.

150. In the email from Mr Adrian Smith sent on 27 March 2017 and in the one dated 6 April 2017, the implication is that the claimant was responsible for the leaks to the press and that a letter would be sent to her threatening action if the Branch's financial records were disclosed.

151. It is, in our view, clear from Mr Beatty's evidence and from the above extracts that a determination was made on or around the 3 March 2017 by Branch's union officials regarding how the claimant should be treated. This was in response to the negative press and rumours. Thereafter the documents referred to above are consistent with there being further determinations on how to deal with the claimant. These placed her at

a disadvantage in that she was named when there was no need to do so and blamed for the alleged weakening of the unions. She was isolated and a target for attack for having to exercise her right to inspect the accounts under section 30. We are satisfied, having regard to section 65(5), that the claimant's conduct was her requesting the disclosure of the Branch's accounts. Such conduct falls within section 65(2)(c) and (j).

152. We accept that the Branch's representatives and officers wanted to address the rumours and negative press coverage. There was no evidence that they decided to formally discipline the claimant although there was a discussion about it which was not pursued. We are, however, satisfied that a determination was made on or around 3 March 2017 that she should suffer a detriment, in that the she would be identified and blamed for the consequences to the union and the union movement in having taken her case to the Certification Officer and the consequences for the union and officials considering the EAT judgment. The email of 3 March, the Twitter tweet and the subsequent emails referred to above specifically referred to the claimant by name rather than as a member of the Branch or of the union. We, therefore, have come to the conclusion that the claimant had been unjustifiably disciplined in respect of the email communications from the branch. Each communication sent to the membership followed a discussion by the union officers and amounted to a determination. As such section 64(2)(f) is satisfied and the claimant was unjustifiably disciplined. Paragraph 2a(i) of the List of Issues in relation to the specific correspondence referred to above, is well-founded.

153. If we are in error in concluding that the above communications constituted determinations and the claimant was unjustifiably disciplined, we do conclude, in the alternative, that a determination was made on or around 3 March 2017, when the Branch Committee decided that it was time to address the rumours and negative publicity by referring to the claimant in their communication with the membership. The subsequent communications referred to above, directly followed on from the decision taken on or around the 3 March. In that respect she was unjustifiably disciplined.

154. We accept that union officials have the right to engage in political and legal discourse in relation to matters affecting their interests and/or the interests of their union or the union movement. It is perfectly legitimate to do so and this is what the membership would have expected from their union, particularly when a union and/or its officials face a negative press and rumours on social media. There is, however, a boundary that any union should be wary of crossing and that is when the member becomes victimised by the body that is there to protect them. As Mr Justice Supperstone held in the Kelly case, "It is necessary in a democratic society to protect the rights of members of unions to hold their unions to account for breaching the union's own rules, where the members act in good faith." The claimant was exercising her right as a union member when she requested disclosure of the Branch's accounts. It was not

necessary to name and to target her in the Branch's emails and in other communications in the manner in which the Branch did."

26. I have also given due consideration to the decision in **Killorn** and in particular its finding that:

> *"again we agree with the Industrial Tribunal's conclusion that the publication of the member's name in a circular or newsletter circulated to branch members, naming the respondent and others as strikebreakers, with the intention of causing them embarrassment, could reasonably be described as subjecting those individuals to detriment. In our view, whether or not a member suffered deprivation or detriment is the sort of question that Industrial Tribunals, with their expertise on industrial matters, particularly suited to answer"*

Has there been a Determination?

27. I find that the judgement in the **Mills** case includes findings that the union made a determination in respect of the emails it sent naming Ms Mills. A number of these emails are the same emails relied on by the claimant. The tribunal made that finding on the basis of evidence before it which included but was not limited to witness evidence. The issue before me today is whether to strike out the claims or issue a deposit order. I find that it cannot be established that the claimant has no reasonable prospect or little reasonable prospect of success of establishing that the union made a determination within section 64 TULCRA. As is clear from the **Mills** case deciding to send an email can amount to a determination. This is a matter which requires careful consideration of the evidence and it is a matter for a full and final hearing.

28. One of Mr Potter's submission was that the findings in the **Mills** judgement that the sending of each email involved a determination could not be separated from the wider context of the case, which included Ms Mills taking legal action to obtain access to the union's accounts, publicity of the legal action involving criticism of the union in the press and that the actions of the union were found to have isolated and victimised Ms Mills. His submission was that these wider findings could not possibly apply to the claimant's claim and therefore there could be no or little reasonable prospect that the claimant could establish a determination in respect of each email. I find that, even if this wider context could not be applied to the claimant's case, I am not satisfied that it would almost inevitably lead to a finding that a determination in respect of sending each email was not made. Therefore, this submission cannot establish that the claimant has no or little reasonable prospect of success on this issue.

Has there been a detriment?

29. I find that both the **Mills** and the **Killorn** cases establish that it is possible that communications such as emails and tweets can amount to a detriment. Therefore I find that the emails and tweet of which the claimant complains,

could amount to a detriment for the purposes of the unjustifiably disciplined statutory regime. Whether or not each email or tweet does is a question of fact which involves careful consideration of article 10 ECHR. The **Mills** judgement sets out findings as to how and when the union crossed the boundary. I consider that this is the case which requires careful consideration of the conduct of the respondent and considerations of freedom of expression and article 10 ECHR. I do not accept that the claimant's claim that the union's behaviour amounts to a detriment is so flawed that it can be established that it has little or no reasonable prospects of success.

30. Mr Potter's submission was that the communications on which the claimant relied were justifiable comment on matters relating to the interests of the union or the union movement and that, in contrast to the Mills case, the claimant was not victimised. The claimant disagrees.

31. The documents relied on by the claimant are set out in his further and better particulars and are as follows:

    31.1 An email dated 3 March 2017;
    31.2 a tweet dated 4 March 2017 containing a link to the above email;
    31.3 an email dated 5 March 2017;
    31.4 an email dated 14 March 2017;
    31.5 an email dated 15 March 2017;
    31.6 an email dated 16 March 2017;
    31.7 an email dated April 2017;
    31.8 an email dated 4 October 2017.

32. The claimant is identified by name in the email dated 3 March 2017, in the link in the tweet dated 4 March 2017 and in the email dated 16 March 2017.

33. The email dated 14 March 2017 titled "A Dummy's Guide to Financial Records" refers to "*Cue a campaign from the same grouping (named last week…*"

34. The email dated 15 March 2017 includes the statement "*as we said yesterday, cue the obligatory campaign from the same grouping…*"

35. The email dated 15 March 2017 titled "A Message from Duncan Holley" refers to "*the intricacies of the current war of words that is playing out between the BASSA rep community in a small number of members*."

36. The email dated 5 March 2017 refers to "*some*" "a *small minority*" and similar terms. Similar terms are used in the email dated 4 October 2017.

37. The email dated 21 April 2017 sets out "*by comparison, Unite is far from the only union affected by the complaint culture, Unison (public services union) are currently embroiled in certification officer cases in regards their general secretary election… The aspirations of unsuccessful past candidates to change them through the certification officer was a mistake*."

38. I find that an argument could be made that a number of these communications, particularly the emails dated 14 March 2017 and the 15 March 2017 titled "A Message from Duncan Holley" could not be seen as referring to the claimant and/or could not amount to detriment because of what is contained in that email (i.e. only reasonable general comment). However I do not consider that each email can be fairly considered independently of the other emails as they form a series of correspondence addressing an ongoing issue. The appellant was named in some of the communications and therefore it is arguable that he would have at least be seen to have been part of the group that was referred to in all the communications.

39. Further, I consider that it is arguable that all of the communications must be considered and their cumulative impact as to whether or not the claimant suffered a detriment.

40. The respondent's submission is in part that what the claimant was subjected to was of a different order to that Mrs Mills suffered. I consider that this is an issue which would be considered at a full hearing and it cannot be said that this submission is so overwhelmingly persuasive that the claimant's claim has no or little reasonable prospect of success.

41. I have used the language of no reasonable prospects of success and the little reasonable prospects of success interchangeably to a large extent in this judgement. This is partly because that was the basis on which the submissions were made to me, however, it is also because having considered both tests carefully and paying attention to the differences in the tests, I find that even the more generous test of "little reasonable prospect of success" is not satisfied.

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Employment Judge Bartlett

Date: 1 March 2019

Sent to the parties on: 13 March 2019

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For the Tribunal Office