EMPLOYMENT TRIBUNALS

Claimant: Mr S Mistry

Respondent: Craig & Rose Limited; Mr B Leseute; and Mr M Beauchamp

Heard at: Cambridge Employment Tribunal by video **On:** 21 June 2022

Before: Employment Judge Dobbie, sitting alone

Representation
Claimant: Mr B Frew (Counsel)
Respondent: Mr C Milsom (Counsel)

JUDGMENT

1. The Claimant's claim for victimisation is struck out on the basis that it has no reasonable prospects of success.

REASONS

Introduction

1. The Claimant presented a claim form to the Tribunal on 25 June 2021, in which he brought claims of:
   (a) Unfair dismissal;
   (b) Direct race discrimination;
   (c) Harassment related to race; and
   (d) Victimisation.

2. At a prior case management hearing, on 22 March 2022, before Employment Judge Brown, the matter was listed for a one-day preliminary hearing (today) to determine:
   (a) Whether evidence of the protected act on which the Claimant relies for his complaint of victimisation is admissible, and, if not, whether the Claimant's complaint of victimisation should be struck out as having no reasonable prospect of success; and
   (b) Whether the Claimant should be ordered to pay a deposit or deposits as a condition of pursuing any of the contentions on which his claim is based.

3. By an email dated 18 May 2022, the Respondent informed the Tribunal that it was withdrawing the application for deposit orders in respect of the

Claimant's claims. Accordingly, the sole matter remaining to be determined was the issue of whether the letter dated 5 April 2021 (which was said to contain the protected act) was admissible, and, if not, whether the victimisation claim should be struck out as having no reasonable prospects of success.

The Hearing

4. Counsel for both parties provided succinct skeleton arguments. There was an agreed bundle. No live evidence was needed or called because the sole matter to be determined was a legal point.

5. During the hearing, Mr Frew accepted that if the evidence of the protected act was inadmissible, that would be the end of the matter, the claim would have to be struck out for having no reasonable prospects of success. That was an appropriate and sensible concession (he could not tenably have argued otherwise).

6. Both parties agreed that the letter in question, that dated 5 April 2021, marked "Without Prejudice Save As To Costs", was genuinely without prejudice. The Claimant sought to put that letter into evidence but the Respondent refused to waive the joint privilege. The sole dispute then was whether that without prejudice privilege should be overridden pursuant to the doctrine of unambiguous impropriety.

Relevant law

Victimisation

7. It is trite law that under sections 27 and 39 of the Equality Act 2010 ("EqA") a claimant can bring a claim for victimisation if they suffer a detriment because they did a protected act. Section 27(2) EqA sets out the definition of a protected act. A protected act is thus a vital ingredient for a victimisation claim without which the claim will fail.

Without prejudice privilege

8. The basic rule is that where a communication is a genuine attempt to settle a dispute, the communication will be protected by without prejudice privilege and cannot be admitted in evidence. There are good policy reasons for this rule which I need not go into here, but which were briefly highlighted in the Respondent's skeleton argument, referring to **Cutts v Head [1984] Ch 290** at 306.

9. Without prejudice privilege is a joint privilege that cannot be unilaterally waived by a party **Rush & Tompkins Ltd v Greater London Council [1989] AC 1280.**

10. In **Unilever plc v Procter & Gamble Co [1999] EWCA Civ 3027,** LJ Walker stated that one party may be permitted to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety. LJ Walker stated [§41] that the expansion of exceptions to the without prejudice rule should not be encouraged because one important aspect of Lord Woolf's civil justice reforms was to

encourage those who are in disputes to engage in frank discussions before they resort to litigation. He also noted [§23] that the Court of Appeal had warned that this exception should be applied only in the "clearest cases of abuse of a privileged occasion". The Rule will apply where there is "unequivocal abuse of a privileged occasion".

11. In **Motorola Solutions Inc and another v Hytera Communications Corp Ltd and another [2021] EWCA Civ 11**, the Court of Appeal added that the test for the admissibility of without prejudice statements based on the "unambiguous impropriety" exception is not whether there is a "good arguable case" that there has been unambiguous impropriety, but rather simply whether the evidence establishes unambiguous impropriety. The Supreme Court refused permission to appeal the **Hytera** decision on 23 February 2022.

12. In **Ferster v Ferster and others [2016] EWCA Civ 717**, Court of Appeal dismissed an appeal of a decision allowing a party, JF, to amend an unfair prejudice petition to refer to an email sent in the context of a mediation. The court agreed that it fell within the "unambiguous impropriety" exception to without prejudice privilege. In that case, there was a dispute between brothers who were equal shareholders in a company. JF had been sued for breach of fiduciary duty, which led him to begin the unfair prejudice proceedings. Following an unsuccessful mediation, an email was sent to JF from his brothers offering to sell their shares to him at an *increased* price, on the basis that they had become aware of "further wrongdoings" by JF. It stated that it was in JF's interest to "wrap this up speedily and quietly" and that a settlement would "obviate the need of further steps such as committal proceedings". The court held that the critical question was whether the privileged occasion was itself abused and that it might be easier to show unambiguous impropriety where there was an improper threat. It was held that the email unambiguously exceeded what was permissible in settlement of litigation, it went far beyond what was reasonable by threatening criminal action and it had serious implications for JF's family. The purpose of the communication was to obtain financial advantage and there was no attempt to make any connection between the alleged wrong and the increased demand for a higher sale price.

13. In **Savings and Investment Bank Ltd (in liquidation) v Fincken [2004] 1 WLR 667** the court held that the risk of perjury, serious though it was, did not in itself constitute an abuse of a privileged occasion. The Court reiterated that truly exceptional circumstances were required before this exception to the without prejudice rule would apply.

14. In **Fincken**, Rix LJ stated that this was why Hoffman LJ in **Forster v Friedland [1992] (unreported)** emphasised that it was the use of the privileged occasion to make a threat in the nature of blackmail that was, if unequivocally proved, unacceptable, and therefore amounted to unambiguous impropriety.

15. In **Swiss Re Corporate Solutions Ltd v Sommer [2022] EAT 78** the EAT held that an employment judge had erred in finding that there was no basis at all for an employer's allegations of serious misconduct against an

employee in a without prejudice letter and that therefore the letter could be admitted (setting aside without prejudice privilege). The EAT considered that the high threshold for unambiguous impropriety could be met in circumstances where a party made exaggerated allegations, although it was unaware of any decided case on this point. However, exaggeration would not usually pass the threshold without findings as to the guilty party's state of mind.

16. In **Woodward v Santander UK Plc [2010] IRLR 834,** the EAT stated that there is no special exception to the without prejudice rule in discrimination cases, the relevant conduct relied on must fall within the current exception of "unambiguous impropriety" in order to justify a departure from the rule. This clarified any uncertainty which had arisen following the case of **BNP Paribas v Mezzotero [2004] IRLR 508,** as to whether there was a specific exception to the without prejudice rule in discrimination cases, where the need to get to the truth might outweigh the public policy in keeping settlement discussions confidential.

Discussion and findings

17. Mr Frew's submission on the matter (after setting out the law) was that:

> "It is submitted that the present case presents a circumstance where the exception should be applied on the basis that if it is not there will be a clear case of abuse of a privileged occasion. In the circumstances of the Claimant alleging that he has suffered retaliation for having asserted that discrimination has taken place, albeit in without prejudice correspondence, excluding that evidence would act as a cloak for unambiguous impropriety in the form of discrimination."

18. When I queried what the act of unambiguous impropriety was, it boiled down to the assertion that there had been an act of unlawful victimisation contrary to ss.27 and 39 EqA and that maintaining the without prejudice privilege (by refusing to admit the letter containing the pleaded protected act) would act as a cloak for unambiguous impropriety by preventing the tribunal from being able to determine that claim.

19. In the present case, it is the Claimant's own without prejudice communication which he seeks to rely on. Therefore, applying the authorities, he has to show that the cloak of without prejudice privilege was abused in relation to him sending that communication. The Respondent's reply, which the Claimant relies on as the detriment, was (ostensibly) sent in open correspondence. I am not aware of any cases on point where the individual's own without prejudice communication is the subject of an application for admissibility relying on the unambiguous impropriety exception.

20. At the point of sending that communication, even on the Claimant's own case, there cannot be said to have been unambiguous impropriety. He was not arguing that his actions in sending the letter amounted to unambiguous impropriety and there were no facts in respect of the Respondent's actions that were relied upon at this earlier stage.

21. The Respondent then replied openly. The Claimant contended that this communication is the detriment (which essentially completes the cause of action for victimisation). However, such letter was sent openly (ostensibly). Hence, it cannot be said that the *Respondent* was using the cloak of without prejudice privilege to commit an act of unambiguous impropriety. Given that there was no unambiguous impropriety when the Claimant's letter was sent, I fail to see how the doctrine could apply to assist the Claimant. Further, I see no principled basis on the facts of this case on which to extend the rule of unambiguous impropriety to a chain of correspondence to allow the protected act to be admitted. The authorities are unanimous that the exception must be narrowly construed and can only be applied where there is proven to be unambiguous impropriety.

22. I am wrong about that, and even if I did extend the principle to cover a party's own without prejudice communications, the authorities are clear that the exception only applies where there is *unambiguous* impropriety. To find in the Claimant's favour on this application would – in essence - require me to find that the victimisation claim was proven. This is because in order to argue that there is *unambiguous* impropriety, I would need to find that the Respondent's reply was an act of detriment caused by the protected act. I am unable to make a finding that there was in fact an act of unlawful discrimination without hearing evidence from the Respondent's witnesses. Without making that finding, there is no wrongdoing to rely on an unambiguous impropriety. Certainly, there is nothing within the letter itself which shows an unambiguous abuse of a privileged occasion.

23. As such, on its face, there is nothing *unambiguous* showing there was an abuse of the without prejudice privilege. It is entirely *ambiguous* as to whether there is any causative connection between the protected act and the reply. Applying but for causation, of course there is a link: without the prior without prejudice letter from the Claimant, there would be no reply from the Respondent. However, victimisation claims do not apply "but for" causation and as stated, in absence of hearing the substantive claim, I cannot find that the Respondent's reply is an unambiguous act of victimisation requiring me to lift the without prejudice veil.

24. The Respondent's reply to the letter is addressed to the Claimant's solicitors and is sent between professional representatives. There is nothing within in that amounts to perjury or blackmail for example. It could well be said that it is a fair warning letter. One party is threatening legal claims (the Claimant) and the other warns that if they do so, there will be counterclaims and legal defences available to them that they will run.

25. The core *facts* upon which the counterclaims and defences are advanced by the Respondent are not disputed by the Claimant, namely that the Claimant did delete data. What is disputed is whether he saved the data elsewhere. On the Respondent's case (that he did delete data which the Respondents say they have been unable to find elsewhere, without expert assistance) the Respondent considers it reasonable to have warned him of the implications of these acts "*IF* he has no satisfactory explanation". It therefore states that, subject to his explanation, it may have a counterclaim for the notice monies paid to him that he would not otherwise

have received if the Respondent had known of the alleged wrongdoing at the date of termination. This is a far cry from threats of criminal proceedings or blackmail which have been found to amount to unambiguous impropriety. I also cannot say it amounts to exaggerated threats, which in **Swiss Re** were not sufficient in any event.

26. I find that the Respondent's reply to the without prejudice letter is a legitimate fair warning between professional parties when litigation was threatened by the Claimant and thus in contemplation of the parties.

27. The Respondent would have been entitled to advance such arguments in any unfair dismissal or discrimination dispute at the remedy stage and could have issued an employer's contract claim if the Claimant had presented a contract claim.

28. Therefore, I find that there is no unambiguous impropriety from the Respondent. At best, the Claimant's case on victimisation could be said to be *arguable* if his own letter containing the protected act was admitted. But being "arguable" is not a sufficient basis to lift the WP privilege applying **Hytera** and the other authorities above.

29. I therefore find that the Claimant's communication of 6 April 2021 is inadmissible given that it is protected by without prejudice privilege which has not been bilaterally waived and is not overridden any unambiguous impropriety.

30. Therefore, the victimisation claim has no reasonable prospects of success and is struck out under Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013.

Other matters

31. The Respondent sought to apply for costs in the sum of £2,250.00. I declined to hear the application at this time because there would be no opportunity for the Claimant to advance evidence on means, which I would need to hear to determine any such application. I therefore directed the Respondent to make the application in writing, and for the Claimant to respond to it in writing (or apply for an oral hearing if he felt it necessary). I will then determine such application on paper or list a hearing to decide it if necessary.

Employment Judge Dobbie
Date 21 July 2022

REASONS SENT TO THE PARTIES ON

.....21 August 2022, GDJ.....