EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Daniel Duffy

and

Respondent: Stagecoach South East

HELD AT London South ON 8 February 2021

EMPLOYMENT JUDGE PHILLIPS

Appearances:

For Claimant: In person

For Respondent: Mr Owen Kessack, Solicitor

JUDGMENT

The Respondent's application for a deposit order is refused.

REASONS

1. On 10 November 2020, the Respondent issued an application under Rule 39 of the Employment Tribunal (Constitutional and Rules of Procedure) Regulations 2013, for a deposit order against the Claimant, on the basis that his unfair dismissal claim had little reasonable prospect of success. On 5 February, Mr Joel Mitchell, the Responder's Managing Director, provided a witness statement, further details of which are summarised below.

Brief facts

2. The Claimant was an engineering manager who had worked for the Respondent at their Dover and Folkestone depot since August 2009. The Claimant brings a claim of unfair dismissal. He says he was incorrectly suspended on 16 March 2020, and was dismissed while he had a grievance outstanding against his manager. In his ET1 at paragraph 8, he raises a

number of procedural and substantive challenges to his dismissal. In particular he says that

1) His suspension was incorrect
2) Additional matters were added into his final appeal hearing
3) The disciplinary process took too long [14 weeks in total]
4) His disciplinary hearing was dealt with by telephone, whereas others were offered a face to face or video hearing;
5) No or insufficient account was taken of the fact that he had 12 years of clean service and was regarded as honest

3. The Respondent denies the claims. It says, in its ET3 Response, the Claimant was fairly dismissed for a number of conduct-related reasons, following a full and fair investigation, disciplinary hearing and appeal process. In particular, it says there was an incident on 5/6 March 2020 when a number of buses ran out of fuel and were stranded. This led to the Claimant being suspended. During the investigation which followed, a number of other matters, all or any of which the Respondent believed could amount to gross misconduct, were uncovered.

4. The Respondent's application for a deposit order was heard at the Telephone Case management hearing on 8 February. As I did not have a copy of the witness statement and exhibit of Mr Mitchell, there was brief adjournment of the Telephone hearing in order for this to be supplied and so that I could read it and the exhibits.

5. In his witness statement, Mr Mitchell set out the background to and reasons for the deposit order application. Put briefly, Mr Mitchell says that section 8.2 of the ET1 states that the Claimant's claim for unfair dismissal is based on, in summary the 5 allegations set out above at paragraph 2.

6. In respect of item 1, Mr Mitchell says this is incorrect: he says the Claimant was suspended from his duties, on full pay, on 16th March 2020 in accordance with clause 13 of his contract of employment dated 29th October 2019 (see pages 16 – 26 exhibit JM1). He says this was confirmed to the Claimant by letter dated 16th March 2020 (page 27 exhibit JM1). In respect of items 2 and 4, Mr Mitchell asserts these are not legitimate grounds with which to bring an unfair dismissal claim. He says that, in any event, the Claimant was advised during the period of suspension that further allegations of misconduct had been identified and that these would also be investigated. He refers in this regard to the letter relating to the suspension dated 19th March 2020 (page 15 JM1). In regard to item 3, Mr Mitchell explained that the disciplinary procedure took 13 weeks; from the date the Claimant was suspended on 16th March 2020 to the decision to dismiss being upheld at the final appeal stage on 19th June 2020. He said this procedure covered suspension, the investigation, the Disciplinary Hearing, the First Stage Appeal and the Second Stage Appeal, with both appeal stages including a further investigation period. He said that this coupled with the transitional issues of working during the Covid-19 lockdown period,

meant the disciplinary procedure was handled expediently, reasonably, fairly and without undue delay. In respect of item 5, Mr Mitchell said the Respondent does take into consideration length of service and an employee's relevant misconduct record, but the allegations against the Claimant were deemed to be gross misconduct and while length of service and a clean conduct record were considerations, they are not, on their own, legitimate grounds for a successful unfair dismissal claim. He therefore said that he believed that the Claimant's claim for unfair dismissal had little to no reasonable prospect of success.

7. Mr Kessack submitted that, on this basis, the Claimant's ET was fundamentally flawed. He pointed out that that the test to be applied in such an application is that the tribunal may make a deposit order if it considers that (i) Any specific allegation or argument (ii) in a claim or response (iii) has 'little reasonable prospect of success'. He said this applied with regard to each individual allegation as well as to the claim in its entirety.

8. Mr Duffy took exception to the descriptions put forward by Mr Mitchell. He said that, with regard to item 1, he was given no details about his initial suspension, was not put on notice of it and was given no details until he asked. With regard to item 2, he said he was no referring to additional matters being added during suspension but during his final appeal: he said he thought they did this to avoid a further disciplinary hearing; he said this related to accounting for money for scrap metal and how it was kept; On item 3 he said he was not kept properly informed about when things were going to happen – he was left waiting in the dark. After discussion he accept that 14 weeks during the pandemic was probably not unreasonable and agreed that he would not be pursuing the length of time as an individual procedural defect. On item 4, he said was others were offered either face to face or video hearings at the same time he was offered only a telephone hearing. On item 5, he repeated that he did not believe proper account had been taken of his length of service, honesty and exemplary record.

9. Mr Kessack said the Respondent disagreed with what the Claimant had said. He said that clause 13 of the terms of employment in the Contract entitled the Respondent to suspend the Claimant. He said the letters of suspension had been exhibited.

The applicable legal principles

10. Rule 39 allows for a party to be ordered to pay a deposit of up to £1,000 in order to continue to take part in proceedings, where an Employment Judge considers that any arguments or allegations in a claim have "little reasonable prospect of success". Before making any order, it is necessary to make reasonable inquiries of the party's ability to pay. Mr Mitchell in his witness statement pointed out that the Claimant currently earnt £604.85 per week (net)

and said that he was therefore in a position from a financial perspective to make payment in respect of a Deposit Order.

11. In *Hemdan v Ishmail & Another*, UKEAT/0021/16, the EAT identified at [10-11] of its Judgment the purpose of a deposit order as being to identify claims with little prospect of success and to discourage pursuit of those claims by requiring a sum to be paid and by creating a risk of costs if, ultimately, the claim fails. The purpose is not, however, to impede access to justice or to effect a strike-out "through the back door". A deposit order should be capable of being complied with and a party should not be ordered to pay a sum which he or she is unlikely to be able to raise (*see at [17]). The EAT in* Van Rensburg v Royal Borough of Kingston-upon-Thames & Others, UKEAT/0095/07, held at [27] that an Employment Tribunal must have a proper basis for doubting the likelihood of a party being able to establish the facts essential to a claim or response.

12. For the purposes of a deposit order application, the Claimant's case should be taken at its highest. A deposit order cannot be made merely because a party's case is not clear (*Tree v SE Coastal Services Ambulance NHS Trust* (UKEAT/0043/17)).

13. As set out in *Hemdan*, (paragraph [12]) the test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. Further, (*Hemdam* [13]) the assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. "Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise. … If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested."

14. Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved, and the case is likely to be allocated a fair share of limited tribunal resources, are also relevant factors. It may also be relevant in a particular case to consider the importance

of the case in the context of the wider public interest (*Hemdan* [15]). If a tribunal decides that a deposit order should be made in exercise of the discretion pursuant to Rule 39, sub-paragraph (2) requires tribunals to make reasonable enquiries into the paying party's ability to pay any deposit ordered and further requires tribunals to have regard to that information when deciding the amount of the deposit order. Those, accordingly, are mandatory relevant considerations (*Hemdam* [16]). An order to pay a deposit must be one that is capable of being complied with. A party without the means or ability to pay should not therefore be ordered to pay a sum he or she is unlikely to be able to raise.

15. The 2013 Rules make explicit that deposit orders can be made in relation to individual "allegations or arguments". A party can therefore line up a series of allegations which it says have little prospects and seek deposits in relation to each, although the tribunal must in the end "*stand back and look at the total sum awarded and consider the question of proportionality before finalising the orders made*" (*Wright v Nipponkoa Insurance (Europe) Ltd* (UKEAT?0113/14)).

Discussion and Conclusion

16. There are a number of matters here that are challenged that are the subject of factual disputes, which can only in my judgment be resolved by hearing evidence on oath from both sides (e.g. items 1, 2, and 4). These matters are all matters of procedure which, if upheld by a Tribunal, could amount to a finding that there has been a procedurally unfair dismissal, irrespective of any substantive reason. I am reluctant to order a deposit to be paid, when there are such factual disputes. Further, on item 1, clause 13 of the Contract does not in fact deal with any rights of the employer to suspend during an investigation – as opposed to when notice of termination has been given. That is not to say that an employer cannot suspend absent express contractual provision, but that clause is not a "slam dunk" answer to this allegation. Item 5 is in my judgment a matter for the Tribunal hearing the case to resolve on the evidence, in terms of whether dismissal in these circumstances was within the range of responses of a reasonable employer and whether these matters were properly taken into account by the dismissing officer and given due consideration. I do not believe it is appropriate for me to endeavour to assess the merits of this at this interim stage. While it is clear that a Tribunal can assess the plausibility of a party's case, the factual truth or otherwise of a claim or allegation, is something that in this case in my judgment requires determination by the Tribunal at the full hearing.

17. In my judgment, with the exception of item 3 on length of time, the matters raised by the Claimant do potentially disclose a basis upon which an Employment Tribunal could uphold the claim of unfair dismissal, either on procedural or substantive grounds. Whilst it may well be difficult for the Claimant to succeed at a Full Hearing of his unfair dismissal claim, in my

judgment that does not mean that he has “little” reasonable prospect of success. On balance therefore, I do not consider that it can be said, with the exception of item 3, which the Claimant has conceded, in particular given the impact of the Covid 19 pandemic, would be unlikely to succeed, that the Claimant’s case of unfair dismissal or the individual allegations relating there to, has no reasonable prospect of succeeding. I therefore dismiss this application for a deposit order.

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Employment Judge Phillips
8 February 2021, London South