Case No: 2402681/2017

EMPLOYMENT TRIBUNALS

Claimant: Miss S T Channer

Respondent: Brennan Atkinson International Limited

Heard at: Manchester **On:** 23 October 2017

Before: Employment Judge Wardle

Representation
Claimant: Miss H Gardiner - Counsel
Respondent: Mr A Serr - Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that (a) the emails relied upon by the claimant in her claim form are admissible items of evidence (b) the respondent is considered to be vicariously liable for the acts of alleged discrimination perpetrated by its agent Martin Abramson (c) a deposit order as a condition of the claimant proceeding with her discrimination claims is not appropriate and (d) a deposit order as a condition of the claimant proceeding with her unfair constructive dismissal complaint is not appropriate.

REASONS

1. This matter was listed for a Preliminary Hearing on the respondent's application to determine four issues.

2. These were (a) in relation to the emails relied upon by the claimant in her claim form from Martin Abramson, whether the same are inadmissible before the Tribunal, having been obtained in breach of Mr Abramson's right to privacy under Article 8 of the ECHR and/or the Data Protection Act (b) whether, in any event, the respondent is vicariously liable for any acts of alleged discrimination perpetrated by Martin Abramson, under the provisions of section 109 of the Equality Act 2010 (c) in relation to (b) above, in the event that the Tribunal is not satisfied that it should strike out the claimant's claim in relation to Martin Abramson as a person for whom

the respondent is vicariously liable, but considers that such contention has little reasonable prospect of success, whether a deposit order should be made in relation to such a contention and (d) whether a deposit order should be made in respect of the claimant's complaint of unfair dismissal in any event.

3. In addressing these issues the Tribunal heard evidence from the claimant and on behalf of the respondent from Mr Simon Fine, Managing Director. Each of the witnesses gave their evidence by written statements, which were supplemented by oral responses to questions posed. It had also before it a bundle of documents, skeleton arguments and a number of authorities.

4. In circumstances where the hearing did not finish until late afternoon leaving the Tribunal with insufficient time to address what were less than straightforward issues the parties were informed that the Tribunal would be reserving its judgment. It has since been able to complete its consideration of the issues requiring determination having regard to the evidence, the submissions and the applicable law in order to reach conclusions. In so doing it found the material facts to be as follows.

Facts

5. The claimant was employed by the respondent as a Senior Account Manager from 2005 until her resignation on 19 April 2017.

6. In or about December 2016 three emails came into her possession at pages 75, 77 and 79 of the bundle sent by Martin Abramson to Simon Fine. In the first of these sent on 9 December 2016 timed at 17.05 he wrote ' Sales is our biggest problem I would be looking to replace Tracey (the claimant) dom can do her job send out em and wait for replies Get someone hungry redistribute accounts between Elliot dom and new person There must be an ELI Portnoy character in the community ask about.' After then discussing sales in the email he concluded by saying 'Come on Simon so when we speak next Friday you have done it, you will see your confidence levels will rocket'.

7. In the second of the emails sent on 15 December 2016 timed at 21.03 with the subject 'Tracy', which was copied to Angela Chaloner, who was employed as Trading Director Mr Abramson wrote 'Simon I think you should make a brave decision re Tracey she is lazy only working three days a week.... I really feel we could split her accounts up between Elliot and dom and look for someone you (sic) is hungry it is time to make her redundant'.

8. In the third of the emails also sent on 15 December 2016 timed at 21.07 with the subject 'Timing on Tracy', which too was copied to Ms Chaloner, he wrote ' The time to do it is now don't let her start in the new year I don't think the redundancy costs will be that high. Another thing she takes far to (sic) much holiday'.

9. The emails, which were sent in the course of the respondent's business as accepted by Mr Fine were also sent through Mr Abramson's company

email address (ma@brennanatkinson.co.il) to the company email addresses of Mr Fine and Ms Chaloner. Their timing was also accepted by Mr Fine as not to have been unusual as it was not uncommon of Mr Abramson to send work related emails outside of normal working hours. Their sender Mr Abramson, who resides in Israel, is Mr Fine's father-in-law and the founder of the respondent company. He is a shareholder who holds voting shares with the respondent business. He also is a major investor in the business and has outstanding loans on the respondent business. It also emerged during Mr Fine's cross-examination that Mr Abramson received an income from an overseas company previously called Benjamin David Holdings Limited and now DHB Consulting Limited that raised monthly invoices against the business. The invoices are for set monthly amounts of £16,000 and $20,000 and expenses incurred by him in respect of buying trips on behalf of the business. The contractual arrangements with this overseas company for the provision of Mr Abramson's services as a consultant have been in place since 2009 when the respondent company was incorporated. In regard to this consultancy which Mr Abramson provided it was Mr Fine's evidence that it was on the buying side and that since early 2016 he has gradually become less involved in day to day matters of the business.

10. However, he accepted in cross-examination that Mr Abramson's consent was still needed by employees before they could purchase stock over a certain value and that he had been in regular contact with employees from 2014 until 2016 when he stepped back. There were however several instances in the bundle of him continuing to get involved in day to day matters beyond the early part of 2016. For example in August 2016 he was involved in discussions with the claimant regarding issues she had with her holiday entitlement and bonus and made an offer to her in the course of negotiations. Further in November 2016 he requested the claimant to provide him with a schedule of her customer appointments for the next two weeks and separately suggested to her that the Co-op would be a good buyer of National Trust stock. There was an instance also of his dictating specific times when presentations would be made to customers by the business. Whilst in the December 2016 emails he wanted to see the agenda for a planned strategy meeting to see if he could suggest any additions and set out a series of steps to be taken in respect of the business going forward, which included staffing, stock levels, order cancellations, customers and sales. These interventions suggested that Mr Abramson's influence continued beyond the early part of 2016 and extended beyond buying products for the business.

11. The claimant was on holiday in Thailand at the time that the emails were sent by Mr Abramson not returning to the country until 28 December 2016. She received them as screenshots via the mobile messaging service 'Whatsapp' on her work supplied iphone. Whilst it was her case that she received them anonymously she accepted that the screenshots had by way of a signature the mobile telephone number of the sender with them but gave evidence that she did not recognise the number and that she did not seek to find out who sent them to her explaining that her immediate reaction upon receipt was one of shock such that she did not initially divulge them to her partner and that she then effectively dismissed them until she got home when she discussed matters with her family and was

recommended to seek legal advice which she did at the earliest opportunity leaving matters in her solicitor's hands thereafter. She is no longer in possession of the phone having returned it to the respondent in April /May 2017.

12. On her return from holiday having taken legal advice the claimant raised a grievance at page 80 with the respondent on 6 January 2017 stating that it had come to her attention that the company was preparing to dismiss and replace her under the guise of a 'redundancy', which of course would be an unfair dismissal as her role was not redundant at all adding that now that she was aware of this plan that she believed her employment relationship to be close to untenable. She also advised that it had come to her attention that her replacement was to be from the Jewish community which led her to believe that as she was not Jewish she was being dismissed and replaced for a directly racially discriminatory reason and that she had been referred to as lazy as she only worked part-time and that she took too many holidays apparently for which reasons she was to be made redundant which was also discriminatory on the grounds of her part-time status. By the same letter she enclosed a Data Subject Access Request which resulted in the emails being provided to the claimant on 24 February 2017 as part of the response to her request.

13. Protracted correspondence subsequently took place between the parties' legal representatives in relation to the grievance with a principal issue for the claimant being that Direct Law & Personnel (DLP) the respondent's representatives to whom the grievance had been referred for adjudication were conflicted which resulted in the grievance being heard in her absence by them and which saw them delivering an outcome on 6 March 2017, having considered the content of the emails revealed by the claimant's data subject access request, advising that her grievance was not upheld.

14. This decision was appealed by the claimant by a letter dated 22 March 2017 following which in the light of issues arising as to the conduct of the appeal and comments made by DLP to and in respect of the claimant's solicitor she resigned with effect from 19 April 2017.

15. Her claim form was presented on 5 May 2017 by which she made complaints of unfair constructive dismissal, belief discrimination contrary to the Equality Act 2010 and less favourable treatment contrary to the Part-Time Workers Regulations 2000.

Law

16. Dealing with the first issue as to whether the emails are inadmissible before the tribunal both Miss Gardiner and Mr Serr in their skeleton arguments pointed to the relevant law as being found in the Employment Tribunals Rules of Procedure 2013, the Data Protection Act 1998 (DPA) and the Human Rights Act 1998 (HRA). However Mr Serr also sought to rely on the Computer Misuse Act 1990 and the Regulation of Investigatory Powers Act 2000 (RIPA).

17. Rule 41 of the Rules Of Procedure provides that 'the Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective.... The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.'

18. Section 1(1) DPA defines "personal data" as 'data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual'.

19. Section 55(1) DPA provides that 'a person must not knowingly or recklessly without the consent of the data controller - (a) obtain or disclose personal data or the information contained in personal data, or (b) procure the disclosure to another person of the information contained in personal data'. Section 55(3) provides that a person who contravenes sub-section (1) is guilty of an offence.

20. Article 8 of the Convention's Rights and Freedoms at Part 1 of Schedule 1 of HRA provides that (1) Everyone has the right to respect for his private and family life, his home and his correspondence and (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interest of security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health and morals or for the protection of the rights and freedoms of others.

21. Section 1 of the Computer Misuse Act 1990 provides at section 1(1) that 'a person is guilty of an offence if - (a) he causes a computer to perform any function with intent to secure access to any program or data held in any computer, or to enable any such access to be secured (b) the access he intends to secure, or to enable to be secured, is unauthorised and (c) he knows at the time when he causes the computer to perform the function that that is the case. At sub-section (2) it is stated that 'the intent a person has to have to commit an offence under this section need not be directed at - (a) any particular program or data (b) a program or data of any particular kind or (c) a program or data held in any particular computer'.

22. Section 1(1)(b) of RIPA states that 'it shall be an offence for a person intentionally and without lawful authority to intercept, at any place in the United Kingdom, any communication in the course of its transmission by means of a public telecommunications system'.

Conclusions

23. The submissions of Mr Serr in relation to the admissibility of these emails were in summary that the Tribunal has the power to exclude even arguably relevant evidence that has been obtained unlawfully in breach of the HRA or some other statutory provision, which was he suggested

illustrated to some degree by the covert recording cases of Chairman and Governors of Amwell View School v Dogherty {2007] IRLR 198 and Williamson v Chief Constable of Greater Manchester Police UKEAT/0346/09, in which evidence obtained by a covert recording of panels' private deliberations during internal hearings was excluded in both cases. He submitted that these emails were obtained in breach of the DPA, the Computer Misuse Act 1990 and possibly RIPA and that to admit them into evidence would be a breach of the HRA arguing that Article 8 was engaged here as this was private correspondence sent at 9.00 p.m. in which a private view was expressed by Mr Abramson to his son in law about the general competency of a member of staff.

24. Miss Gardiner in her submissions disputed that Article 8 was engaged here as the emails were not private but had been sent in the course of business pointing to their contents which concerned the conduct of the respondent's business going forward; the fact that the respondent's Trading Director was copied into two of them; the lack of any personal or private element to them and the fact that they were sent from Mr Abramson's Brennan Atkinson's email address to Mr Fine's Brennan Atkinson email address. She submitted that it would be contrary to the overriding objective to deal with cases fairly and justly to exclude the emails pointing to the facts that they had been disclosed by the respondent in response to the claimant's subject access request; they formed the basis of her grievance; they were considered in detail during the grievance, with no objection to the legality or otherwise of them being raised; they were relevant evidence in the proceedings; their exclusion would prevent the Tribunal from properly examining her claims under the Equality Act and the Part Time Workers Regulations and would artificially limit the examination of her constructive dismissal claim and the parties would not be on an equal footing.

25. In determining this issue of admissibility the Tribunal found itself preferring the submissions of Miss Gardiner. It considered that the covert recording cases relied upon by Mr Serr were distinguishable from the facts in this case where the claimant had not done anything secretly or underhand in obtaining this evidence in the form of these emails accepting that they had been received unsolicited and that whilst their sender may have contravened the Data Protection Act 1998 and/or the Computer Misuse Act 1990 in accessing Mr Fine's or Ms Chaloner's computer to have obtained the emails such contravention was not something with which the claimant was complicit. And whilst she may have been able to have identified the source of the screenshots to her from their signature in the form of an accompanying mobile number which she says that she did not recognise the Tribunal could appreciate that such would not have been a priority for her given the threat to her continued employment that the emails signified. For such reasons and noting also that if paragraph 13 of her grounds of complaint is to be believed that the evidence relied upon by her in respect of her grievance, which is taken to be the emails, was made known to Mr Isaac Ginsbury, who had at that time been appointed to hear the grievance, prior to 24 January it did not accept the respondent's contention that the claimant was not coming to these proceedings with clean hands.

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26. Turning to the alleged breach of Mr Abramson's and Mr Fine's right to privacy as provided for by Article 8 the Tribunal considered notwithstanding that the correspondence in question was not personal or private in nature and was clearly sent in the course of business as accepted by Mr Fine that their right to respect for their correspondence had been infringed by the emails' copying and provision to the claimant.

27. However the Tribunal took the view that this right had to be weighed in the balance against the claimant's right to a fair trial as given by Article 6, which would not be achieved if the contents of that correspondence was excluded from evidence. Having carried out that balancing exercise it concluded greater weight should be given to the claimant's right and that the overriding objective to hear cases fairly and justly would be best served by these emails being admitted into evidence in respect of these complaints.

28. Turning to the second issue as to whether in any event the respondent is vicariously liable for any acts of alleged discrimination perpetrated by Mr Abramson, under the provisions of section 109 of the Equality Act 2010 the Tribunal noted these to be as follows - (1) anything done by a person (A) in the course of A's employment must be treated as also done by the employer (2) anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal (3) it does not matter whether that thing is done with the employer's or principal's knowledge or approval.

29. In her skeleton argument Miss Gardiner had sought to argue that Mr Abramson fell within section 109 either as an employee or as an agent. However in the light of the evidence which emerged of Mr Abramson's contract for services as a consultant for the respondent business for a very significant consideration she abandoned her argument that he should be regarded as an employee and focussed instead on his role as the respondent's agent.

30. In this regard she submitted that he was an agent in a very general sense who was involved in all aspects of the respondent business pointing to his trips on its behalf to make purchases; his involvement in sales and in the negotiation of terms of employment as happened with the claimant in August 2016 and his giving directions and instructions in relation to the business moving forward over a range of matters as illustrated by his emails to Mr Fine in December 2016.

31. Mr Serr in answer submitted that whilst it was accepted that Mr Abramson does act in the capacity of an agent for the respondent that agency was to do with buying and sales and that there was a difference between hiring and firing and strategising sales. He further submitted that there was no scope to infer that he was an agent for matters of general HR suggesting that this was supported by the emails themselves where he asks Mr Fine to make the decision about terminating the claimant's employment.

32. The Tribunal again preferred the submissions of Miss Gardiner as the evidence showed that Mr Abramson's agency was not confined to buying and selling but extended across all aspects of the respondent business

including staffing matters such as retention and terms and conditions and that his influence was considerable at all levels of the organisation. It therefore concluded that his urgings to Mr Fine to dispense with the claimant's services in these emails were made in the course of his authorised agency and that pursuant to section 109(2) of the Equality Act 2010 the respondent as his principal is vicariously liable for these acts of alleged discrimination.

33. The Tribunal next considered the respondent's application that in the event that it was not satisfied that it should strike out the claimant's claim in relation to Mr Abramson as a person for whom the respondent is vicariously liable, but considers that such a contention has little reasonable prospect of success, whether a deposit order should be made in relation to such contention.

34. The ordering of a claimant to pay a deposit as a condition of being permitted to continue to take part in the proceedings has only a slightly lower threshold than that for striking out in that the criterion for ordering a deposit is where it is considered that the contentions put forward by any party in relation to a matter to be determined by a tribunal have little reasonable prospect of success. Essentially therefore the power given under Rule 39 of the Employment Tribunal Rules of Procedure is designed to deal with cases, which are perceived as weak but which would not necessarily be described as having no prospect of success. The Tribunal did not consider that these complaints of belief discrimination and less favourable treatment as a part-time worker predicated on these emails were, having regard to the views expressed by Mr Abramson, appropriate ones for ordering that the claimant should pay a deposit as a condition for continuing with them.

35. The Tribunal finally considered the respondent's application as to whether a deposit should be made in respect of the claimant's complaint of unfair dismissal and again found this complaint and the contentions behind it was not an appropriate one for the ordering of a deposit as a condition of continuing with it having regard to the impact of the views expressed by Mr Abramson on the employment relationship between the claimant and the respondent and the issues raised in relation to the handling of her grievance.

Employment Judge Wardle

Date 15 November 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

22 November 2017
FOR EMPLOYMENT TRIBUNALS