Case No: 2411771/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr D Gwilliam

Respondent: TEL Engineering Limited t/a Trolex Engineering

Heard at: Manchester **On:** 24 May 2019

Before: Employment Judge Wardle

Representation
Claimant: Ms J McCarthy - Solicitor
Respondent: Mr D Walton - Solicitor

RESERVED JUDGMENT

The judgment of the Tribunal is that the respondent's application for the striking out of the claimant's claim and its alternative application that his claim be made the subject of a deposit order are each refused as too is its application for a costs order.

REASONS

1. This matter was listed for a Preliminary Hearing for consideration whether on the respondent's application the claimant's claim of unfair dismissal should be struck out on the grounds of it having no reasonable prospect of success pursuant to rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 and/ or pursuant to rule 37(1)(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant has been unreasonable and alternatively should the Tribunal not be satisfied that the claim has no reasonable prospect of success that pursuant to rule 39(1) he should be required to pay a deposit as a condition of continuing with his claim on the basis that it has little reasonable prospect of success. In addition by its application the respondent sought a costs order pursuant to rule 76(1)(a) on the grounds that the claimant or his representative has acted vexatiously or otherwise unreasonably in the bringing of the proceedings and/or pursuant to rule 76(1)(b) on the grounds that the claim had no reasonable prospect of success.

2. In addressing these issues the Tribunal received representations on behalf of the claimant from Ms McCarthy and on behalf of the respondent from Mr Walton.

3. Having reserved judgment and having been unable to complete its consideration of the issues requiring determination in what was left of the hearing day after dealing with another listed matter the Tribunal has since been able, having regard to these representations and the applicable law, to reach conclusions on the issues to be determined.

4. In so doing it found the material facts to be as follows.

Facts

5. The claimant was employed by the respondent, which is in the business of the design and manufacture of electro-mechanical machinery as a Quality Inspector. His employment extended from 28 April 1986 until his summary dismissal on 21 March 2019.

6. The events which led up to his dismissal were as follows. On the respondent's case in or about February 2018 concerns were raised by staff with its senior management that he had brought a knife into the workplace and had been engaging in some disturbing social media postings promoting himself as a vigilante and declaring his intent to confront youths with an axe. In regard to the allegation that he had brought a knife into the workplace it is the claimant's case that as part of an interest he has in Viking re-enactment events he restores Viking pieces including historical weapons and that he had with permission on a few occasions taken such pieces into the workplace in order to work on them on the workshop machinery in his own time.

7. The raising of the aforementioned concerns led on the respondent's case to it, through its directors Chris Rogers and Andy Dawson, addressing them informally with the claimant at a meeting on 23 February 2018. In relation to his media postings according to the respondent he explained that he had recently become involved again in a motorcycle club ("Rebels MCC") and that he was not involved in any violent activity outside of the workplace but was merely promoting a stance that he would not stand for youths causing trouble in the area in which he had grown up. In relation to the issue of the claimant having allegedly brought a knife into work he acknowledged that he had brought knives in but stated that he believed that he had the permission of the Engineering Manager to enable him to work on them during his lunch breaks.

8. On the respondent's case the meeting concluded with Mr Rogers and Mr Dawson issuing a categorical statement of disapproval for any member of staff bringing knives or any other offensive weapon into the workplace and a direction to the claimant that he should never bring any such objects into work with him again.

9. On 13 March 2019 the respondent says that the claimant was engaged in a passing conversation with Mr Dawson and Matt Bell (a machine operator) in the inspection department during the course of which he produced a

knife that was folded away, which he had secreted in his motor cycle jacket. Having regard to the clear direction given to the claimant on 23 February 2018 Mr Dawson instructed him to remove the knife from the workplace immediately, which he did by putting it into his motorbike outside in the car park.

10. In terms of the events of 13 March 2018 the claimant accepts that he showed a historical piece to Mr Dawson by taking it out of his pocket and putting it on the table but maintains that it was the handle to a blade knife and that Mr Dawson must have presumed that the blade was inside which caused him to ask him to put it away as he said he was terrified of knives, which he did so straightaway.

11. The claimant's conduct in bringing a knife into work contrary to the respondent's previous instruction was according to the grounds of resistance discussed by Mr Dawson with his fellow directors on 14 March 2018 and the decision was taken to suspend him, which was given effect the following day by Mr Chris Rogers. The letter of suspension dated 15 March 2018 makes reference to three disciplinary issues to be the subject of investigation in the form of (i) the claimant removing and then destroying protective packaging for an encoder that was marked up correctly; was on the correct shelf and in the accepted knowledge that the item was expensive (ii) his knowingly bringing several illegal weapons on to site after being told by the directors that this should never be done and (iii) his disruptive and confrontational behaviour.

12. By the letter the claimant was instructed not to contact by any means suppliers/customers/staff and colleagues and advised that a failure to comply may of itself constitute misconduct (or if, the investigation is undermined in any way, gross misconduct), which may result in disciplinary action against him. It concluded by advising that he would be contacted at the earliest opportunity to be told of the outcome of the investigation and that if he was required to attend a disciplinary hearing he would be given full details of the allegations against him and the results of the investigation in advance of the hearing.

13. Subsequent to the claimant's suspension the respondent says that various activities on his part came to light, which appeared not only to breach the terms of his suspension but also gave it cause for concern about the safety of its staff and workplace. In particular it says that (a) he made various contacts with a number of members of the respondent's staff focusing on his employment position and status and making derogatory comments about Mr Dawson and other directors (b) he sent a letter addressed to Mr Dawson dated 19 March 2018 containing intimidatory and threatening terms and references and (c) in contravention of specific direction not to do so he attended the respondent's premises on 19 March 2018 on his motor bike dressed in his biker gear and parked up in one of the respondent's parking spaces having previously texted a member of staff to say that he would be round later on his bike to fuck up two pricks.

14. The respondent says that it regarded this conduct during the period of the claimant's suspension to be sufficiently serious to justify its reference to the police. It also says that in the light of his conduct pre and post suspension

that it decided that it was in the best interests of the business and its staff/directors to bring the employment of the claimant to an end and that with the input and support of professional advice that it was entitled to take the unusual step of effecting such dismissal without first undertaking a dismissal hearing with him.

15. The respondent communicated its decision to dismiss the claimant with immediate effect by a hand delivered letter dated 21 March 2018, which was in the bundle of documents before the Tribunal at pages 47-49. In this it is explained why the normal next stage in the disciplinary process of inviting the claimant to attend a disciplinary hearing was not to be proceeded with namely because the evidence of his offending activity in connection with his employment appeared unarguable and damning and because of his activity during his suspension regarding his dealings with other staff and his conveying messages and engaging in activity appearing to pose a threat of physical violence to people at the company. In relation to the three disciplinary matters identified in the letter of suspension as set out above the dismissal letter principally concerns itself with the events of 13 March 2018 and advises that the claimant has been found to be guilty of bringing a knife into work as witnessed by Mr Dawson and Mr Bell in circumstances where he made no secret of the fact that he had brought such items in and indeed bragged about the same and where he had been specifically instructed previously not to do so. In so far as the other two matters of his removing and destroying protective packaging for an encoder and engaging in disruptive and confrontational behaviour are concerned the letter is suggestive of these also having been found to be proven on account of the reference to the company's findings also giving cause to impose severe disciplinary penalty and sanction but the clear impression given is that it was the claimant's conduct in bringing an offensive weapon into the workplace contrary to instruction on 13 March 2018 which the respondent regarded as amounting to gross misconduct and as enabling it to dismiss the claimant summarily.

16. The respondent concluded its letter by stating that in recognition of the slightly unusual, albeit justified, approach of its taking and communicating its decision remotely it was prepared to extend to the claimant a right of appeal against the disciplinary decision reached and if he wished to exercise this right then he should write to Steve Rogers (another of the directors) within five working days of the date of the letter setting out the grounds of his appeal in full. The claimant did not exercise his right of appeal within the stipulated period but he did write by email on 12 April 2018 stating that he was aware his appeal date had passed but that he had been in a depressed and distressed state and asked if a late appeal could be allowed before setting out his grounds in ten numbered paragraphs. At paragraph 2 he stated that he had always asked Mark Corbett for permission before bringing re-enactment weapons in to work on and that this had been only on two occasions and at paragraph 3 he stated that the knife which Andy Dawson saw and thought to be a flick knife was a bladeless spring assisted knife that was legal in the UK and that the blade was at his home as he had brought the empty handle in to look for replacement screws from his collection of oddments. The respondent provided an undated response to say that it had considered the claimant's late appeal but that it would not consider re-employment. In relation to the

ten points it made no comment in respect of eight of them and in answer to his suggestion that Mr Dawson was mistaken in thinking the item he brought in on 13 March 2013 was a knife it stated that we do not condone the carrying of knives and will not permit this on company premises.

17. In the meantime the respondent's solicitors had written to the claimant on 23 March 2018 advising that the company had serious concerns about his conduct during his suspension period and since his employment was terminated drawing attention to the letter he addressed to Andrew Dawson dated 19 March 2018 making a number of threatening remarks; his communications with a number of the company's employees focusing on his suspension and dismissal in which he had made uncorroborated comments about Mr Dawson and threats to him and other directors; the company's belief that he had tried to register a Facebook account in the name of Mr Dawson using the email address and mobile phone number of Chris Rogers; his publishing on Facebook on 21 March 2018 a copy of the company's letter of dismissal which it had marked 'strictly private and confidential' and his having attended in person at the offices of a number of the company's suppliers. By the letter he was warned that his conduct gave rise to several potential causes of action namely breach of the duty of confidentiality and fidelity, harassment and defamation.

18. Despite this warning the claimant continued to pursue a course of conduct which amounted to the harassment of Mr Dawson between 20 March and 10 August 2018 and Mr Steve Rogers between 9 and 12 August 2018 and he was subsequently charged for these offences under the Protection from Harassment Act 1997 and also in respect of two malicious communications made on 12 August 2018 under the Malicious Communications Act 2003, which saw him pleading guilty to the charges on 26 November 2018 and his being sentenced on 17 December 2018 to 12 weeks imprisonment suspended for two years; 240 hours of compulsory unpaid work for the community; attendance at a Rehabilitation Activity Requirement Programme for 20 days and his being made the subject of a Restraining Order for 2 years prohibiting him from making any contact directly or indirectly with Stephen Rogers, Christopher Rogers or Andrew Dawson and entering the respondent's premises.

19. Following the claimant's sentencing the respondent's solicitors made on 22 January 2019 the specific applications set out in paragraph one above.

Conclusions

20. In considering the application to strike out the claimant's unfair dismissal claim under rule 37(1)(a) on the basis that it has no reasonable prospect of success the Tribunal had regard to the guidance given by Lady Smith in Balls v Downham Market High School and College [2011] IRLR 217, in which she stated that with such an application the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent in its grounds of resistance or in submissions and deciding

whether its written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test. This cautious approach to striking out claims taken in Balls v Downham Market High School and College stems from the proposition that it is unfair to strike out a claim where there are crucial facts in dispute and there has been no opportunity for the evidence in relation to those facts to be considered.

21. In the Tribunal's view given that in this case the claimant's dismissal for gross misconduct was based on his allegedly bringing into work a knife in contravention of a previously given management instruction and there was a dispute of a crucial nature as to whether the object he had in his possession on 13 March 2018 was in fact bladed or not, which was not tested by the respondent with him by its decision not to hold a disciplinary hearing as a result of his conduct following his suspension, this high test was not met in this case in order to enable it to grant the respondent's application for strike out of this claim on the ground that it has no reasonable prospect of success and such application is refused.

22. Turning to the respondent's other application under rule 37(1)(b) for strike out based on the ground that the manner in which the proceedings have been conducted by or on behalf of the claimant has been unreasonable it is the case as established in Blockbuster Entertainment Ltd v James 2006 IRLR 630 CA that for a tribunal to strike out a claim for unreasonable conduct it has to be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible and in either case the striking out must be a proportionate response.

23. In support of this application Mr Walton submitted that there had been an attempt to sanitise the claimant's conduct and pointed to paragraph 6 of his ET1 in which he claimed that he had turned up for work on 19 March 2018 after his suspension on 15 March 2018 due to a misunderstanding on his part involving him thinking that he had to come into work in circumstances where there was CCTV footage showing him arriving in his biker gear at 11.30 a.m. when typically he would have started at 7.00 or 8.00 a.m. He also pointed to a letter received from the claimant's solicitor dated 17 April 2019 in which it was claimed that the charges against him related to offences between 10 and 13 August 2018 and that they would have no relevance to the proceedings in circumstances where the offences committed by him related to the respondent's directors and pre-dated his dismissal. In this connection the documents before the Tribunal showed that the claimant's solicitor had requested information from the police on 27 March 2019 about charges preferred against her client in the preceding 12 months and that she had incompletely been supplied with a charge sheet which referred only to the period between 10 and 13 August 2018 and his pursuing a course of conduct amounting to the harassment of two individuals different to the respondent's directors. Finally he pointed to the conduct of the claimant in attending the Preliminary Hearing when he was the subject of a Restraining Order prohibiting any conduct with the respondent's directors and the failure of his solicitor to give advance notice of his intention to be present. Having regard to the elements of the test for a striking out of a claim for unreasonable conduct the Tribunal was not satisfied that the conduct relied upon by the respondent involved either a

deliberate and persistent disregard of required procedural steps or had made a fair trial impossible, which rendered obsolete the question whether striking out was a proportionate response.

24. The Tribunal finally considered the respondent's alternative application that the claimant should be ordered to pay a deposit as a condition of being permitted to continue to take part in the proceedings. This has a slightly lower threshold than that for striking out in that the criterion for ordering a deposit is where it is considered that the contentions put forward by any party in relation to a matter to be determined by a tribunal have little reasonable prospect of success. Essentially therefore the power given under Rule 39 is designed to deal with cases, which are perceived as weak but which would not necessarily be described as having no prospect of success. In relation to this application the Tribunal considered that this claim was not an appropriate one for ordering that the claimant should pay a deposit as a condition for continuing with it having regard to the reason for dismissal and the crucial factual dispute concerning this and the departures from the ACAS Code of Practice on Disciplinary and Grievance Procedures by the respondent as regards the keys to handling disciplinary issues in the workplace in effecting his dismissal. Such application is therefore also refused.

25. Having found as such it follows that the respondent's application for a costs order under rule 76(1)(a) and/or (b) is also refused.

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Employment Judge Wardle

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Date 10 June 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
21 June 2019
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FOR EMPLOYMENT TRIBUNALS