



EMPLOYMENT TRIBUNALS

Claimant: Mr R Cooper

Respondent: Blackpool Teaching Hospitals NHS Foundation Trust

Heard at: Manchester Employment Tribunal

On: 25 May 2021

Before: Employment Judge Dunlop (sitting alone)

Representation

Claimant: Mr A Rozycki (counsel)

Respondent: Mr E Williams (solicitor)

RESERVED JUDGMENT

1. The respondent's application to strike out the claimant's claim is dismissed.

REASONS

1. This is a claim of wrongful dismissal and unfair dismissal. It is due to be heard at a final hearing in December 2022.
2. I heard no evidence and make no findings of fact. However, in order to understand the respondent's application, it is necessary to set out the background to the claim to some extent. I hope that I have done so in an uncontroversial manner, but nothing I say about the background facts should be taken as seeking to bind the parties (or the Tribunal) on any future occasion.
3. The claimant was a hospital chef and he was dismissed in early 2019 for stealing items of food from the kitchen. These allegations arose as part of a broader investigation into stock losses, under which numerous employees were investigated. A full disciplinary process was followed, during which the claimant had trade union representation from UNISON.
4. It appears that at the hearing the claimant admitted to stealing a small number of low-value items. He says in his claim form he was innocent of

theft. The claimant's case appears to be that he made a 'tactical' admission, designed to ensure that he avoided dismissal, and that he did so on the advice of, and under pressure from, his union representative.

5. The claimant presented an ET1 claim form in May 2019. As I have said, he expressly asserts his innocence in that claim form.
6. Following the claimant's dismissal and presentation of the claim, the respondent appears to have 'gotten wind' of a suggestion that the claimant had, in fact, admitted the theft of some items to his union representatives. The respondent made direct contact with the union to seek confirmation of this rumour, and was eventually provided with copies of emails which, taken at face value, suggest that such an admission had been made. These are internal UNISON emails, and the claimant is not party to them. The emails imply that there has been a complaint by the claimant about the union handling of his case, including that he "alleged that the branch advised him to admit to theft despite the fact he was continually denying having stolen any items" and provide an account of a conversation in which, it is said, that an admission of theft was made.
7. The claimant has been represented from an early stage of the Tribunal litigation by Mr Stephen Holmes, who is a lay representative with some experience in ET litigation. Today, they have instructed Mr Rozycki, but he has not had on-going involvement in the case.
8. The claim was set for a one-day hearing on 4 October 2019 with standard directions, including a direction for mutual disclosure of documents relevant to the case by 10 July 2019.
9. In a letter dated 8 July 2019, Mr Williams wrote to Mr Cooper reminding him of the upcoming deadline for disclosure. The letter included this paragraph: *"Please note that we require full copies of all communications between yourself and your Trade Union representatives at UNISON, as our understanding is that you admitted, to your Trade Union representative, that you had stolen items from our client."*
10. By letter dated 25 July 2019 Mr Holmes wrote to Mr Williams stating that the claimant denied making any such admission and asking Mr Williams to explain the basis of his assertion.
11. In response, Mr Holmes provided a disclosure list on 19 August 2019. He wrote that he was obtaining files from UNISON and would send the material on when it arrived.
12. There was further correspondence, including an email on 26 September 2019 when Mr Holmes stated that the files had arrived by post, and that he would update the document list accordingly, as well as scanning and sending a copy of each document contained in the file. An updated list, with scans of documents not already in the respondent's possession, was sent on 30 September 2019. This included a small number of additional documents obtained from UNISON.

13. The hearing was re-listed for 27-30 April 2020, with the agreement of both parties, on the basis that a one-day hearing would be insufficient. The 4 October 2019 date was retained for a preliminary hearing for case management, on the basis that both parties had been communicating with the Tribunal about the case management directions.
14. The 4 October preliminary hearing took place before Employment Judge McDonald and resulted in a case management order sent to the parties on 29 October 2019. In that case management order EJ McDonald records the main issues in the unfair dismissal claim as being, in summary, (1) whether the respondent had reasonable grounds to believe the claimant was guilty (2) whether the dismissal was genuinely for misconduct or whether it was contrived by managers as he had raised a grievance and (3) alleged disparity of treatment between the claimant and other employees investigated. At this hearing, there was a lot of discussion about disclosure, particularly relating to how much material relating to other employee's disciplinary processes resulting from the investigations the respondent should be required to disclose. Directions were made with a view to progressing this and other issues, but there was no specific discussion of the issue of disclosure of UNISON material. There was further correspondence between the parties and the ET, largely related to the comparator issue.
15. On 31 January 2020, Mr Williams wrote to Mr Holmes disclosing the two internal UNISON emails which had been provided to him by UNISON officials in the workplace shortly before. The letter invited the claimant to withdraw his claim within 7 days, failing which it was stated that the respondent intended to make an application for strike out. By letter dated 13 February 2020, the application was made.
16. The respondent's argument is that there "must" be further written communication between the claimant and the union relating to the admission that the claimant allegedly made. By failing to disclose such communication the claimant and/or Mr Holmes have conducted proceedings in a manner which is unreasonable (if not scandalous or vexatious) and that, under Rule 37(1)(b) the claim should be struck out. Mr Williams contends that the claimant and Mr Cooper never expected the respondent to obtain the emails from UNISON, and therefore expected to be able to keep quiet about the fact that Mr Cooper had, in fact, admitted to the theft, thereby misleading the tribunal.
17. It appeared to be suggested in correspondence that the application might be advanced under Rule 37(1)(a) i.e. that the claim had no reasonable prospect of success, but this was not pursued by Mr Williams today.
18. Returning s37(1)(b), Mr Williams' letter of 13 February 2020 appears to suggest that the claimant was at fault for failing to disclose the UNISON emails. However, he was not party to those emails, nor was there any evidence to suggest that they were included in the material provided to Mr Holmes. Without such evidence, I am not prepared to simply assume that they would have been and certainly not for the purposes of an application with such serious consequences as this one.

19. There has never been any suggestion that the claimant's alleged admission to UNISON was in writing – the UNISON emails recount verbal conversations, which would themselves give rise to no documents to be disclosed. Rather, Mr Williams relies on a reference in one of the emails to the claimant having made a complaint about the branch having advised him to admit to theft. He asks me to infer that this complaint must have been in writing and/or be recorded on UNISON's systems, that that material would have been provided to Mr Holmes when 'the files' were sent by post, and that the claimant has failed to disclose it. He makes similar points in relation to other material which, he invites me to infer, must have been generated – for example an outcome to the complaint.
20. Mr Rozycki prepared a helpful summary of the law in his skeleton argument, which was largely agreed. It referred, in particular, to the case of **Bolch v Chipman [2004] IRLR 140 EAT** and the two-stage process which must be followed in determining an application such as this.
21. The first stage involves determining whether the conduct in question was the conduct of proceedings and, in the circumstances and context, amounted to scandalous, unreasonable or vexatious conduct. I am satisfied that the actions of the claimant and Mr Holmes in disclosing document lists and copy documents to the respondent is part of their conduct off the proceedings. Equally, a failure to disclose a disclosable document would be part of their conduct of the proceedings.
22. I take note of the fact that the only order which related to disclosure was the general order to disclose "relevant" material. Although Mr Williams had referred in correspondence to the alleged admission, there had been no order for specific disclosure. I consider that Mr Cooper and Mr Holmes have to be given a margin of error in assessing what is relevant as they are not legal professionals. More fundamentally, however, the claimant's position is that these emails were not in the material which came back to him from UNISON. Mr Williams cannot gainsay that on a summary application. Indeed, it is perfectly conceivable that UNISON (who were not themselves under any legal disclosure obligation) may, whether intentionally or inadvertently, have limited the documents supplied to Mr Holmes. Equally, I am not prepared to make the series of leaps that Mr Williams' submission requires to assume that the claimant must have been in possession of some other disclosable document recording his alleged admission to UNISON. Whilst the claimant has evidently had dealings with UNISON, I have no real information as to what information passed between them, whether orally or in writing, who was involved in dealing with it, or whether it may be legally privileged. I have outlined in this judgment I am unable to conclude that Mr Cooper and/or Mr Holmes have failed to comply with the order for disclosure and, if they have, that such failure was unreasonable conduct.
23. the application therefore fails at the first part of the test.
24. The second stage involves a consideration as to whether strike out is an appropriate sanction where scandalous unreasonable or vexatious conduct has been found. There was a disagreement between Mr Williams and Mr Rozycki as to whether I could only strike out the claim if a fair trial was now impossible. Given my conclusion in relation to the first stage, this point does

not strictly arise for determination. However, in deference to the time spent on this matter in the hearing, I record that even if I had been persuaded that there had been non-disclosure and that that amounted to unreasonable conduct I would still have declined to strike out the claim as a whole. It seems to me that the question of what the claimant may have said to his union representatives is of very limited relevance to the question of whether he was fairly dismissed by the respondent. Even accepting that the issue of whether he was actually guilty of misconduct will have to be determined in the context of the wrongful dismissal/contributory fault argument, it seems to me that a painstaking exploration of the interaction between the claimant and his union representatives is just as likely to cloud that issue as it is to clarify it. Impressions and memories of that conversation may well legitimately vary, and the accounts of it produced at a later date must also be considered against a backdrop of a dispute between the claimant and the union as to the handling of the case. The rights and wrongs of that dispute are not the subject matter of the tribunal proceedings.

25. The case will proceed to hearing and a case management summary and orders will be produced separately.

Employment Judge Dunlop

Date: 9 June 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

21 June 2021

FOR EMPLOYMENT TRIBUNALS