EMPLOYMENT TRIBUNALS

Claimant: Mr S Rush

Respondent: Sevco 5112 Limited

Heard at: Nottingham **On:** 7 February 2018

Before: Employment Judge R Clark

Representatives:-

Claimant: Mr P Gilroy QC
Respondent: Ms J Russell of Counsel

JUDGMENT

1. The claims against The Derby County Football Club Limited (1st respondent) and Global Derby (UK) Limited (3rd respondent) are dismissed upon withdrawal. The claimant's claims precede against Sevco 5112 Limited only.

2. The claimant's application for an order to strike out the respondent's response **succeeds in part.** It is ordered that so much of the respondent's response that seeks to advance a liability defence to the claim of unfair dismissal is struck out as having no reasonable prospect of success. This order is without prejudice to the respondent's ability to advance any matters pleaded so far as they may be relevant to remedy (including those in respect of *Polkey* or contributory conduct).

3. The claimant was unfairly dismissed. Remedy to be determined, if not agreed.

4. The respondent's application for an order to strike out, or impose a deposit, in respect of the claimant's claim under s.10 of the Employment Relations Act 1999 is refused.

5. The respondent's application for an order to strike out, or impose a deposit, in respect of the claimant's claim under s.93 of the Employment Rights Act 1996 is refused.

REASONS

1. **Preliminary Matters**

1.1. This open preliminary hearing was listed to determine the identity of the correct respondent and the applications flowing in both directions for strike out. There has also been a further joint application for a stay to these proceedings.

1.2. The claimant named three respondents as a protective measure against a background of his employment being within a complicated corporate structure and recent TUPE transfers. Recent disclosure has confirmed the correct respondent to be Sevco 5112 Limited (hereafter "the respondent") and the parties are in agreement that the claims against the first and third respondents will therefore be dismissed upon withdrawal.

1.3. The respondent has issued proceedings against the claimant in the High Court. It is a substantial claim approaching £7m. The claimant is presently preparing his defence and a counterclaim of similar proportion. The underlying facts substantially overlap with the facts in this claim. Both parties are in agreement that it is proper that these proceedings are stayed pending the conclusion of the High Court matter albeit that they both still seek determination of their respective strike out applications today. I explored with the parties whether there could be any risk that this Tribunal expressing any view on the reasonable prospects of success could embarrass other proceedings and was reassured that would not be the case. In the circumstances, I granted the stay and dealt with the applications. The timescale is such that the stay will initially be until 31 August 2018 at which point the parties will update the Tribunal and make further application as necessary. Unless the High Court matter is compromised, it seems likely that the stay will need to be renewed.

1.4. Finally, the Tribunal itself has the claim identified as one of unfair dismissal and breach of contract. In fact, it is a claim for unfair dismissal, for failure to comply with the right to be accompanied and a failure to provide written reasons. It is agreed that the claimant has not, in fact, brought a claim of breach of contract but his ET1 merely reserves his position to bring a civil claim for wrongful dismissal and other claims in the High Court. In view of the concurrent proceedings, and the fact there is no contract claim to be withdrawn, I simply record this is the common understanding of the extent of the claim in this jurisdiction.

2. <u>The Applications</u>

2.1. There are three applications before me which can be summarised as follows.

a The claimant's application to strike out the respondent's response either entirely or at least insofar as it asserts a liability defence to the claim of unfair dismissal under Part X of the Employment Rights Act 1996 ("ERA").
b The respondent's application to strike out the claimant's claim insofar as it alleges a breach of his right to be represented under ss.10 and 11 of the Employment Relations Act 1999 ("ERelA")
c The respondent's application to strike out the claimant's claim insofar as it alleges a breach of his right to receive a written statement of the reasons for dismissal under ss.92 and 93 of the ERA

2.2. Both parties also advance their applications in the alternative that I order a deposit to be paid as a condition of being allowed to continue with that particular contention.

2.3. I have received written submissions from both counsel, an authorities bundle from the respondent and, from the claimant, a short bundle of correspondence concerning the claimant's dismissal which is agreed flowed between the

parties. Both parties supplemented their written submissions orally.

3. **Legal Principles**

3.1. The powers to strike out or impose a deposit are found in rules 37 and 39 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

3.2. So far as is material to these applications, those rules provide:-

> ***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) ..***
>
> ***(c) ..***
>
> ***(d) ..***
>
> ***(e) ..***
>
> ***(2)..***
>
> ***(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.***

3.3. And:-

> ***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.***
>
> ***(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.***

3.4. Should I contemplate a deposit order in respect of any of the applications, both counsel agree the financial means of their respective clients are such as would not weigh against imposing a deposit of any amount.

3.5. In terms of strike out, both put their respective applications on the footing of the other's contention as having no reasonable prospect of success. That is an assessment which must be made against the relevant substantive test for making out the contention. Ms Russell concedes that the policy arguments militating against strike out in discrimination cases in *Anyanwu and another v South Bank Students' Union and South Bank University [2001] IRLR 315* does not apply with the same force to unfair dismissal claims, although I take from *Anyanwu* not simply a public policy argument, but the fact that certain matters, such as discrimination claims, usually require findings to be made in a complicated factual matrix. Any case requiring findings of fact is likely to fall outside the scope of a strike out. I am reminded of *Ezsias v North Glamorgan NHS Trust [2007] ICR 1126* in that respect. I also have in mind that strike out has been described as a "draconian" power (*Blockbuster Entertainment Ltd v James [2006] IRLR 630 CA*) and that test is a high one (*Balls v Downham Market High School & College [2011] IRLR 217*).

3.6. The essential difference between the two rules is whether the contention has "*no",* or "*little",* reasonable prospect of success. Only if I determine it falls into one or other category will an order be made. Otherwise, the matter simply proceeds, in this case subject to the stay. I approach the strike out test in

terms that, whilst no "*reasonable"* prospect requires something short of an absolute certainty, to strike out an argument the prospects of it failing must nonetheless be reasonably close to certain.

4. Background

4.1. The applications before me require an assessment of the respective merits. They do not engage me in making findings of fact. The basis of my assessment is therefore on the parties' respective submissions and how the respective cases will be put. In the case of the party defending the application will be considered at its highest. Both parties have pleaded their case fully and in detail. That said, it is necessary to put the applications in some sort of context and what follows seeks to do that drawing on that which is either not contentious or not materially in dispute.

4.2. The claimant was the CEO of the respondent company. To an outsider, he was the CEO of Derby County Football Club and had been for about 5 years. Mr Morris took control of the Club in or around September 2015.

4.3. On 18 April 2017, Mr Morris wrote to the claimant suspending him from his post [bundle page 5]. The letter cites the reason as being to investigate potentially serious disciplinary issues. It refers the claimant to the DCFC staff handbook, sets out the conditions of the suspension and concludes stating that Mr Morris would :-

> ***"keep you appraised (sic) of the progress of this investigation and will contact you in due course."***

4.4. That letter was followed by a letter from Sarah Edwards, HR Director dated Friday 28 April 2017 [6]. It again referred to the ongoing investigation into potentially serious disciplinary issues. It required the claimant to attend an investigatory meeting scheduled for the following Wednesday, 3 May 2017. It identified the individuals who had been appointed to carry out the investigation as Simon Davers of Geldards and Andy Delve of Smith Cooper. There seems no doubt that the claimant would know they were lawyers and accountants respectively. It summarised the concerns that were to be discussed in three broad categories adding :-

> ***"Please be aware that these are only some of the issues raised and we reserve the right to raise these other concerns at a later date".***

The author refers to the fact the meeting was investigatory and not disciplinary in nature and, as such, the statutory right to be accompanied did not arise. However, and notwithstanding that position, the claimant was told he could be accompanied by a work colleague or trade union representative if he wished. There were no enclosures or other documents referred to or provided. The employer's three areas of concern were articulated in that letter in broad terms as being:-

> ***".. over Agency Representation Contracts, Football Scouting Agreements, Football Consultancy Agreements and Football Services Agreements that you entered into on behalf of Derby County Football Club, along with Ayrton Wassall's relationship with the Wasserman Group and the terms of the departure of Chris Evans."***

4.5. The claimant's Solicitors responded on his behalf on Tuesday 2 May [7-11]. It is a lengthy and detailed letter, the salient parts being, in summary:-

a A request that the claimant be legally represented at the meeting, in view of the position of those undertaking the investigation.

b A request for a postponement to allow the lawyer of his choice to attend the meeting.

c Alternatively, expressing the obstacles he faced to exercising the right given to him to be accompanied at the meeting arising from the fact that he was precluded from contacting work colleagues by the terms of his suspension and was not a member of a trade union. He suggested it would take at least two working days to secure a trade union representative to accompany him or for agreement to a reasonable alternative date.

d The concern that the absence of any detail of the matters to be discussed hindered any sensible preparation amounting to ambush and a sham investigation.

e That the claimant would be advised not to attend the investigation meeting unless he is allowed legal representation and reasonable notice of all the issues to be discussed.

f A denial of any wrong doing.

4.6. In terms of the detail given to the claimant about the allegations, the first matter, in respect of his role in various unparticularised football contracts and agreements, is cast particularly broadly. There seems to have been less ambiguity asserted by the claimant in respect of the second and third allegations (the Wassal and Evans matters) and the letter sets out something of the claimant's position so far as he understood those issues.

4.7. The respondent's solicitors replied the same day [12]. Their letter deals only with the issue of legal representation. It seems there is some conflation of the right under s.10 ERelA and the primary request for legal representation as the request was denied on the ground that :-

> ***"there is no legal requirement for legal representation at this meeting because it is not a disciplinary meeting, therefore the meeting will be going ahead as planned."***

4.8. The claimant's Solicitors replied by email later that same day [13]. They noted that the vast majority of points they had raised had not been dealt with and that the claimant:-

> ***"..has no comment to make in these circumstances as he cannot be expected to attend a meeting to be conducted in an unlawful, unfair and unreasonable manner.***
>
> ***For the avoidance of doubt, he wishes to make it absolutely clear however that he has done nothing wrong and has conducted himself with professionalism and integrity at all times***
>
> ***Should any disciplinary matter be pursued any charges will be vigorously resisted."***

4.9. Two items of correspondence were sent on 3 May 2017. They were an email from the respondent's solicitors to the claimant's solicitors [15] and a letter from Mr Morris directly to the claimant [17]. Both informed of the decision to dismiss the claimant with immediate effect. The email between solicitors describes the planned meeting of 3 May to which the claimant did not attend as being one which was:-

> ***"simply an investigation meeting at this stage, to understand [the claimant's]***

explanations for the matters under investigation and to consider whether further action was necessary once the investigation was complete".

It goes on to state how:-

> ***"with the information before the company and the adverse inference that must be taken from [the claimant's] failure to attend today's meeting, the Company has reached a decision in [the claimant's] absence and, in doing so, can only conclude that the allegations before the Company are substantiated."***

4.10. In his letter, Mr Morris describes having given the claimant ample preparation time and notice to attend this investigation meeting but that the claimant had:-

> ***"failed to attend without good reason"***.

In light of this, he drew adverse inference and considered the claimant had displayed a clear intention not to engage in this process. The result of which is that he reached a conclusion in the claimant's absence, albeit this was never held out to be the meeting at which disciplinary decisions would be made. The claimant was dismissed on the grounds of gross misconduct with effect from the date of the letter and no right of appeal against the decision was given although I suspect, as it is not advanced in the claimant's case before me, that such a right did exist in the employer's internal disciplinary procedure.

4.11. On 4 May 2017, through his solicitors, the claimant asked for written reasons [21-23]. The respondent's solicitors replied on 15 May 2017 [24]. The reasons are contained in 3 bullet points. They reflect the three matters contained in the suspension letter, albeit now with slightly more flesh on the bones. They were stated to be:-

- ***The entering into of inappropriate and excessive agreements on behalf of the Club in the form of; Agency Representation Contracts, Football Scouting Agreements, Football Consultancy Agreements and Football Service Agreements, breach of football association regulations; transactions to the significant financial detriment of the Club***

- ***Attempting to influence an employee of the Club, Ayrton Wassall, to provide false information to the Football Association in relation to an enquiry over his relationship with an external sports agency***

- ***Instructing an employee of the Club, Sarah Edwards, to negate a clause from an agreement with another employee, Chris Evans, potentially exposing the Club to liability following the termination of that employee's employment, in direct contravention of an instruction from the Club's Chairman that such a clause was a critical element of the employee's contract.***

5. The claimant's application to strike out the Response

5.1. The claimant's application is put on two bases. The first is that the strike out should operate on the entirety of the respondent's response so that they are debarred from playing any further part in the claimant's unfair dismissal claim. In the alternative, it is put on the basis of striking out the response so far as it denies liability for an unfair dismissal, such order then not affecting the respondent's ability to defend remedy, in particular by reference to any relevant matters pleaded touching on *Polkey* or contribution.

The Claimant's Submissions

5.2. Mr Gilroy stresses the importance to the claimant of a declaration of unfair

dismissal in the sense of a public judgment in his favour. He invites me to consider the progress of the disciplinary procedure adopted by this respondent. That it repeatedly represented a procedure which separated the investigative stage from any disciplinary hearing stage. That based on the respondent's own handbook and repeated representations in correspondence, no disciplinary sanction would be imposed until the conclusion of the later disciplinary stage and not, as appears to have been the case, the investigative stage. He points out that the allegations are described as "serious disciplinary issues*",* yet without sufficient detail to know what they all were and apparently reserving other disciplinary matters to be added in later, the exact nature of which is not even hinted at. The claimant's response to the investigation meeting was a reasonable request for proper representation, more notice of the issues and more particularisation of the allegations he faced. The claimant's position, on advice, that he could not be expected to attend an investigatory meeting in such circumstances was not without good reason as alleged by Mr Morris and, in any event, was not so much as to say he would not participate in any further stage of a disciplinary hearing. In fact, he explicitly states that he would vigorously resist any disciplinary matter that is pursued. In the event he was deprived that right and summarily dismissed without a hearing on the grounds of "gross misconduct" with immediate effect. What was scheduled as an investigatory meeting had "morphed" into a disciplinary hearing without the claimant being informed. The letter of dismissal gave no hint of the actual reasons. The subsequent written reasons for dismissal remain vague, do not suggest dishonesty or that the claimant made a secret profit. They are inadequate and not true. So much can be seen by contrasting the brevity of the information provided with the extensive detail provided ten months later in the ET3.

5.3. Mr Gilroy relies on the respondent's own pleaded case as to the events of the alleged investigatory meeting of 3 May 2017 which he says became, one way or another, a disciplinary meeting. It sets out in paragraphs 68-70 of the grounds of resistance how "*the investigation meeting did not take place*" and that Mr Morris "*came to meet the investigatory team*" and that Mr Morris "*decided that the claimant's employment was to be terminated with immediate effect*".

5.4. On the test to be applied, as set out in s.98 of the ERA, Mr Gilroy relies on well settled law going back to *British Home Stores Limited v Burchell [1978] IRLR 379*. It is not for the Tribunal to determine whether the employee was guilty of the conduct complained of, but whether, at the time of the decision the employer genuinely believed the conduct complained of had taken place; that that belief was based upon reasonable grounds, and the decision was made after a reasonable investigation.

5.5. To be considered against that test, he lists in paragraph 15 of his written submissions 16 matters he characterises as "incontrovertible and overwhelming facts" which I have summarised above. He argues that the respondent's conduct of the claimant's dismissal manifestly fails the *Burchell* test and for the respondent to argue otherwise is an affront to the intelligence of the Tribunal. The process fails both substantively and procedurally. The respondent's actions were in flagrant breach of the ACAS Code of Practice. He argues that there is no prospect, let alone any reasonable prospect, of a Tribunal finding anything other than that the claimant was unfairly dismissed.

5.6. Mr Gilroy also advanced some arguments in support of the unfairness which

may or may not be the case, but which require evidence. I cannot reach any determination on those matters today. They were that since the Club's acquisition by Mr Morris, neither he nor anyone else had indicated any concern regarding the claimant's work; that all contracts and commercial agreements prior to September 2015 had been the subject of detailed due diligence prior to the takeover, again with no suggestion being made by Mr Morris or anyone else that there was any issue with the claimant's work and that all contracts and agreements prior to 30 June 2016 had already been independently audited and signed off by the club auditors and at no time had any party suggested to the claimant that there was any issue or potential issue whatsoever with any of those agreements.

5.7. Alternatively, the claimant seeks to strike out the response insofar as it asserts that it has a defence to a liability finding of unfair dismissal. Such an order would not prevent the respondent from arguing either ***Polkey*** or contributory fault so far as remedy is concerned but, he argues, such arguments have nothing to do with the merits of the question as to whether or not the claimant was unfairly dismissed. If such a trite proposition required authority, Mr Gilroy draws support from the repeal of s.98A(2) ERA with the effect that the short lived reversal of ***Polkey*** ended and the orthodoxy of procedural unfair dismissal was restored. As this is a case in which dismissal is admitted, the burden rests with the respondent to prove that there was a potentially fair reason in its mind at the time. If it does, the Tribunal will then consider the reasonableness of the decision, applying s.98(4)(ERA).

The Respondent's Submissions

5.8. Ms Russell's skeleton argument argues briefly, but forcefully, that the claimant's application is absurd and that it is inappropriate to strike out or make a deposit where there are complex factual and legal disputes. Supplementing that, she reminds me of the full extent and meaning of s.98(4) ERA and that it is a more nuanced test than the claimant suggests meaning a finding of unfair dismissal is not inevitable. She impressed on me the seriousness of the breaches of trust and loss sustained by the club leading to it being entitled reasonably to dismiss an employee whose role and seniority was such that his obligation to the employer was that of a fiduciary. I was taken to a number of the matters set out in the grounds of resistance which detail the reasons the respondent relies on for dismissal, the serious nature of the failure and the value of the loss to the club which, in some cases, the respondent will say breached the Football Association guidelines, although this is firmly disputed. The respondent argues how the claimant refused to attend the investigation meeting and that the respondent should have the opportunity at a full merits hearing to argue its process was reasonable and that further evidence is needed of Mr Morris's decision leading to the summary dismissal of the claimant as this is not as clear as it needs to be.

5.9. In that respect, it was argued that Mr Morris needed to be cross examined on the areas of factual dispute. It was disputed that there was no proper basis for dismissal. It was disputed that the claimant had not been supplied with a summary of the alleged wrong doing, he had received the material details. It was disputed that the claimant was not informed of the concerns. It was disputed that the claimant indicated he would cooperate with the process and that, in fact, it was the claimant who was playing games and obstructing the process. It was argued that the respondent had substantial material before it. That it was disputed that the claimant sought a postponement of the

investigation meeting to obtain representation and that such an argument was in fact being advanced for the first time only today.

5.10. Ms Russel argues that applying the full factual matrix to the test to be applied by s.98(4) leaves only one conclusion. That is that the respondent has an arguable defence and it is inconceivable that it should suffer a knock-out blow at this stage or be subject to a deposit.

Discussion

5.11. I start by considering the two bases on which the claimant's application is advanced. The first being a strike out of the response in its entirety. Rule 37 provides a number of threshold conditions which, if met, may engage strike out. The extent of the reach of any strike out order will depend on the particular test within the rule 37 that is engaged along with the overriding objective. A number of the provisions in rule 37 could, if made out, justify a strike out of the other party's argument in its entirety although, in appropriate cases, the overriding objective requires further consideration of whether a fair trial remains possible and, where it does, an order short of strike out would be the proportionate response. In any event, while the effect of striking out a response under rule 37(5) is as if no response has been received as set out in rule 21, rule 21 itself admits of some continued participation by the defaulting party to the extent permitted by the Judge. It therefore seems to me that I will always be required to apply the overriding objective if any order were made on this basis of the application.

5.12. In this case, the application is based on rule 37(1)(a) but it relies only on the respondent's case having no reasonable prospects of success. It is not argued to be scandalous or vexatious. As such, those prospects of success must to be assessed against the relevant test to be applied in any final merits hearing and, where they fail that test, the extent of the strike out is limited by the extent of that test. Both counsel cite the test in s.98(4) ERA and its long settled interpretation. That provision does not address the merits of the statutory compensation that might be awarded under chapter II of Part X ERA which is, essentially, the alternative basis of the claimant's application.

5.13. It seems to me that I must reject the claimant's principal application. Were I minded to strike out, it would be on the basis of the respondent's prospects against s.98(4) going to liability only. Alternatively, were I to apply rule 37(5), it seems to me that I would then be bound to engage rule 21(3) and consider the justice of allowing or depriving the respondent an opportunity to defend remedy in circumstances where, if its assertions are accepted by a Tribunal, could well have a significant effect on the remedy judgment. Either way, in practice, the claimant's principal and alternative applications effectively arrive at the same destination. I therefore prefer to embark on my analysis on the basis of the claimant's alternative application.

5.14. Taking the parties' respective positions at their highest, the respondent has advanced a number of serious concerns about the claimant's conduct which may have caused it substantial financial loss. The respondent may turn out to be correct and, for the purpose of this application, I accept everything Ms Russell says in that regard. Whether the pleaded position is ex-post facto or was genuinely in the mind of the employer at the time is a question of fact to be determined and going to the true reason for dismissal. In itself, that is not amenable to strike out and requires a determination on findings of fact. It is not

a contention that I could, today, regard as having little prospect of success, less still no reasonable prospects. Whether the circumstances and reasonableness of the investigation make it reasonable to hold that belief is itself also a matter which requires facts to be found at a final hearing and takes it out of the scope of the orders I am asked to make. However, the circumstances and reasonableness of the investigation also begin to touch on what is the glaring and obvious issue in this case, namely why, after repeatedly stating how the respondent's own disciplinary procedure was being adopted so as to separate the investigation stage from any disciplinary decision making, the respondent then went on to summarily dismiss without offering any disciplinary hearing.

5.15. It seems to me that that question clearly engages a fundamental principal of s.98(4) which is that not only must any decision to dismiss fall within the band of reasonable responses of a reasonable employer, but so too must the steps taken to reach that decision, as to which *Sainsburys Supermarkets Ltd v Hitt [2003] ICR 111* is authority. Of course, that there is a concept of reasonableness to be applied to the procedure adopted may admit an answer that, in any particular case, it was within the range of reasonable responses not to hold a disciplinary hearing before dismissing the claimant. It seems to me, therefore, that the tests in this application have to be considered more specifically in the context of how the parties put their case on this narrower point and how a Tribunal will approach the question of the fairness of the process.

5.16. In assessing the process, a Tribunal is required by s.207 of the Trade Union and Labour Relations (Consolidation) Act 1992 to have regard to any applicable code. Such a code exists in the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2015). Whilst breach of the code does not itself establish liability, s. 207(2) provides that any provisions which appear to be relevant to a question arising in the proceedings shall be taken into account in determining that question (my emphasis). There is no dispute that there was non-compliance with a significant part of the code. Aside from the statutory code, the principles of natural justice provide a fundamental minimum floor of procedural standards, usually expressed in the three rights to know the accusation, to be heard in response and to be judged in good faith.

5.17. Whilst the respondent carries no legal burden in the determination of s.98(4) ERA, both it and the claimant have an evidential burden to advance their respective cases. Unsurprisingly, the claimant extensively lists the procedural, and in some cases substantial, deficiencies leading to his dismissal. The respondent's submissions on the procedural question amount to the need for Mr Morris to be cross examined to explain that decision which I do not find attractive as a basis for filling any gaps in the respondent's case. However, although not advanced before me today in its submissions, I must also have regard to the respondent's grounds of resistance so far as its case on the point is set out. The ET3 refers to a contractual power of summary dismissal at paragraph 71, an assertion that it was reasonable to dismiss the claimant in all the circumstances at paragraph 79 and, more specifically at paragraphs 83-86, that it was reasonable to depart from the ACAS code of practice. The respondent acknowledges the claimant was not invited to a disciplinary hearing which it says was reasonable due to the claimant's stance in not attending or engaging in any investigatory process, or otherwise with the respondent. It avers a need to act expeditiously in view of the severity of the matter and potential harm and reputational damage to the respondent. All of which left it with no option but to deal with the matter expeditiously.

5.18. I have come to the view that there are fundamental problems with the respondent's case on the procedure adopted. The stated need to act expeditiously, the severity of the matter and risk of loss and reputational damage is wholly inconsistent with the fact that the claimant was suspended for just over two weeks before the planned investigation; during that period, the respondent's contemporaneous correspondence had repeatedly identified this meeting as no more than an investigatory meeting and that any disciplinary hearing or decision would be at a later stage. That the 3 May hearing was investigatory in nature was a position being maintained by the respondent in the dismissal correspondence, notwithstanding that the decision had by then been made. Whatever the state of the respondent's investigation into the disciplinary allegations, nothing had changed by 3 May other than the claimant did not attend the investigation meeting. It knew no more and no less than it knew about the allegations when it was previously indicating to him this was an investigatory meeting only. It is not right to say the claimant had no reasonable grounds for not attending the investigatory meeting, he had set out his grounds in the correspondence which are not without reason. In any event, it is not right to extend the claimant's stance of not attending the investigatory meeting with him disengaging with the process in total. The last correspondence from the claimant's solicitors made clear he would vigorously resist any charges "should any disciplinary matter be pursued" which implies his and his lawyers understanding at the time was that this investigatory stage was a precursor to any later decision making stage.

5.19. Any Tribunal considering the procedure adopted by this employer would be faced with only two possibilities as to why things actually unfolded as they did on 3 May. Either the employer was acting in good faith when it represented to the claimant that the 3 May meeting was only investigatory in nature or it wasn't, and it was instead secretly intending to dismiss him there and then. The latter possibility is, for obvious reasons, not advanced by the respondent no doubt due to the inescapable conclusion of unfairness that would bring. If the former possibility applies, there was nothing new arising from his non-attendance to divert it from its planned course of a separate investigatory stage followed, if necessary, with a disciplinary stage which could reasonably have been concluded well within a week or so and, at which, it may well have been reasonable for a reasonable employer to weigh the employee's earlier non-participation against any case then advanced by him, including drawing such adverse inferences as appeared appropriate. Nor can it be said that his non-attendance at the investigation stage alters the apparent severity of the allegations and there is no increased risk of loss to the respondent during his continued suspension from his post. The respondent's contention as to why it did not follow its own procedure as it had stated it would, does not have credible force.

5.20. Applying the relevant tests, I would have no hesitation in concluding that this contention that the dismissal was procedurally within the range of reasonable responses falls within the realms of having little reasonable prospect of success such that it engages the power to impose a deposit. However, in this case I think it is just to go further. The contention is so far removed from the contemporaneous events that I must consider whether there are any reasonable prospects that a Tribunal could accept it. Whatever the severity of the disciplinary allegations, the consequences to the claimant are commensurate and demand a similar degree of respect to procedural fairness. However pressing the respondent's perceived need was to bring the matter to a

conclusion, it was known to the respondent from the moment it embarked on what, initially, looked like being a procedurally compliant process. The circumstances in which it will remain reasonable to depart from the range of accepted minimum procedural standards will be rare. On the undisputed chronology of this case, I cannot see any Tribunal concluding that this was such a case and, consequently, I have concluded that the contention that the dismissal was procedurally fair has no reasonable prospects of success. Consequently, I strike out the respondent's response insofar as it asserts a liability defence to the claim of unfair dismissal. The claimant consequently obtains a liability judgment in his favour but, so far as any future remedy hearing is concerned, the respondent is not prevented from raising its pleaded arguments so far as remedy is concerned. If the respondent is correct, there may well be significant reductions applied under *Polkey* and contributory conduct.

6. **The Respondent's Application to Strike Out the Claim under s.11 ERelA 1999**

The Respondent's Submissions

6.1. Ms Russell for the respondent argues simply that the claimant was invited to a meeting clearly referred to as an "investigatory meeting". As such, the statutory right to be accompanied was not engaged. In any event, whilst asserting the right was not engaged, the employer nevertheless voluntarily offered the claimant to be accompanied as if it was. It asserts that the decision to dismiss was not made as part of any disciplinary meeting. Consequently, the claimant's claim that there was a failure to comply with the right has no, or alternatively little, reasonable prospects of success.

The Claimant's Submissions

6.2. For the claimant, Mr Gilroy argues that there is a reasonable argument that there has been a failure by the respondent. There is a finding of fact needed on the true nature and circumstances of the meeting held on 3 May and whilst it was initially labelled as an investigatory meeting, in one way or another it became a disciplinary hearing. The claimant accepts that, if genuine, the investigatory meeting in itself would not engage the statutory right but, in this case, something happened in connection with that meeting requiring findings of fact, in particular whether the meeting was always intended to be the disciplinary hearing, whether it spontaneously morphed into a disciplinary hearing or otherwise. The need for a finding of fact should prevent strike out at this stage.

6.3. Mr Gilroy argues that although the request for representation principally sought legal representation, it put the issue of arranging a companion in broader terms identifying the difficulties with contacting a due to the prohibition on contacting colleagues during suspension and, also, not being a member of a trade union and needing two clear working days' notice to obtain the support of a trade union representative.

Discussion

6.4. The cause of action is set out in s.11(1) of the ERelA, namely that the employer has failed, or threatened to fail, to comply with section 10(2A), (2B) or (4). Section 10 provides, so far as is material:-

10 (1) This section applies where a worker—

(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and

(b) reasonably requests to be accompanied at the hearing.

(2A) Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who—

(a) is chosen by the worker; and

(b) is within subsection (3).

(2B)….

(2C)….

(3) A person is within this subsection if he is—

(a) employed by a trade union of which he is an official within the meaning of sections 1 and 119 of the Trade Union and Labour Relations (Consolidation) Act 1992,

(b) an official of a trade union (within that meaning) whom the union has reasonably certified in writing as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings, or

(c) another of the employer's workers.

(4) If—

(a)a worker has a right under this section to be accompanied at a hearing,

(b)his chosen companion will not be available at the time proposed for the hearing by the employer, and

(c)the worker proposes an alternative time which satisfies subsection (5),

the employer must postpone the hearing to the time proposed by the worker.

(5) An alternative time must—

(a)be reasonable, and

(b)fall before the end of the period of five working days beginning with the first working day after the day proposed by the employer.

6.5. For the purpose of s.10(1), s.13(4) defines a disciplinary hearing as :-

".. a hearing which could result in :-

(a)the administration of a formal warning to a worker by his employer,

(b)the taking of some other action in respect of a worker by his employer, or

(c)the confirmation of a warning issued or some other action taken.

6.6. Breaking those provisions down, in order to succeed in a claim under s.11, the claimant must establish the following constituent elements :-

a That he was required or invited by his employer to attend a hearing. (s.10(1)(a))
b That the nature of that hearing was disciplinary according to s.13(4).
c That he made a request to be accompanied at that hearing (s.10(1)(b))
d That, in the circumstances, his request was reasonable (s.10(1)(b)).
e That the person he sought to accompany him fell within s.10(3)

A claim may succeed where the above elements are satisfied and the employer refuses that companion to accompany the employee or, alternatively, where the above elements are satisfied but :-

a the claimant's chosen companion will not be available at the time proposed by the employer and he makes a request to postpone the hearing (s.10(4)(b)), and
b the claimant proposes a postponement of the hearing to a later time which is reasonable and not later than 5 working days after date proposed by the respondent. (Ss.10(4)(c) and 10(5).

6.7. In this case there is no dispute that the claimant clearly was invited or required to attend a hearing on 3 May. There is a dispute of fact as to whether the true

nature of that hearing was investigatory, as the respondent labelled it, or whether it was in fact disciplinary. It seems to me that there are aspects of the respondent's handling of this matter that warrant that enquiry. However, resolving that dispute in isolation does not advance the claimant's claim. If there is a finding that it was an investigatory meeting and the disciplinary decision was taken independently, the result is that hearing to which the claimant was invited was not a disciplinary hearing within the meaning of the section and the right was not engaged. Similarly, any independent "hearing" (or such other process as led to the decision to dismiss as the Tribunal should find) was not a hearing to which the claimant was invited or required to attend such that, again, the right is not engaged. Alternatively, even if the Tribunal should find that this investigation meeting was in fact always intended to be the meeting at which the claimant would be dismissed and as such should be characterised as a disciplinary hearing under the Act, the fact remains that the respondent voluntarily gave the claimant the right to be accompanied such as it exists in the act. In those circumstances, it may have inadvertently complied, but it nonetheless did comply.

6.8. Determining the nature of the hearing as a disciplinary hearing only provides traction for the claimant's claim if there was also a refusal of a reasonable request to be accompanied. It is common ground that there was a request made in the claimant's solicitor's letter of 2 May. Principally, that request was for legal representation. The respondent's subsequent refusal to permit him to be accompanied by a legal representative cannot establish a breach of the s.10 right even if the hearing was a disciplinary hearing as such a companion is not a person falling within s.10(3) ERelA. There is no case advanced of the respondent refusing to permit the claimant to attend that hearing, whatever its nature, with a companion falling within s.10(3).

6.9. It seems to me that the only live issue in the claim is whether the so called "broader" basis on which the claimant put his request to be accompanied can be interpreted as a request by the claimant to exercise his right to postpone the hearing within the circumstances prescribed by s.10(4) and (5) of the ERelA. The position is not clear. On the one hand, the claimant does not seem to advance this proposition in correspondence other than the letter of 2 May and, even then, it can be read simply as a reason to support the contention why going ahead the following day could render the hearing unlawful. Within the same letter, the later ultimatum does not repeat any postponement request. On the other hand, that which it does set out clearly identifies his difficulty in exercising the statutory right and suggests a further period of two clear working days which, if interpreted as a request to postpone, would appear to fall within s.10(5). Consequently, this is not a claim that I can say has no reasonable prospects of success and I do not strike it out. Whilst it is not an obviously strong case, I am equally not satisfied that it falls within the realms of *little* reasonable prospects. I consequently decline to make any order limiting its progress.

The Respondent's Application to Strike Out the Claim under s.93 ERA

The Respondent's Submissions.

6.10. In defence to the claimant's claim that it failed to provide written reasons for dismissal, Ms Russell for the respondent points to its letter of 15 May 2017 [24] provided in response to the claimant's solicitor's written request for written reasons. Put simply, she argues the respondent complied with the request and

discharged its statutory obligation. The reasons stated are adequate and true and that is all that is required by the ERA.

The Claimant's Submissions

6.11. Mr Gilroy concedes that *a* letter containing written reasons was provided by the respondent but points to the claimant's specific basis of his claim under s.93(1)(b) that the reasons were inadequate or untrue, as opposed to a complete failure to respond to the request. He argues that the determination of both the adequacy or truth of the reasons provided requires the Tribunal to make findings of fact and notes how the respondent's grounds of resistance assert only that the reasons were adequate, not that they were true. He suggests that the respondent has focused on s.92 only and overlooked the s.93 requirement that the reasons be adequate and true.

Discussion

6.12. Section 92 of the ERA provides the right in the following terms, so far as is material :-

> ***92 (1)An employee is entitled to be provided by his employer with a written statement giving particulars of the reasons for the employee's dismissal—***
> ***(a)if the employee is given by the employer notice of termination of his contract of employment,***
> ***(b)..***
> ***(c)..***
> ***(2)Subject to subsections (4) and (4A), an employee is entitled to a written statement under this section only if he makes a request for one; and a statement shall be provided within fourteen days of such a request.***
> ***(3)..***
> ***(4)..***
> ***(4A)..***
> ***(5) A written statement under this section is admissible in evidence in any proceedings.***

6.13. Although expressed within s.93, which otherwise provides the cause of action to enforce the s.92 right, s.93 effectively widens that right not just to the mere fact of receiving a written statement on request, but to its adequacy and truthfulness. It provides

> ***93 (1)A complaint may be presented to an employment Tribunal by an employee on the ground that—***
> ***(a)the employer unreasonably failed to provide a written statement under section 92, or***
> ***(b)the particulars of reasons given in purported compliance with that section are inadequate or untrue.***

6.14. Neither counsel referred to any authority on the boundaries of the adequacy of the reasons provided.

6.15. For my part, I would be prepared to conclude that the necessary adequacy of reasons is simply that which identifies why the employee was dismissed and may be in short, or summary, form. One purpose of the section is to inform the employee of a stated reason in the context of whether to exercise his other statutory rights, such as to claim unfair dismissal. Such written reasons provided become admissible in any later claim, potentially to be advanced by the employee against the employer. It is arguable, therefore, that the reasons given in this case could be held to be adequate for these purposes. The fact that the respondent could have given more detail, as it subsequently did in the

ET3, may not render the written reasons inadequate although may well carry weight in supporting the claimant's case in other respects. However, the truth of the reasons cannot be determined by the respondent's assertion before me that they are true, any more than they can by the claimant's assertion that they are not. They may or may not be true. The determination of that requires a finding of fact which is the domain of a final hearing on the evidence. Consequently, this is not a contention that I regard as falling within either threshold so as to engage either order sought. Consequently, I refuse the applications and the claim will proceed, subject to the stay.

Employment Judge Clark

Date 19 February 2018

JUDGMENT SENT TO THE PARTIES ON

26 February 2018

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FOR THE TRIBUNAL OFFICE