EMPLOYMENT TRIBUNALS

Claimant: Ms L Campbell

Respondent: (1) Orchid Field Marketing Limited;
(2) David Skinner, Ceuta Holdings Limited;
(3) Edwin Bessant, Ceuta Holdings Limited.

RECORD OF A PRELIMINARY HEARING

Heard at: Bury St Edmunds (in private) On: 19 February 2019

Before: Employment Judge Cassel (sitting alone)

Appearances
For the claimant: Mr A MacPhall, Counsel
For the three respondents: Mr G Self, Counsel

RESERVED JUDGMENT ON PRELIMINARY HEARING

(1) An email of 14 November 2017 from Mr P Burrows is admissible in part.

(2) By agreement, correspondence between the parties and identified as 'Without Prejudice' is admissible in evidence.

(3) Correspondence purportedly created under the provisions of section 111A of the Employment Rights Act 1996, will be the subject of evidence and submission at the substantive hearing.

REASONS

(4) The claimant has brought a claim of unfair dismissal under the Employment Rights Act 1996 and claims under the Equality Act 2010 which are resisted by the respondent. Case management orders were promulgated by Employment Judge Vowles on 18 June 2018 and at paragraph 11 of the orders that were made, he identified those claims that are brought and referred to a draft list of issues that had been agreed between the parties.

(5) A trial date for a full merits hearing has been listed at Reading Employment Tribunal for 26 April 2019 – 7 May 2019 inclusive.

(6) Employment Judge Vowles made further case management orders on 5 November 2018 and a preliminary hearing was set for today, the purpose of which is to consider any application by either party regarding the admissibility of evidence, in particular whether any privilege attaches to any documents.

(7) At the hearing today, Mr A MacPhall represented the claimant and Mr G Self represented the three respondents. I was told that both Counsel had had discussions prior to the hearing in respect of three matters:

7.1 whether documents that were exhibited in an agreed bundle of documents which I marked as R1 which were written 'Without Prejudice' were admissible in evidence;

7.2 whether documents created were said to be inadmissible by reason of the provisions of section 111A of the Employment Rights Act 1996, were admissible; and

7.3 whether a document produced at page 53 of the bundle was admissible in whole or in part or whether privilege applied to that document and thus should not be admitted in evidence.

(8) I was told that in relation to the first matter, Counsel had resolved between themselves which documents are admissible. In relation to the second issue I was told that those documents said to be created under the provisions of section 111A of the Employment Rights Act 1996 would be admitted in evidence and be the subject of submission. The third issue, whether to admit an email of 14 November is to be the subject of submission today.

Background to the Dispute as to Admissibility

(9) The claimant was the Managing Director of the first respondent. She sold her shareholding in the company in March 2016 to Ceuta Holdings Ltd. ("Ceuta"),

for whom the second and third respondents are the Chief Financial Officer and Chief Executive Officer.

(10) The situation was not a happy one, as the business relationship between the parties developed in a way that most, if not all, of the relevant parties found to be unsatisfactory. On 4 April 2017 the claimant offered to buy back her shareholding in the first respondent, but that offer was rejected. In the following August, the possibility of selling the business back to the claimant and others was raised and on 31 August a meeting took place and the claimant was told by Mr Peter Burrows who was a Director of Ceuta, that consideration to the buy back proposal would be made. There was some form of discussion as to whether the claimant was prepared to leave the company but that no doubt will be the subject of evidence at the substantive hearing. In any event, a decision was made not to offer to sell the first respondent to the claimant and matters developed in a way such that the parties took legal advice and correspondence from solicitors was exchanged.

(11) The parties agree that the claimant's contract of employment ended on 13 May 2018. A letter of dismissal was sent to her on 9 November 2017.

(12) On 13 November 2017 the claimant wrote to Mr Burrows in the following terms,

"Request to appeal: Notice of Termination.

Whilst I note the notice of termination does not give right to appeal, given the legal process was not followed, I request the right to appeal this decision.

The dismissal is legally unfair and in my view, this is 'victimisation', having alleged sex discrimination. I previously requested a full investigation into the case I have cited against David Skinner and would like to see the output of the investigation that Ceuta agreed to undertake."

(13) An investigation apparently had been set in motion on 30 October 2017. However there was no evidence before me that demonstrated that the claimant knew of the investigation, although subsequently she was informed of the outcome. I have used the word 'apparently' because I make no finding of fact as to the commencement of the investigation which will no doubt also be the subject of evidence at the substantive hearing. But, for the purposes of the application today, the investigation is of some importance.

(14) In any event, advice was taken by the respondent and an email was sent on 14 November 2017 to the claimant in error although the intended recipient was the third respondent, in which Mr Burrows referred to that advice. In less than two hours, Mr Burrows withdrew the email explaining that it had been sent to the wrong person.

(15) The issue between the parties is whether this email is admissible in part or in full in the substantive hearing of the claim.

(16) The email of 14 November.

(17) The substantial part of the email commences with the following,

"Our legal advisers say our options are as follows…"

Thereafter, there are two paragraphs: one described as (a) and the other as (b). Both sections refer to advice.

(18) I can deal briefly with (a). I have been reminded in submissions of X v Y Ltd. UK EAT/0261/17/JOJ, which was an appeal heard before Slade J DBE. I was reminded that at paragraph 38 of that judgment, Slade J referred to,

"It is in the interest of the public and the administration of justice for a client to be open and frank with their legal advisers so that soundly based legal advice can be given without the concern that it could be made public."

(19) It seems to me that as far as paragraph (a) is concerned, the meaning of the words that are used are clear and unambiguous. In view of my finding it is not necessary, or indeed desirable, to repeat them in this judgment. There is nothing to suggest that the words in paragraph (a) are anything other than straight forward legal advice and I do not find that there is a strong prima facie case of iniquity.

(20) As far as (b) is concerned, bearing in mind the matters discussed and subsequently decided, I do repeat the words used which are as follows,

"Agree to an appeal (which would need to be managed by you) whereby the findings would be there has been another complaint about David's direct management style but as the complaint was from a male it would strengthen our case on the discrimination accusation. The conclusion would be that given Lysa's accusations there is no discrimination case to answer."

Submissions

(21) Without doing disservice to the full and helpful submissions by both Counsel, I will summarise the salient parts of their submissions as follows. Mr MacPhall submited that there is clear evidence of iniquity such that there is a strong prima facie case and this part of the email should be admitted in evidence. He pointed to the letter in response to the appeal of 15 November 2017 and to the fact that the email, subject to this application, was written at a date, 14 November 2017, that post-dated the application for appeal but pre-dated the decision on appeal. He submitted that the contents of the letter of 15 November reflected the advice

that was given, but more importantly, reference was made to the investigation that was being undertaken which was brought to the attention of the claimant. Although the investigation was described and a comment was made that,

"The final findings of which we will be happy to make available to you in due course. At this stage however, we are satisfied that there is no evidence that would support or even point towards you, or any other employee, having been treated unfavourably / differently as a result of their gender or indeed any other protected characteristic."

(22) His submission was that the outcome was pre-judged and in effect followed the advice at (b). In support of this contention, he submitted, the investigating manager reached a conclusion at paragraph 4 of her report which is very close to what he described as the "pre-determined outcome" at (b).

(23) The thrust of his submission was that there are two words which are repeated at (b) and these are, "would be". He submitted that the use of those two words is central to his submission and presented strong prima facie evidence of a case of iniquity.

(24) Mr Self submitted that it was necessary to look at the context of the dispute and in so doing it would be apparent that in requesting an appeal, the claimant had engaged in a sham. He traced the history of the dispute and submitted that as the negotiations had failed to bring about the result sought by the claimant, she raised issues of unlawful discrimination. When she concluded that there was no realistic prospect of an acceptable settlement, she decided to pursue a tribunal claim of sex discrimination. He submitted that in reality there was no offer of appeal in the dismissal letter and that the claimant knew that no appeal was anticipated, but none the less she requested the appeal.

(25) Against this contextual background, advice was sought and it is accepted was given and the options were set out in the email of 14 November. As far as (b) was concerned the conclusion reached in the investigation was perfectly permissible. It was neither a surprise nor discriminatory in its nature bearing in mind an interview report from July 2017 of another member of staff in which adverse comments were made about the behaviour of David Skinner.

(26) Mr Self also referred to X v Y Ltd. and referred extensively to the guidance referred to therein.

(27) I was reminded by both counsel that this application is for a provisional assessment as to whether a document is admissible. I stress that I make no findings of fact save as to the admissibility of (b).

(28) In deciding this application, I have looked carefully at the judgment in X v Y Ltd. to determine two questions; first the meaning of (b) of 14 November 2017 and

second whether the advice in the email constituted a strong prima facie case of iniquity.

(29) I have already referred to the strong public interest in maintaining legal advice privilege and that it is well established that, "advice sought or given for the purpose of effecting iniquity is not privileged", Barclays Bank Plc v Eustice [1995] 1 WLR 1238. The standard of proof is whether there is a "strong prima facie case" and that this in itself is not determinative of the issue whether the legal advice given was to perpetrate or was in furtherance of iniquity.

(30) I have been reminded of the high threshold referred to at paragraph 45 of X v Y Ltd. in which reference is made to Eustice that "what is prima facie proved really is dishonest and not merely disreputable or a failure to maintain good ethical standards and must bear in mind that legal professional privilege is a very necessary thing and is not lightly to be overthrown, but on the other hand, the interests of victims of fraud must not be overlooked. Each case depends on its own facts".

(31) The words "would be" must of course be seen within the context of (b),and in my judgment these words are of particular significance. Mr MacPhall submitted that if this really had been honest advice, other words would be used and that 'would be' is not merely didactic but it is instructive and amounted to, in effect, an attempt at deception and was a clear message to the respondent to reach the conclusion that was in fact reached. I accept that submission and give the meaning of this part of the email that which I have been invited by Mr MacPhall to give it. The second issue to be determined follows on from the interpretation I give to the words that were used. I find that there is a strong prima facie case of iniquity and that legal advice privilege has been lost and (b) is admissible in evidence. It will of course be for the tribunal hearing the claim to determine whether the advice given was in fact to perpetrate or in furtherance of iniquity.

Other matters

(32) The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practicedirections/

(33) The parties are reminded of rule 92: "Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise) …" If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

(34) The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.

(35) If the Tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.

(36) The following case management orders were uncontentious and effectively made by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Bundle of Documents

   By consent the respondent will produce a bundle of those documents relied on by either party in these proceedings. The documents will be numbered and in chronological order and four sets of the bundle will be made at the first day of the hearing.

2. Written Statements

   The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must exchange copies of their written statements no later than 8 April 2019.

3. Final hearing preparation

   3.1 On the working day immediately before the first day of the final hearing (but not before that day), by 12 noon, the following parties must lodge the following with the Tribunal:

   3.1.1 four copies of the bundle(s), by the respondent;
   3.1.2 four hard copies of the witness statements (plus a further copy of each witness statement to be made available for inspection, if appropriate, in accordance with rule 44), by whichever party is relying on the witness statement in question;
   3.1.3 a hard copy of the following, agreed if possible, by the respondent – a neutral chronology and a 'cast list'.

4. Final Hearing

4.1 All issues in the case will be determined at a final hearing before an Employment Judge sitting at The Employment Tribunals, The Courthouse, 30 – 31 Friar Street, Reading, Berks., RG1 1DP, commencing on 26 April 2019 and concluding on 7 May 2019, starting at 10 am or as soon as possible afterwards. The parties and their representatives, but not necessarily any other witnesses, must attend by 9.30 am on that day. The time estimate for the hearing is 6 days.

4.2 The claimant and the respondents must inform the Tribunal as soon as possible if they think there is a significant risk of the time estimate being insufficient and/or of the case not being ready for the final hearing.

5. Other matters

5.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.

5.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.

5.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.

5.4 Public access to employment tribunal decisions
All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

5.5 Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.

5.6 Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

11 March 2019

_____

Employment Judge Cassel

Sent to the parties on:

15 March 2019

For the Tribunal:

……..