Case No: 2201721/2019

EMPLOYMENT TRIBUNALS

Claimant: **AB**

Respondent: **Albemarle Club Limited**

Heard at: London Central **On:** **19 and 20 February 2020**

Before: Employment Judge Hildebrand (Sitting Alone)

Representation
Claimant: Mr S Liberadzki, Counsel

Respondent: Miss S Jolly, One of Her Majesty's Counsel.

PRELIMINARY HEARING: RESERVED JUDGMENT

1. The documents in the Without prejudice correspondence between the parties remain subject to privilege. There is therefore no basis for the Respondent's application for the Claim to be struck out and that application therefore fails.

REASONS

The Application

1. By an application dated 13 January 2020 the Respondent applied to strike out the Claim.

2. The Claim asserts that the Claimant had worker status as a hostess working at the Respondent club. She claimed she had suffered a detriment contrary to Section 146 Trade Union and Labour Relations (Consolidation) Act 1992 on the grounds of her trade union membership or activities. It appears that issues will arise in the case as to the work the claimant was required to undertake in the club, and in the transactions entered at the club for her to spend time outside the club with members who had selected her as an escort.

3. The Respondent asserted that the Claimant, through her representative, had

sought to blackmail the Respondents or alternatively had blackmailed the Respondents whether intending to or not. The Respondent contended that the blackmail had occurred in the course of without prejudice correspondence between the parties and in light of the terms of the correspondence Without Prejudice Privilege ("WPP") had been lost.

4. There were two Respondents to the Claim at the time of the application. On 31 January 2020 the Claimant's Representative wrote to the Tribunal withdrawing the Claim against the Second Respondent.

The Evidence

5. The Tribunal was supplied with a comprehensive bundle of documents and a witness statement for Mr R O'Keeffe, ("ROK"), the representative for the Claimant. ROK is a case worker at Southwark Law Centre. He has no legal training but is supervised by a solicitor. He gave oral testimony and was extensively cross examined. The Tribunal also received skeleton arguments and bundles of authorities from both Counsel, for which I am grateful, together with their oral submissions.

6. The Respondent did not provide to the Tribunal copies of the emails which gave rise to the application until the day of hearing of the application. The parties suggested that there should be a judgment in a private document dealing with the issue of whether the without prejudice privilege should be lifted in this case and further public judgment on the strike out application.

The Application for Private Judgment

7. In the recent Court of Appeal case, **Curless v Shell International Limited 2019 EWCA Civ 1710**, where a similar issue arose in the related area of legal advice privilege ("LAP") the initial hearing was in private before the Employment Tribunal. The judgment was not private. On the appeal the EAT made an anonymity order. The Court of Appeal was asked to make a similar order. That application was rejected. The judgment of the Court states thus:

"38 The starting point for any consideration of an application for any such order is CPR 39.2(1), which provides that the general rule is a hearing is to be in public. A number of discretionary exceptions to the general rule are set out in CPR 39.2(3). In addition to those expressly mentioned there, and any statutory restrictions, it may be necessary in some cases to carry out a balancing exercise where there are competing rights under the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") such as between, on the one hand, an individual's right to private and family life under Article 8, and, on the other hand, the right to a fair and public hearing under Article 6 and the right to freedom of expression under Article 10. Such a situation is contemplated by CPR 39.2(4).

39 Although none of those Convention rights has automatic priority over the other or others, and always depending on the precise facts and circumstances, due to the importance of the principle of open justice it will usually only be in an exceptional case, established on clear and cogent grounds, that derogation from the principle of open justice (including the freedom to publish court proceedings) will be justified; and, in such a case, the derogation must be no more than strictly necessary to achieve its purpose. There is no general exception to open justice where privacy or confidentiality are in issue.

40 No question arises in the present case of any Convention right competing with the principle of open justice. The concern of Shell was that, even if it won the appeal, and so the relevant emails were excluded as evidence on which Mr Curless could rely at the future hearing on the substantive merits of his claim, the mind of the judge hearing the substantive dispute in the ET might be tainted by knowledge of the emails through learning about the hearing and the determination of this appeal. We consider that this is a plainly inadequate ground for qualifying the operation of the principle of open justice. Judges are well used to having to exclude from their consideration of the merits and their reasoning evidence which is strictly inadmissible. This is standard practice as judges often have to decide on the admissibility of evidence before or during a trial. Indeed, this is graphically illustrated by the fact that, although we were referred to several cases on the scope and application of legal professional privilege, we were not shown a single transcript or report in which the parties were anonymised.

41 We were not told anything to suggest that the relevant principles and appropriate considerations for derogations from the open justice principle are any different in the ET or the EAT. The position in the ET is governed by various provisions of the Employment Tribunals Act 1996, including in particular sections 10-12, and the ET Rules in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2103, including in particular Rule 50 headed "Privacy and restrictions on disclosure". Those provisions were recently considered by the Court of Appeal in L v Q Ltd [2019] EWCA Civ 1417. Bean LJ, with whose judgment the only other member of the court, Rose LJ, agreed, said (at [11]) that he had very serious doubts about the decision of the ET to conduct the hearing in private but neither that decision nor the ET's orders anonymising the parties and the witnesses was in issue on the appeal. The Court set aside an order of the ET that its judgment was not to be placed on the register of ET decisions, emphasising the importance of open justice and the limited scope for derogations from it."

8. In light of the reaffirmation in **Curless** of the primacy of open justice, I do not consider that there is anything in the present case to justify departure from that principle in the present case. No convention right is engaged which outweighs the principle of open justice. I appreciate that we are dealing with WPP here and not LAP. I do not consider that materially different considerations apply in the present case from the case of **Curless**.

9. It has not been necessary to set out in this judgment the detail of the offers and counter offers made by the parties. That there were such discussions is not unusual. They continued at least until an offer made by the Respondent on 10 January 2020 and a counter offer on 13 January 2020 from the Respondent. It may be said that the hearing in this case should not have been closed. The order was made on the application of the parties jointly who argued at the outset that a public hearing might prejudice the right to a fair trial. Having heard the application and resistance I do not accept that argument has been made out.

The Background to the Application to Strike Out

10. The basis of the Respondent's application made on 13 January 2020 was that the without prejudice marking had been used as a cloak both for blackmail and for a threat to defame the Respondents, their solicitors and counsel. It was said that the Claimant's Representative had continued to misrepresent the Claimant's case and had entangled threats and blackmail in settlement negotiations despite attempts by the Respondents to explain why this was inappropriate.

11. In response ROK asked for clarification of the basis for the application. He was referred in a letter of 17 January to a telephone conversation between Counsel on 6 January 2020 and an email of 8 January 2020. The focus was on 4 aspects. All derive from a proposed "crowdfunding statement" supplied to the Respondent in draft at the same time as a Without Prejudice proposal. The statement was said to have wrongly said that the Claimant was given anonymity by the Tribunal because of the inherent dangers of "full service sex work." Criticism was made of the fact that it further stated the the Claimant was employed as a full time hostess and full service escort by the Respondent and was booked via her managers for full service sex work at fixed basic rates determined by the club. Further the Respondent challenged the fact that the Claimant stated that the Respondent had instructed her solicitors and Ms Jolly QC to argue that AB had no rights at all. Finally the Respondent objected to the fact that it was said that the representatives and the Respondents were trying to intimidate and deter AB and all sex workers from pursuing such claims.

12. In response to the clarification provided, the Claimant through her Representative applied to amend her particulars of claim on 20 January 2020 to provide further detail of the specific work she was contracted or expected to provide. This was described as further factual detail relevant to worker status. It was said by the Claimant that this detail had not been included in the Particulars of Claim filed when the Claims was presented because the Claimant did not have anonymity at that stage, wanted to avoid potentially incriminating herself and had concerns as to whether an illegality point might be taken against her. Those concerns appear to have been alleviated and the application to amend was then made.

13. The history of the without prejudice correspondence to which the Respondent takes objection is instructive. The parties were in negotiations before Christmas 2019. On 23 December 2019 ROK put a proposal He set out in his email the terms of a press release the Claimant wished to make on conclusion of the settlement. The Respondent replied on 2 January 2020. The Claimant responded on Thursday 3 January 2020 at page 118. In the reply ROK indicated that he would need to go to Crowdfunding the following Tuesday 7 January 2020. He provided a draft campaign statement. It contained the elements to which the Respondent objects at paragraph 7 above. This is therefore the start of the exchanges which are the subject matter of this hearing. He stated : "The draft campaign statement reads as follows."

14. ROK wrote further at 12.41 on 6 January 2020 at page 127 following a conversation between Counsel for each side and made clear that it was not his intention to suggest that the Solicitor and Counsel for the Respondent intended to intimidate AB. He produced a further draft, version 2, at pages 128 and 129 which retained the statement that anonymity was granted as a result of the inherent dangers of full service sex work. The version continued to suggest that the Respondent's representatives who are named were instructed to argue that AB had no rights at all and that the Respondent was trying to intimidate AB and all sex workers from pursuing such claims.

15. At 16.03 on 6 January 2020 ROK sent a further version of the Crowdfunding Campaign Statement to the Respondent. This is found at the bottom of page 126. This was sent following further contact between Counsel. In Version 3 he softened his position on the anonymity stating that it was in part granted because of the dangers inherent in full service sex work. This version removed reference to A B

working as a full service escort. It removed a further reference to rates for short and night bookings being set by the club. It removed reference to the named lawyers arguing that AB had no rights at all, and referred instead to them arguing she had no trade union or other employment rights. ROK asked if the Respondent still considered the statement to be defamatory.

16. AT 23.38 on 6 January 2020 ROK, as a result of further concerns being relayed to him by Counsel for AB, provided Version 4 to be found at page 126. This email removed reference to members of the club booking AB for full service sex work via her managers at rates determined by the club.

17. The Respondent replied through solicitors on 8 January 2020. It was stated that even the latest version continued to misrepresent AB's case with the intention of inflating adverse publicity. It was also considered on advice to be defamatory of the Respondent.

18. On 8 January 2020 at 1807 ROK wrote to say that his motivation for mentioning the Crowdfunding in the settlement negotiations was to convey that there was a limited time for negotiations and this was a genuine attempt to settle. The draft text had been included to allow the Respondent to comment and amendments had taken place and there would be further work before the text was finalised.

19. The Respondent made a proposal to settle with a proposed press release on 10 January 2020 at 1654. The Claimant rejected it on 13 January 2020 at 11.14.

20. As stated above the Respondent applied to strike out the Claim at 15.05 on 13 January 2020.

21. At page 184 is the Crowdfunding Statement put up by the Claimant on 20 January 2020. This is therefore Version 5. The Respondent's name is not mentioned, nor is its Solicitor or Counsel. ROK notified the Solicitors for the Respondent it had been put up. The Solicitor took by return a point about the position in the case of the Second Respondent. From the silence on other issues no complaint is taken to have been made of the terms of the statement and in relation to defamation.

The Evidence of ROK

22. The witness statement of ROK and the extensive cross-examination add title to the facts presented. This is a case about the documents and the positions taken in them. For what it is worth ROK appears to be a diligent case worker without any malice in his actions but inexperienced in the world of litigation. His explanation for his actions demonstrated his desire to create a timeframe for the negotiations. He appreciated that a crowdfunding campaign may take some time to bear fruit and that the statement heralding the campaign is akin to an advertising pitch. In his evidence he apologised unreservedly for the statement that the Solicitor and Counsel for the Respondent had sought to intimidate AB and others from pursuing claims.

The Anonymity of the Claimant.

23. Much has been made in this hearing of the suggestion that the Claimant has through her representatives misrepresented or sought to misrepresent the basis

on which she was granted anonymity at a hearing on 20 November 2019. The order is found at page 103 of the bundle. As is common practice it sets out no reason for it being made. The Case management Summary at page 98 and following contains a section headed “Preliminary Hearing Anonymisation Order.” The Judge refers to the application, the written skeleton arguments on on both sides, oral submissions and a report from Dr Jonathan Ornstein, a consultant psychiatrist.

24. The Judge states that full reasons were given at the oral hearing. In the absence of a request for those reasons or agreement between Counsel regarding the note I must rely on the written material available to me. A further difficulty has arisen between Counsel in relation to what is said to have been an oral agreement on which Miss Jolly relies to the effect that the Claimant asserted she was a sex worker in her application but the Respondent refrained from cross examining on that point in return for agreement no point would be taken at a later stage in relation to the failure to challenge at that time.

25. I therefore have a short series of paragraphs from the Judge. At paragraph 7 the Judge said that the tribunal found that because the case would feature evidence of a highly sensitive and personal nature the publication of the Claimant’s identity could risk her safety and harm her mental health. It could also effect her chance of obtaining different employment in future. The Judge stated that Dr Ornstein’s report concluded that the Claimant’s name being made public would have a very detrimental effect on her mental health.

26. In her statement for the anonymity hearing the Claimant makes clear that she spoke to a friend who had moved from stripping into full service sex work and because of her respect for her friend decided to approach the Respondent about working in the club. She then describes being assaulted by a client booked through the Respondent. This allegation is found in the Particulars of Claim as filed at paragraph 16.

27. The Respondent asserts that the Claimant has raised the issue of her earnings in mitigation from sex work in the case and it was only on that basis that the Respondent accepted that sex work was relevant to the case. I find that difficult to accept.

28. Limiting consideration to the issue of the grounds for anonymity it cannot be said that ROK misrepresented the finding of the Judge. He did not accept the Respondent’s assertion that the only ground for the anonymity order was the expert evidence of Dr Ornstein regarding potential detriment to AB’s mental health. The application made and the ruling of the Judge appear to accord with that position.

The Submission of The Respondent.

29. The Respondent set out her strike out application in her skeleton argument. She sought a strike out under Rule 37(1)(b) on the grounds that the conduct of the proceedings had been unreasonable and/or vexatious and /or scandalous. The leading case is **Unilever PLC v The Proctor and Gamble Co. [2000] 1 WLR 2436.** She also relied on **Ferster v Ferster [2016] EWCA Civ 717** and **Halfords Media UK Ltd v Ponomarjovs [2015] 10 WLUK 23.** Ferster contained a threat of a perjury prosecution and imprisonment. Halfords contained a threat to mail 10,000

recipients with detrimental material. Both these case were held to be unambiguous impropriety. The effect of ROK's actions was blackmail or tantamount to the same. The threat exceeded what was permissible in ordinary without prejudice negotiations and contradicted the factual case which had been pleaded. It is not proposed to repeat all of the skeleton argument or submissions in this judgment. It was submitted a fair trial was no longer possible because the trust of the Respondent in the claimant and her representatives had been irreparably damaged. The Respondent cited inter alia **Gainford Care Homes v Tipple [2016] EWCA Civ 382**, **Sud V London Borough of Hounslow EAT 0182/2014** and **Chidzoy v BBC EAT 0097/2017.** In **Sud** there was forgery of a date in a medical report. In **Chidzoy** there was direct disobedience to a direction of the Judge not to discuss evidence in cross-examination during a break. The individual spoke to a journalist in the tribunal waiting room.

30. The Respondent at paragraphs 33 to 36 set out an alternative ground for striking out namely that the Claimant had deliberately put forward a false claim which was calculated to mislead both the Respondent and the tribunal. The Respondent denied the Claimant was engaged to perform sex work of any kind. The tribunal could only deal with the claim put forward by the Claimant. It was unfair and unjust for the Respondent to have to replead its defence to the claim and and procure further witnesses.

The Claimant's Submission

31. The Claimant produced a written Skeleton Argument. It dealt with the circumstances in which there is an exception to the without prejudice rule. **Unilever PLC (CA)** makes clear that perjury, blackmail or other unambiguous impropriety is required. The Claimant argued that the required aspects were not present here. There was no basis for the submission that a fair trial was no longer possible. Cases where there had been strike out involved impugning the giving of documentary or oral evidence.

The Law

32. I take the law from the submissions and skeleton arguments of counsel. The principles are straightforward. The exceptions to without prejudice privilege are clearly stated. Unless the exception is made out there is no basis for an application to strike out.

Conclusion on Strike Out

33. I consider first the Respondent's second point. Should the claim be struck out because ROK put forward a false and misleading claim to the Tribunal and to the Respondent and sought to refer to it in the crowdfunding notice?

34. I take it for these purposes that the Respondent accepts that the Claim contained in the proposed amendment is the claim the Claimant now wishes to put forward. This is the true claim. The claim presented at the outset is said to be the false and misleading claim. It has been said on behalf of the Claimant that had she not been granted anonymity she would not have pursued the case to hearing. It is further said by ROK that he held concerns about a plea that the claim was contrary to public policy or would be met with an illegality argument. That is not an issue on

which I have heard argument, or one for me to determine.

35. It is clear that the claim as presented to the tribunal makes very clear the type of work the claimant was engaged to undertake. The claim at paragraph 3 states that the Claimant would be paid £500 by the member to spend the night with a member. I asked Miss Jolly to explain how that could be and she explained that the payment was for the hostess to remain at the club talking to the member entertaining them through the night. That is not consistent with the Claimant's pleaded case at paragraph 3 where the requirement on the Claimant to return to the club when the booking was finished is pleaded. To be clear, any normal reading of the claim in this case reveals that the proposed amendment does no more than provide detail to the explicit position set out by the Claimant in the claim as presented. By way of example at paragraph 5 it is stated that when a hostess was booked the member would have to purchase a bottle of champagne for at least £300 from the club. At paragraph 6 the Claimant claimed that when she was with the member having left the club she could agree additional services with the member. The member could pay by cash or through the club by card. I do not believe there is any basis for the suggestion that ROK presented a false and misleading case. There is therefore no basis for the Claims to be struck out on that ground.

36. Having removed that aspect from consideration, for convenience I return to paragraph 11 of the Claimant's submission where the grounds relied on by the Respondent are set out conveniently in tabular form. The first aspect for consideration as unambiguous impropriety is the suggestion that the proposed crowdfunding notice incorrectly recorded the basis for the anonymity granted to the Claimant. As is clear from my analysis above it is clear the Judge relied on a number of grounds for the order made. To say that something is done in the light of a cause might admit of other possible causes. ROK was prepared to change the term used to: "in part because of. " I do not accept that his actions in this context can come within the definition of unambiguous impropriety.

37. The second aspect relied on by the Respondent was a reference to the Claimant starting work as a "full service escort." The hours and rates were set by the club. This accords closely with paragraph 3 of the claim and cannot amount unambiguous impropriety.

38. The third aspect relied on by the Respondent is the naming of solicitors and counsel for the Respondent and the suggestion in version 1 that they were to argue AB had no rights at all. I accept the Claimant's submission that this must be construed in context to mean employment rights. This was made clear in later versions. I can see no basis for unambiguous impropriety in this aspect.

39. Finally there is the suggestion that the Respondent's lawyers were trying to intimidate and deter AB and all sex workers from pursuing such claims. This was removed on 6 January 2020. It cannot be the basis for a finding of unambiguous impropriety in an application some 7 days later when it had ceased to be a live issue.

40. It follows that I do not accept any of the matters raised by the Respondent can in my judgment be appropriately described as unambiguous impropriety. In the event that I am incorrect in that conclusion I also indicate that had it been appropriate for the WPP to be lifted none of the matters relied on would be sufficient to strike out the claim and leave the Claimant with no rights, or with no trade union or

other employment rights. There is no basis for saying that a fair trial is no longer possible in this case. The wrongdoing in **Sud** and **Chidzoy** was of a manifestly different gravity.

Employment Judge Hildebrand

Date 17 March 2020

JUDGMENT SENT TO THE PARTIES ON

17 March 2020

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