Case Number: 2301537/17

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MARTIN**
Members

BETWEEN:

Marc Cowan (1)	
Thomas McKain (2)	
Natalie Parsons (3)	**Claimants**
and	
Picturehouse Cinemas Ltd	**Respondent**

ON: **10 August 2017**

APPEARANCES:

For the Claimant: **Mr Brittenden - Counsel**

For the Respondent: **Mr Croxford - Counsel**

RESERVED JUDGMENT ON INTERIM RELIEF APPLICATION

The Judgment of the Tribunal is that the Claimants application for interim relief under sections 161 AND 163 TULR(C)A 1992

The full merits hearing has been listed by agreement for five days commencing at 10 am or as soon as reasonably practicable thereafter on 12 March 2018

REASONS

1. The Claimants sought interim relief of their claims to the Tribunal. All Claimant's were dismissed by the Respondent without notice on 14 June 2017. It is common ground that the application was correctly made within the seven day time limit with the appropriate certificate for each Claimant from

BECTU in compliance with s161 TULR(C)A 1992 and no procedural issues have arisen in the case.

2. For various reasons which are not necessary to set out, this hearing was heard later than is usual in applications of this nature. Therefore, unusually I had before me the Respondent's response to the Claimant's claim. There was no objection to my having read this document prior to the hearing. I also declared that I was a member of the Picture House Cinema and the parties had no objection to my hearing this application.

3. I was agreed that I would not be hearing oral evidence and would be deciding the case based on the witness statements and documents provided. I was provided with seven witness statements. For the Claimant I had a witness statement from each of the Claimants and a witness statement from Mr Morrissey (BECTU). For the Respondent, I had a witness statement from Ms Debbie Cairns ((Acting Head of People and Training), Mr Cormac O'Connor, (Regional Manager) and Mr Vandyke (General Manager). I was supplied by the parties with an agreed bundle of documents comprising 293 pages, authorities from both parties and skeleton arguments from both parties. The parties were released for an hour while I read the papers.

4. I am to decide was whether the Claimants claims under section 152 TULR(C)A are likely to succeed before a full tribunal. It was also agreed by the parties that the key issue in the application was whether there was sufficient evidence of the required causal connection between the Claimants dismissal and them having undertaken trade union activities or them being members of a trade union.

5. Both parties provided written submissions for which they are thanked. Both parties referred to several authorities. The test that I am concerned with is still that set out in the case of ***Taplin v C Shippam Limited [1978] IRLR 450*** namely that the Claimants have a "*pretty good chance of success*" in establishing that the reason that they were dismissed was that they were members of a trade union and or had participated in union activities thereby making the dismissal automatically unfair. The Respondent says it dismissed them for a reason related to their conduct.

6. The basic factual background is not in dispute although the legal interpretation is. All three Claimants were employed by the Respondent at the Ritzy cinema in Brixton. All three were members of BECTU which is an independent trade union recognised at the Ritzy (although not at other cinemas in the group) for collective bargaining and workplace representatives. All three were summarily dismissed for gross misconduct on 14 June 2017.

7. There has been industrial unrest for some time at the Respondent, with staff balloting for strike action in relation to pay and conditions. Strikes have taken place at the Ritzy since September 2016 along with strikes at other cinemas. The Respondent's grounds of resistance record that the Respondent became aware in March/April 2017 of attempts to block book tickets on the Hackney

cinema website, with the tickets being held so that no one else could book them, for as long as possible. After a certain period of time the tickets are automatically released back into the system for sale. The Respondent described this as an apparent concerted attempt to prevent the sale of tickets during strike days. The Claimants say that the Ritzy, unlike Hackney was closed on strike days.

8. On 15 April 2015, there was strike action at six of the Respondent's cinemas including the Ritzy. Later that day there was a meeting in a pub in Dulwich attended by BECTU members from the Ritzy and other cinemas. This was held at an appropriate time in accordance with the legislation outside of working hours. During this meeting, which had no agenda, no minutes and no particular structure there was discussion about an escalation of strike action and how this could be achieved, with talk of extending the ticket purchase activity as undertaken at Hackney to other cinemas and including members of the public who could sit at home and 'cyber-picket' on the union's behalf.

9. On 18 April 2017, an email was sent to Ritzy BECTU members at their private email addresses from a BECTU email address making reference to the next strike date and other campaigning ideas including the 'cyber-attack'. As relevant this email said

"For those of you who couldn't make it on Saturday, and didn't make it to the all-members meeting – here's an overview of what was agreed. Please do come and talk to one of the reps for a more detailed account if you want.

….

We are also going to start pushing cyber-pickets – where supportive members of the public who can't come down to a picket line spend their day block-booking seats and keeping them in the online basket, so they can't be sold on tills or online. It makes the strike much more effective when they keep cinemas open on strike days – and Hackney have managed to keep their cinema pretty much empty this way.

…
Any questions, let us know.
Much love, the reps x"

10. This email (referred to as the 'Ritzy email') was seen on 27 April 2017 by the General Manager and subsequently given to the Respondent by a BECTU member at the Ritzy. As a result, the Respondent's solicitors contacted BECTU raising concerns about this email on 28 April 2017. In response on 3 May 2017, BECTU said the email was not authorised by them and that they would write to members at the Ritzy to say so. A further letter written by BECTU to the Respondent on 10 May 2017 said amongst other things that it had written to all members at the Ritzy '*disassociating itself from the "cyber picketing" activity. We consider and are advised that this was an appropriate step for us to have taken. We are happy to continue to disassociate BECTU from this kind of activity which does not form part of our lawful industrial action against your clients".*

11. In relation to the meeting on 17 April 2017 this letter said:

"You ask for the agenda and notes of the all-members' meeting referred to in the email of 18 April 2018. We understand this was an informal meeting that took place after the strike action on 15 April 2017. It was not organised or attended by any fulltime BECTU official. There was no agenda, nor minutes, nor notes of this meeting.

Our actions in publicly disassociating ourselves from this activity should make clear that we have not organised, encouraged or condoned it".

12. The email BECTU sent to Ritzy members on 3 May 2017 said "*Please note that this kind of activity is not endorsed by BECTU. It is potentially unlawful and BECTU will not provide assistance to members who are involved in unlawful activity".*

13. The Ritzy email was sent by Ms Kelly Rogers and the Respondent accepts that the Claimants were not involved in it being sent. The Respondent accepts that Mr Cowan and Mr McKain were on annual lave when the email was sent. Ms Parsons received it when it was sent. The Respondent began an investigation and suspended the six BECTU representatives working at the Ritzy including the Claimants. All six were subject to disciplinary proceedings. The letter inviting Mr Cowan is substantially the same as the letters to the other two Claimants and puts the disciplinary charges as:

1. That you were aware of an email to BECTU members at the Ritzy which sought to damage the Company by inciting others to attack the Ritzy's website (by block-booking cinema seats in an online basket without any intention to purchase the tickets, preventing genuine sales), and you did not disclose this to the company (or indeed to your union, BECTU) and did not take any steps to attempt to prevent such conducted, is supported by your admission that you did not do so during the investigatory meeting on 18 May 2017(the Investigatory Meeting") and

2. That during the Investigatory Meeting, you were not open and transparent in our responses to questions and in fact, that you were dishonest in respect of some of your answers. Whilst be appreciate you may well have been trying to protect other employees, the attacks on the Company's website are a very serious matter and as an employee, we would expect you to provide full and honest responses to questions during an investigation".

14. Disciplinary hearings were held for all six employees and as a result the Claimants were dismissed, one employee was allowed to resign (as he was going into teaching and a dismissal may be prejudicial to his intended career), one employee was given a final written warning. Mr O'Connor conducted the disciplinary hearing and in his witness statement says that the Claimant's trade union membership or activities had not impact on his thought process during the disciplinary process or his decision to dismiss the Claimants. He refers in his statement to the decision only to discipline the representatives of BECTU and not other BECTU employees because the email had been signed off from "*the reps*" and he considered that they had to accept more responsibility as they had direct access to BECTU and could have gone to it for advice.

15. The main issues to be decided at the full hearing of this matter will be whether the Claimants were engaging in union activity and whether if they were whether this was the reason (or if more than one the principal reason) for the dismissals.

16. I have been assisted by clear submissions from both parties. I do not propose to set them out in full, but in summary their submissions are as follows:

The Claimant's submissions

17. That what constitutes activities of a union is not defined but should not be construed restrictively (Dixon and Shaw v West Ella Development Ltd [1978] IRLR 151.

18. Participating in the preliminary planning and organising of industrial action constitutes participating in union activities at an appropriate time (Britool v Roberts [2993] IRLR 48).

19. Sending, reading and deciding what action to take in response to any branch emails must necessarily count as a trade union activity.

20. That participation in union activity is protected even if the employer objects to the manner in which it is undertaken (Bass Taverns Ltd v Burgess [1995] IRLR 596; Lyon v St James Press Ltd [1976] IRLR 215; Mihaj v Sodexho Ltd [215] ICR D25.

21. That the Tribunal should robustly scrutinise the evidence (Specialty Care lc v Pachela [1996] IRLR 48.

22. The nature of the union communications is confidential and employers have no right to be informed of what comments are made or discussed. That the meeting on 15 April took place in employees own time in a private room in a pub and discussed the next strike date and other campaigning activities and was a trade union meeting constituting trade union activity.

23. The Ritzy email sent on 18 April 2017 was from the branch email to private email address and as such was private and confidential and the Respondent had no right to see it or be informed about it.

24. That the reason for dismissal is heterodox with the Respondent inventing a wholly new positive obligation on all employees to report any alleged wrongdoing to the employer about what their trade union and members are or are contemplating doing (Sybron Corp v Rochem Ltd [1983] IRLR 253; Ranson v Customer Systems Plc [2012] IRLR 769) and there was no evidence of any wrongdoing, no breach of contract.

25. That the principal reason for dismissal was for the manner in which the Claimants each participated in trade union activity at the appropriate time. That not being open and honest in the investigation and disciplinary hearing could not be a standalone reason for dismissal and the Respondent's evidence in relation to this is flimsy.

26. The Claimants were dismissed for a union email that they did not author, or have any involvement in its creation and that the inescapable conclusion is that the Respondent wanted redress and to purge itself of representatives it did not like.

The Respondent's submissions

27. That BECTU repudiated the proposal for cyber-picketing as being unauthorised by it and potentially unlawful.

28. Four representatives were dismissed, one permitted to resign and one given a final warning. The distinction being that the Claimants were not believed to have been open and honest in the investigation and disciplinary meetings whereas the other employee had been open and cooperative.

29. That Parsons v Airplus International Ltd [2016 UKEWAT/0023/16 where the EAT upheld a decision refusing interim relief because of the need for detailed fact finding and resolution of issues of law meant it could not be said that the Claimant was likely to succeed but only she had a good arguable case. No detailed findings of fact or resolution of difficult issues of law are expected.

30. Likely means more than a 51% chance of success.

31. The reason for dismissal is the reason operating in the mind of the decision-maker and it is only if that reason falls within s152 that the dismissal is automatically unfair.

32. In Metrolink Ratpdev v Morris [2016] UKEAT 0113/16 it was held that as a matter of principle dismissal for such an act of misconduct (disclosing confidential information when told not to) did not enjoy the protection of s152. Azam v Ofqual [2015] UKEAT 0407/14 where it was held that even though a branch executive committee had endorsed the claimant sending information to members, the tribunal had been entitled to conclude that the action fell ouside the scope of what could properly be called trade union activities because she ad failed to represent t the branch committee the true basis upon which it had been disclosed to her and/or because it fell outside the constraings placed on trade union activities.

33. South West Trains v McDonnell [2003] WL 20990444 where it was held that there was a distinction to be drawn between what had actually happened and what the employer believed.

34. Mahaj v Sodexo [2014] UKEAT/0139/14 where it was held that the way in which union activities were carried out was not material to the question of whether the Employment tribunal at the full liability hearing was likely to hold that the dismissal fell within the statutory protection unless it was such as to take the conduct outside the proper scope of trade union activities.

35. Mr O'Conner provides cogent explanations for his reason for dismissal which are likely to be accepted as genuine at a full liability hearing. The fact that one of the representatives was given a final written warning is indicative of him focussing on the facts personal to each representative and only dismissing where justified by their conduct.

36. Mr O'Connor had been a member of BECTU and had no issue with membership or employees participating in lawful industrial action.

37. The Claimants do not say that they had previously been treated detrimentally because of their trade union membership or activities.

38. The Claimants accepted that cyber-picketing should not have been in the email as it was wrong and potentially illegal. That the email did not impose a duty of confidence.

39. The Claimants accepted they should have brought the email to the attention of BECTU and/or the Respondent on becoming aware of it.

40. It is unsustainable that any action agreed at a meeting o union members or proposed in an email to members is protected by confidentiality and is a protected trade union activity.

Conclusions

41. I have carefully considered the witness statements, documents referred to and submissions of both parties. Both submission have merit and are both in their own ways persuasive.

42. I am mindful that the test I am to apply is whether there is a pretty good chance of the Claimants succeeding at a full hearing and that my role is not to decide facts or come to conclusions were there is a dispute on the law.

43. Having carefully considered the case law referred to above and considered the submissions and witness statements my conclusion is that whilst the Claimants have an arguable case, that I do not find that they necessarily have a pretty good chance of success. The question of whether the matters referred to constitute trade union activities is not sufficiently clear for me to make a finding either way. I find that the Respondent's case is also arguable and that I cannot say that there is more than a 51% chance that the Claimants claims will succeed.

44. For this reason, the Claimant's application for interim relief fails.

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Employment Judge Martin
Date: 14 August 2017