Case Number: 3303861/2018 (V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms AB	v	(1) C Ltd (In voluntary liquidation) (2) Mr D (3) Mr E (5) Ms G

Heard at: Watford, by CVP **On**: 24 August 2020

Before: Employment Judge Hyams

Representation:

For the claimant: In person
For the respondents: Ms Caroline Jennings, of counsel

JUDGMENT

The documents and events on which the claimant seeks to rely which were written or as the case may be occurred in the course of settlement negotiations between the parties are subject to without prejudice privilege in that they do not conceal unambiguous impropriety within the meaning of the applicable case law, including *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2004] 1 WLR 667.

REASONS

Introduction

1 On 24 August 2020 I conducted an open preliminary hearing. It had originally been listed to determine also a strike-out application made by the respondents, but that application was not pressed, so the issues that I had to decide were these:

1.1 whether or not the claimant should be permitted to amend her claim by the addition of claims concerning events that post-date her original claim to this tribunal;

1.2 whether or not any of those events are covered by without prejudice privilege; and

1.3 whether or not the claimant should be permitted to amend her claim in other ways as proposed by her in compliance with order number 5 of those which I made following a case management hearing that I conducted by telephone on 20 April 2020.

2 The first and third of those questions were case management issues, but the first of them was dependent on the answer to the second question. This judgment deals only with that second question.

The applicable law

3 As I indicated in the case management summary which was sent to the parties after the hearing of 20 April 2020, while it is clear that the relevant communications and things done which the claimant seeks to make the subject of her claim were made and done in the course of negotiations to settle her potential and then actual claims, the claimant is seeking to rely on those things because she claims that they involved or constituted unambiguous impropriety within the meaning of the applicable case law, which includes *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2004] 1 WLR 667.

4 Paragraphs 40-57 of the judgment of Rix LJ, with which Carnwath LJ agreed, show what is required to satisfy the test of unambiguous impropriety. It is not necessary or helpful to set out the whole of that passage in these reasons, not least because in my case management summary written after the hearing of 20 April 2020, I drew the parties' attention to a part of that passage, and the claimant had, she said during the hearing of 24 August 2020, obtained a copy of the judgment in *Fincken*. I therefore merely (1) record here that I read that passage with care before considering the material on which the claimant seeks to rely in this case and (2) repeat what I said in my case management summary written after the hearing of 20 April 2020 about

> 'the difficulty of a party seeking to avoid the application of the without prejudice privilege ("WPP"), given in particular the factors discussed in paragraphs 57-63 of the judgment of Rix LJ in *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2004] 1 WLR 667 as discussed by His Honour Judge Hands QC in *Portnykh v Nomura International plc* [2014] IRLR 251, in particular in paragraphs 41 and 42.'

5 I record here also that I then '[drew] the claimant's attention in particular to for example the final sentence of paragraph 41 where His Honour Judge Hand QC commented on "how limited the concept [of 'unambiguous impropriety'] actually is."'

6 It is clear that it is for the party who seeks to rely on things said and done during settlement negotiations on the basis that they constituted or involved

unambiguous impropriety to satisfy the court or tribunal that those things constituted or involved such impropriety. I therefore turn to the claimant's submissions on this point.

The claimant's submissions

7 The claimant put before me a detailed set of written submissions and supplemented them by oral submissions. The written submissions were put before me only after the hearing of 24 August 2020 had started. That was not the claimant's fault, and I record it only in order to make it clear why I was unable to read them before the start of that hearing. The factors on which the claimant relied were stated in paragraph 2 of her written submissions. That paragraph had 18 subparagraphs (identified by lower case lettering, i.e. paragraphs a-r), and subparagraph a had 19 subparagraphs, each of which was identified by a lower case Roman numeral (i.e. subparagraphs i-xix). For the sake of clarity, I identify those paragraphs below by inserting brackets around them. So, for example, subparagraph ii of subparagraph a of paragraph 2 is referred to below as paragraph 2(a)(ii). I describe the elements of the claimant's written submissions in the paragraphs immediately below, and I return to them and discuss them in the following section, entitled "A discussion".

8 Paragraphs 2(a)(i)-(vi) and 2(l) were to the effect, as I read them, that the respondents threatened to sue the claimant in Canada for (mainly but not only) defaming them with a view to pressuring her into stopping making assertions about them which they knew were not defamatory because they were true, and at the same time made untrue and defamatory statements about the claimant, with a view to pressurising the claimant to give up her claims to this tribunal and to stop making statements about the respondents which were defamatory (not in a legal but a practical sense, i.e. which if they were true were not capable of being the subject of legal action).

9 The rest of paragraph 2(a) consisted of a number of in some cases linked and in other cases separate allegations about the conduct of the negotiations, in some cases relying on the effect on the claimant herself, in her particular circumstances, of the manner in which the negotiations were conducted. Paragraphs 2(b)-(d) as I read them were about the same things. Paragraph 2(e) relied on ACAS guidance about the law on without prejudice privilege. Paragraph 2(f) referred to ACAS guidance on non-disclosure agreements and when they should not be used, including

9.1 if the intention is 'to "stop someone reporting discrimination, harassment or sexual harassment," or "to cover up inappropriate behaviour or misconduct, particularly not if there's a risk of it happening again," or

9.2 "it could cause serious moral or ethical issues".

10 The claimant also relied in paragraph 2(f) on the ACAS guidance as showing that "NDAs ... cannot be used to stop whistleblowing."

11 Paragraphs 2(g)-(i) and (l) built on that proposition, arguing that the respondents "attempted to engage in unlawful behaviour by forcing the Claimant into a non-disclosure agreement". Paragraph 2(o) was also about forcing a non-disclosure agreement on the claimant. Paragraph 2(j) relied on the fact that the claimant was unable to pay for counsel for her claim to this tribunal, "due to the financial harm caused to her by the Respondents".

12 Paragraph 2(k) was about a matter which could at best from the point of view of the claimant amount to an allegation that perjury would be committed if an allegation of the respondents was maintained at trial. Paragraphs 2(m) and (n) were of a general nature, amounting in my view to submissions in support of the proposition that the other conduct of the respondents relied on by the claimant as being sufficiently unambiguously improper to justify the non-application of without prejudice privilege, was actually so improper.

13 Paragraphs 2(p) and (q) were to the effect that the negotiations were not genuinely for the purpose of settling the claimant's claims in these proceedings but were, "rather an attempt to intimidate and silence the Claimant ... [and were] part of an ongoing pattern of attempts to stop the Claimant from speaking about what happened to her or warning others, including warning them in her professional capacity as someone who works on humanitarian issues with a focus on gender issues and safeguarding".

A discussion

14 I could see nothing more serious by way of wrongdoing here than

14.1 a threat to do something which, if it occurred, would be perjury, and

14.2 a threat to sue the claimant for defamation without having a genuine evidential foundation for the threatened claim.

15 The first of those things is not capable of constituting unambiguous impropriety, given the following part of the passage in *Fincken* to which I refer above:

> "57. ... It is not the mere inconsistency between an admission and a pleaded case or a stated position, with the mere possibility that such a case or position, if persisted in, may lead to perjury, that loses the admitting party the protection of the privilege (see the first holding *in Fazil-Alizadeh*, described in para 47 above). It is the fact that the privilege is itself abused that does so. It is not an abuse of the privilege to tell the truth, even where the truth is contrary to one's case. That, after all, is what the without prejudice rule is all about, to encourage parties to speak frankly to one another in aid of reaching a settlement: and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances.

58. It may be said, as indeed Ms Gloster has powerfully argued, that even if the mere possibility of future perjury does not suffice to destroy the privilege, the admission which demonstrates that perjury has been committed in the past, by reference to an existing affidavit, is or should be different and that no authority suggests otherwise. In this way she seeks to support the judge's decision, which was premised on the prospect of future perjury, as was the decision in *Merrill Lynch*, by the different route of the impropriety of past perjury. There is indeed a substantial case to be made that the courts should not pass by such proof of perjury with indifference. There is a clear public interest in the discouragement of perjury. Nevertheless, on balance I do not think that the courts should adopt such a position. If they did, the very serious and criminal charge of perjury would fall to be debated, without the protection which should be available to the accused party, on an interlocutory outing (as here) or even at trial, with the potential of derailing the trial by the exposure of without prejudice material to the trial judge. Essentially the same problem would arise in connection with statements of truth, which now apply under the CPR to all particulars of claim or defence: although they cannot give rise to the offence of perjury, they can give rise to the only relatively less serious matter of contempt of court."

<u>A threat to do something which, if done, would constitute blackmail</u>

16 The conduct to which I refer in paragraph 14.2 above would be capable of being classified as unambiguous impropriety if it amounted to or was in the nature of blackmail. Blackmail is defined by section 21 of the Theft Act 1968 (which was a codifying statute) in the following way:

"(1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief—

(a) that he has reasonable grounds for making the demand; and

(b) that the use of the menaces is a proper means of reinforcing the demand.

(2) The nature of the act or omission demanded is immaterial, and it is also immaterial whether the menaces relate to action to be taken by the person making the demand."

17 There are in the current Westlaw summary of the law of blackmail the following paragraphs (which in my view were an accurate statement of the law so far as relevant):

"8. A threat to do something which the person is lawfully entitled to do, if it is menacing in character and done for gain/loss, may still be blackmail:

for example, threatening to report some one to the police unless they pay money.

9. The threatening words or conduct must be intimidating in character, of such a nature that the mind of an ordinary person might be influenced or made apprehensive so as to accede unwillingly to the demand (*R. v Clear (Thomas Walter)* [1968] 1 Q.B. 670).

10. **Unwarranted**: Any demand made with menaces is unwarranted unless it falls under the exception provided by ss.21(1)(a) and (b) of the 1968 Act, namely the person has reasonable grounds for making the demand and the use of menaces is a proper means for making the demand. The person must have a genuine belief that the use of menaces was proper in the circumstances, and it is highly unlikely that anyone could ... believe that any unlawful conduct could ever be proper (*R. v Harvey (Alfred Alphonsus)* (1981) 72 Cr. App. R. 139)."

A discussion

18 A threat to sue someone will usually be intimidating. However, what the claimant relied on here was a threat to sue her in the circumstance that the respondent was at the same time defaming her. That was clear from the following sequence in paragraph 2(a):

'i. The Respondents and their UK counsel Ms. Paula Stuart, upon receipt of the Claimant's Tribunal claim at end of February 2018, contacted a lawyer in Calgary, Alberta where the Claimant was residing and directed him to threaten the Claimant with a defamation lawsuit.

ii. The Respondents had refused to participate in Acas conciliation in January 2018 despite the Claimant's attempts to engage them in negotiations.

iii. The Respondents did not threaten the Claimant with a defamation claim until after receiving the Tribunal claim, and had not done so when they became aware of the alleged acts of defamation in January 2018. There was no existing dispute in Canada and the threats of a defamation suit were frivolous and vexatious and would constitute a SLAPP—these are increasingly being used to intimidate and harass sexual assault and domestic violence survivors and "making their life a living hell";

iv. The Respondents threatened the Claimant with a frivolous and vexatious defamation suit (SLAPP), when they knew they had actually defamed the Claimant, which they admitted in writing– for example Mr. D wrote on Jan 15 2018, "I know we are defaming her by calling her a serial litigator but it's a calculated choice"'.

19 If the respondents were defaming the claimant (including in the ways referred to by the claimant in paragraphs 2(a)(v) and (vi) of her written submissions), then that did not in any way affect the propriety or otherwise of the threat to sue the claimant for defamation.

20 In addition, and separately, an unwarranted threat to sue will be capable of being responded to by a person of ordinary fortitude (that being in my judgment the appropriate yardstick here) by saying words to the effect: "Well, go on then, sue me. Your claim will lose and you will have to pay my costs." That is clear from the content of paragraph 9 of the Westlaw summary which I have set out in paragraph 17 above: the threatening conduct must be "of such a nature that the mind of an ordinary person might be influenced or made apprehensive so as to accede unwillingly to the demand".

21 The claimant relied in paragraph 2(a)(viii) of her submissions on this factor:

> "The Claimant was protected by PIDA and her claim was a whistleblowing claim, which was implied in her original ET1 under 'automatic unfair dismissal' and Ms. Stuart as UK counsel is aware of PIDA protection of whistleblowers, and that a gagging clause would be improper in a whistleblowing case, not to mention threatening a lawsuit for engaging in protected speech".

22 I could not see in what way that factor could properly be taken into account by me here: if a "gagging clause" would be "improper", then the claimant could without fear refuse to agree to one, or, if it were not enforceable, agree to it in the knowledge that it would not be binding.

23 In paragraph 2(a)(ix), the claimant relied on the following factor:

> "The Respondents, via Mr. Oppenheim [the lawyer instructed by the respondents in Canada], were told multiple times by the Claimant to stop threatening her while citing her multiple vulnerabilities and stating her distress. Not only did they fail to stop, they escalated their threats and intensified their pressure with a 48hr deadline to retain a lawyer and agree to a meeting".

24 The claimant did not need to continue to participate in the negotiations: she could simply withdraw from them. As far as I could see (and I therefore concluded that), she could not, by citing her own vulnerabilities, make conduct which would not be in the nature of blackmail into improper conduct for the purposes of the law of without prejudice privilege.

25 In paragraph 2(a)(x), the claimant relied on this factor:

> "The Respondents attempted to force the Claimant into a settlement with a blanket gagging clause, which would negatively impact her well-being as well as her career working and writing on those very issues".

26 In my view, that was not conduct which satisfied the requirement for unambiguous impropriety of a sufficiently serious sort for without prejudice privilege to cease to apply.

27 The same was true in my view of the conduct relied on by the claimant in paragraphs 2(a)(ii), (vii), (xi), (xii), (xiii), (xiv), (xv) (especially bearing in mind the decision of Underhill P in the analogous situation of the law against victimisation in *Parmar v East Leicester Medical Practice* [2011] IRLR 641), (xvi) (which was in fact completely irrelevant because it was about the claimant's conduct and not that of the respondents), and (xvii) (which was supplementary to the threat to sue for defamation and in my view added nothing to that threat) of her written submissions.

28 I add that the factors referred to in paragraph 2(a)(xix) of the claimant's written submissions were the claimed consequences for the claimant of what had occurred, not what had occurred, and were therefore irrelevant to the question of the impropriety of the respondent's conduct as far as the law of without prejudice privilege was concerned. As for the content of paragraph 2(a)(xviii), that was a description of the content of the correspondence in part 3 of the bundle prepared for the hearing of 24 August 2020, and the correspondence sent on behalf of the respondents in that part was in my view incapable of being characterised, either in itself or as part of an accumulation of conduct which could constitute unambiguous impropriety, as improper.

<u>My conclusion</u>

29 I concluded that there was not, in the circumstances, unambiguous impropriety of a sort which would justify without prejudice privilege being displaced. In my view, therefore, any aspect of the conduct on which the claimant sought to found her claim which arose during the course of the unsuccessful settlement negotiations which occurred here was covered by such privilege.

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Employment Judge Hyams
Date: 25 September 2020

Sent to the parties on:

09/10/2020

Jon Marlowe
For Secretary of the Tribunals