Appeal No. UKEAT/0129/19/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 30 August 2019
Judgment handed down 9 September 2019

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

MS TRACEY KASONGO — APPELLANT

HUMANSCALE UK LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL GODFREY (Representative) Camden Community Law Centre 2 Prince of Wales Road Kentish Town London NW5 3LQ
For the Respondent	MR CHRISTOPHER EDWARDS (of Counsel) Instructed by: iGlobal Law 71 Queen Victoria Street London EC4V 4AY

SUMMARY

PRACTICE AND PROCEDURE – Disclosure

PRACTICE AND PROCEDURE – Admissibility of evidence

The Respondent before the Tribunal had disclosed a draft dismissal letter prepared by its solicitors from which it had redacted the solicitor's comments and notes. It was common ground that the draft letter was not legally privileged, but that the redacted parts were protected by legal advice privilege within the umbrella definition of legal professional privilege. The issue was whether the Respondent had waived privilege in the redacted parts of that letter by having disclosed two earlier documents. The issue was whether the Tribunal had wrongly found that one of the earlier documents was not protected by legal advice privilege and if it had erred in not dealing with the other document.

Held: The Tribunal had erred in failing to address or rule on the document it had not mentioned, and it was perverse to find the other document was not legally privileged when it was made for the purpose of obtaining or giving legal advice. The parties agreed that it was for this Tribunal to decide whether the Respondent was permitted to cherry pick and if it could maintain, or had waived, privilege in relation to the redacted parts of the draft dismissal letter by choosing to disclose other material that they were entitled to withhold as confidential.

It was further held that all three documents were part of the same transaction of providing legal advice about the dismissal of the Claimant. Given the nature and purpose of the disclosure, fairness required that the redacted part of the letter concerning the reason for the Claimant's dismissal also be disclosed, since it would be unfair to allow the Respondent who had waived privilege in relation to the other two documents not to reveal those redacted parts of the dismissal letter which related to the reason for dismissal. It would be impermissible cherry picking as the cliché goes. The redactions that did not concern the reason for dismissal, such as references to holiday pay entitlement and post-employment restrictive covenants could remain

redacted, if the Respondent so desired. But the Respondent consented to removing those redactions for consistency and transparency and would excise the redactions for the trial bundle.

HER HONOUR JUDGE STACEY

1. This is an appeal from a decision of EJ Goodman made at a closed preliminary hearing in the London Central region of Employment Tribunals on 4 January 2019, with reasons sent to the parties on 25 February 2019. The Employment Judge refused to allow the redacted parts of a draft letter dismissing the Claimant to be adduced as evidence in the case. The issue concerns the Tribunal's approach to legal professional privilege.

2. The Appellant is the Claimant before the Tribunal and Humanscale UK Ltd is the Respondent and I shall continue to refer to the parties by reference to their status below.

3. The Claimant was employed by the Respondent manufacturer and vendor of ergonomic office furniture as a marketing executive and was dismissed on 15 February 2018 after 11 months service. In summary, her case is that she informed her manager that she was, or might be, pregnant on 30 January 2018 and that the effective cause of her dismissal and other unfavourable treatment was her pregnancy or the prospect of her taking maternity leave. She brought claims under s99 **Employment Rights Act 1996** (automatically unfair dismissal for family reasons) and s18 **Equality Act 2010** (pregnancy or maternity discrimination). The Respondent defends the claim on grounds that it had no idea that she was or might be pregnant and in any event her dismissal and other treatment complained of was entirely due to her poor performance, work attitude, attendance and lateness issues which had been ongoing throughout her employment.

4. At the full merits hearing of the case which will take place on 17-18 September 2019 and at the risk of over simplification there will be three principal factual issues for the Tribunal to determine in relation to the claim: (1) Did the Respondent know that the Claimant was, or might

be pregnant? If so, when did they know and who knew? (2) When did they decide to dismiss the Claimant/subject the Claimant to the other detrimental treatment complained of and (3) what was the reason for her dismissal/other treatment complained of?

5. As part of the standard disclosure exercise ordered by the Tribunal at a closed preliminary hearing on 27 September 2018, the Respondent disclosed a contemporaneous note prepared by Karen McGrath, the Respondent's Senior HR Manager of a telephone call she had had with their external solicitor, Chris Williams at 9am on 25 September 2018. Ms McGrath's evidence to the tribunal as set out in her witness statement is that on 19 January 2018 the Claimant's managers considered that they wanted to dismiss the Claimant, so Ms McGrath spoke to Mr Williams "to get advice on the termination process." Her hand written notes set out the advice received about the lack of protection from unfair dismissal given the Claimant's length of service in UK law, that pay in lieu of notice could be given, and "Potentially looking at risk – equality (on grounds of race)", and there is a mention of ACAS early conciliation and that claims take 4-5 months to come through.

6. Later that day, at 12:11, Ms McGrath emailed the Respondent's in-house Associate General Counsel in New York, Anna Volftsun, copied to two other managers, explaining they "would like to terminate an employee asap based on behaviour (issues with tardiness, attendance and quality of work)" and she summarised the legal advice received from Mr Williams that there was no risk of an unfair dismissal claim given her length of service, but "there may be a potential equality case based on her ethnic background" and she asked for Ms Volftsun's thoughts when convenient. That email was also disclosed by the Respondent as part of the routine disclosure exercise. One can see why – they appear to corroborate the account that dismissal of the Claimant

on performance and conduct grounds was already in hand, before the date the Claimant states she intimated that she might be pregnant.

7. The Respondent also disclosed a redacted draft dismissal letter dated 2 February 2018 prepared by the Respondent's lawyers. The Claimant had somehow found it possible to read the redacted words in the letter and wanted to rely on them at the forthcoming hearing. The Respondent objected, so the Claimant applied to the Tribunal and her application was duly heard by EJ Goodman on 4 January 2019. The application dealt with a number of other issues which are not relevant for the purposes of this appeal, but it is noteworthy that the disclosure point was just one of a number of matters that the Tribunal had to deal with at that hearing.

8. In short the Tribunal decided (see paragraphs 22-31) that:

a. The redacted part of the 2 February draft dismissal letter was covered by legal professional privilege;

b. It had been inadvertently disclosed in that it had not been intended that the Claimant would be able to read the redacted words;

c. It would have been obvious to her that she was not intended to read the redacted words;

d. Ms McGrath's email of 25 January 2018 to the Respondent in-house counsel did not attract legal professional privilege. The Tribunal does not appear to have considered Ms McGrath's note of Mr Williams' legal advice received earlier on 25 January 2018 (although it was common ground that it was before it);

e. There had therefore been no cherry picking by the Respondent's lawyers and they had not selectively disclosed and waived privilege in some, but not all of the documents, since only the redacted part of the 2 February 2018 letter was privileged; and

f. The Claimant could not rely on the redacted parts of the letter at the forthcoming hearing.

9. Points (d), (e) and (f) are the subject of this appeal. At the preliminary hearing the Respondent had been concerned about how the Claimant had managed to reveal the redacted part of the letter and was concerned that it had been achieved by underhand or even fraudulent means. The Tribunal did not make a finding as to whether the Claimant had used specialist software or if she had inadvertently stumbled across it and it had just happened when she cut and paste the document. The Tribunal merely notes that "she had found it possible to read the redacted words." The Claimant sensibly does not seek to pursue an inadvertent waiver point.

10. At this tribunal the appeal was sifted straight to a full hearing and permission given by HHJ Auerbach on 1 May 2019 on grounds that the Tribunal's judgment that the redacted part of the 2 February 2018 letter could not be adduced as evidence at the forthcoming hearing was either perverse or amounted to an error of law.

11. It is, as Mr Edwards in his helpful and comprehensive submissions sets out, trite law that communications passing between a party and his or her legal advisers are privileged, provided that they are confidential and were made for the purposes of obtaining or giving legal advice (legal advice privilege). Such communications encompass, but are not limited to, communications made with reference to litigation that is pending or contemplated. The question of litigation privilege does not arise on the facts in this case. Legal advice privilege extends to advice as to what should or should not prudently and sensibly be done in a "relevant legal context" **Three Rivers DC v Bank of England** [2005] I AC 610 HL) see in particular Lord Scott of Foscote at 38:

> **"In cases of doubt the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law. If it does not, then, in my opinion, legal advice privilege would not apply. If it does so relate then, in my opinion, the judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege in our law. Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply? The criterion must, in my opinion, be an objective one.**

12. Legally privileged advice does not lose its privileged status simply because it had been communicated by the recipient of the advice to relevant staff within the same organisation, even where the disclosure evidenced, paraphrased or revealed the substance of legal advice instead of communicating the whole of that advice **USP Strategies PLC & ors v London General Holdings Limited** [2004] EWHC 373).

13. Elias LJ whilst President of this Tribunal helpfully summarised the earlier authorities in **Brennan v Sunderland City Council** [2008] ICR 479 and the correct approach to considering whether privilege had been waived. There are two related questions: the first is the nature of what has been revealed: is it the substance, the gist, content or merely the effect of the advice? The second is the circumstances in which it is revealed: has it simply been referred to, used, deployed or relied upon in order to advance the party's case?

14. In the course of argument, Mr Edwards sensibly conceded that Ms McGrath's note of her conversation with Mr Williams on 25 January 2018 contained Mr Williams' legal advice about the Respondent's rights and liabilities under private law towards the Claimant in the context of her dismissal, and that it was covered by legal advice privilege. He further sensibly conceded that the onward transmission of that advice to Ms Vofltsun in Ms McGrath's email three hours later was also covered by legal advice privilege. How could it not be? In answer to the first of the questions as formulated by Elias J (as he then was) the substance, gist and content of the legal advice has been disclosed which goes directly to the issue of the reason for the Claimant's

dismissal, and also the Respondent's state of knowledge (or lack of it) as to whether she might be pregnant as at 25 January 2018. In answer to the second question it has been deployed and referred to in Ms McGrath's evidence to advance the Respondent's case that they did not know that she might be pregnant and that her dismissal was for performance and conduct issues, and that the risk of a possible claim for pregnancy discrimination is not at all on their radar in the confidential discussions Ms McGrath has with the Respondent's solicitors. The Tribunal's conclusion that the email was not legally privileged and its failure to reach a decision on the note, clearly amounts to an error of law. Both parties agreed that the correct course was for this tribunal to exercise its powers under s35(1)(a) **Employment Tribunals Act 1996** to substitute the erroneous conclusion.

15. Since both the note and email of 25 January 2018 are legally privileged, and the Respondent chose to disclose them in its list of documents to the Claimant, it follows that they have waived privilege in respect of them. But where then does that leave the redacted parts of the 2 February 2018 letter? As per Lord Bigham CJ in **Paragon Finance plc v Freshfields** [1999] 1 WLR 1183 1188C-D:

> **"A client expressly waives his legal professional privilege when he elects to disclose communications which the privilege would entitle him not to disclose…. While there is no rule that a party who waives privilege in relation to one communication is taken to waive privilege in relation to all, a party may not waive privilege in such a partial and selective manner that unfairness or misunderstanding may result".**

16. The practice of selective waiver of privilege that was unfair or risked misunderstanding is often referred to as "cherry-picking" as useful shorthand, meaning choosing only the best fruit and leaving the less tasty, unripe or even bad ones behind. It has been considered in a number of cases, and although the precise formulation of the definition in each of the cases has been articulated in a number of different ways, the core features remain constant: firstly, the use of legally privileged material in a selective manner, and secondly to obtain a forensic advantage, a

risk of unfairness or misunderstanding, that can arise from the Court or Tribunal having only a partial view of the privileged material.

17. In this case the Claimant has seen the redacted material in the draft letter. After the explanation for the dismissal, the lawyer has written in bold italics *"[Tamsin [the Claimant's line manager] – please double check I have this correct factually and that you are not uncomfortable with us saying any of this. The idea is to do enough to show we've not dismissed her for any discriminatory reason.]"*. There are three further redactions that do not relate to the Claimant's dismissal and do not form part of the issues before the tribunal. They relate to the calculation of any outstanding holiday pay entitlement and post-employment restrictive covenants. Since the Respondent agreed that if they would be required to include an unredacted copy of the letter insofar as it related to the reason for the Claimant's dismissal, they would remove all the redactions, I shall not overly concern myself with those.

18. Mr Edwards effectively conceded that given the importance in the case of the Respondent's reason for dismissing the Claimant, the redaction set out above, could present a partial or misleading picture in light of the 25 January 2018 documents and that on reflection, absent any other arguments, it should properly be before the Tribunal.

19. But he relied instead on a different argument: that the draft dismissal letter was not part of the same transaction as the documents of 25 January 2018. He relied on Mann J's judgment in **Dore and ors v Leicestershire County Council and another** [2010] EWHC 34 (Ch) and **Fulham Leisure Holdings Ltd v Nicholson Graham Jones** [2006] EWHC 158, in which he held that waiver only applied to the "transaction" in question, which might go beyond the actual

document (or privileged information) disclosed. He suggested the following approach to decide if the disclosure forms part of a transaction or not:

> **"(i). One should identify the "transaction" in respect of which the disclosure has been made.**
>
> **(ii). That transaction may be identifiable simply from the nature of the disclosure made – for example, advice given by counsel on a single occasion.**
>
> **(iii). However, it may be apparent from that material, or from other available material, that the transaction is wider than that which is immediately apparent. If it does, then the whole of the wider transaction must be disclosed.**
>
> **(iv). When that has been done, further disclosure will be necessary if that is necessary in order to avoid unfairness or misunderstanding of what has been disclosed."**

20. Mr Edwards submitted that there was a clear distinction and difference between the legal advice given on 25 January and the advice on the wording of the draft dismissal letter of 2 February 2018, and they were separate transactions. The redacted letter of 2 February 2018 was therefore unaffected by the waivers of privilege in the 25 January 2018 documents.

21. However, I agree with Mr Godfrey's submission that it is a wholly artificial distinction. They are all part of the same transaction which is the giving of the legal advice about the dismissal of the Claimant. The 6 day gap between the legal advice and the draft letter does not mean it is a different transaction. They are part of the same continuum and transaction of advising on the dismissal of the Claimant and possible legal implications. The Respondent, having chosen to waive privilege in respect of the 25 January note and email, is precluded from withholding the inextricably linked redactions to the draft dismissal letter containing the lawyer's comments concerning the dismissal. The other redactions are not relevant, but since the Respondent has agreed to include them for consistency and transparency I need say no more about them.

22. The parties both agreed that in this aspect too I should exercise the powers of the Tribunal pursuant to s35(1)(a) **Employment Tribunals Act**. I agree that it is not a matter that should be remitted back to the Tribunal for two reasons. Firstly because limb (b) of **Jafri v Lincoln College**

[2014] EWCA Civ 449 para 21 was satisfied: without the error by the Tribunal the result would have been different, and this Tribunal is able to conclude what it must have been. No factual assessment is required, nor any assessment of the merits of the case. There is no possibility of alternative conclusion. Secondly, because the parties consented to this Tribunal substituting the Employment Tribunal's decision to avoid a further adjournment of the forthcoming hearing of the case on 17 September 2019. So even if the issue falls outside **Jafri** limb (b) the parties have asked this Tribunal to decide the issue (see para 47 **Jafri**).

23. For the above reasons I allow the appeal and Order that the redactions to the draft dismissal letter of 2 February 2019 be removed and the full letter be included in the trial bundle and adduced in evidence at the forthcoming hearing.