EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B Smart	**v**	On Direct Business Services Ltd t/a Cloud Direct

PRELIMINARY HEARING

Heard at: **Bristol** **On: 9 September 2019**

Before: **Employment Judge O'Rourke**

Appearances
For the Claimant: In person
For the Respondent: Mr B Gill - counsel

JUDGMENT

1. The Claimant's application for strike out/deposit order in respect of the Response is refused.

2. In respect of his application for further disclosure, orders were made, as set in a separate case management order of same date.

REASONS

1. There has been a previous telephone case management hearing in this matter, before Employment Judge Oliver, 12 April 2019, to which order ('the Order') reference is made as to the background to this claim of constructive unfair dismissal, the issues in respect of that claim and previous orders for disclosure [Respondent's bundle 59-64].

Application for Disclosure

2. The Claimant considered that the Respondent had not complied with disclosure ordered at that Hearing. The Respondent had provided a bundle, showing existing disclosure and the Claimant provided a separate, smaller, bundle of documents, to which he referred (referred to as 'R' and 'C', respectively, hereafter).

3. He was asked to set out what disclosure had not been provided and he stated the following (upon which I invited submissions from Mr Gill):

    a. Documentation relevant to whether or not the Respondent had drawn up draft settlement agreements with other employees, as, he stated, there is reference in existing disclosed documents indicating that that was the case [example C's bundle 10]. Mr Gill stated that his instructions were that such agreements had not been drawn up. I note, in any event that this matter was not included in the specific disclosure order of Judge Oliver, but it was agreed that if the Claimant felt such matter of relevance, he could raise it in cross-examination at the final hearing. Further, it was difficult to see how this point related to the alleged fundamental breaches of contract he relies upon (and as set out in paragraph 10.1 of the Order). The Claimant was urged, both in respect of this matter and any other issues that may arise between now and the final hearing, before raising any such issue with the Respondent and/or Tribunal, to consider whether it relates to these six alleged breaches. If it does not, it is unlikely to be of relevance to his case, or of benefit at the hearing. Generally, if the Claimant seeks, as he does, to show that the Respondent's evidence is not credible, he can do so, by way of cross-examination at the hearing, based on the existing disclosed documents.

    b. Whether or not an email from the Respondent of 27 July 2018 [C4] should be so heavily redacted? He stated that the current level of redaction prevented him from showing the correct sequence of events relating to an alleged 'protected conversation'. Mr Gill was unable to explain the level of redaction, but agreed that he would consult with the Respondent/their solicitors as to whether or they could justify it. He was conscious that many employers can be overly cautious in respect of their employee's data protection and he would remind the Respondent that the DPA does not apply to documents provided for the purposes of litigation. It was agreed that the Respondent would, within seven days, either provide unredacted documents, or an explanation as to why such redaction was necessary (see case management order of same date).

    c. The same point arose in respect of the six documents attached to the Respondent's email of 23 July 2018 [C5-11] (for which an identical order was made). Clearly, if the Claimant was dissatisfied with any such response, he would be at liberty to make a further disclosure application, but it would be likely that any such application would be dealt with at the outset of the final hearing, with perhaps the Respondent being ordered to bring unredacted copies of the documents to that Hearing, in order that the Tribunal could decide the issue, having seen the documents.

    d. He considered it highly suspicious that there was a complete absence of internal correspondence from the Respondent, covering the period 15 August to 19 September 2018 and related to discussion about him

and his subsequent grievance (with the implication that the Respondent was failing to disclose emails between managers which may, for example, have made adverse comments about him). Mr Gill stated that his instructions were that the Claimant had been provided with all relevant documentation from that period, to include specific disclosure of documents dating from that period and no others existed. I considered that this request amounted to a 'fishing expedition' by the Claimant and was, in any event, if he considered it a credibility point, something he could raise at the final hearing (of which issue and others, the Respondent is now on formal notice of).

e. (While he raised a further point of disclosure, in relation to a Subject Access Request of his, pre-dating his resignation, he accepted that as the alleged failure by the Respondent to comply with that Request was no longer one of his alleged breaches of contract (as set out in paragraph 10.1 of the Order), such disclosure issue was no longer relevant.)

f. He contended that an email of the Respondent, dated 3 September 2018, in respect of the reason for the retrospective change in his commission arrangements [R90] was, in effect, a fabrication, constructed in an effort to show that the change was a mistake, rather than deliberate. Following an order of the Tribunal of 22 July 2019, for specific disclosure of 'the native email file' in relation to that document that information was provided to him. He considers that there are discrepancies in that computer data [148-182] and requested that an expert report be commissioned on the issue. Following submissions from Mr Gill, I agreed that, bearing in mind the Overriding Objective such a request would be completely disproportionate to the issues in this claim of constructive unfair dismissal. The Respondent accepts that the Claimant's commission structure was changed, without consultation with him and I don't see that the email alters the Respondent's responsibility for that situation. Also, the Claimant did not have sight of that email at the time and it could not, therefore, have formed part of his rationale for resignation. Therefore, whether, after the event, the Respondent can show that the decision was a 'mistake', is irrelevant to the decision made by the Claimant at the time.

4. Claimant's Application for Strike Out/Deposit Order. The Claimant contended that the Response to his claim provided little or no rationale as to why it was resisted. He pointed out that the Respondent's own decision in respect of his grievance [C33] stated that '*trust and confidence has now been severely damaged all round'* and he queried, therefore, how the Respondent could seek to deny breach of the implied term (which is, *per se*, 'fundamental'). Having heard submissions from Mr Gill, I concluded that I would not be striking out the Response, or making a deposit order, for the following reasons:

    a. I had heard no evidence on these matters.

b. While it *might* appear from the apparent concessions made by the Respondent already in respect of the alleged breaches that the Claimant could *potentially* succeed on that element of his claim, firstly, no such admissions were made by Mr Gill at this Hearing and he stressed that the Claimant had the burden of proof in such matters and his evidence would be put to test at the final hearing. In any event, *even if* breaches were shown, they would need to be found to be fundamental and even if so, the other elements of the claim (reason for resignation/acceptance of the breach and dismissal fair in any event – as set out in paragraphs 10.2 to 10.4 of Judge Oliver's order (wrongly numbered 8)) would need to be determined by the Tribunal, for any finding of constructive unfair dismissal.

c. The Response [R36-42] is, frankly, very poorly drafted and it is currently very difficult to decipher what the Respondent's case is in respect of the issues at paragraph 10 of the Order. It will be to the advantage of all concerned, both for the drafting of witness statements and the conduct of the final hearing that even at this late stage, the Respondent sets out, with clarity, its position (an order was made in that respect). Clearly, any such setting out should not contradict anything that has been stated in the Response, but if it does, the Claimant will be at liberty to raise such contradiction at the final hearing, as to credibility, both in cross-examination and in submissions.

5. Generally, the Claimant felt that he (and his previously-instructed solicitors) had been misled by the Respondent on various points, to include their grounds of resistance to the claim, or had had to spend inordinate, or sometimes wasted efforts in respect of disclosure and related preliminary hearings. It was pointed out to the Claimant that if, at the final hearing, he considered this still to be the case and *perhaps* if his assertions in this respect were borne out by evidence at the Hearing, he would be at liberty, if so minded, to make an application for costs (in respect of time spent by his solicitor), or for a preparation time order, in respect of time he had spent, when not legally represented.

6. Conclusion. On that basis, therefore, the matter remains listed for hearing, at Bristol, on 11-14 November 2019.

Employment Judge C H O'Rourke
Bristol
Dated 9 September 2019

Sent to the parties on

13 September 2019