EMPLOYMENT TRIBUNALS

Claimant: Miss G Raja

Respondents: Starling Bank (1)
Mr M F Newman (2)

RECORD OF A PRELIMINARY HEARING

Heard at: (by telephone) **On:** 19 November 2020

Before: Employment Judge Davidson

Appearances
For the claimant: in person
For the respondent: Ms E Smith, Solicitor

JUDGMENT

1. By letter dated 27 October 2020, the claimant requested inclusion of her communications with ACAS in the trial bundle. She says this will show that ACAS told her that the respondent's position was that she was 'not going to pass her probation and was going to be dismissed'.

2. The respondent's primary defence to the claimant's claims is that the claimant was going to be dismissed before she requested a meeting on 9 March 2020 (which turned out to be her dismissal meeting). Her requesting this meeting is the basis of her claims of discrimination, whistleblowing and health and safety.

3. The respondent accepts that the claimant had passed her probation although the respondent's representative, Ms Smith, who had been in contact with ACAS during the Early Conciliation period, was not aware of this at the time and recalls telling the conciliation officer that she did not know if the claimant had passed probation.

4. I cannot form a view whether the comment was made. The claimant suggests that ACAS told her this and therefore it must be true. However, this does not allow for misunderstandings along the line of communication and that can never be ruled out.

5. The claimant's complaint of victimisation is based on this comment and, for this reason, she states that it is imperative that document is admitted and the Conciliation Officer is called to give evidence. Of course, by that token if the Conciliation Officer does give evidence and admits to the possibility of a misunderstanding, that would undermine the claimant's victimisation claim.

6. However, I will consider the application taking the claimant's case at its highest and assuming such a comment was made. The respondent maintains that it should not be disclosed as it is privileged. All communications with ACAS are made on the express understanding that they cannot be used against the party making them.

7. The claimant accepts the starting principle that communications with ACAS are privileged but contends that this is an exception because she believes the respondent tried to intimidate her into not bringing her claim by telling ACAS a lie. She relies on the ET case of Vernon v London Borough of Hammersmith and Fulham (ET/2200455/10 and 2205480/10) in which a tribunal found that communications between the employer and ACAS could be admitted in evidence. These communications had been expressly authorised by the employer to be disclosed to the employee, and they contained unfounded criticisms of the employee which had not been advanced as part of the defence to the claim. The comments regarding the employee's performance would have the effect of dissuading her from seeking promotion in future. In that case, unlike this case, the employment was continuing and the effect of the respondent's comments was designed to impact the ongoing relationship.

8. The Vernon case also found that other communications with ACAS which the employer asked to be confidential from the claimant could not form part of the claimant's case as they were privileged, and the claimant failed in arguing that those comments showed unambiguous impropriety.

9. The claimant also relies on Ferster v Ferster [2016] EWCA Civ 717 in support of her claim. This case referred to a mediation offer which contained express threats which the court found amounted to blackmail and was therefore within the definition of unambiguous impropriety.

10. Having reviewed the authorities, the test is whether treating the communication as privileged will act as a 'cloak for perjury, blackmail or another unambiguous impropriety', bearing in mind that unambiguous impropriety will only be found to be present in the clearest of cases. I find that the alleged comment made to ACAS, even if found to have been said, does not satisfy this test. Even if the claimant could establish that the respondent gave inaccurate information about whether she had passed her probation, this comes nowhere near that level of impropriety. It is open to the respondent to put forward their position which, in this case, was that the claimant's performance was not good enough. The comment regarding probation does not add much to their primary position which is that the decision had been taken to terminate her employment before any event which could give rise to her disability, health and safety or whistleblowing claims. The claimant knew that she had passed her probation and that the comment was factually inaccurate. In the course of negotiations, she could have made that

point to ACAS, who would have passed it back to the respondent. Even if the comment was made, it was not going to change anything, particularly as the claimant knew it was not true and it was not the main basis on which the respondents were defending the claim.

11. I also note that the conciliation officer does not make adjudications in the conciliation process so, even if the conciliation officer thought this strengthened the respondent's claim, it made no difference as the conciliation officer's view on the merits did not affect anything. The claimant is intelligent enough and sophisticated enough to be able to respond to the conciliation officer that, as a matter of fact, she had completed her probation.

12. Parties are encouraged to use the conciliation service provided by ACAS and they do so in the expectation that what they say will not be used against them. Clearly there are communications which will lose that protection if they fall within the 'unambiguous impropriety' category but I find that if every comment made to a conciliation officer needs to be fact-checked for fear of it being held against a party when putting their case forward, the efficacy of conciliation will be affected. For that reason, my understanding of the authorities is that the threshold for losing privilege is set high. In my view, this comment does not reach the threshold.

13. The application is refused.

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19 November 2020

Sent to the parties on:

20/11/2020
For the Tribunal Office:

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