EMPLOYMENT TRIBUNALS

Between

Mr P Hedlund

Claimant

and

London Borough of Lambeth (1)
Governing Body of Lark Hall Primary School (2)
Respondents

Heard at London South Employment Tribunal on 6 March 2017

Before Employment Judge Baron

Representation:

Claimant: **The Claimant was present in person**

Respondent: **Tim Dracass - Counsel**

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal as follows:

1 The claim is dismissed as against the Second Respondent following a withdrawal of the same by the Claimant;

2 The First Respondent is not to be prevented from maintaining in these proceedings that the Claimant did not make a protected disclosure within section 43A of the Employment Rights Act 1996 as alleged by the Claimant.

REASONS

1 This hearing has occurred in somewhat unusual circumstances. On 26 July 2016 the Claimant presented a claim against the London Borough of Lambeth ('the Respondent'), being case number 2301396/2016. He alleged that he had been unfairly dismissed from his post as a teacher and he applied for interim relief 128 of the Employment Rights Act 1996 on the basis that he made a protected disclosures or disclosures. I have not inspected the file, but I see from the Tribunal's database that there was a hearing listed for 12 August and another one for 1 September 2016, presumably to consider the interim relief application. Both were postponed. The Respondent presented a 'holding' response as the claim

had been served during the school holidays. In it the Respondent stated that the Claimant had been dismissed without notice.

2 That claim was settled as a result of conciliation action taken by ACAS, and the terms were recorded in what is usually described as a COT3 Agreement. It was signed by the Claimant on 31 August 2016 and on behalf of the Respondent on 2 September 2016. It was agreed that a sum of money be paid to the Claimant within 21 days of the receipt of the COT3 form having been signed by the Claimant and received by the Respondent. There were other provisions not of immediate relevance. What is relevant is clause 8:

> The parties agree that the Claimant made a Public Interest Disclosure in relation to the School.

3 On 5 October 2016 the Claimant presented this claim to the Tribunal in which he alleged that he had suffered post-employment detriments in relation to the provision of references, and such detriments were caused by the protected disclosure. Paragraphs 13 and 15 of the Grounds of Resistance are as follows:

> 13 No admissions are made in relation to any allegations made by the Claimant. For the avoidance of doubt the Respondents will say that any admissions made in the COT3 in the earlier proceedings were made for the purpose of reaching a settlement in those proceedings only and not for any other purpose.
>
> 15 The Claimant sent a letter to the [ ] Respondent on 29.1.16. It is not admitted that this letter was a protected disclosure. If a protected disclosure was made then no admissions are made in respect of the knowledge of this of any officer or employee, this issue will be covered in witness statements.

4 There was a preliminary hearing for case management purposes on 12 January 2017 before Employment Judge Sage. In the notes recording the outcome of that hearing she identified the issue to be decided at this hearing as follows:

> Whether the [ ] Respondent is bound by the concession made in the agreement term at paragraph 8 of the COT3 dated the 31 August 2016 . . . .

5 I decided that although this was in effect a hearing in which the burden was on the Claimant to show why the Respondent should not be allowed to pursue the response as pleaded, it would be more helpful to the Claimant if Mr Dracass were to put forward the Respondent's case on the point first and allow the Claimant to respond.

6 Mr Dracass provided me with an extract from Harvey[1] relating to the withdrawal of admissions together with Part 14 of the Civil Procedure Rules and a copy of the report of *Walley v. Stoke-on-Trent City Council* [2007] 1 WLR 352 CA. He said that when the Grounds of Resistance were presented in respect of the first claim the Respondent did not have easy access to relevant information because of the school summer holidays. Now, he said, the Respondent could not accept that the Claimant had a reasonable belief that the information disclosed in the letter of 29 January 2016 in question fell within section 43B of the 1996

[1] Division P1.1.J(4)(c) paragraph [361] and [362]

Act, nor that he reasonably believed that it was in the public interest to make the disclosure.

7 Mr Dracass submitted that the position was analogous to the situation where a concession had been made before the presentation of a claim and so fell within CPR 14.1A. In the civil jurisdiction any concession made in such circumstances can be withdrawn without the permission of the court. Mr Dracass referred to the headnote in *Walley.* It is important to appreciate that that case was heard before the Civil Procedure Rules were amended to add rule 14.1A. In *Walley* the defendant had informed the claimant that liability would not be an issue in a personal injury claim.

> Held, . . . , that CPR r 14.1(5) applied only to admissions made in the course of proceedings and not to pre-action admissions; that the correct procedure in respect of pre-action admissions was an application made under CPR r 3.4(2) to strike out a defence or part of it either as an abuse of process or as being otherwise likely to obstruct the just disposal of the case; that for a claimant to show that the withdrawal of an admission would amount to an abuse of the process of the court it would be necessary to prove that the defendant had acted in bad faith; that, further, for the claimant to show that the withdrawal of the pre-action admission was likely to obstruct the just disposal of the case, it was necessary for the claimant to prove that he would suffer some prejudice which would affect the fairness of the trial; that, in the circumstances, the claimant had failed to demonstrate that the defendant's withdrawal of its pre-action admission was either an abuse of process or was otherwise likely to obstruct the just disposal of the case; and that, accordingly, the case would be remitted to the county court for a trial on liability

8 The position here, said Mr Dracass, was that the Claimant was effectively seeking an order under rule 37 to strike out the response. Mr Dracass accepted that the Claimant was a litigant in person, and there was no criticism of him for not framing his position in accordance with the rule. However, said Mr Dracass, the Claimant would have to show that the Respondent had acted in bad faith, or that he had suffered prejudice in relation to the current proceedings.

9 The other authority to which my attention was drawn was in a footnote to CPR 14.1 as follows:

> An admission in a defence in one action has been held not to be binding in other proceedings between the same parties on a different issue (*re Walters* (1889) 61 L.T. 872).[2]

10 The Claimant, somewhat surprisingly, said in a witness statement that as soon as the COT3 Agreement had been signed he destroyed a notebook he had kept about the alleged incidents the subject of the alleged disclosure. Thus, he said, he would be prejudiced if the Respondent were allowed to pursue the contention as to the making of a protected disclosure.

11 The Claimant pointed out that the authorities to which Mr Dracass had referred did not relate to circumstances in which there had been an enforceable agreement between the parties, as was the case here. The authorities related to concessions made before or during particular proceedings, rather than in an Agreement. In entering into the COT3 Agreement rights had been given up, including the right to have a

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[2] No copy of that authority was made available.

hearing on his application for interim relief. The Claimant said that he had a legally enforceable right against the Respondent and that it was not in the interests of justice to allow the Respondent to renege on the concession made.

12 Mr Dracass replied saying that the Tribunal should be allowed to decide in these proceedings whether the Claimant had made a qualifying disclosure within section 43B of the 1996 Act, and a protected disclosure within section 43A.

13 I now consider my conclusion, which I have not found easy. It is common ground that there is no specific provision the Employment Tribunals Rules of Procedure 2013 which is the equivalent of either CPR 14.1 or 14.1A. Although the Civil Procedure Rules do not strictly apply to Employment Tribunals (save in some specified respects not relevant here) useful guidance can often be obtained from them. I consider that the provisions of CPR 14.1-(1) and note 14.1.1 put the provisions into context:

> 14.1-(1) A party may admit the truth of the whole or any part of another party's case.
>
> 14.1.1 In various ways, for the purposes of reducing costs and delay and of narrowing the issues in dispute, the CPR encourage parties, where appropriate, to make admissions of fact and to concede claims (or parts of a claim) and not to contest the incontestable throughout the trail process.

14 CPR 141A-(1) contains a similar provision to CPR 14.1-(1) but relating to admissions made before the commencement of proceedings. There is again specific reference to 'the truth . . . of another party's case'.

15 I do not consider that the Civil Procedure Rules are of much assistance because I read them as referring to admissions made specifically with reference to the dispute in question. The word 'admission' therefore has a limited meaning.

16 I turn to the Employment Tribunals Rules of Procedure 2013. The Tribunal has a very wide power under rule 29 to make case management orders. However, such orders are for the purposes of case management and do not in my judgment apply to the current circumstances where I am being asked effectively to decide the limitations of how a response to a claim may be pursued.

17 Of more potential relevance is the power under rule 37 to strike out a claim or response, or parts of such:

> **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—
>
> (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.

18 That is not how the matter was presented to me by the Claimant, which is not surprising because he is a litigant in person, and it was not the issue as identified by Judge Sage at the preliminary hearing on 12 January 2017. It does, however, follow the logic of the *Walley* authority. It is only in an exceptional case that this power will be exercised, as the effect is to prevent a claimant from pursuing what may be a valid claim, or to prevent a respondent from pursuing what may be a perfectly valid defence. The power of striking out under rule 37 is often referred to as a draconian power. I am not satisfied that any of the conditions in paragraphs (a) to (e) of rule 37(1) have been satisfied. I will not exercise the power in rule 37 for those reasons.

19 Although not argued by the Claimant I record that the matter is not one where the doctrine of *res judicata* applies. The question as to whether there has been a protected disclosure has not yet been the subject of a judicial decision.

20 The Claimant emphasised that there was a COT3 Agreement between the parties, and that (to use the technical term) consideration had been provided by both parties. I have no doubt that he is correct as that is apparent from the terms of the Agreement. The Tribunal does not have the jurisdiction arising from that to prevent the Respondent from maintaining that there had not been a protected disclosure by the Claimant.

21 Finally, whatever the truth as to the destruction of documents (as to which I am not making any findings) I am not satisfied that by destroying documents (whatever they were) then the Claimant has suffered such prejudice that somehow the Respondent should be prevented from pursuing its defence. In any event, the destruction was by the Claimant's own hand.

Employment Judge Baron

06 March 2017