EMPLOYMENT TRIBUNALS

Claimant: Mr M Cummings

Respondent: Royal Borough of Greenwich

Heard at: **London South Employment Tribunal**

On: **6 December 2021 (by remote video hearing)**
7 December 2021 (by hybrid hearing)
8 December 2021 (by remote video hearing)
22-24 March 2022 (in person)

Before: **Employment Judge Ferguson**

Members: **Ms M Oates-Hinds**
Mr J Turley

Representation
Claimant: 6-9 December 2021: Mr W Brown (solicitor)
22-24 March 2022: In person
Respondent: Ms C Casserley (counsel)

JUDGMENT having been sent to the parties on **5 April 2022** 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

PROCEDURAL BACKGROUND

1. The Claimant was employed by the Respondent as a chargehand in the street cleansing department from 30 November 2017 until his dismissal for gross misconduct on 1 November 2019. The allegations against him included drug-taking while on duty in February 2019 and making threats to other Council employees. The Claimant is black. Two white colleagues, LS and TON, were also accused of drug-taking on the same occasion. The Claimant was suspended in April 2019. LS and TON were suspended around four months later. All three were dismissed, but LS and TON were reinstated on appeal.

2. By a claim form presented on 28 March 2020, following a period of early conciliation from 29 January to 29 February 2020, the Claimant brought complaints of unfair dismissal and race discrimination. The Claimant alleged that his suspension in April 2019 amounted to direct race discrimination. He also alleged that the Respondent withheld certain documents and evidence from him during the subsequent disciplinary investigation and during the appeal against his dismissal, and that those acts or omissions were also direct race discrimination.

3. A four-day final hearing commenced on 6 December 2021. The Claimant was at that time represented by Mr Brown of Brown & Co Solicitors. The Respondent was represented by Ms Casserley of counsel, instructed by Ms Tandi, in-house solicitor for the Respondent. The hearing was conducted mostly as a remote video hearing, but in part as a hybrid hearing due to technical difficulties.

4. At the start of the hearing the Claimant withdrew the complaint of unfair dismissal because he did not have two years' service. He also confirmed that he did not contend that his dismissal was an act of race discrimination. The allegations of direct race discrimination were clarified by the Claimant as follows:

    4.1. The Claimant's suspension on 12 April 2019;

    4.2. The Respondent's failure to follow its own procedures in suspending the Claimant before the allegations had been thoroughly investigated.

    4.3. Deliberate withholding of information or evidence, namely:

        4.3.1. The identity of witnesses (employees interviewed during the disciplinary investigation);

        4.3.2. Until 6 September 2019, the date of the alleged drug-taking incident;

        4.3.3. Information obtained between the disciplinary hearing and the dismissal relating to Facebook use and the disciplinary hearing officer's visit to a police station;

        4.3.4. Tracking information obtained by the disciplinary hearing officer during the appeal;

        4.3.5. Notes of LS's investigatory meeting on 5 September 2019.

5. The Claimant relied on TON and LS as comparators, or alternatively a hypothetical comparator.

6. By the morning of day three the Claimant had finished giving evidence. The Respondent had started its evidence, but it was agreed that one or two short additional witnesses for the Claimant could be interposed later. One of the Respondent's five witnesses, Lee Worms, had completed his evidence. The second witness, Jamie Mcdonald, was in the middle of giving evidence when

technical problems arose. Around the same time the Respondent informed the Tribunal that there were documents that were relevant to the case that had not been disclosed to the Claimant. The explanation given was that the initial discovery exercise had been inadequate and missed a large number of relevant documents, and that this had only come to light when the Respondent was searching for a document the previous evening as a result of questions asked of its witnesses on the second day of the hearing.

7. A further issue that had arisen during the hearing was that certain key documents in the bundle had been redacted, and the Respondent indicated that it would be willing to produce unredacted versions.

8. The investigation into the allegations against the Claimant had been conducted by Asya Mircheva, Operations Manager. She interviewed seven members of staff as part of her investigation. The bundle included notes of those interviews in anonymised form, the witnesses identified as "Witness A", "Witness B" etc. Mr Worms and Mr Mcdonald confirmed during their evidence to the Tribunal that they were two of the witnesses interviewed and they referred to Ms Mircheva's investigation notes during their evidence.

9. It was agreed by all that the case needed to be adjourned to allow for a proper disclosure exercise to take place. New dates were listed, 22-24 March 2022, with a further day set aside on 25 March 2022 for Tribunal deliberations.

10. We issued case management orders on 8 December 2021, confirmed in writing on 13 December 2021, as follows:

> 1. *By 22 December 2021 the Respondent must send to the Claimant copies of all further documents relevant to the issues that have not previously been disclosed.*
>
> 2. *By the same date the Respondent must send to the Claimant unredacted versions of any redacted documents previously disclosed.*
>
> 3. *By the same date the Respondent must confirm to the Claimant the identities of the anonymous witnesses referred to during the disciplinary investigation.*
>
> 4. *If the Respondent is not willing to disclose fully redacted*[1] *documents or disclose the identity of any witness it must provide an explanation to the Claimant in writing by the same date.*
>
> 5. *If either party wishes to rely on documents not already before the Tribunal the Respondent must prepare a supplementary bundle, paginated so that the electronic page numbers accord with the printed page numbers, by 14 January 2022.*

[1] This should have read "unredacted" and it was agreed that that is how both parties understood the order.

6. *If the Respondent wishes to rely on any supplementary witness evidence or call any additional witnesses, statements must be prepared and sent to the Claimant by 28 January 2022.*

7. *Any additional documents or witness evidence will only be admitted by agreement between the parties or, in the absence of agreement, with the permission of the Tribunal following an application made on the first day of the resumed hearing.*

8. *Electronic copies of any supplementary bundle and any additional witness statements must be sent to the Tribunal four days before the resumed hearing. The Respondent must also bring to the Tribunal four hard copies of any supplementary bundle and any additional witness statements on the first day of the resumed hearing.*

11. On 22 December 2021 Ms Tandi, in-house solicitor for the Respondent who has had conduct of this case since before the final hearing in December 2021, wrote to Mr Brown, then acting for the Claimant, pursuant to paragraphs 2-4 of the orders. Some previously redacted documents were attached in unredacted versions. Where documents remained redacted, for example to obscure private telephone numbers or the name of a child, those redactions were explained. The email then continued:

> "**3. Unredacted Witness Statements**
> Finally in terms of the witness statements. The Respondent is in the process of obtaining authorisation from the various witnesses to disclose their names and we will revert to you early in the new year once this has been confirmed.
>
> The Respondent has potentially a couple of others documents to unredact but we will confirm this by Friday 24 December 2021."

12. This referred to the notes of Ms Mircheva's interviews with the seven witnesses. Ms Tandi did not return to this issue in correspondence with the Claimant until shortly before the resumed hearing when the names of the witnesses were disclosed.

13. The resumed hearing started on 22 March 2022. The Claimant represented himself, Brown & Co Solicitors having come off the record shortly before the resumed hearing. A supplementary bundle of 189 pages was produced with the newly disclosed documents, and all five Respondent witnesses produced supplementary witness statements addressing those documents. The new material included evidence about the alleged threats made by the Claimant, including internal correspondence and a risk assessment relating to staff believed to be at risk of harm from the Claimant. The Claimant also produced a supplementary witness statement which mainly contained submissions but parts of it were evidence relating to the new documents. The Claimant gave evidence again and was cross-examined on the new documents. Lee Worms for the Respondent was re-called and completed his evidence. Jamie Mcdonald was re-called and completed his evidence.

14. At the start of the third day of the resumed hearing, when Asya Mircheva for the Respondent was in the middle of giving her evidence, Ms Casserley for the Respondent informed the Tribunal that she had become aware of further documents that had not been disclosed to the Claimant. She initially described these as "unredacted" versions of the statements taken during the investigation, but having seen them that is not an apt description. They are longer statements of/ notes of interviews with the seven witnesses who were interviewed by Ms Mircheva as part of the disciplinary process, each signed by the witness in question, with significant differences to the ones previously disclosed and that appear in the bundle. They include longer statements from the two witnesses, Mr Worms and Mr Mcdonald, whose evidence had already concluded.

15. No-one from the Respondent's side had previously given any indication of the existence of these documents to the Claimant or to the Tribunal, although the Claimant did pick up in cross-examination of Mr Mcdonald on the second day of the resumed hearing that an email from Ms Mircheva in the original bundle referred to two statements by RT, one of the alleged targets of the Claimant's threats, a "detailed statement" and a "short anonymised statement". Mr Mcdonald, who said he was supporting RT during the investigation, gave evidence that RT signed and returned both statements. The Tribunal queried why the "detailed" statement was not in the bundle and it is that enquiry that, presumably, led to the revelation on the morning of the third day.

16. The Respondent accepts the new statements are significant evidence. There can be no doubt about that. Two of the witnesses, for example, say that the allegation of threats against RT came not from RT himself but from another participant on the scheme that RT was on. That directly contradicts the evidence given by Mr Worms and Mr Mcdonald to the Tribunal. There is also a reference to extremely disparaging and potentially prejudicial comments made by another manager, Darren Osborne, about the Claimant. Mr Osborne has not been called as a witness by the Respondent. The new statements also raise real questions as to why they were edited in the way that they were, and why Mr Worms and Mr Mcdonald referred in their evidence only to the versions in the original bundle, when they must have known these documents existed, having signed them, and why the Claimant was not informed of their existence at any stage during the disciplinary process despite them being in the possession of the investigating officer. There is at least the possibility that the reason the statements were edited was to strengthen the case against the Claimant and/or avoid criticism of the Respondent. That is something the Claimant must be entitled to explore in cross-examination.

17. The problem was that this arose on the last day of the resumed hearing. The issue was raised shortly after 10am and the documents were provided to us at 10.15am. The Claimant needed to have a fair opportunity to consider the implications of the new documents and cross-examine the Respondent's witnesses. Re-call of Mr Worms and Mr Mcdonald was inevitable. There was simply no prospect of concluding the evidence within the remaining time allocated to the case, i.e. less than one day. Neither party sought to argue otherwise.

18. There is also the issue about the Respondent's conduct of the proceedings. We were so concerned about Ms Tandi's email of 22 December and the way in which these documents had been revealed that we considered it appropriate to hear evidence from her and to hear submissions on the possibility of striking out the response.

19. Ms Tandi told us that she qualified as a solicitor in 2005 and had been employed by the Respondent since July 2021. She took over conduct of this case as soon as she joined the Respondent and oversaw the original disclosure process. She says, and we accept, that she explained to the Respondent their disclosure obligations when searching for and providing her with relevant documents. She said that the longer versions of the statements were amongst the documents given to her between the adjournment on 8 December and the 22 December deadline for further disclosure. She said she was intending to disclose everything, as advised by counsel they were required to do, and she was about to do so, but then had a last-minute conversation with the manager(s) instructing her and was told not to disclose the longer statements. She said the names of the witnesses were disclosed to the Claimant shortly before the resumed hearing and it was an oversight that the full statements were not disclosed.

20. We do not accept that this can be put down to simple oversight. Ms Tandi knew when she sent her email on 22 December that there were significant additional documents that were deliberately not being disclosed. She gave no indication of their existence in the email, in breach of the orders we made which required disclosure of all relevant documents and for any redactions (or, by implication, entire documents being withheld) to be explained. More than that, she expressly addressed the issue of the statements produced in the disciplinary hearing in her email and implied that the only issue with them was the identity of the witnesses. The suggestion that there were "potentially a couple of other documents to redact" also cannot fairly be taken to refer to the disclosure of entirely different documents never previously disclosed. Indeed in Ms Tandi's evidence she said that this referred to other documents that were later disclosed, prior to the resumed hearing.

21. The email, read as a whole, was misleading, and we find that Ms Tandi must have realised that it was. The Respondent and Ms Tandi did absolutely nothing about the undisclosed documents in the period up to the resumed hearing commencing on 22 March. They allowed the hearing to proceed, knowing that these documents had not been disclosed and their existence had been concealed. It was only because it came up in the hearing, much to the Claimant's credit, that the issue came to light. Ms Casserley has acted quite properly in bringing it to our attention as soon as she became aware of it.

THE LAW

22. Rule 37 of the Employment Tribunals Rules of Procedure provides:

> **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—
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> (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).
>
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
>
> (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

23. The reference to "scandalous" conduct of the proceedings is directed to the conduct of the proceedings in a way which amounts to an abuse of the tribunal's process. It is not to be given its colloquial meaning of signifying something that is 'shocking' (Bennett v Southwark London Borough Council 2002 ICR 881, CA).

24. For a tribunal to strike out a claim or response for unreasonable conduct, it must 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 (Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA). In ordinary circumstances, neither a claim nor a defence can be struck out on the basis of a party's conduct unless a conclusion is reached that a fair trial is no longer possible (De Keyser Ltd v Wilson 2001 IRLR 324, EAT).

25. The Tribunal must also, as always, consider the overriding objective to deal with cases fairly and justly. When considering proportionality, the Tribunal must consider whether there are other remedies short of striking out the response that would adequately address the Respondent's conduct (see, e.g. Laing O'Rourke Group Services Ltd and ors v Woolf and anor EAT 0038/05).

CONCLUSIONS

26. We heard submissions from both parties on the issue of whether the response should be struck out.

27. We consider that the Respondent's conduct of the proceedings has certainly been unreasonable. It may also come into the category of scandalous conduct. Ms Tandi was well aware of the importance of ensuring a comprehensive disclosure exercise took place after the hearing collapsed in December 2021. Her failure to inform the Claimant's solicitor of the existence of the documents at the time of her email on 22 December 2021, or at any time thereafter,

amounted to a breach of the Tribunal's orders and it had the effect of misleading the Claimant and, ultimately, the Tribunal. It has wasted a significant amount of Tribunal time. We have found that Ms Tandi's conduct was knowingly misleading.

28. It goes deeper than that, though. At least one if not more managers at the Respondent must have been aware throughout these proceedings that these documents existed. All witnesses have given their evidence without mentioning them. Ms Mircheva in particular, who conducted all of the interviews, appears to have typed the documents and received the signed copies, has never acknowledged their existence in either of her witness statements or explained that she edited them, as we have now been told that she did.

29. That leads on to the next question, whether a fair hearing is still possible. We do not consider it is. Mr Worms and Mr Mcdonald would need to give evidence for a third time. No doubt they would need to produce second supplementary witness statements. The Claimant is acting in person. This is not a satisfactory or fair way to conduct a trial. We are already dealing with matters that took place three years ago. Most importantly, the credibility of the Respondent's witnesses has been so damaged that it would be impossible for us to have any confidence in the evidence we hear.

30. Ms Casserley argued that striking out the response would deprive the Respondent's witnesses of the ability to have a full decision in response to serious allegations of race discrimination. We accept that is true and we take full account of the impact on individual employees of the Respondent who are implicated in the allegations. We also readily appreciate the stress caused by a case like this. We understand why they would prefer a full judgment on the facts, having had an opportunity to respond to the serious allegations of racially motivated conduct. We must also consider, however, the inevitable impact on everyone of having to come back to the Tribunal a third time several months from now, as is inevitable if we do not strike out the response. We also bear in mind that some of the Respondent's witnesses must bear at least part of the responsibility for the collapse of the hearing for a second time.

31. Further, the effect of striking out the response is that we would proceed as if no response had been presented. Rule 21 provides that an Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. The effect of issuing a judgment under Rule 21 is a declaration that the Respondent as the employer discriminated against the Claimant. The judgment would not include any specific criticism of individual witnesses.

32. Ms Casserley did not argue that we could not "properly determine" that the Claimant was discriminated against in the ways identified in the agreed issued pursuant to Rule 21, taking his case at its highest as we would be required to do. She asked to "reserve her position", however, on the question of whether we could take into account the evidence we had already heard. Leaving aside the question of whether that is a legitimate approach, when it would have been open to her to argue the point if she wished, we consider that any argument

that we could not do so would be bound to fail since Rule 21 expressly refers to the decision being made "on the available material". In any event we did not consider it necessary to take into account the evidence we had already heard except to the extent that we were satisfied the Claimant had an arguable case so we could "properly determine" the claim.

33. We considered whether there were any other measures that would appropriately address the Respondent's conduct short of striking out the response. We do not think there are. The trial has already been derailed once as a result of the Respondent's failure to comply with its disclosure obligations. What was originally a four-day hearing had already taken up eight days of allocated Tribunal time. We would need at least another three days to complete the evidence in light of the need for Mr Worms and Mr Mcdonald to be re-called. We must consider the proportionality of relisting the case again.

34. We recognise that striking out a response is a draconian measure. It is a last resort. But in the unusual and serious circumstances of this case, we consider it is the only fair and proportionate response to the Respondent's conduct of the proceedings.

35. We therefore strike out the response and we find, pursuant to Rule 21, that the claim as clarified in the agreed list of issues, succeeds. When discussing the terms of the judgment the Claimant agreed that there was no separate complaint relating to the Respondent's "failure to follow its own procedures" and that he was provided with the tracking information, so that particular complaint was withdrawn. The remainder of the allegations of direct race discrimination succeed.

REMEDY

36. We heard submissions from both parties on the appropriate award for injury to feelings. The Claimant did not claim any pecuniary loss.

37. The Claimant's evidence as to the effect of the discrimination on him was set out in his original witness statement as follows:

> "28. I have always worked extremely hard in my job and completed my duties to the highest standard; I have done nothing wrong yet I am in this position now in court still trying to prove my innocence. A number of experiences in my job has let me to now strongly believe that if I was white, I would not be suffering like this, I would not have been targeted, I would not have been accused, I would not have lost my livelihood. The damage it has done to me and my family has been immense, I want to be treated equally, I am not guilty of any offence. I did not deserve to be treated this way and I hope the truth will come out, that the Respondent will be shown to have discriminated against me and my name will be cleared of any wrong doing."

38. In his supplementary witness statement the Claimant added, "The stress and detriment this has had on me and my family has had a profoundly devastating effect affecting every area of our lives, mentally, physically and financially leading me to suffer from severe anxiety."

39. We also had two witness statements from the Claimant's wife which described the impact on him, but we give those limited weight because she did not attend to give evidence.

40. The Claimant has submitted GP notes which show attendances in February 2020 and January 2022 where he mentioned stress or anxiety relating to the these proceedings, and on the latter occasion he was prescribed Propranolol for anxiety.

41. The acts of discrimination we have upheld are the Claimant's suspension, which lasted six and a half months, and the withholding of certain aspects of the disciplinary investigation, which the Claimant later found out about, either at the time of his dismissal or shortly afterwards.

42. To suspend an employee as result of race discrimination is obviously serious and we accept this had a major impact on the Claimant's life. The withholding of evidence, again due to the Claimant's race, compounded his feeling that the whole process was unfair and that he was being targeted.

43. We must be careful not to compensate the Claimant for injury to feelings caused by matters that are not part of his claim, such as the dismissal, or the reaction of some of the managers, for example reporting the Claimant to the police and installing panic alarms, etc, much of which the Claimant has only discovered through these proceedings.

44. It is always difficult to assess injury to feelings where we have not made full factual findings on the alleged discrimination, but we often have to do so following a judgment under Rule 21, and as noted above we consider we are entitled to take into account the evidence we have heard.

45. The applicable Vento bands are as follows:

- a lower band of £900 to £8,800 (less serious cases);
- a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and
- an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000

46. Doing the best we can on the available material we consider the Respondent's conduct in this case falls within the middle band. If we were considering the impact on the Claimant of everything he feels was unfair, including his dismissal and the matters that have come out during the proceedings, we would have been inclined to make an award towards the upper end of the band. Limiting the award to the complaints discrimination we have upheld, we consider the middle of the middle band is appropriate, i.e. £17,550.

47. The Claimant has argued he should be awarded aggravated damages in part because of the Respondent's conduct of these proceedings. We have already dealt with the Respondent's conduct of the proceedings by striking out the response. That has saved the Claimant the need to come back on another

occasion and argue his case. We note that compensation for discrimination, including any aggravated damages, are compensatory not punitive. In the circumstances we do not consider it necessary or appropriate to make a separate award for aggravated damages.

48. We calculate interest on the basis of 1,076 days from 12 April 2019 to the date of the hearing. At 8% this amounts to £4,138.92.

49. The total amount awarded to the Claimant is £21,688.92.

Employment Judge Ferguson

Date: 24 May 2022