EMPLOYMENT TRIBUNALS

Claimant: Mr J Stevenson

Respondent: DHL Services Limited

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 13 May 2021

Before: Employment Judge Brewer

Representation

Claimant: Mr B Henry, Counsel
Respondent: Ms L Amartey, Counsel

JUDGMENT

1. The claim that the sole or main purpose of the respondent giving the claimant a verbal warning was to prevent or deter him from taking part in the activities of an independent trade union at an appropriate time has no reasonable prospect of success and is struck out.

2. The claim that the sole or main purpose of the respondent giving the claimant a verbal warning to penalise him for taking part in the activities of an independent trade union at an appropriate time has no reasonable prospect of success and is struck out.

REASONS

Introduction

1. This case was listed for an open preliminary hearing following the respondent's application that the case be struck out as having no reasonable prospect of success, or, in the alternative, that the claimant be asked to pay a deposit as a condition of continuing the claim on the basis that the claim has little reasonable prospect of access.

2. For the hearing I had an agreed bundle of documents running to 86 pages. No witness evidence was presented. I heard and have taken account of the detailed submissions made by Mr Henry and Ms Amartey and I am grateful to them for their careful and considered representations.

3. Given the listing and the issues raised in the submissions and given that Mr Henry indicated that he would want detailed reasons, I reserved my decision which I set out below.

Issues

4. The issues for me to consider are whether the claimant's claim, that he suffered a detriment under section 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), has little or no reasonable prospect of success and therefore whether the claim should be struck out under Rule 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, or the claimant be required to pay a deposit as a condition of continuing with the claim under Rule 39.

Law

5. The material parts of the Tribunal Rules are as follows:

> ***"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—*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success…*
>
> ***Deposit orders***
>
> ***39.****—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument…*

6. The claimant's claim is brought under section 146(1)(b) TURCA, which is in the following terms:

> ***146(1)****-A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—…*

> *(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, …*

7. Also relevant are sections 146(2) and 148 which are in the following terms:

> ***146(2)**-In subsection 1) "an appropriate time" means—*
>
> *(a) a time outside the worker's working hours, or*
>
> *(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;*
>
> *and for this purpose "working hours", in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work.*
>
> ***148**(1)-On a complaint under section 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act.*

8. Mr Henry and Ms Amartey agreed that the burden of proof is on the claimant to show a *prima facie* case under section 146(1) and if he does, the burden of proof shifts to the respondent to show why it acted as it did. That is clear from the case of **Yewdall v Secretary of State for Work and Pensions** EAT 0071/05 in which the EAT set out what it considered to be a 'very sensible' approach for tribunals to adopt, at least in respect of detriment claims under S.146. The tribunal should ask itself:

    a. have there been acts or deliberate failures to act on the part of the employer?
    b. have those acts or omissions caused detriment to the claimant?
    c. were those acts or omissions in time?
    d. in relation to those acts proved to be within the time limit, and which caused detriment, has the claimant established a prima facie case that they were committed for a purpose prescribed by S.146.

9. According to the EAT in **Yewdall**, it is only after the last question has been answered in the affirmative that the onus transfers to the employer to show the purpose behind its acts or omissions. Were it otherwise, the employer would have the burden of giving some explanation in a case where it is not clear what it is it has to explain.

10. I was invited by both counsel to accept that the case law related to cases of discrimination under the Equality Act 2010 (and its legislative predecessors)

apply to what is in effect a Trade Union discrimination case. I agree and the relevant authorities and principles I have taken account of are as follows.

11. In **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed.

12. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

13. Turning to the strike out provisions of the Rules, I note that claims of discrimination are rarely struck out where there is a factual dispute between the parties (**Anyanwu v South Bank Student Union** 2001 UKHL 14, and also see **Mechkraov v Citibank NA** 2006 ICR 1121). However, the test is of course whether there is no (or in the case of a deposit, little) reasonable prospect of success, even if there are factual disputes.

14. Having said that, I note that I should, when considering strike out, take the claimant's pleaded case at its highest, however, I do not lose sight of the fact that in many, indeed almost certainly in most claims of discrimination the Tribunal will need to draw inferences from disputed findings of fact which I am not in a position to, and indeed nor should I, do. Those inference may be critical in many cases.

15. In relation to section 146 claims, the focus is often what the respondent's sole or main purpose was. In that regard I note that an employer who has mixed purposes will contravene the provisions, but only if the unlawful purpose is the dominant purpose — if an employer has two purposes of equal weight, neither could accurately be said to be the 'main' purpose (see **Kostal UK Ltd v Dunkley and ors** 2018 ICR 768, EAT). In **University College Union v Brown** EAT 0084/19 the EAT held that the question of the employer's 'sole or main purpose' is a subjective one, to be judged simply by enquiring into what was in the mind of the person or persons within the employer organisation who committed the 'act, or any deliberate failure to act' complained of.

Findings of fact

16. I make the following brief findings of fact (references are to pages in the bundle).

17. The claimant has worked for the respondent as a Stock Handler since 1996. He remains employed. He has been a representative of USDAW for some 15 years. It was not disputed that the respondent enjoys good relations with USDAW.

18. The claimant, along with many colleagues, was placed on furlough on 1 April 2020.

19. On 1 May 2020 the claimant posted to his Facebook page a comment which included the following [35]:

> *REALLY!! If you really want people to feel valued and as a company you really want to help people with their worries and concerns in these unprecedented times pay people the 20||% uplift alongside the 80% government furlough scheme…instead of DECLINING as you have!! And save your hypocritical tips and hints to help us and the paper it's written on…HONESTLY!! Rant over!!*

20. This post garnered some 88 comments.

21. On 5 May 2020, the claimant again posted to his Facebook page [42]. The material parts of this post were as follows:

> *Work update!! For colleagues back at work who have called or messaged me concerned regarding a shift change…I have been in touch with the union to clarify and it would be a complete contractual change…*

22. The claimant's Facebook page is set to 'private' so only his friends can see his posts [14]. It is clear that some of those friends are also colleagues.

23. The respondent says that it considered the posts to be a breach of its social media guidelines and commenced a disciplinary investigation.

24. The claimant attended two investigation meetings, the first on 5 June 2020 and the second on 16 June 2020.

25. A disciplinary hearing was held on 24 June 2020 and the claimant was given a verbal warning. This is, he says, the detriment he suffered pursuant to section 146(1)(b) TULRCA.

26. On 26 June 202o the claimant appealed, and his appeal was heard, and rejected on 10 July 2020.

27. Early conciliation took place between 18 September 2020 and 1 November 2020.

28. The claim for was presented on 26 November 2020.

Discussion and conclusion

29. I shall start with a brief summary of the parties submissions.

30. Ms Amartey submitted that there was simply no evidence that the respondent's sole or main purpose was as alleged by the claimant. She also submitted that the activities in question, that is the two Facebook posts, were not the activities of a trade union. There is no issue that the claimant received a verbal warning and that this was clearly a detriment. Finally, initially Ms Amartey submitted that the 'activity' was not done during an 'appropriate time'. However, as I pointed out, section 146(2) TULRCA says that the appropriate time is either time outside of the claimant's working hours or time which is classified or known

as, as Mr Henry put it, facility time. Given that working hours is defined by section 146 as the time when the claimant "is required to be at work" and given that at the material times the claimant was on furlough, when he posted the posts in issue the claimant was clearly outside of his working hours – he was clearly not required to be at work, he was furloughed. On further consideration, Ms Amartey conceded the point.

31. Thus, we are left with these questions: Does the claimant have no, or alternatively little reasonable prospect of succeeding in his argument that:

    a. when the claimant made one or both of the Facebook posts in issue, he was taking part in the activities of an independent trade union at an appropriate time,
    b. irrespective of the answer to (a) above, that the sole or main purpose of the respondent giving the claimant a verbal warning was to prevent or deter him from taking part in the activities of an independent trade union at an appropriate time, or
    c. if, when the claimant made one or both of the Facebook posts in issue, he was taking part in the activities of an independent trade union at an appropriate time, the sole or main purpose of the respondent giving the claimant a verbal warning was to penalise him for so doing.

32. In relation to the activities of an independent trade union, Ms Amartey submitted that I should focus on whether the activities were authorised by USDAW and to not conflate the activities of a trade union representative with the activities of the trade union. She submitted that posting comments on a private Facebook page is not the activity of a trade union. She pointed out that in the investigation meetings the claimant insisted that he was posting to a private and confidential page.

33. In relation to the sole or main purpose question, Ms Amartey submitted that there was simply no evidence that this was the case. The burden is on the claimant to show a *prima facie* case and he could not. It is clear, she submitted, that the respondent's concern was potential reputational damage from critical posts on Facebook which the respondent says were in breach of its social media policy.

34. Mr Henry conceded that it would be difficult to show that the 1 May 2020 post was a 'trade union activity'. However, given that the disciplinary hearing and the warning were given for both posts, both have to be considered. He pointed out that the second post, the 5 May 2020 post, is the dissemination by the claimant of USDAW's view about potential shift changes. The post refers to the claimant having been in touch with the union and that he is setting out their response. Mr Henry says that I can infer that this was therefore authorised trade union activity.

35. In relation to the sole or main purpose question, Mr Henry said that on the evidence before me it was strongly arguable that the warning was given for a 'trade union reason'. Mr Henry agreed that the posts were to a Facebook page which included colleagues and non-colleagues of the claimant.

36. I was referred to two specific case. The first is **Dixon v West Ella Developments Limited** 1978 ICR 856. The question for the EAT in that case was whether the reporting by a member to his trade union on the safety of his working conditions with a view to an inspection being carried out of the same, constituted taking part in trade union activities within the meaning of what is now section 146 TULRCA. The decision being appealed was a majority decision, the Tribunal Chairman (as he then was) dissenting. The EAT held that the majority took too narrow a view of what constituted trade union activities. Two points of interest can be derived from the EAT's judgment.

37. The first is that:

> *…it is important to note that the words are "the activities of an independent trade union," not "trade union activities". In other words, the words "trade union" are not being used in an adjectival sense; what is being looked for are the activities of a trade union. The provision should be applied bearing that in mind*

38. The second is that the words "*the activities of an independent trade union"* should not be construed too narrowly but that in relation to how to define that term,

> *experience does show that it is unwise to try to give sweeping answers to what in the circumstances can only be hypothetical questions. It all depends on the facts of the individual case*

39. The second case I was referred to is **Chant v Aquaboats Limited** 1978 WL 58158. This case concerns the dismissal of an employee for organizing a petition. The question arose whether this constituted activity of a trade union as opposed to activities of a trade unionist which, said the EAT, were not the same thing. The majority of the Tribunal held that Mr Chant was not undertaking the activities of the union principally because although the union vetted the petition, that did not make it a communication from the union. The EAT approved this passage from the Tribunal's decision:

> *The next point the tribunal had to consider was whether the organisation of the petition could be held to have been activity of the Trade Union. We find that it was not an activity of the Trade Union. It is perfectly true that Mr. Chant had drafted the petition and had taken it to be vetted by the union office before presenting, it. But this vetting did not in any way make it a communication from the Union to the employers. Mr. Chant was not a shop steward. It is in fact signed by a number of men most of whom were not union members. It is of course open to employees in any firm to make representations by petition or otherwise to their employers about machinery which is unsafe. The mere fact that one or two of the employees making representations happen to be trade unionists, and the mere fact that the spokesman of the men happens to be a trade unionist does not make such representations a trade union activity*

40. I turn then to the questions I posed myself at paragraph 31 above.

Does the claimant have no, or alternatively little reasonable prospect of succeeding in his argument that when he made one or both of the Facebook posts in issue, he was taking part in the activities of an independent trade union at an appropriate time?

41. The post of 1 May 2020 is on the claimant's own evidence, a rant against the respondent. Mr Henry did not really seek to convince me that this amounted to the activities of a trade union. As the claimant says in his ET1 at paragraphs 6 and 7 [14] about this post:

> *The claimant was clear in stating that this was his opinion…there was no reference to the respondent by name in the post…the claimant's profile is set to private so only friends of his can see the posts*

42. In my judgment there is no reasonable prospect of an employment tribunal finding that in posting the first post the claimant was undertaking the activities of a trade union.

43. The second post, dated 5 May 2020, is in different terms. It bears close scrutiny. As set out above the key points are that there were queries over the position that some employees found themselves in when faced with a potential shift change. Taking the claimant's case at its highest, the claimant sought the opinion of his trade union which he then posted on Facebook. The key points of the post are:

> *Work update!! For colleagues back at work who have called or messaged me concerned regarding a shift change…I have been in touch with the union to clarify and it would be a complete contractual change…*

44. At first glance it may be tempting to say that because this post refers to the fact that the claimant had been in touch with USDAW for their view about the contractual position in relation to the potential for changing shift patterns, and was reporting their view, the post was therefore the claimant undertaking the activities of a trade union. But it seems to me that this does not necessarily follow. As the EAT said in **Dixon** (above), It all depends on the facts of the individual case. Just because the union gives a representative a view on a question it does not follow that passing on that view amounts to the undertaking of trade union activities. In fact, although not on all fours, the present case is not dissimilar to the position Mr Chant found himself in (again see above). The passing on of information given by, or for example approved by, a union may simply amount to the activities of a trade unionist. Paraphrasing the EAT in **Chant**; the mere fact that the claimant happens to be a trade unionist does not make his activity trade union activity even if what he was doing was passing on information he had gathered from the union.

45. I turn therefore to what the claimant and his union have said about this Facebook post.

46. At the first investigation meeting the claimant was represented by Ed Leach, Area Organiser for USDAW.

47. During the meeting the claimant, referring to the 5 May 2020 post, said that this was "*designed as instructions for people as to what rights they had for people to help themselves at that time*" [47]. Mr Leach, when talking about the 5 May 2020 post said that it was "*John providing in the most efficient & effective way to the members he reps. John conveyed the view what people's contractual rights were…*". Mr Leach does not say that the claimant was carrying out this activity on behalf of the union, he does not say it was authorised or even endorsed by the union. Further, although he states that this was the most efficient and effective way for the claimant to communicate with the members he represents, the reality is that there is no evidence that this post reached all of the members of the union the claimant represents and yet there is evidence his posts reached people not employed by the respondent and with no interest in the respondent's changing shift patterns.

48. Mr Leach does say that the 5 May 2020 post was "*a statement I advised [the claimant] of and then he conveyed it to his colleagues on facebook*", [50] but again this falls short of saying that the claimant was authorised to do so and that in so doing he was undertaking the activities of the union. Mr Leach had every opportunity to say simply that trade union representatives had, for example, been asked to cascade the information to members through social media, but, at least at this point, he did not.

49. At the second investigation meeting the claimant was represented by Ken Hart. Again, the 5 May 2020 post was discussed. The claimant said that "*I'm responding to people…they were asking me…I was a bit closer to the information*" [56]. There is no reference to the union or any activities of USDAW to help members with regard to the potential shift changes. I accept that the claimant said that the post was what "*Ed told me to write word for word*" but this is the first and only suggestion that the union knew that the claimant was going to pass on information to members and there is no suggestion anywhere, at this point, that if they did, they knew or authorised a trade union representative to post union information to a private Facebook page to which non-union members, indeed people who were not even employees of the respondent, had access. At the end of the second investigation meeting Mr Hart says that the union is concerned that "*the management can take somebody's private outburst and blow it out of all proportion*" [60]. He does not say that any or any part of any post was the activity of the union.

50. At the disciplinary hearing the claimant was again represented by Mr Leach. Mr Hancock was the disciplinary manager.

51. At this hearing the claimant's case altered somewhat. He was now saying that Mr Leach said "*it was a good idea*" to post to Facebook on 5 May 2020 [68]. Mr Leach agreed that this was what he had said. I am not in any position to take a view about witness credibility, as I have not heard any oral evidence. I merely note that this was not something either the claimant or Mr Leach said during the

first investigation meeting when they had every opportunity to do so, and not something the claimant said at the second investigation meeting.

52. Given the above I cannot say that the claimant has no reasonable prospect of succeeding in his allegation that when he made the 5 May 2020 Facebook post he was taking part in the activities of an independent trade union at an appropriate time. I do however consider that the allegation has little reasonable prospect of success given my comments in paragraph 51 above.

53. This leaves two key questions which can be taken together since they are both determined by what the respondent's subjective reason was for the verbal warning. These are: **a) Does the claimant have no, or alternatively little reasonable prospect of succeeding in his claim that the sole or main purpose of the respondent giving the claimant a verbal warning was to prevent or deter him from taking part in the activities of an independent trade union at an appropriate time, or b) does the claimant have no, or alternatively little reasonable prospect of succeeding in his claim that the sole or main purpose of the respondent giving the claimant a verbal warning was to penalise him for taking part in the activities of an independent trade union at an appropriate time**

54. For this we must consider Mr Hancock's motivation, again taking the claimant's case at its highest.

55. From the notes of the disciplinary hearing, it is quite apparent that Mr Hancock is focusing on the negative comments about the respondent which came from the first post on 1 May 2020. Mr Hancock first mentions the 5 May post on the second page of the meeting notes [68]. All he does is confirm that what the claimant had said was set out in the investigation notes which he had clearly read, but he immediately reverts to discussing the comments left about the first post, the 1 May 2020 post. That is the clear focus of his questions. It is the claimant who raises the 5 May 2020 post again at [69], not Mr Hancock.

56. I accept Mr Henry's submission that the verbal warning is in respect of both posts, the disciplinary outcome letter makes that clear [74]. However, in my view, looking at the totality of the documentary evidence I had before me, it is clear that Mr Hancock's main concern was the reputation of the respondent which he believes was jeopardized by the claimant posting what he refers to as work-related issues. He says in terms that the posts and the comments "*can be construed as damaging to our business reputation*" [74]. Taking the claimant's case at its highest, Mr Hancock either treats as one issue, or at least makes no differentiation in his outcome letter between, the 1 and 5 May 2020 posts when awarding the disciplinary penalty, and that equal treatment, equal weight given to both posts as it were, means that the claimant cannot in my judgment show that even if Mr Hancock acted as he did with some mind towards the 5 May post being union activity, his sole or main purpose in giving the warning was to prevent, deter or penalise the claimant as alleged.

57. Finally, it is worth mentioning the claimant's appeal grounds. These are at [76]. He says that he is appealing because he feels he has been singled out. But the singling out is not, as one might expect, because he was doing his trade union

duties. The claimant says he was singled out because of the comments other people made after he made his posts. He is aggrieved that colleagues who commented on his post had not been disciplined (although as I understand it a number were subsequently disciplined). However, as I have said above, both posts are referred to in the outcome letter and seem to be given equal treatment by reference to the respondent's reputation and I see no basis for drawing any inference related to trade union activities even if there were such.

58. Taking all of the above into account I conclude as follows:

    a. The claim that the claimant was undertaking the activities of a trade union when posting to Facebook on 1 May 2020 has no reasonable prospect of success;
    b. The claim that the claimant was undertaking the activities of a trade union when posting to Facebook on 5 May 2020 has little reasonable prospect of success;
    c. Because of my findings about the position of Mr Hancock and because at its highest, the case suggests that both Facebook posts are given equal weight by him, or at least he does not differentiate between them, it cannot in my view be said that the claim that the sole or main purpose of the respondent giving the claimant a verbal warning, either to penalise him for taking part in the activities of an independent trade union at an appropriate time, or to prevent or deter him from taking part in the activities of an independent trade union at an appropriate time have any reasonable prospect of success.

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Employment Judge Brewer

Date: 13 May 2021