EMPLOYMENT TRIBUNALS

OPEN PRELIMINARY HEARING

Claimant:	And	**Respondents:**
Ms M Mulumba		(R1) Partners Group (UK) Limited (R2) Partners Group (USA) Inc

Heard by: CVP **On**: 5 October 2021

Before: Employment Judge Nicolle

Representation:

Claimant: In person
Respondents: Mr D Craig QC
Ms F Onslow, of Counsel

RESERVED JUDGMENT

1. The Tribunal does not have jurisdiction to hear the Claimant's claim of victimisation on the basis that it falls outside the ambit of s.108 of the Equality Act 2010 (the EQA) and is barred by judicial proceedings immunity.

REASONS

The Hearing

2. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

3. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net.

4. The parties were able to hear what the Tribunal heard.

5. The participants were told that it is an offence to record the proceedings.

6. From a technical perspective, there were no major difficulties

7. The Respondents provided a bundle comprising of 259 pages. The Claimant also provided a bundle, albeit there was significant duplication between them.

8. Both parties submitted skeleton arguments which they then spoke to at length. The Respondents provided a bundle of 20 case law authorities and there was a further bundle prepared by the Respondents' solicitors of an additional 5 case law authorities referred to by the Claimant in her submissions.

Background

9. The Claimant was employed by the Second Respondent between 21 September 2015 and 31 August 2018. She presented a claim form to the Tribunal on 28 January 2019. There was an open preliminary hearing to determine the issue of territorial jurisdiction on 3 and 4 December 2019.

10. In her disclosure in November 2019 the Claimant disclosed five recordings of meetings she had recorded on 4 August 2015, 8 August 2017, 27 February 2018, 20 April 2018 and 5 July 2018 (collectively referred to as the "Recordings").

The Respondents' amendment

11. On 6 February 2020, the Respondents applied to amend their response to enable them to argue that any compensation the Tribunal may award to the Claimant should be extinguished, or reduced, as result of her having committed gross misconduct by covertly making the Recordings which it says contain confidential information.

12. The Respondents say that the Recordings constitute a violation by the Claimant of their internal codes of practice . The Second Respondent's Employee Handbook, issued to the Claimant in September 2015, expressly prohibits the copying of confidential information.

13. There was a closed preliminary hearing before Employment Judge E Burns on 18 March 2020. She allowed the Respondents' application to amend their response to argue that they would have been in a position to dismiss the Claimant for making the Recordings (the Respondents' Amendment).

Claimant's amendment application

14. In a letter to the Tribunal dated 22 April 2020 the Claimant sought leave to amend her claim to include allegations of victimisation through the withholding of entry shares and detriment due to the Respondents' amendment to include an allegation of gross misconduct. The Respondents consented to the first of the above amendments but opposed that in respect of detriment due to alleged gross misconduct (the Disputed Amendment).

15. The Disputed Amendment which was the subject of the hearing. The Respondents' opposed the Disputed Amendment on the following grounds:

a) The victimisation claim falls outside s.108 of the EQA and therefore the Tribunal has no jurisdiction to hear it;

b) The victimisation claim is barred by judicial proceedings immunity;

c) The Respondents' actions do not amount to a "detriment" within the meaning of the EQA; and

d) The Claimant cannot found a claim based on her own unlawful conduct.

16. For the purposes of the hearing the Respondents' sought to rely only on (a) and (b) above.

The Recordings

17. The Claimant says that four of the Recordings relate to meetings between her and Human Resources. She disputes that these Recordings contain confidential information. The other Recording is of an Investment Committee Meeting. The Claimant denies that this was recorded covertly. She says that it was an encouraged and accepted practice for recordings to be made of Investment Committee Meetings so that an accurate note could be made. She contends that she was treated inconsistently to other employees who she says were not subject to allegations of gross misconduct.

18. She retained these recordings on her employer issued I-Phone. She saved these recordings prior to the return of the phone to the 1st Respondent a few weeks after the termination of her employment.

19. The Claimant is concerned that the label of gross misconduct will potentially cause her serious career damage in the financial services industry. However, there is no evidence that the Claimant has so far been deprived of the opportunity of potential employment as result of a negative reference referring to gross misconduct. The Respondents say that no such references have been provided. Their position is that the reference to gross misconduct was included in their response to the Claimant's Tribunal proceedings as part of their litigation strategy and subject to privileged advice from their lawyers.

The Law

20. Section 108 of the EQA provides:

(1) A person (A) must not discriminate against another (B) if –

(a) the discrimination rises out of and is closely connected to a relationship which used to exist between them, and
(b) conduct and description constituting the discrimination would, if it occurred during the relationship, contravene this Act.

21. The House of Lords in Rhys-Harper v Relaxion Group plc [2003] ICR 867 provided guidance on the concept of post-employment discrimination. It was held that the predecessor discrimination statues to the EQA should be interpreted as extending to acts of discrimination and victimisation against a former employee carried out by an employer after termination of the contract of employment where there is a substantive connection between the discriminatory conduct and the relationship of the employer and employee. Or where (according to the minority judgments) the relationship between

employer and employee is still continuing, notwithstanding the termination of the employment, in that transactions attributable to a continuation of the relationship remain to be completed. The Court in its decision gave examples of post termination benefits arising from a contract of employment and the provision of a reference.

22. At paragraph 45 of the judgment it was held that what is comparable is the way the employer treats the claimant former employee and the normal way he treats or would treat other former employees in similar circumstances.

23. In Chief Constable of Greater Manchester Police v Aston UKEAT/0304 19_HHJ Auerbach said at paragraph 100:

> "Parliament has not merely stipulated that the conduct must be something that "arises out of" the past relationship, but also that it must be "closely connected" to it. Both tests must be satisfied, and the second must add something to the first, further narrowing the field. Further, Parliament has deliberately added the word "closely" to the word "connected". There must be not merely a connection, but a close one".

24. At paragraph 101 he went on to state:

> "It is also, I think, clear, that those tests will not by themselves be satisfied merely by a "but for" test being passed. Nor by a finding that the impugned conduct was done, as it were, in the capacity of X employer. Those are necessary, but not sufficient findings. In particular, the "closely connected" test requires something more".

25. It was held that the withdrawal of a goodwill offer made to the claimant and making it conditional could not be said to have been "closely connected" to the claimant's former employment; and that, accordingly, there was no jurisdiction to entertain the post termination victimisation claim.

26. At paragraph 105 HHJ Auerbach said:

> "In a but-for sense, and in the sense of the capacity in which it was made, I think it arose from the former employment, and was connected with it; but it was not, in my judgment conduct which arose from and was closely connected with it".

Judicial proceedings immunity

27. The judgment of Devlin LJ in Lincoln v Daniels [1962] 1QB 237 at 257-258 set out the position as follows:

> "The absolute privilege which covers proceedings in on before a Court of Justice can be divided into three categories.
>
> "The first category covers all matters that are done before a Court. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence" (which I shall refer to as category 1).

> "The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings" (which I shall refer to as category 2).
>
> "The third category is the most difficult of the three to define, it holds that the privilege extends to preparatory steps taken in relation to witness evidence to include the proof of that evidence taken by a solicitor" (which I shall refer to as category 3).

28. The House of Lords in Darker and others v Chief Constable of the West Midlands Police [2001] 1AC 435 held that the immunity did not extend to cover the fabrication of false evidence,

29. In Darker the judgment of Lord Hope of Craighead drew a distinction between statements made by police officers prior to giving evidence and things said or done in the ordinary course of preparing reports for use in evidence. The functions that they are performing can be said to be those of witnesses or potential witnesses where they relate directly to what requires to be done to enable them to give evidence. Their conduct at earlier stages in the case may however involve the performance of their functions as enforcers of the law or as investigators and in respect of which judicial proceedings immunity will not apply.

30. He went on explain the distinction as being between acts calculated to create or procure false evidence or to destroy evidence as having an independent existence from, and being extraneous to, the evidence that may be given as to the consequences of those acts.

31. In Heath v Commissioner of Police of the Metropolis [2005] ICR 329 Auld LJ at paragraph 17 held that judicial proceedings immunity applied to anything said or done by anybody in the course of judicial proceeding whatever the nature of the claim made in respect of such behaviour or statement, except for suits for malicious prosecution, for perjury and proceedings for contempt of court. He went on to say:

> "That is because the rule is there, not to protect the person whose conduct in court might prompt such a claim, but to protect the integrity of the judicial process and hence the public interest"

32. In South London and Maudsley NHS v Dathi [2008] IRLR 350, the EAT considered an allegation that letters sent in the course of proceedings before the Employment Tribunal amounted to acts of discrimination and victimisation. The EAT held that those letters attracted judicial proceedings immunity, relying on the decision in Darker and struck out the claim.

33. In Parmar v East Leicester Medical Practice [2011] IRLR 641 Underhill J explained at paragraph 10:

> "Even if the claimant eschews the vulgar error of saying that the evidence was given by reason of that act simply because the proceedings were the occasion for it, it will be entirely plausible for him to allege that the manner or content of

> the evidence was to some extent "even if only subconsciously, influenced by the fact that the protected act had been done".

34. The judgment of Lewison JL in Singh v Reading Borough Council [2013] 1 WLR 3052 is authority for not everything said and done in the course of proceedings attracting judicial proceedings immunity. In that case improper pressure was brought on a witness and the immunity did not apply.

35. Mr Craig QC referred me to the comprehensive review of the relevant case law by then Employment Judge Dr S J Auerbach in Dempsey v Maitland Hudson & Co LLP UK ET/2201456/2014. At paragraph 69 he stated:

> "This is an area of the common law in which there have been a series of multi-layered, carefully nuanced and reasoned decisions".

He emphasised the need for careful analysis and sensitivity to the particular facts of each case.

36. At paragraph 77 he said that the various circumstances in which the protection of judicial immunity maybe vitiated set a high bar of transgression.

37. At paragraph 92 he said that he was not persuaded that there is anything peculiar, in policy terms, which shall calls for a different approach to be taken where the course of action is protected disclosure detriment. In both Heath and Dathi the immunity was successfully invoked in claims of discrimination and victimisation.

Exercise of my discretion as to whether to permit an amendment

38. More generally in exercising my discretion as to whether an amendment should be granted I need to apply the well established principles enunciated in Selkent Bus Co Ltd v Moore [1996] ICR 836 which involve balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

Submissions

Respondents

39. Mr Craig QC summarised the Respondents' position as follows:

a) Reliance on the Claimant's impugned conduct was made by the Respondents in litigation;
b) It only arose in the context of litigation;
c) It concerns a pleading;
d) The Respondents are obliged to plead this point;
e) it concerns a hypothetical i.e. that the Claimant would have been dismissed in any event;
f) The Disputed Amendment was applied for 18 months after the Claimant's employment ended.

40. The Respondents say that the victimisation claim is not justiciable. Further, they say that to properly defend it they would be put in the impossible situation of likely having to give up privileged information.

41. Mr Craig QC argues that the Respondents' reference to gross misconduct could never be actionable as victimisation. He says that it forms part of the Respondents' defence to the claim and goes to liability and/or remedy.

42. He says that he is not aware of any case where, for example, a respondent using a defence of gross misconduct in a claim where an employee alleges that they had made a qualifying protected disclosure and then been dismissed, that the former employee then been permitted to pursue a claim of victimisation in relation to the grounds of dismissal.

43. He says that the Respondents' Amendment falls within the core judicial proceedings immunity. He says that this is squarely within Category 2.

44. Mr Craig QC says that the protection provided by judicial proceedings immunity cuts both ways. He says that in her claim the Claimant has made a series of arguably defamatory statements but nevertheless is protected from legal action given that they fall with judicial proceedings immunity.

45. He says that the Disputed Amendment does not fall within the ambit of s.108 of the EQA.

46. He says that there are simply too many links in the chain for the Disputed Amendment to be regarded as arising from the Claimant's employment and therefore it is outside the scope of s.108 of the EQA. He denies the fact that there was a continuing employment relationship and distinguishes the position, for example, where a former employee is able to bring a claim in respect of being deprived of post termination employment benefits or is provided with a detrimental reference.

47. He says that the Claimant would, in any event, have a remedy. He says that if the Respondents' pleading were to be regarded as unreasonable it could be struck out or the Claimant could be awarded costs.

48. He referred to the importance of avoiding satellite litigation.

49. He says that there is no basis to argue that applicable European Law makes any difference.

Claimant

50. She says that the Respondents have recently chosen not to dismiss employees who use an unauthorised third party App to record and transcribe meetings and who did not request permission to so.

51. She says that the Respondents' allegation of gross misconduct was introduced as an intimidation tactic analogous to what the House of Lords had ruled to be outside the scope of judicial proceedings immunity in St Helens Borough Council v Derbyshire [2007] ICR 841. This case involved over 500 female catering staff employed by the

Council in its school meal service bringing equal pay claims. Two months prior to the hearing of the outstanding claims the Council wrote letters to all the catering staff, including the applicants, pointing out that a successful claim was likely to lead to the cost of school meals rising to such an extent that the Council would have to consider ceasing to provide them except to those entitled to receive them by law, with a consequent reduction in the school meals service for which only a very small proportion of the existing workforce would be required.

52. It was held that the employment tribunal had been entitled to take the view that in sending the letters the Council had gone further than was reasonable in protecting its interest in the equal pay litigation and to conclude that the letters would not have been sent by a reasonable employer in the circumstances and that the employees had thereby suffered a detriment.

53. Mr Craig QC says that the Claimant's reliance on St Helens is fundamentally wrong. He says it was not a case where judicial proceedings immunity was engaged. He says the case was fundamentally different in that the applicants were current employees and therefore s.108 of the EQA was not applicable.

54. The Claimant says that gratuitous libel is not protected by judicial proceedings immunity, as per Lord Hutton in Taylor v Director of the Serious Fraud Office [1999] 2 AC 177. This case concerns an action for deformation in relation to a letter written by the Serious Fraud Office to the Isle of Man Attorney General. An issue arose as to whether absolute immunity from prosecution applied because the letter was written in the course of a criminal investigation. The House of Lords upheld the decision of the Court of Appeal that the immunity applied in this case.

55. Mr Craig QC says that reliance on this case is plainly wrong even if the labelling of the Claimant's conduct was gratuitous. He says that the Respondents' Amendment relying on the Claimant's gross misconduct falls within the protection of judicial proceedings immunity and that this would only be vitiated in circumstances where it was made extraneously to the legal proceedings or, for example, was a communication to third parties outside the scope of the immunity.

56. She says that the concept of judicial proceedings immunity was not relevant at the time that the Respondents realistically knew that the Investment Committee Meeting was recorded. She says that the Respondents' real concern is that the recording captured an employee of the Respondents allegedly mocking the accent of an Indian female colleague. Again, this argument is disputed by the Respondents who point to the fact that the recording was discovered through the disclosure process.

57. She says that relying on LJ Lewison's judgment in Singh that the Respondents' investigative process and conduct is outside the scope of judicial proceedings immunity.

58. The Respondents say that there was no investigation. The Recordings came to light as result of the disclosure process in the litigation. They were then considered as part of the legal process. Mr Craig QC says that the Claimant's reliance on Singh is therefore misconceived.

59. The Claimant repeatedly referred to the fact that the Respondents' use of a gross misconduct defence constituted a malicious abuse of process. She says that this

thereby vitiates the protection provided by judicial proceedings immunity. She further says that s.108 of the EQA does not apply in circumstances where a respondent has fabricated reasons. She says that any investigation was improperly conducted. She says the parties were not on an equal footing. She contends that the Respondents had placed a false characterisation on the Recordings.

60. The Claimant says that the fabrication of evidence is not protected.

61. She says that findings of fact by the Tribunal are needed as to the nature of the Recordings.

Conclusions

S.108 of the EQA

62. I find that the Disputed Amendment falls outside s.108 of the EQA. I reach this finding for the following reasons.

63. I do not consider that the alleged act of victimisation arises out of, and is closely connected, to a relationship which used to exist between employer and employee. I find that the alleged victimisation has arisen as the result action taken by the Respondents in the legal proceedings.

64. Whilst I accept that applying a "but for" test it would arguably be met this in itself would not be sufficient as it would not satisfy the close connection limb, particularly where the issue arose whilst litigation was extant between the parties.

65. Further, the Respondents' Amendment was made nearly two years after the Claimant's employment with the Second Respondent ended. It was made in the context of the Tribunal proceedings. Given the circumstances it was not all together surprising that having received legal advice the Respondents considered it appropriate to add the contention of gross misconduct to its defence in the context of seeking to extinguish or reduce any compensation which may be awarded to the Claimant.

Judicial proceedings immunity

66. I find that the Respondents' Amendment, to include an allegation of gross misconduct, falls within judicial proceedings immunity. I reach this finding for the following reasons.

67. It falls within the Category 2 as enunciated by Devlin LJ in Lincoln v Daniels namely that it was done within the pleadings.

68. Whilst the Claimant vehemently disputes the Respondents' label of "gross misconduct" this, even if justified, is not in itself sufficient to disapply the application of immunity. Immunity may in some cases benefit dishonest or malicious witnesses/parties. As the EAT made clear in Aston that is the price that must be paid for the principle. In any event I do not consider that the Respondents' reliance on this defence constitutes malice or dishonesty. I find that it was a legitimate step taken in the course of litigation.

69. I do not accept that judicial proceedings immunity is vitiated as a result of the Respondents' Amendment arising out of a purported earlier investigation unconnected with the proceedings. There is no evidence for this, and, in any event, I would have found that it fell within the protection of judicial proceedings immunity given that it was relied on in the pleadings. The protection would therefore fall on the protected side of the distinction in the example given between a police officer fabricating evidence in the course of his or her duties and then giving a witness statement in court relating to such evidence.

Respondents' argument regarding legal privilege

70. I do not, however, place any reliance on the Respondents' argument that any failure to accept that the Disputed Amendment that outside the ambit of s.108 of the EQA and/or the protection of judicial proceedings immunity would automatically have the effect that the Respondents would be compelled to waive privilege. Whilst I acknowledge that the decision to make the Respondents' Amendment would have been based on legal advice ultimately it would nevertheless have been a decision made by the Respondents to reflect their interpretation as to the circumstances of the Recordings and whether in making and retaining such Recordings the Claimant had committed an act of gross misconduct.

Overall conclusions

71. Had I not found that the Disputed Amendment was outside the ambit of s.108 of the EQA and that the Respondents' Amendment was subject to judicial proceedings immunity I would have considered the Disputed Amendment to have been appropriate within the principles enunciated in Selkent.

Employment Judge Nicolle

16 October 2021

Sent to the parties on:

18/10/2021.

For the Tribunal: