EMPLOYMENT TRIBUNALS

Claimant: **Mr R A Barker**

Respondent: **Sanders Senior Living Limited**

Heard at: **Nottingham** **On:** **23 September 2021**

Before: **Employment Judge Butler (sitting alone)**

Representation
Claimant: Mr J Heard, Counsel
Respondent: Mr M Davies, Counsel

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RECONSIDERATION JUDGMENT

The Judgment of the Tribunal is that the judgment dated 12 March 2021 is revoked as follows:

1. All correspondence and discussions between the parties marked or recorded as being without prejudice are privileged (excluding the Claimant's letter to the Respondent dated 19 August 2020 but including the conversations between the Claimant and Respondent on 27 and 28 August 2020) and may not be relied upon at the final hearing; and

2. The Claimant did not waive privilege in his letter to the Tribunal dated 2 December 2020 or at any other time.

REASONS

<u>The application for reconsideration</u>

1. The Respondent made an application for reconsideration of my judgment dated 12 March 2021 on 26 March 2021. Unfortunately, this was not drawn to my attention for several months, hence the delay in dealing with it. There was a reconsideration hearing via CVP on 23 September 2021 where both parties were represented by counsel. I am grateful to them for their assistance in the hearing. There was an agreed bundle of documents which, as far as I can see, did not include all of the relevant documents referred to. This was not helpful and seems to have been a common theme running through this litigation.

2. I have previously been critical of the Respondent's solicitors who I consider have been very selective in the documents they wish to have included or subject to privilege. I maintain that view and do not consider that they have taken into account the overriding objective. In particular, one of their grounds for reconsideration is that they were denied the opportunity to present arguments around s.111A(3) of the Employment Rights Act 1996. That is quite clearly wrong as their counsel raised it but put forward no argument to the effect that it was engaged in this case.

3. I am not convinced by the Respondent's argument, citing **Trimble v Supertravel Limited [1982] ICR 440 EAT** that it is entirely appropriate for me to reconsider my judgment. The argument that the Respondent did not have an opportunity to Properly 'ventilate' the matter must be wrong when the Claimant was represented by counsel at the hearing. It may have been more appropriate to appeal any alleged error of law to the EAT. Having said that, there is probably enough in the arguments now before me to merit a reconsideration, but only just.

Discussion and conclusions

4. Briefly, the grounds of the application are that there was an error of law, new documents have come to light, the Respondent did not have an opportunity to make representations around s.111A(3), the Claimant waived privilege in its email of 2 December 2020 and there was a potential dispute between the parties in August 2020.

5. I have already considered the opportunity to make representations argument above. However, I have now been referred to the decision in **Harrison v Aryma Limited [2019] 233** which is quite unequivocal in confirming that s.111A(3) is engaged in cases of automatic unfair dismissal, which this is. As I am bound by that precedent, I must revoke my previous judgment to the effect that s.111A applied to the conversations and correspondence in this litigation. Accordingly, the question of privilege falls to be determined under common law principles.

6. For the without prejudice rule to apply, there must be a genuine attempt to compromise a dispute, merely setting out one's case or critising the other party will not suffice. Further, litigation need not have begun; the question is whether, in the course of negotiation, the parties either contemplated, or might reasonably have contemplated, that litigation might ensue if terms were not agreed (**Framlington v Barneston [2007] EWCA Civ 502).** Privilege applies to oral and written communications.

7. The first correspondence I have to consider is the letter from the Claimant to the Respondent dated 19 August 2020. In it, he says, **" …. I now believe this makes my position untenable …. and believe the best way forward for all concerned would be to agree a settlement agreement …. I am happy to**

discuss the above in a protected conversation if required". This letter is marked 'Without Prejudice'. I do not, however, consider it attracts privilege because it makes no reference to the protected disclosures the Claimant claims to have made and gives no indication at this stage that litigation is contemplated. Thus there is no reasonably chohate and definable issues or series of issues but is more in the nature of a number of reciprocal differences which might or might not prove soluble with reflection and discussion (**BE v DE [2014] EWHC 2318 (Fam)).**

8. On the morning of 26 August 2020, Ms Friend of the Respondent telephoned the Claimant with an offer of 3 months' pay. There is no evidence before me that this offer was made to resolve a dispute as the Claimant had not, at this stage been dismissed. Both parties seem to agree that this was a without prejudice conversation, but, following **Framlington**, there is no indication from either party that litigation was contemplated if a settlement was not agreed. Accordingly, despite the label attached to the conversation, it does not attract privilege.

9. Moving on to the next conversation between Ms Friend and the Claimant, it was then that the Claimant was dismissed. He then wrote to the Respondent on the same day in an open letter in which he said, **"This sacking today has happened after I have issued two separate whistle blowing letters raising serious failing and breaches …. which impacted on the Residents, together with my serious accident at work that resulted in me going to hospital by amblance ….I will be meeting with my Solicitor tomorrow to go through all the above in detail, clearly this is constructive dismissal and you will be hearing from me shortly".**

10. It is at this stage that a dispute or a potential dispute arose. Consequently, all correspondence or discussions between the parties then attracted privilege as they were an attempt to resolve matters without the need for litigation or further litigation as the case may be.

11. This brings us to the claim by the Respondent that the Claimant waived privilege in the letter to the Tribunal dated 2 December 2020. In this letter, the Claimant's solicitors said this:

"The Claimant does not have any issue with the without prejudice correspondence being included. However, the Claimant does take issue with the Respondent's assertion that "it will be necessary for the Tribunal to understand all the events that occurred in August 2020", only to then be extremely selective in terms of the without prejudice correspondence referred to the in the Grounds of Resistance".

12. In its application for this reconsideration, the Respondent refers to **Somatra Ltd v Sinclair Roche & Temperley [2000] EWCA Civ 229** as authority for the proposition that where the parties have agreed to put without prejudice communication before a Tribunal, the entirety of that communication, including all admissions, will be before the Tribunal.

13. Herein lies the issue for the Respondent. The Claimant's letter of 2 December 2020 is not, in my view, a waiver of privilege. It clearly sets out that, whilst the Claimant has no issue with the without prejudice communications being before the Tribunal, the Respondent is being selective in what should be included. It is, therefore, a potential waiver subject to a condition. Following **Somatra**, I cannot

see that there has been a bilateral waiver of any communication. The Claimant's letter is not, as the Respondent argues, a clear an unequivocal waiver of without prejudice communications. Accordingly, there being no waiver of privilege, the without prejudice letter from the Claimant to the Respondent dated 30 November 2020 remains privileged.

14. Neither party has set out succinctly precisely which documents are being referred to in connection with an argument that they are or are not privileged. A schedule of such communications would have been helpful. I further note that the Respondent gives every impression of being selective in terms of its own communications and whether or not they attract privilege.

15. I repeat here the comment I made to counsel and in my previous judgment about the point of the privilege arguments. I cannot see that any of the communications between the parties have any consequence at all in relation to liability. This is the case even if they were before the Tribunal at the final hearing. Thus it would have been an easy "win" to suggest none of them were privileged. However, I have applied the law as I see it and revoked my previous judgment accordingly.

16. It follows that any reference to the privileged communications must not be put before the Tribunal at the final hearing and there should be no reference to them in witness statements. The communications which survive this judgment may, of course, be referred to but I consider them, as stated above, to have no impact on liability. If there are any references to privileged communications in the pleadings, they must be redacted.

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Employment Judge Butler

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Date 1 November 2021