EMPLOYMENT TRIBUNALS

Claimant: Mr KD Galbraith

Respondent: Capita Plc

HELD AT: Liverpool **ON:** 24 May 2019

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: In person
Respondent: Ms S Letherell

JUDGMENT having been sent to the parties on 30 May 2019 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

Preamble

1. By a claim form received 10 May 2019 the claimant brings a claim for interim relief under section 128 of the Employment Rights Act 1996 alleging he was dismissed on 3 May 2019 ostensibly for inappropriate email messages. The claimant maintains the allegations of gross misconduct masked the real reason for his dismissal and was as an excuse for dismissing the claimant due to his union activities.

2. There was no requirement for the claimant under S.18A of the Employment Tribunals Act 1996 to contact ACAS and be offered 'early conciliation' before being allowed to submit a tribunal claim where the employee is also making an application for interim relief under S.128 ERA or S.161 TULR(C)A — Reg 3(1)(d) Employment

Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254

3. The certificate required from an authorised official was produced by CWU in a letter dated May 2019 written by Andy Kerr, deputy general secretary. Andy Kerr confirmed the claimant had held the position of youth branch representative of Preston Brook and Bury Branch since December 2018. It is not disputed by the respondent that the claimant held this position.

4. The respondent confirmed that it was prepared to deal with the claimant's application today, having originally requested an adjournment that was refused earlier. It has produced a bundle of documents relating to the disciplinary process which the Tribunal has considered. Given the bundle was prepared at short notice, the ET1 having been served on the incorrect head office address, a number of documents, including witness statements taken at the investigation hearing, were not included. The claimant, who did not object to the respondent's bundle being produced, having been given as much time as he wanted to view them, produced no documents, and relies upon an email sent to the CWU on 22 May 2019 as his statement and written submissions in the case, which the Tribunal has taken into account. Both parties agreed that they were in a position to deal with the claimant's application without any need for an adjournment.

The claimant's application

5. The claimant claims he was automatically unfairly dismissed because of his union activities and brings this application under section 128 (a) of the Employment Rights Act 1996 as amended ("the ERA"). He puts his claim as follows:

5.1 The claimant was invited to a disciplinary hearing for the 11 April 2019, but this date was adjourned at the claimant's request. After a number of adjournments requested by the claimant the hearing took place on 25 April 2019 notification of which the claimant received the morning of the 25 April by email. The claimant was represented by his union official Mr McIntosh, (who was also in attendance at this application for interim relief) and it is accepted the hearing went ahead with no difficulties. The Tribunal took the view given the undisputed fact that the claimant had requested a number of adjournments, which were granted, and that the disciplinary finally went ahead without any difficulties or complaints made by the claimant, informing him of the hearing date the morning it was due to take place, whilst not in accordance with the ACAS Code, it is not strong evidence of an automatic unfair dismissal because of union activities. It is notable the claimant does not have sufficient continuity of employment to bring an ordinary claim of unfair dismissal.

5.2 The 3 May 2019 disciplinary outcome letter refers to a disciplinary hearing and dismissal taking place on 11 April 2019. The disciplinary hearing took place on 25 April 2019 and the dismissal by the letter of 3 May 2019 which the claimant received on the 3 May 2019. The last day of employment should not have been 11 April 2019 and yet the claimant's final salary recently received (without any wage slip) appears to reflect the termination date of 11 April and not 3 May 2019. The claimant alleges he has been underpaid but there is no claim before the Tribunal to this effect.

5.3 The claimant alleges that the dismissing officer, Iain Reid, signed the letter inviting him to the 11 April hearing and the outcome letter, pre-judged the claimant's guilt evidenced by the reference to the words "gross misconduct relating to alleged gross misconduct" set out in the outcome letter dated 3 May 2019 and earlier letters inviting the claimant to a disciplinary hearing which used the same terminology.

5.4 The Tribunal took the view the fact that the repeated use of the words "gross misconduct relating to alleged gross misconduct" was unlikely to be accepted as an indicator that the claimant's dismissal was prejudged. It was not persuaded that the similarity in wording reflected a pre-judged outcome on the part of the dismissing officer. The 3 May 2019 outcome letter was accompanied by 6-page signed document titled 'Disciplinary hearing outcome.' The 'Disciplinary hearing outcome' referred on numerous occasions to what had been said by the parties at the disciplinary hearing on 25 April 2019. The claimant was asked to elaborate by the Tribunal on his argument with reference to this document, and he gave many different conflicting explanations as to why it pointed to Iain Reid prejudging his guilt prior to the disciplinary hearing taking place. The claimant on the one hand denied that the 6-page document reflected what had taken place during the disciplinary hearing, maintaining it deal with earlier emails and the claimant's grievance. The claimant alleged, without any persuasive supporting evidence, Iain Reid had made his decision in or around 8 or 9 April 2019 and the subsequent disciplinary hearing notes matched the decision he had arrived at earlier on the 8 or 9 April 2019.

5.5 The claimant also accepted as the disciplinary and grievance hearing had taken place on the same day, it was the only hearing he had, and some of the rationale set out in the 6-page document was a "fair reflection" of what had taken place at the disciplinary hearing. The Tribunal took the view on the evidence before it, that is was unlikely a Tribunal at liability hearing stage would find Iain Reid had written the 3 May 2019 letter and the 6-page document attached to it before the actual disciplinary hearing had taken place. In short, the claimant is unlikely to establish at a liability hearing that the decision to dismiss was taken before the grievance and disciplinary hearing held on 25 April 2019, and a Tribunal is likely to find that the decision to dismiss was taken after the 25 April hearing and before 3 May 2019 and it had not been pre-judged by Iain Reid.

5.6 The claimant also relies upon previous comments made by managers concerning his trade union duty and role, as set out in the 22 May 2019 email which the Tribunal does not intend to repeat. He referred the Tribunal to a comment made about his union activities in the investigation meeting held on 26 March 2019 which he described to the Tribunal as follows: "the line of questioning at the investigation brings up union activates that I should have known better because of union activities." There is only one reference to union activates in the documents before the Tribunal, and this was contained in the undisputed typed notes taken by the investing officer. The notes record she asked, "Is there a reason why you haven't followed whistle blowing process being union." This was the full extent to referencing the claimant's union activities and the Tribunal's view is that on the limited evidence before it would not assist the claimant in establishing he had been automatically unfairly dismissed for union activities.

6. It became clear during the claimant's presentation of this application following questions put to him by the Tribunal that (a) he had conceded the alleged offence of breaching the respondent's Cyber and Information Security Policy in relation to another employee when on two occasions he sent an email to a colleague referred to as "HD" from her computer and under her name back to herself under the exclusive login that had been allocated to "HD". The 6-page document attached to the disciplinary outcome letter written by Iain Reid set out the following regarding the admissions made by the claimant during the disciplinary process; "Kyle confirmed that he had sent the above email and he was fully aware sending emails on someone else's login was a breach of Capita Policy. By Kyles' own admission, he made a conscious decision to utilise HD's unlocked PC whilst on 'Auto in' to send emails from HD to HD to 'teacher her a lesson.'"

7. The investigation notes of 26 March 2019, considered and taken into account by Iain Reid during the disciplinary process, reflect the following admissions made by the claimant when he confirmed he sent an email to HD from herself; "I thought it was rather amusing. I was drawing attention to the fact that she had left herself logged in…I thought it would also be funny." When asked whether he was aware it was a breach of the respondent's policy the claimant answered "yes, but people do this all of the time." The claimant confirmed at the hearing today that he knew of no other person within the respondent who had committed the same offence as he had, although managers had and did access to other people's computer. It is notable in direct contrast; the claimant was not a manager and he did not have authority. The claimant alleged managers had "created a culture of acceptance" when they sent emails to other staff on unlocked PC's, conceded he had not brought it to a manger's attention and it is undisputed he said; "I should have brought it to someone's attention…I admit I shouldn't have sent email…I hadn't seen it as an issue or concern, reflecting on it now I shouldn't have done it…meant it was a joke between me and HD."

8. In short, the respondent's case is that it has a Cyber & information Security Policy which it regards as an important security measure, the Policy was breached by the claimant on his own admission; this was deemed by Iain Reid, the dismissing officer, to amount to gross misconduct and the claimant was dismissed. It appears to the Tribunal, who is not in a position to make any findings of facts, that the claimant's claim is not likely to succeed on a broad and general assessment of the material put before it today as set out above. In short, the claimant does not have a "pretty good chance" of success at a liability hearing, his claim appears on the face of it, to be a weak one and the Tribunal's prediction is that it was one the claimant was unlikely to win.

Law

9. The Tribunal discussed the relevant law with the parities during the hearing and provided the claimant with a copy in order that he could properly prepare and make oral submissions given his status as a litigant in person.

10. The statutory test does not require the tribunal to make any findings of fact, it is not whether the claim is ultimately likely to succeed, but whether 'it appears to the tribunal' that this is likely — a point emphasised by the EAT in *London City Airport*

Ltd v Chacko 2013 IRLR 610, EAT. The Appeal Tribunal stated that this requires the Tribunal to carry out an 'expeditious summary assessment' as to how the matter appears on the material available, doing the best it can with the untested evidence advanced by each party. This, it observed, necessarily involves a far less detailed scrutiny of the parties' cases than will ultimately be undertaken at the full hearing.

11. The statutory test is clarified in *Ryb v Nomura International plc ET Case No.3202174/09*. The Tribunal must make a decision as to the likelihood of the claimant's success at a full hearing of the unfair dismissal complaint based on the material before it, which will usually consist of the parties' pleadings, the witness statements and any other relevant documentary evidence. The basic task and function is to make 'a broad assessment on the material available to try to give the tribunal a feel and to make a prediction about what is likely to happen at the eventual hearing before a full tribunal'.

12. When considering the 'likelihood' of the claimant succeeding at tribunal, the correct test to be applied is whether he or she has a 'pretty good chance of success' at the full hearing — *Taplin v C Shippam Ltd 1978 ICR 1068, EAT*. In that case, the EAT expressly ruled out alternative tests such as a 'real possibility' or 'reasonable prospect' of success, or a 51 per cent or better chance of success. According to the EAT, the burden of proof in an interim relief application was intended to be greater than that at the full hearing, where the tribunal need only be satisfied on the 'balance of probabilities' that the claimant has made out his or her case — i.e. the '51 per cent or better' test. This approach was endorsed by the EAT in *Dandpat v University of Bath and anor EAT 0408/09* and, more recently, in *London City Airport Ltd v Chacko* (above).

Conclusion

13. During the course of this hearing it came to the Tribunal's attention inadvertently, that the claimant had lodged an appeal against his dismissal that remained outstanding.

14. Prior to arriving at this decision, the Tribunal considered whether it could proceed with hearing the application given the fact that the claimant's appeal was still outstanding and invited the views of both parties on this matter. It gave the claimant two opportunities to consider his position, with the possibility of an adjournment of his application for interim relief until after the appeal hearing, depending on its outcome. This was the preferred outcome for the Tribunal and respondent, which was rejected by the claimant who had the opportunity following an adjournment to discuss matters with his union representative, the Tribunal having laid out clearly its concern in arriving at a decision that may possibly affect the success or otherwise of the appeal and its ability to carry out a proper assessment given the fact that the respondent's disciplinary process was still outstanding. The claimant was very clear that he wished to proceed with his application, he believed the appeal hearing would be used by the respondent to its advantage and "get the charge to stick." Despite the fact that the appeal had yet to be heard the claimant had reached the view that appeal decision may also have been pre-decided. On this basis, given the claimant's views that were expressed with some strength of feeling and clarity, the Tribunal went ahead and continued to decide the application in the respondent's favour, preferring Ms

Letherell's submission that the claimant's actions were serious as the respondent was highly regulated, and their severity exacerbated by the fact he found it amusing, this increased the risk to the respondent as the claimant did not appear to understand its seriousness and cumulatively, it led to his dismissal.

15. The Tribunal concluded the respondent is likely to advance a plausible fair reason for the claimant's dismissal, and the disciplinary outcome is unlikely to be a cover-up for another true, inadmissible reason relating to the claimant's union activities. It was unlikely the claimant would establish he had been automatically unfairly dismissed because of union activities, and his claim for automatic unfair dismissal at a full hearing did not have a "pretty good chance of success." Accordingly, the claimant's application for interim relief has no merit and is dismissed.

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Employment Judge Shotter
21 June 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

28 June 2019

FOR THE SECRETARY OF THE TRIBUNALS