



EMPLOYMENT TRIBUNALS

Claimant: Mr A Anjum

Respondent: Epsom & St Helier University Hospitals NHS Trust

Heard at: London South (Croydon) – in person and by CVP

On: 18 & 19 October 2021

Before:

Employment Judge Tsamados

With members:

Ms P Barratt

Mr H Smith

Representation

Claimant: Mr J Jupp, Counsel

Respondent: Mr A Ross, Counsel

JUDGMENT

The unanimous Judgment of the Employment Tribunal is as follows:

The claim is struck out.

REASONS

Written reasons are provided at the request of Mr Jupp.

Background

1. This was a hybrid hearing, in which some of the participants attended in person and some attended by way of the Cloud Video Platform (CVP). Principally, both Counsel, the Claimant, Mr Smith and I were in person and Ms Barratt attended by CVP. The Respondent's witnesses, Solicitor and observers were a mixture of attendance in person and by CVP.
2. The Claimant brought a claim consisting of complaints of age discrimination, unfair

dismissal and damages for breach of contract which the Respondent denied in its entirety. The full hearing was set for four days commencing on 18 October 2021. The Claimant gave evidence and was due to continue giving evidence today (19 October 2021). Prior to a break I gave the Claimant what I will refer to as the witness warning. At the end of the day I repeated the witness warning.

3. It was not disputed that I had done so or the terms in which I had given the witness warning, but for the avoidance of doubt I set this out. I told the Claimant that when we adjourn the proceedings whilst a witness is still giving evidence, I have to warn them that they must not discuss their evidence or the case with anyone, including their legal team. At the end of the day I also said to the Claimant that he would probably find this a relief, in not discussing his evidence or the case, and so focusing on having a relaxing evening.

Findings

4. At the start of the hearing on 19 October 2021, Mr Jupp told us that he had to address the Tribunal on a development in the case. He then apprised us of the following. Yesterday at 16.16 hours, after the hearing had concluded, he telephoned his instructing Solicitor to update her on the events of the day in a call which lasted for seven minutes. This morning at 9.02 hours he received an email (described as a file note) from her in which she set out a conversation that she had with the Claimant earlier at 8.15 hours, from which he understood there to have been a discussion of the case and how it had gone, notwithstanding that he had advised her that the Claimant was still giving evidence. The Claimant was not waiving privilege on the email/file note. Mr Jupp glanced at the email briefly, has not shared the content with the Claimant, but has told him that there was a problem with the conversation. He added that his Instructing Solicitor was mortified, there was no malicious intent and it was a genuine mistake.
5. As indicated above, there was no dispute that I issued the witness warnings to the Claimant both before an afternoon break and again at the end of the day's proceedings or as to the content of my warnings.
6. Whilst Mr Ross was aware of this matter shortly before the hearing, he asked for a brief adjournment to take instructions. He also pointed us to Chidzoy v BBC UKEAT/0097/17 which he believed would be of assistance.

The Respondent's strike out application

7. On recommencing, Mr Ross made an application under schedule 1 rule 37(1)(b) & (e) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 for the claim to be struck out. This was on the basis of unreasonable conduct and/or because it was no longer possible to have a fair trial.
8. I indicated that during the adjournment we had obtained copies of and considered Chidzoy and the case of Bolch v Chipman [2004] IRLR 140, EAT referred to in it.
9. In essence, Mr Ross made the following submissions:
 - a. The four-stage test under Bolch as affirmed in paragraph 24 of Chidzoy in effect encompasses the grounds contained within rule 37(1)(b) & (e);
 - b. The matter before us is more straightforward than Chidzoy, in that we know that the case was discussed, albeit we do not know exactly what was said by the Claimant and his Solicitor because the Claimant has not waived privilege on the email/file note;
 - c. The Claimant was in the middle of cross examination when the case was

adjourned yesterday and was given the usual witness warning. Further, he is represented by Counsel and Solicitor who it is reasonable to assume would also have explained that he must not discuss his evidence whilst under oath. He overheard Mr Jupp telling the Claimant during the afternoon adjournment that it would be better if they did not sit together during the break because of how it might look or words to that effect. Mr Jupp can correct him if this is incorrect;

- d. He is not suggesting that the Solicitor did anything else improper and told the Claimant what to say or coached him. But he does say it is highly likely that what was discussed will have an impact on the Claimant's future evidence;
- e. It is impossible for the Employment Tribunal to judge the impact because 1) we do not know what was said and 2) even if there was a file note, it would still be impossible to determine the impact because a note would not record cues such as pauses, tone and fillers, as to what someone thought about what had happened;
- f. He then addressed each element of the test in Chidzoy:
 - (1) The Claimant was warned twice clearly not to talk about the case and subject to correction once by Mr Jupp outside the Tribunal room during the break. It is reasonable to suppose that the Solicitor would also have warned him of the significance of not discussing the case during his evidence. It was unreasonable conduct by the Claimant to ignore those warnings and to respond to his Solicitor's enquiry. The Solicitor ought to have known not to discuss the case with the Claimant during his evidence and she was aware from Mr Jupp that he was still giving evidence. It was unreasonable conduct by the Solicitor to have telephoned the Claimant in the first place, further, to have continued the conversation without realising that what she did was wrong and further to then send an email/file note of the conversation to Mr Jupp still without realising that what she did was wrong;
 - (2) It is not possible to have a fair trial. The evidence has been tainted, it is difficult to determine to what extent and it cannot be measured. We know that the conversation was as to how the hearing had gone and so it is fairly obvious that this would have included discussion of the Claimant's evidence and would have been done in the knowledge from Mr Jupp as to how the case had gone, which is a matter that Mr Jupp would not have discussed with the Claimant until the conclusion of his evidence. It is also not possible to have a fair hearing because of the Solicitor's actions. It is more prejudicial than the circumstances in Chidzoy (where the discussion was with a journalist who did not have any prior involvement or knowledge of the case), to talk about the case with your Solicitor who had conduct of the case from the very start;
 - (3) The only appropriate remedy is that the claim should be struck out. By the Claimant's and the Solicitor's actions, the evidence is tainted in the middle of cross examination for this Tribunal and for any other Tribunal if the case were adjourned and listed before another panel at any point in time;
 - (4) The consequence for the Claimant would be that his claim is at an end. But the emphasis is on proportionality and the starting point is from unreasonable conduct and measuring the unreasonableness. He was not seeking to ignore the consequences for the Claimant in not being able to proceed, the cost of pursuing the claim and being here, but the Claimant and the Solicitor are the authors of their own misfortune.

10. After a further adjournment, Mr Jupp addressed us. In essence, his submissions were as follows:
 - a. Chidzoy was an appeal from an Employment Tribunal's case management decision to strike out the claim. The essential decision for the Employment Appeal Tribunal was whether this was a decision that the Employment Tribunal could have reached. So it does not follow that the same test applies to every Tribunal;
 - b. The facts of Chidzoy are very different to the Claimant's. In Chidzoy, the Respondent had to draw the Claimant's default in talking to a journalist during her evidence to the Tribunal's attention, and the Claimant had made disparaging remarks about the Respondent's legal team. In the Claimant's case, it was a genuine error by the instructing Solicitor and once it came to light there has been full and frank disclosure to the Respondent and to the Tribunal;
 - c. As to the unreasonable conduct, he accepted that warnings were given in the terms set out. But he made the point in mitigation, that it was the Instructing Solicitor who telephoned the Claimant and not the other way round. It was not the case that the Claimant was fishing around for information. It was a genuine mistake by the Instructing Solicitor and she apologises to the Employment Tribunal;
 - d. As to whether a fair hearing is still possible. Every case is different. Some have complex factual matters that need to be untangled by many witnesses. As the Tribunal observed yesterday, this case involves very narrow factual matters. Cross examination has proceeded on a structured basis, Mr Ross indicated he had about an hour more today. The Claimant does not know what questions will be asked today. The Tribunal as an experienced and astute panel will be able to detect if the Claimant's evidence changes in content or emphasis. He has 2 or 3 re-examination questions that he had already prepared. He glanced at the email but did not read it and it does appear to be a discussion of the case. He did that so as not to be influenced by its contents and has not discussed it with the Claimant. It is privileged and it is the Claimant's right not to waive privilege and of course he needs to take advice on that but it will be fraught with difficulty. He accepts that the events were unfortunate, but there has been full and frank disclosure and whilst it was an error there will be no repeat of this;
 - e. If the Tribunal decide that a fair hearing is not possible, then the Tribunal can adjourn and relist the hearing and start again in a few months time or relist it to be heard by a different Employment tribunal;
 - f. Whether a further hearing is before this or another Tribunal, we have to live in the real world and simply because there was a conversation with the Solicitor it is hardly likely to be of effect given that the Claimant's evidence would be starting afresh;
 - g. It would be wholly inappropriate to strike out the claim. The claimant has incurred significant costs and by striking out the claim the Respondent would get an unexpected windfall due to a mistake by the Claimant's legal team. Whilst you might say it is their own fault, this is not about that, it is about striking out the claim with all the attendant costs including those against the legal team or proceeding before this Tribunal or another one. It is a great step to deny the claimant his claim. This matter should proceed before this Tribunal.

11. By way of reply, Mr Ross in essence said the following:
 - a. He had a limited number of questions already planned arising from yesterday but much of what he intended to ask covers new ground. But in as far as there are factual disputes, this is about what was alleged to have been said and alleged not to have been said, and the Tribunal simply has to decide who is telling the truth. The Claimant's credibility is at stake and he was already planning to make submissions about how the Claimant gave his evidence yesterday. It is unlikely that these matters did not come up in the discussion between the Claimant and his Solicitor and as to our intervention on a number of occasions as to the need to give specific answers and not long speeches;
 - b. There is no other option but to strike out. The Claimant has already had a dry run in his evidence and as to observations from the Employment Tribunal about his evidence and no doubt from his Solicitor. He is not suggesting that the Solicitor acted malevolently or maliciously and that is not a necessary ingredient;
 - c. As to the costs that the Claimant has incurred, his Solicitors have let him down gravely, no reasonable Solicitor would do this and the Solicitors are insured. He was unsure how far to delve into this, but the Solicitors are at fault.
12. At this point, I intervened and told Mr Ross that we have to tread carefully because whilst we are aware that there was a conversation about the case, the Solicitor is not here to defend herself and may not be able to do so for the same reason that the Claimant claims privilege on the email/file note.
13. Mr Jupp responded to the point about my prompts to the Claimant on giving evidence, that the Claimant got the measure of it towards the end. In reply Mr Ross said that it would be hard to say what is a result of the prompts or from the conversation with the Instructing Solicitor. I said, was it not of assistance for the Claimant to give precise answers to specific questions and whilst Mr Ross accepted this, he said that it underlines the point as to what has prompted the Claimant in the giving of his future evidence.
14. By this time it was 12 noon and so we adjourned to deliberate and reach our decision, with an indication that we would reconvene after the lunch break.

Relevant Law

15. Rule 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013:

"37 Striking out

(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—

... (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;

... (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...."

16. Chidzoy v BBC UKEAT/0097/17/BA

17. Bolch v Chipman [2004] IRLR 140, EAT

Conclusions

18. We appreciate the facts of each are very different, but the four-stage test as found in Bolch and affirmed in Chidzoy applies to applications relating to unreasonable conduct and the ability to have a fair hearing. We did not accept Mr Jupp's submission in this regard. Moreover, Chidzoy specifically applies to a situation where the Claimant spoke to a journalist during her evidence notwithstanding numerous witness warnings being given.
19. The four-stage test is set out in Chidzoy at paragraph 23 of the Employment Appeal Tribunal's Judgment. We deal with this below.
20. Is there unreasonable conduct by the Claimant and/or on his behalf? It is clear to us and Mr Jupp accepted this that the proceedings have been conducted unreasonably by the Claimant and on his behalf by his Solicitor, although he did put forward mitigating circumstances. Nevertheless, the Claimant was given a clear warning instructing him not to discuss his evidence or the case with anyone whilst he was still giving evidence and that this included his legal team. His Solicitor would have been aware of this requirement generally in legal proceedings when witnesses are mid-evidence and she was aware specifically that the Claimant was mid-evidence because Mr Jupp had told her as much before she contacted the Claimant. Whilst she was the one that telephoned the Claimant and asked him how the case had gone, he was aware from the warnings (which apparently included an indication from Mr Jupp as to the inappropriateness of the two of them being seen sitting together during the break) that he should not have discussed the case or his evidence, but in any event, this does not change the position. It is clearly unreasonable conduct by both the Claimant and his Solicitor.
21. Is a fair hearing still possible? The difficulty we have is that without seeing the email/file note we can only conclude on balance of probability from what we have been told about the nature of the conversation that it included a discussion which would have a material impact on the Claimant's future evidence and thereby taint it. We do not believe it is right to give the Claimant the benefit of the doubt here without seeing that document.
22. The Claimant has had the opportunity to disclose the document at the start of the hearing and after the adjournment. We understand that there are issues of legal privilege but this could only extend to that document and not more widely. It is of course the Claimant's prerogative not to waive privilege but it leaves us in the position that reasonable conduct is admitted and we find that from what we know that the conversation was of a nature that would have a material impact on the Claimant's future evidence.
23. Mr Jupp submits that a fair hearing is still possible because the areas of disputed evidence are mapped out and that as an experienced and astute Employment Tribunal, we would be able to spot any change in content or emphasis in the Claimant's future evidence. In the alternative from carrying on, he suggests we adjourn and relist the hearing. Then further in the alternative he suggests that the matter be relisted before a differently constituted Tribunal.
24. The difficulty with all of these suggestions is that without knowing the extent of the conversation we cannot judge the extent to which the Claimant's future testimony would be tainted by it. Mr Ross told us that he is about 2/3rds of the way through his cross examination and aside a number of questions arising from yesterday's testimony he will be covering new ground. He also indicated that he will be making submissions as to the Claimant's credibility arising from his testimony to date.

25. Whilst we have the benefit of full pleadings, contemporaneous documents and witness statements, there are clear and significant areas of dispute between the parties and there have already been a number of responses to questions in which the Claimant covers ground not previously contained within those documents and so it is likely that this will arise in his further testimony.
26. We are alert to the fact that from some of the answers given already, that Mr Ross would be challenging the Claimant's credibility although we had not formed a view on this. But the Claimant's credibility is an issue already. And in terms of future testimony how can we possibly judge the extent to which the Claimant's answers to future questions and particularly those covering new ground will not be tainted by the conversation with his Solicitor notwithstanding whatever experience and astuteness we can bring to bear.
27. The alternatives suggested by Mr Jupp do not address our concerns. Whilst we might be in a better position than another Employment Tribunal, we still cannot gauge the extent to which the conversation has tainted the evidence. Starting again will not address that. A hearing before another Tribunal still does not address that. The Claimant still has the prior knowledge of the conversation and has been involved in the hearing to date and knows the answers he has already given in cross examination.
28. Whilst we appreciate that striking out the claim is an extreme step to take, and not one we contemplate lightly, on the basis of what we know without seeing the file note and having had the chance to consider its contents we do not believe that a lesser remedy is more appropriate.
29. We understand the clear consequences for the Claimant in striking out his claim but having considered the circumstances and the submissions of both parties it is unfortunately a consequence of the unreasonable conduct found and its impact on the ability to have a fair hearing.
30. We are therefore minded to strike out the claim unless the Claimant is prepared to disclose the file note and allow us the opportunity to consider its contents and its impact on our decision.
31. At this stage we paused to give the Claimant the opportunity to reconsider whether or not to disclose the email/file note. Mr Jupp indicated that he has not been asked to waive privilege and has not discussed the matter with the Claimant.
32. With Mr Ross's agreement we gave Mr Jupp permission to take instructions on the matter from the Claimant.

Disclosure of the email/file note and further submissions

33. After an adjournment, we were provided with a copy of the email/file note by Mr Jupp, with a covering email indicating that the Claimant had waived privilege as to the contents. This was also provided to Mr Ross. The email/file note which was sent to Mr Jupp at 09:02 this morning is set out below:

"Subject: Dr Anjum: file note 8.15 am

Dear Jeffrey (this is my file note of my conversation and just FYI, no new info)

I spoke with Dr Anjum this morning to find out how he thought it had gone and to check he was ready for today.

He asked how you thought it had gone and I said likely as expected and fairly mixed. It is not a straightforward case and there are many different issues under consideration-so inevitably a mix of some strong points and others less so.

He said that when he got home last night he felt he had probably said too much. He said that on reflection he had taken the instruction to elaborate if required a bit too literally! He said this without me having said anything-so it must have been troubling him. I told him not to dwell too much on yesterday and to move on with today as positively possible. I said there was still a long road ahead.

I said I understood that they made a bit of a deal out of sacu - and he said that was correct and one point he has been meaning to say is that sacu has always been there-it was previously call sau. He said (as we know) it isn't a new thing and that if they had said "your contract will end and you will leave or you can get involved in sacu" it would have been a no brainer.

The final thing he mentioned was how there was never any discussion with him. The monthly meetings were the time to discuss plans but because of his views on sacu organisation he was effectively frozen out of any discussions.

He then said he was ready in his suit and tie. I said I hoped it went well and that I would check in later today to catch up.

Kind regards"

34. We then heard further submissions from each party.
35. In summary, Mr Jupp said as follows. The file note speaks for itself. It does discuss parts of the evidence given yesterday, but the Employment Tribunal can now see in the cold light of day what was discussed and can now assess its impact. The Claimant can be cross examined and asked questions on it and matters illuminated, if deemed necessary. So in terms of a fair trial being possible the Tribunal is now in a much better position to assess and make allowances. There is nothing in the email that is unsurprising in the context of someone giving evidence.
36. I asked Mr Jupp, given the part in parenthesis at the beginning, whether there had been any previous discussion with the Solicitor which had prompted the email and he replied emphatically absolutely not. We accepted what he said.
37. In summary, Mr Ross said as follows. This matter is about a telephone conversation between the Solicitor and the Claimant. The email is nothing more than a summary made of it after the event and we do not know how long the call lasted, whether this was made from notes jotted down at the time or made from memory. He maintains the same point as before and even if it is now shown to the Tribunal, one cannot be confident that the file note reflects the entirety of the conversation. What is sure is that this is a Solicitor who does not appreciate the witness rule and the ordinary boundaries of what can be discussed. It shows no restraint on the part of either party to the conversation. It was clearly inappropriate to pass on Mr Jupp's view of how the case had gone. There is a detailed discussion about a point of evidence relating to SACU. This is material from which the Solicitor has effectively acted as a conduit for a conversation between the barrister and the witness and has fed information from the barrister to the Claimant. The Tribunal spoke of not giving the Claimant the benefit of the doubt as to what the then unseen file note contained. He should also not be given the benefit of the doubt on matters which might not be contained in this summary of the conversation. The point of the summary is evidently for Mr Jupp's purposes and although not criticising him, of course, the purpose of it is not to create a comprehensive record but to pass on information that might be useful.
38. Mr Ross responded that an issue in Chidzoy was that nothing could be achieved in asking the Claimant about something over which the Respondent has no positive case to put. He was not criticising the Claimant for not previously waiving privilege and so this amounts to a neutral factor.
39. In the light of disclosure of the email/file note and the further submissions we

adjourned to reconsider our decision.

Our reconsidered decision

40. We considered whether there was any merit in calling the Claimant to give evidence and the discussion of this point albeit in the different circumstances of Chidzoy. We reached the view that in the case before us there would be no merit in calling the Claimant to give evidence as to the conversation with the Solicitor. The Respondent has no cross-examination questions to ask because it has no positive case to put. It can only challenge the Claimant's answers but with nothing more to go on and put to the Claimant than his own replies framed by the email/file note. In any event, we found that the email/file note gives us a sufficient indication and frankly it does not help the Claimant's position.
41. We appreciate that the Claimant has now waived privilege but to be fair that was in the face of being struck out but we felt it appropriate to give him that further opportunity. Whilst we do not criticise him for not doing so sooner, we do not believe that this mitigates against the harm that had already occurred
42. Having seen the email, in a number of ways it worsens the Claimant's position.
43. It is just a summary of the conversation. We cannot be confident that it reflects the entirety of the conversation. It has been written for the purposes of providing information to Mr Jupp.
44. The Solicitor starts off by asking the Claimant how he thought the hearing had gone and whether he was ready for today's proceedings. The Claimant then asks her how Mr Jupp thought the hearing had gone, to which she gives perhaps one would call a muted response, but nevertheless this is an indication of what Mr Jupp thought. The Claimant then observes how he felt his evidence had gone to which the Solicitor gives, again a muted response, but nevertheless an indication of how it had gone by telling him not to dwell on it and to be positive. Then in the fifth and sixth paragraphs there is a specific discussion of the Claimant's evidence.
45. What is overwhelmingly apparent is that the Instructing Solicitor showed no regard for her position as a Solicitor, restraint in what was discussed or regard to general Employment Tribunal/Court procedure. The Claimant showed no regard or restraint in what he said in following the witness warnings that were given.
46. It is also apparent that the Instructing Solicitor not only disregarded these matters in her conversation with the Claimant, but in her email she was in effect acting as a conduit between the Claimant's perceptions of how the case had gone, discussion of Counsel's as well as her own thoughts, and with Counsel by passing this information onto him, when he still had a role further in conducting the Claimant's evidence, although we would hasten to add that we not criticising Mr Jupp in any way for this. It is hard to see how the evidence is and will not be further tainted by these matters.

47. As a result we are more firmly of the view that it is not possible for there to be fair hearing and that the appropriate remedy is to strike out the claim.

Employment Judge Tsamados
Date: 20 October 2021

Sent to the parties on
Date: 21 October 2021