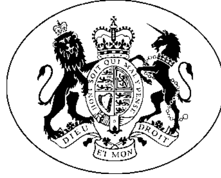
Case Numbers:2201717/2023
2210189/2023
2212727/2023



EMPLOYMENT TRIBUNALS

Claimant: **Ms Katerina Rainwood**

Respondents:
(1) Pemberton Capital Advisers LLP
(2) Pemberton Operational Services UK Ltd
(3) Graeme John Dell
(4) Symon Drake-Brockman
(5) Paul Aldrich

RECORD OF A PRELIMINARY HEARING

Heard at: London Central (initially in public and then in private - by CVP)

On: **15 & 16 November 2023**
Before: **Employment Judge R S Drake** (of the Virtual Region)

Appearances
For the Claimant: In Person
For the Respondent: Rs1,2,4 & 5 – Mr Andrew Smith (of counsel)
R3 – Mr Carl Vincent (Solicitor)

RESERVED JUDGMENT

1. The Third Respondent's ("R3") application to strike out the Claimant's ("C") protected disclosure claims against him succeeds.

2. Of C's protected qualifying disclosure claims (24 as expressed in claim number 2201717/2023 – the "First Claim"), 1 as expressed in claim number 2210189/2023 – the "Second Claim" , and a further 1 as expressed in claim number 2212727/2023 – the "Third Claim") under Part IVA of the Employment Rights Act 1996 as amended ("ERA") (described below as "PD1" to "PD26" inclusive) those numbered in the First claim PDs4, 7, 8, 10 and 12 are by consent dismissed on

withdrawal; Those numbered PDs1-3, 5-6, 9, 11, 13, 15, 17-20, 22 in the first claim and the further PDs, 25-26 raised in Claims 2 and 3, are found to fall within Section 43B(4) ERA and do not constitute qualifying disclosures and thus they attract the statutory exemption from qualification by way of "Legal Professional "Privilege". Accordingly they are struck out. All others not so covered (i.e. PDs 14, 16, 21, 23 and 24 remain for consideration at the Final Hearing.

3. C's application for specific disclosure by way of provision of Further Information pursuant to requests dated 20 July 2023 and 13 October 2023 is dismissed as responses have already been provided by the Rs.1,2,4 and 5 on 14 August 2023, 30 October 2023. And 3 November 2023.

Previous Preliminary Hearings

4. There have been previous Preliminary Hearings before EJ Adkin on 31 May 2023 and EJ Davidson on 24 July 2023. Also, there has been an Interlocutory Order made by EJ Khan on 15 September 2023. I refer to these where necessary below.

5. Claims 2201717/2023 and 2210189/2023 were consolidated for hearing purposes by EJ Davidson on 24 July 2023. Claim number 2212727/2023 (presented on 24 July 2023) is also now consolidated by EJ Khan with these first two claims as of 15 September 2023. The listing for final hearing remains unaffected by this further consolidation. However, the timetable for preparation of the consolidated claims as set by EJ Adkin (31 May 2023) is now varied as set out below.

Claims and Issues

6. The claims are as recorded by EJ Adkin on 31 May 2023.

7. The Issues, as discussed at this and both previous preliminary hearings, are to be canvassed between the parties and an agreed list is to be filed at the Tribunal on or by **15 December 2023** .

References

8. I adopt in these Judgments the simple expedient of referring to the parties or claims as follows:-

   8.1 The Parties – "C" or "R1-R5" as appropriate;

   8.2 The Claims – 2201717/2023 the "First Claim" (et seq mutatis mutandis);

   8.3 The 26 alleged protected disclosures the subject of the First Claim – "PD1-PD26" - and 51 alleged detriments – "D1-51";

   8.4 Documents in the 2 Hearing Bundles – "M or C1-439" as appropriate;

9. The Parties put before me and I therefore considered (where directed to/from) the following:-

   9.1 A Hearing Bundle M1-439 and a Confidential Bundle C1-152;

   9.2 Respective Skeleton Arguments comprising a total of 71 pages between them all; Rs1,2,4 and 5 also produced a 626 page bundle of authorities to which I was directed where necessary, so I considered relevant parts;

   9.3 Witness statements from C and from R3 upon which each were cross examined.

10. In these Reasons, I deal in reverse order with the issues which I was mandated to decide i.e. the Legal Professional Privilege ("LPP") Application by R1,2,4 and 5 and then R3's Strike Out ("SO") Application. I finish with C's Further Information disclosure ("FI") Application but note that I have set out the reasons in breid]f in paragraph 3 above. I have endeavoured to preserve confidentiality by referring to the alleged PDs generically described as opposed to describing the facts relating to them in a way which would breach confidentiality. In this way I have endeavoured to avoid the need to issue separate redacted and unredacted Judgments.

REASONS

The Privilege Application – (heard in private)

11. Before today, C had conceded that PDs 4, 7, 8 and 12 attract LPP and should be dismissed, and then on the day, she made the same concession in relation to PD10. Accordingly they required nothing beyond dismissal on withdrawal by consent. Rs did not challenge certain others as attracting LPP (PDs 14, 16, 21, 23 and 24) so they remain to be the subject of determination by a full panel. All the others were challenged by Rs1,2,4 and 5.

The Relevant Statute Law

12. Section 43B(4) ERA provides as follows:-

    "A disclosure of information in respect of which a claim to <u>legal professional privilege</u> …… could be maintained in legal proceedings is <u>not a qualifying disclosure</u> if it is <u>made by a person to whom the information</u> had been disclosed in the <u>course of obtaining legal advice</u>" (my emphasis added)

Mr Smith advises and I have checked that there is no appellate clarification of this provision specifically, so I am directed to common law principles for elaboration. I am also further directed to learned authorship on relevant sources such as Texts (Lewis, Bower, Fodder & Michell on *Whistleblowing – Law and Practice* – 4th Edn 2022), IDS Handbooks and Briefs, and even Hansard on the debates in the HL on the Public Interest Disclosure Bill which eventually came into being via amendment to ERA as set out above.

The Relevant Common Law

13. A plethora of case law was put before me (for which I am grateful) and I was carefully directed to key parts by Mr Smith and by C herself. I do not quote every single element of every single case to which they directed me but quote the elements I judge to be essential to this Judgment by distilling/condensing them, whilst in so doing, I confirm I have considered all elements to which each party directed me and do not ignore any. I set out the key parts (or derived/inferred principles) now for brevity only.

14 I recognise that the following principles emerge from case law:-

14.1 LPP is a fundamental principle in modern jurisprudence and practice – **R v Derby Magistrates ep B [1996] AC 487** – applied by the CA in **Curless v Shell International Ltd [2020] IRLR 36.**

There is no balance to be made between public interest and LPP as the latter is a matter of public interest per se; This proposition is supported by **Three Rivers DC v Gov of Bank of England [2005] 1 AC 610**

Further, LPP is a fundamental Human Right – **R(Morgan Grenfell) v SCIT [2003] 1 AC 563.**

14.2 Mr Smith refers in his Skeleton to 7 principles of LPP (“the 7 LPP Principles”) which I which I respectfully accept and adopt:

14.2.1 Privilege belongs to the client – which begs the question in respect of the PDs claimed by C in this case, i.e. who is the client?

14.2.2 LPP extends to advice for in house and foreign lawyers;

14.2.3 Communication must be in confidential circumstances for dominant purpose of obtaining legal advice;

14.2.4 LPP applies to communications with the continuum of lawyer/client communications;

14.2.5 LPP extends to later documents evidencing the subject matter of earlier confidential communications;

14.2.6 LPP may be waived but loss of so fundamental a right is carefully controlled;

14.2.7 LPP does not apply when a document/advice in question originated as a step in a criminal or illegal action – the so called “iniquity” exception;

14.3 I accept the argument raised by Mr Smith that the question of whether LPP for the purposes of Section 43B(4) ERA exists, should be assessed as at the time the alleged disclosure was made, not when it is litigated – **Smith v Scapa ET 2400172/2017**, which is cited with authority in the IDS Handbook and by Lewis et al; this is also supporter by the last few words of Section 43B(4) as quoted above;

14.4 I take the Statute to be consistent with the well tried and tested common law principles and does not change them but supports them without limiting their effect. I do not take either source of law as limiting the right of an in house lawyer such as C to make protected qualifying disclosure about anything not covered by LPP of which there can be many given the apparent commercial seniority of a person such as this C in these corporate Rs.

Findings and application of law

So as not to open publicly the content of the alleged PDs, I refer to them by the numbering system referred to above. I have considered documents M20-21, C11-15, C42-45, C64-66, M43, M24-27, C86, C94, M102, M178-179,

15. The PDs challenged by the Rs, i.e. 1,2,3,5,6,9,11, 13, 15, 17, 18, 19, 20, 22, 25 and 26 all refer to (inter alia) matters which on my interpretation of them constitute advice to R1 and R2 of legal advice obtained by C from foreign lawyers (a firm called EHP), advice from C herself to her employers (as clients), information obtained in the course of obtaining C’s advice, and/or communications falling within the so called continuum of privileged communications. In short, on detailed examination and consideration of the evidence before me, I accept Mr Smith’s submissions as to their true nature. I do not accept C’s counter submissions.

16. By way of one example, I refer to PD1 – M20-21 – in which C refers to a communication she sent to one of R1 and R2s officers which included express reference to advice from foreign lawyers. This clearly caught by the second limb of Section 43B(4) ERA and by the first 4 of the 7 LPP Principles set out above in paragraph 14.2. By way of further example I refer to PD2 – M21 – in which C refers to a conversation with R3 which by her own admission concerned external lawyers’ advice and information provided to her by R3 in the cure of obtaining that advice which was for the benefit of the corporate Rs; This is clearly caught again by Section 43B94) and by the first five of the 7 LPP Principles above.

17 I have considered C's Statement, her Skeleton, and her Submissions in depth, They express her stream of consciousness view of the chronology of events as she saw them and become assertions of what she takes to be facts, I understand this but this is no substitute for argument as to why the subject matters of her PDs, which prima facie fall within LPP, do not do so on proper interpretation. I recognise C's qualification and learning (she is an admitted solicitor) but do not agree her interpretation of the law of LPP. As just one example, she refers at paragraph 26 of her skeleton to a passage from the High court's decision in **ENRC [2017]** in which it was held that a solicitor simply reporting on facts and findings to a Board without legal advice, then the minutes thereof do not constitute privileged material. Quite clearly in this case, a distinction exists on her facts as pleaded by her since all of the challenged PDs go beyond merely reporting or minuting facts of discussions but refer to actual taking, commissioning, and reporting of legal advice and thus must attract LPP by definition. The distinction she urges me to accept is of no material weight in my judgment and is not in nay way persuasive. The same applies to her counter assertions in relation to the other challenged PDs mutatis mutandis.

18. I do not propose to go through every single challenged PD or its counter arguments in this Judgment, but I confirm I have done so in my deliberations and make the same findings in relation to those challenged by the Rs mutatis mutandis. Those not challenged (which I have also carefully considered) i.e. PDs14, 16, 21, 23 and 24 remain and I agree with both sides that they do not attract LPP, so are not exempt form qualification and thereby may be claimed by C as protected if evidence supports at final hearing.

19. It follows that the Detriments pleaded by C (there are 51) alleged to be because of the making of PDs which are attributable to the PDs challenged by Rs 1,2 4 and 5 and which I have now struck out, must also be struck out insofar as they are attributable to R1,2,4 and 5 collectively or severally.

R3's Strike Out Application – (heard in public)

20. This application focusses not so much on the LPP arguments ventilated and judged above, but upon the allegations of detriment asserted against R3 in the Second Claim. It is common ground that of the 51 whistleblowing detriments pleaded by C throughout the three Claims, there are only 23 pleaded (specifically in the second Claim) against R3, but that by concession C is withdrawing such allegations as would leave extant only what are described as Detriments 21, 22, 24, 28, and 31.

The Relevant Statute Law

21. Section 47B(1A) ERA provides –

"A worker ("W") has the right not to be subjected to any detriment by any act or any deliberate failure to act done –

(a) By another worker of WS employer in the course of that other workers employment – or –

(b) by an agent of WS employer with the employers or authority –

on the ground that W has made a protected disclosure"

22. For the sake of completeness, I set out below the basis upon which I was to consider this application under Rule 37(1) of Schedule 1 to the Employment Tribunals (Constitution & Rules) Regulations 2013: -

> "*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 … <u>has no reasonable prospect</u> of success - (my emphasis) ;*
> (b) *… (c) … (d) … (*not relevant)".

The Relevant Common Law

23. Neither side referred me to it, but I took account of the Court of Appeal's finding in **<u>Swain v Hillman [2001] 1 All ER 91</u>** in which it was held that a Court (or Tribunal in this case) must consider whether a party " … has a <u>realistic</u> as opposed to <u>fanciful</u> prospect of success …" in the context of assertions, as in this case, that C's case has no, as opposed to little prospect of success.

24. **<u>A v B (and another) [2011] ICR D9, CA</u>** - In this case the Court of Appeal held that a Tribunal was wrong to find a claim had no reasonable prospect of success basing this conclusion on a finding that on proper analysis it had "more than a fanciful prospect" of success. From this I derive a distinction between "no prospect" and no more than a "fanciful prospect." .

25. **<u>Anyanwu (and another) v South Bank Students' Union [2001] ICR 391</u>**. - The House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact sensitive and usually require full examination to make a proper determination. This was followed by the Court of Appeal's decision in **<u>Community Law Clinic Solicitors v Methuen [2012] EWCA Civ 571</u>**, in which it was held that and employee's claim for age discrimination should not be struck out because the case required further examination of the.

26. In **<u>Ezsias v North Glamorgan NHS Trust [2007] ICR 1126</u>**, the Court of Appeal again held that it will only be in an exceptional case that a claim will be struck out as having no reasonable prospect of success when the central facts are in dispute.

27. I considered the balance of prejudice facing C if I struck out only parts of her claims of detriment levelled at R3 which I concluded did not leave her with no further way of arguing here hers views as to what has happened or remedies, or to R3 if the challenged detriments were not struck out causing him to have to devote considerable time and energy to meeting claims which on what I have seen and heard today, and also based on C's admissions, have no prospect of success.

Findings and Application of Law

28. In each of the allegations of detriment, I find it hard, not to say impossible, to find on the pleadings that the allege detriments are said to have been perpetrated by R3 specifically. I accept Mr Vincent's submissions of this point. I do not find C's counter arguments persuasive. Her Skeleton is largely an exposition on the law and is limited as to references to the case as pleaded and relies heavily on generalised assertions against the corporate Rs and others, but significantly not against R3 specifically.

29 In this case there is clearly on my examination no conflict of pleading on the key points such as would necessitate ventilation of evidence necessary to make factual findings on contested allegations at a full hearing. On C's own pleadings, there are no such factual disputes to be determined one way or another at a full hearing. This meets the **Swain** point.

30. If a point is clear cut to show that a case as pleaded is such that R3 is not in practical relationship with C during the time a detriment is alleged, then C's claim of detriment allegedly perpetrated by R3 MUST be doomed to fail. I conclude that this is a clear example of no prospect as opposed to no more than a fanciful prospect of success. This meets the **AvB** point.

31. facts so as to properly consider whether age discrimination could be inferred. C's case before me today as currently pleaded is easily distinguishable from **Methuen** because though C has pleaded acts of detriment clearly, in relation to those against R3 which he challenges, she has not pleaded sufficiently any form of argument to show that he perpetrated them. On her on pleading (M99), C acknowledges that R3 had no involvement with determination of the grievance she raised about him. This meets the points elaborated in both the cited cases.

32. In the current case, C's claim as pleaded against R3 in respect of the challenged detriments and as responded to does not show that central facts are in dispute. This meets the **Ezsias** point.

33. Limited to the challenged detriment claims which I describe as D21, D22, D24, D28, D31, such claims are Struck Out as having no reasonable prospect of success. C's arguments against R3 sound principally under the other heads of claim not the whistleblowing detriment claims. She is not deprived by this application or my judgment therein of the right to pursue those other claims where

she does cite R3 as an individual party. Accordingly, R3's application, limited though it is, succeeds in full.

EJ R S Drake

Signed 30 November 2023

Sent to the parties on:

30/11/2023

For the Tribunal Office:

……..……………………..

Note
The judgment having been reserved has not been given orally at the hearing. Accordingly these written reasons are provided without need for a request.

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