



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr D Faulkner

v

Chestnut Inns Limited

Heard at: Bury St Edmunds

On: 18-20 October 2017

Before: Employment Judge Laidler

Members: Mrs M Prettyman and Mr A Schooler

Appearances

For the Claimant: Ms K Moss (Counsel)

For the Respondent: Mr N Ashley (Counsel)

JUDGMENT

1. This matter is adjourned on the claimant's application for a postponement.
2. There will be a preliminary hearing before this Judge on **7 December 2017, at 10am at Bury St Edmunds Employment Tribunals, 1st Floor, Triton House, St Andrews Street North, BURY ST EDMUNDS, IP33 1TR.**
3. The full merits hearing is adjourned to a further hearing before this tribunal on **14 – 23 March 2018 inclusive at Bury St Edmunds Employment Tribunals, 1st Floor, Triton House, St Andrews Street North, BURY ST EDMUNDS, IP33 1TR.**

REASONS

1. This is a claim of Daniel Faulkner in which he brings complaints of disability discrimination and that his dismissal was automatically unfair for health and safety reasons contrary to s.100(1)(c) of the Employment Rights Act 1996.
2. This hearing was listed for 6 days and commenced on Wednesday 18 October 2017. It had been listed on 1 June 2017 when the matter was

before Judge Warren for a Preliminary Hearing. Both counsel that appeared at this hearing were before Judge Warren on that occasion.

3. At that preliminary hearing Judge Warren made orders for the final preparations for trial including that the bundle be provided to the claimant by 1 September 2017, and witness statements exchanged on 5 September 2017.

List of issues

4. The file had been referred to this Judge prior to the hearing upon receipt of a letter from the respondent's solicitors dated 6 October 2017 requesting specific disclosure. The Judge instructed a letter be sent to the parties that she was not prepared to deal with the application so close to the hearing but that the application could be renewed at the hearing. She drew to the parties' attention that it was not apparent from the file whether the order of Judge Sigsworth made on 3 February 2017 that an agreed list of issues be finalised had ever been complied with and required that the parties lodge the agreed list of issues by 4pm on Friday 6 October 2017 (it appears that was a typo graphical error and that the Judge had intended the 13 October 2017). At the outset of this hearing the Judge had not seen a response to that email. It transpired that the representatives had filed an agreed list of issues which had not reached the tribunal file. This was again presented to the tribunal.

Without prejudice material

5. The claimant's counsel indicated that her instructing solicitor only received the trial bundle the previous Thursday before this hearing started. There had been additions to it since then. Counsel had received at 7.30pm the night before the hearing started further documents which she had not seen before. There were places in the bundle and in witness statements referring to a without prejudice conversation. Counsel had asked her instructing solicitors whether they had waived privilege or had heard that the respondent had, and her instructing solicitors had confirmed that they had not done so. Both parties she submitted know that at the appeal hearing there was a without prejudice conversation. She was not suggesting that the fact of those discussions be kept confidential, but as neither party had waived privilege any terms referred to in the discussion should be redacted. Ms Moss suggested that she and Mr Ashley work together to make the appropriate redactions.
6. On behalf of the respondent the application was opposed. It was submitted that the claimant dealt with this in his own witness statement. He gave evidence about the discussion. The matter is in the documents and had never been raised before as an issue. If the document in question is redacted then it would make the document virtually pointless. The claimant was happy to give evidence in his witness statement about this, and therefore has in effect waived privilege. Counsel referred to

paragraphs 85 and 86 of the claimant's witness statement (before it was amended).

7. The respondent submitted that there was more to this issue than whether or not there was a discussion, but it all went to credibility which is a major issue in this case. The claimant states in his witness statement:-

“I disagree that I said I would accept the respondent's offer.”

8. It was therefore submitted on behalf of the respondent that at best the documents recording the appeal meeting were mistaken or at worst dishonest and those planning to give evidence on behalf of the respondent in relation to those documents are going to be committing perjury. The claimant has put this in his witness statement, and the respondent's representative should have the opportunity to deal with it in cross examination and the respondent's witnesses should also have the opportunity to respond to the allegation.
9. It was submitted on behalf of the respondent that it would be farcical to keep the words in at the end of paragraph 86 where the claimant states that in relation to the letter of outcome following the appeal hearing the “I confirm that I did receive this amount from the respondent.”
10. The money that was offered was paid in any event. Whilst it may have begun as a confidential discussion it was paid.
11. On behalf of the claimant it was argued that this was money the claimant was owed by the respondent in any event. The claimant hasn't waived his privilege, and the claimant sees no reason why the terms put forward should be before the tribunal.

The tribunals conclusions on the without prejudice discussion

12. The tribunal was satisfied that as the claimant had mentioned the settlement discussions in paragraphs 85 and 86 of his un-amended statement and referred to the associated documents he had waived privilege. He also acknowledges that the monies offered were paid to him. It would make no sense for the tribunal not to see what the minutes say and to hear the parties' evidence on this matter. It is particularly important in the context of this case as credibility is going to be such an important issue.

The claimant's witness statement

13. Ms Moss explained to the tribunal that she had a conversation with the claimant on the first morning of this hearing before coming into tribunal with regard to his witness statement and the dates of events before his employment started. Her instructions were that the witness statement was prepared in a rush on Monday, and therefore some of the dates in relation to what happened before the claimant's employment are wrong. Although

she would normally deal with this in chief, she wished to flag up the point at this stage. The claimant had given her a chronology which he says is right but is not what is stated in the witness statement. Ms Moss intended to go through the statement carefully with the claimant today and there may be amendments that the claimant needs to make to the statement.

14. The tribunal read the witness statements and related documents during the first day of this hearing. On the second day Ms Moss handed up on behalf of the claimant an amended witness statement. For the record this contained amendments to the following numbered paragraphs; 6, 11, 16, 26, 34, 36, 37, 44, 45, 54, 62, 63, 84, 88, 92, 93, 97, 98, 99 and 101.

Mitigation documents

15. By email of 18 October 2017 sent at 2.18pm the respondent's solicitor asked the claimant's solicitor for disclosure in relation to remedy. She noted that this had still not been received and asked for it by the end of that day or at the latest 8am in the morning. She asked: -

"Please ensure this disclosure includes (but is not limited to) all job applications and other mitigation efforts and all documents relating to revenue generated through his own enterprise."

16. The tribunal saw an email response from Mr Watkins of the claimant's solicitors at 3.52pm stating: -

"I note that you have not requested this disclosure previously."

But would send what he could and would do his best to provide it within the 16-hour time frame.

17. There was further exchanges about the duty to disclose and then an email sent by Mr Watkins at 11.38pm on 18 October 2017 attaching:-

17.1 The claimant's job applications.

17.2 Invoices showing income from work carried out since leaving Chestnut Inns.

17.3 Recruitment website profile.

17.4 Confirmation of contract gained.

18. The documents disclosed were numbered pages 437 to 504 and placed at the end of the tribunal bundle.

19. As a result of this disclosure the representatives needed to take instructions on the documents. It was agreed by the tribunal they would have time to do so, and for them to then provide copies to the tribunal of those documents the tribunal required.

20. The tribunal adjourned from 10.30am to 11.25am for instructions to be taken. There was then further discussion with the representatives when it was agreed that the tribunal would adjourn and have an early lunch, and the cross examination of the claimant would start at 1.30pm.

Cross examination of the Claimant

21. The claimant was called to give evidence and confirmed the truth of his amended witness statement. Cross examination commenced at 1.52pm. Much of the cross examination was about the claimant's work history prior to commencing with the respondent. He was in particular taken to paragraph 6 of his witness statement where he stated he worked "for an English restaurateur as general manager of his busy 180 capacity restaurant Oscar's bar and grill in the Algarve". It was confirmed in evidence by the claimant that that was the first time that Oscar's bar was mentioned. The claimant however stated that his solicitor was aware of it. Later the claimant stated he had produced pay slips for 2015 although they were not mentioned in his witness statement. His solicitor had them although they were not in the bundle.
22. The tribunal was then advised that on 16 October the respondent's solicitors had asked the claimant's solicitor for urgent details of "Oscar's bar and grill" as set out in the claimant's witness statement. The response was "the owner of Oscar's and the wealthy Englishman referred to was Dave Austin. However he no longer owns the business as it was sold from underneath him." The claimant stated he did not know that his solicitor had been asked for that information.
23. The claimant was then asked if he had been through the bundle of documents carefully, and he said that he had not. He had not read the opening note of the respondent's counsel although his counsel stated that she had not given it to him. The claimant stated he had given his solicitor the contract of employment with Oscar's and pay slips. It transpired the claimant had two pay slips with him which he produced to the tribunal. The claimant stated he had other pay slips at home in storage. He would bring the contract and pay slips the next day. There was a break whilst the pay slips were copied. In the break (although not able to speak to her client) Ms Moss took instructions from her instructing solicitor, and advised he did not remember the pay slips and the contract. He checked the file. He found in his file at the end of June the contract in Portuguese and pay slips but these had been saved to the file by a different colleague. They were clearly disclosable and should have been disclosed at that point. It was a clear error on the part of her instructing solicitor. She accepted she should also have appreciated the importance of these documents. They were sent to the tribunal by her instructing solicitor.
24. After this exchange the claimant was taken to his particulars of claim attached to his ET1. He stated that he did not recognise it and had not

read it before. He was then taken to the ET3 and said that he had not seen that before. He had not seen his schedule of loss.

25. There was a break for the claimant to read on his own, these documents. They are quite lengthy. He was also asked to read Mr Ashley's opening note. The tribunal broke at 3.19pm and the claimant advised the clerk he had read these documents at 3.34pm. In coming back to tribunal he confirmed he had read the documents.
26. The tribunal adjourned at 4.17pm on the second day. The tribunal had by then received emails from the claimant's solicitor with copies of further pay slips and the contract of employment which had been copied to both counsel.

The third day of the hearing

27. On the third day, the claimant asked the clerk if he could pass a note to the Judge. He was advised this was not appropriate and any note he had, had to handed up in open tribunal and read to the parties. This is indeed what occurred. The claimant's note was as follows:-

"I the claimant Mr Daniel Faulkner would kindly ask the Judge in my case for a postponement. I have only been in possession of major documents relating to my case for one day and more documents are being brought to my attention whilst under oath and cross examination. I generally feel very ill prepared to state my case against Chestnut Inns, and to answer further questions will be very difficult for me to answer without receiving further counsel from my solicitor and counsel at court. Page 254 and 255 are asking for my solicitor to produce evidence in a 1 hour time scale which is very difficult."

28. The claimant was part way through giving his evidence and under normal circumstances Ms Moss would not have been permitted to speak with him. It was agreed in the circumstances that Ms Moss could talk to the claimant about whether or not there was now a conflict of interest between him and his solicitors. She would also speak to her instructing solicitor about the conflict issue.
29. The tribunal did not resume until 12.30pm when Ms Moss stated that she had spoken to various people and her solicitor's were no longer able to act due to a conflict. As a result she was automatically dis-instructed and could no longer act.
30. It was agreed that as the claimant had not spoken to his solicitors there would be a three way conversation between him, Ms Moss and the solicitors in which the conflict position would be explained to him.
31. On returning after lunch at approximately 1.30pm the claimant confirmed he understood the problems that had arisen with regards to conflict, and

the solicitors were no longer acting for him. He needed to obtain a new representative and would need to speak to his insurance company about funding. He asked for a postponement to enable him to instruct a new representative.

32. On behalf of the respondent it was submitted that it would not be possible at this hearing to resolve the question of how this position had arisen. It may be that it is no fault of the claimant but we do not know. Taking the claimant's position at its highest he may have no fault attributable to him. His solicitors are not here to comment. Mr Ashley did not think he could oppose the application for a postponement but there could be costs consequences. He believed that the claimant was moving next week and asked that details of a new correspondence address be provided.
33. The claimant confirmed he is moving to Devon to rent another property but does not have a date yet. He will be renting; Pebbles, 11 Sandy Way, Croyde, North Devon, EX33 (he did not know the rest of the postcode). An order is made as set out below for him to provide further information.
34. After further discussion, it was agreed that the tribunal had no alternative but to agree to the claimant's postponement application. A preliminary hearing has been listed before this Judge to discuss the progress and make further directions for trial.
35. A full merits hearing has been re-listed before this tribunal panel taking into account the dates to avoid for the tribunal and the parties.
36. The claimant must take all reasonable steps to obtain alternative advice and to discuss the situation with his insurance company funders. It was stressed to him that this is his claim being brought by him, and that there are often claims brought by litigants in person in the employment tribunal without legal representation. The preliminary hearing that has been listed will be an attended hearing as the Judge felt it highly unlikely that the matters for discussion would be suitable for a telephone discussion. If the claimant does not have legal representation by that date then he is perfectly at liberty to attend the preliminary hearing in person without a solicitor.

Employment Judge Laidler

Date: 28/10/17.....

Sent to the parties on:

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For the Tribunal Office