EMPLOYMENT TRIBUNALS

Claimant: Mr P Duffy

Respondent: University Hospitals Morecambe Bay NHS Foundation Trust

HELD AT: Manchester **ON:** 7 September 2017 & 8 September 2017 (in chambers)

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: Mr P Gorasia, counsel
Respondent: Mr E Morgan, counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint of detriment in paragraph 60.5 of the grounds of claim in case number 2406078/2016 is struck out as having no reasonable prospect of success.

2. The claimant's complaint of detriment in paragraph 60.13 of the grounds of claim in case number 2406078/2016 is struck out as having no reasonable prospect of success.

REASONS

Issues

1. The claimant brings claims for constructive unfair dismissal, unlawful deduction from wages and detriments due to protected disclosures.

2. This was a preliminary hearing listed at a case management preliminary hearing on 13 June 2017 to determine two issues:

2.1. The application by the respondent to strike out the complaint of public interest disclosure detriment identified at paragraph 60.5 of the grounds of claim on the basis of absolute privilege; and

2.2. The application by the respondent to strike out the complaint of public interest disclosure detriment identified at paragraph 60.13 of the grounds of claim on the basis of judicial immunity.

3. At this preliminary hearing, it became apparent that there was, in fact, a further issue relating both to the possible strike out of the complaint at paragraph 60.5 and with wider implications for the litigation. This was the issue of whether legal privilege attached to the annotations to the grounds of resistance to the first claim (case no. 2404382/2016) and, if so, whether that privilege had been waived and the claimant could rely on those comments for the purposes of the complaint at paragraph 60.5 and more widely in the litigation. The parties were prepared to deal with this further issue and I agreed to consider it. In the course of submissions, it became apparent that it was common ground that legal privilege did apply to the annotations so the issue to be determined relating to legal privilege was limited to whether privilege had been waived and whether the claimant should be prevented from relying on those annotations.

The facts

4. I heard no witness evidence. I was shown the letters to the GMC which are the basis of the claimant's complaint of detriment at paragraph 60.5 of the grounds of claim in his second claim (case number 2406078/2016) but saw no other documentary evidence.

<u>The application to strike out the complaint of detriment at paragraph 60.5</u>

5. The following matters were common ground:

5.1. The claimant was a registered medical practitioner within the meaning of the Medical Act 1983 (as amended).

5.2. The General Medical Council ("GMC") was his professional regulator.

5.3. The GMC has responsibility for the investigation of complaints about medical practitioners' fitness to practice (the majority of complaints relating to misconduct). Matters which merited referral after investigation used to be dealt with by the GMC's Fitness to Practice Panel (FPP), which was a separate part of the GMC to that dealing with investigations. In more recent times, matters which are considered by investigators to merit referral are determined by the Medical Practitioners Tribunal Service (MPTS). The parties agree that this is an independent judicial tribunal. I was not told when the change to the MPTS determining cases took place, but Mr Morgan informed me that, at the time the referrals in question were made to the GMC, it

would have been the GMC itself, through its FPP, which would have determined any matters considered by investigators to merit referral.

5.4. In accordance with the document "Good Medical Practice", there is an obligation on all doctors to make patient safety their first concern. In accordance with this obligation, any doctor who has a concern, not just the "responsible officer", could properly raise this with the GMC for possible action.

5.5. On dates between 17 December 2012 and 25 July 2014, four anonymous letters were sent to the GMC about the claimant. From the contents of the letters, it appears that they were written by a person or persons within the claimant's department; the urology department at the respondent. The letters alleged matters which, if true, may have called into question the claimant's fitness to practice.

5.6. The letters were not sent in the context of any existing fitness to practice or proceedings or investigation relating to the claimant. It appears that the GMC took no action as a result of the letters.

6. The claimant alleges that the letters were malicious; the contents of the letters were untrue and the writers must have known them to be untrue.

7. The claimant alleges, at paragraph 60.5, that he suffered a detriment because of making protected disclosures, as follows:

> *"Submissions of malicious reports to the GMC only discovered by the Claimant as recently as 12 December 2016 (in a reply from the GMC to an enquiry made by the Claimant as to anything held about him) including on 17 December 2012, 21 May 2014, 21 July 2014, 25 July 2014."*

<u>The application to strike out the complaint of detriment at paragraph 60.13 and the wider issue of legal privilege</u>

8. The claimant's first claim relates to additional payments which he alleges the respondent agreed to pay to him but were not paid after October 2015.

9. The response to the first claim asserts that the claimant had been paid in accordance with his contract of employment and agreed Job Plan and denied that the respondent had made any unlawful deductions from wages. Included in the copy of the response presented to the tribunal were typed comments at the side of two of the pages. These appear to have been comments from someone at the respondent to their legal advisers.

10. Mr Gorasia, correctly in my view, accepted on behalf of the claimant that legal privilege applied to the comments. He argued, however, that privilege had been waived by the sending of the response including the comments and the claimant should be allowed to refer to these comments in the proceedings. I will return to this argument later in these reasons.

11. I have had no evidence, and no suggestion has been made, that the claimant's solicitors did not realise, on receipt of the response to the first claim, that the

annotations had been included in the response in error. Indeed, the complaint at 60.13 acknowledges that the comments box was inadvertently included.

12. The claimant alleges, at paragraph 60.13 of the grounds of claim in the second claim that he suffered a detriment because of making protected disclosures, as follows:

> *"Defending Employment Tribunal proceedings issued by the Claimant for unlawful deductions from wages by asserting that no monies were due to the Claimant notwithstanding that in the Response filed with the Employment Tribunal a comments box was inadvertently included in which the Respondent accepted that at least a five figure sum was owed to the Claimant."*

The application to strike out the paragraph 60.5 complaint

Submissions

13. The respondent argues that referrals to the GMC which could result in proceedings before a quasi-judicial body (previously the FPP and now the MPTS) are the subject of absolute privilege so cannot be relied on in proceedings. Mr Morgan relied on *Ahari v Birmingham Heartlands and Solihull Hospitals NHS Trust UKEAT/0355/07, White v Southampton University Hospitals NHS Trust [2011] EWHC 825 (QB),* and *Vaidya v General Medical Council [2010] EWHC 984 (QB)* in support of his submissions.

14. Mr Gorasia, for the claimant, accepts that the MPTS is a quasi-judicial body. He argues, however, that, at the time the letters were sent, none of the quasi judicial functions of the GMC were invoked so absolute privilege does not apply.

15. Mr Gorasia relied, in particular, on *Singh v (1) Governing Body of Moorlands Primary School (2) Reading Borough Council [2013] EWCA Civ 909 CA.*

16. It was agreed that the application to strike out stands or falls on whether absolute rather than qualified privilege applies.

The law

17. The EAT in *Ahari v Birmingham Heartlands and Solihull Hospitals NHS Trust UKEAT/0355/07* held that the FPP was a quasi-judicial body and that absolute immunity from suit in employment tribunal proceedings attaches to witnesses who give evidence before it. I consider the same reasoning must apply to witnesses giving evidence before the MPTS, which has the same role previously carried out by the FPP.

18. Mr Justice Eady in *White v Southampton University Hospitals NHS Trust [2011] EWHC 825 (QB)*, held that a letter sent to the GMC expressing concerns about Dr White was the subject of immunity and/or absolute privilege. Dr White was not allowed to pursue a complaint of libel in relation to the contents of that letter. Eady J noted, at paragraph 12, that the letter did not contain anything extraneous *"that is to say, anything which is not germane to the legitimate purposes for which the law, for*

reasons of public policy, affords the protection of privilege." Eady J referred to the public policy objective behind such immunity or absolute privilege. At paragraph 7, he wrote:

> *"The public policy objective is to enable people to speak freely, without inhibition and without fear of being sued, whether making a complaint of criminal conduct to the police or drawing material to the attention of a professional body such as the GMC or the Law Society for the purpose of investigation. It is important that the person in question must be able to know at the time he makes the relevant communication whether or not the immunity will attach; that is to say, the policy would be undermined if, in order to obtain the benefit of the immunity, he was obliged to undergo the stress and expense of resisting a plea of malice: see the remarks of Lord Hoffman in Taylor v Director of the Serious Fraud Office [1999] 2 AC 177, 214."*

19. Eady J noted at paragraph 8 that: "It has long been recognised that one of the consequences of according immunity to such communications is that sometimes it can operate to protect a malicious informant."

20. In *Singh v (1) Governing Body of Moorlands Primary School (2) Reading Borough Council [2013] EWCA Civ 909 CA,* the Court of Appeal held that there was no immunity which prevented a claimant from relying, as an allegation of a breach of the implied duty of mutual trust and confidence, on alleged undue pressure placed by the respondent Council on a potential witness to produce a witness statement containing false or otherwise inaccurate evidence for the purpose of employment tribunal proceedings. The Court of Appeal noted at paragraph one that the appeal involved the clash of two principles: *"the principle that a wrong should not be without a remedy, and the principle that those involved in the judicial process should be immune from civil suit fro what they do or say in the course of litigation. The latter principle is known as "judicial proceedings immunity"*. The Court of Appeal conducted a detailed analysis of the basic rule which started as the principle that no action in defamation could be brought against a witness for anything he said in evidence before a court or tribunal, its rationale, unsuccessful attempts to outflank the rule and inroads which had been made into the rule. In considering limits to the rule, they noted that, in *Lincoln v Daniels [1961] 1 QB 237,* it had been held that complete immunity did not apply to a letter written to the Bar Council making a complaint of professional misconduct against a QC. They considered in detail other cases. However, they did not refer to *White v Southampton University Hospitals NHS Trust [2011] EWHC 825 (QB).* Concluding the section on "Limits to the rule", Lord Justice Lewison wrote, at paragraph 66:

> *"Summarising this part of the case:*
>
> *(i) The core immunity relates to the giving of evidence and its rationale is to ensure that persons who may be witnesses in other cases in the future will not be deterred from giving evidence by fear of being sued for what they say in court;*
>
> *(ii) The core immunity also comprises statements of case and other documents placed before the court;*

(iii) That immunity is extended only to that which is necessary in order to prevent the core immunity from being outflanked;

(iv) Whether something is necessary is to be decided by reference to what is practically necessary;

(v) Where the gist of the cause of action is not the allegedly false statement itself, but is based on things that would not form part of the evidence in a judicial enquiry, there is no necessity to extend the immunity;

(vi) In such cases the principle that a wrong should not be without a remedy prevails."

21. The Court of Appeal, in applying the law to the case, noted that Ms Singh's claim was not based on anything that the potential witness might or might not say to the employment tribunal; it was based on what went on outside the tribunal and in particular the means by which the Council procured the potential witness to give her statement. They concluded, in paragraph 71: "The means by which the Council procured the witness statement is a free-standing act."

Conclusions

22. The question in this case is whether absolute privilege extends to communications to the GMC which might lead to proceedings before the quasi judicial body (previously the FPP and now the MPTS).

23. If absolute privilege attaches to the letters to the GMC, then the claimant is not able to rely on those letters and the complaint at paragraph 60.5 must be struck out.

24. It appears to me that this case is on all fours with the situation in *White.* The claimant wishes to found his detriment complaint on four letters written to the GMC. These letters could have led, after investigation, to proceedings before the FPP or MPTS (depending whether the quasi judicial function had been passed to the MPTS or not by then) about the claimant's fitness to practice. The *White* case involved a letter to the GMC which could or did result in proceedings about Dr White's fitness to practice. The reasoning is not dependant on whether proceedings took place. The claimant seeks to make a distinction between the complaint in *White* being addressed to the GMC's Fitness to Practice Directorate and the letter in this case being to the GMC generally. It does not appear to me, having regard to the reasoning in *White,* that this is a relevant distinction. The letters were written to a body which had the power to investigate and make referrals to the quasi-judicial body for determination where they considered proceedings were appropriate. Even if the letters were written after the quasi-judicial function had been transferred from the GMC itself to MPTS, I do not consider this serves to distinguish the cases. I understand the rationale in *White* to be that a person making a communication which may result in proceedings before a quasi-judicial body should be immune from complaints about the communication so they are not inhibited from speaking freely. *White* recognised that this may mean that people making malicious complaints are also given immunity from being sued. *White* referred also to a person making a

complaint of criminal conduct to the police being given immunity from being sued about such a communication. The police do not go on to determine whether a criminal act has been committed. The GMC now investigate complaints and make referrals, where appropriate, which are now dealt with by the MPTS (previously the FPP which was part of the GMC).

25. I consider myself bound by the decision in *White* to find that absolute privilege applies to the letters to the GMC unless *Singh* has overruled *White.* I conclude that it has not. The *Singh* judgment does not deal with a similar situation. It is concerned with alleged undue pressure to make a false witness statement rather than someone making an allegation to a body charged with investigatory functions which may lead to quasi judicial proceedings.

26. Mr Gorasia suggested that this was an analogous situation to the complaint to the Bar Council in *Lincoln v Daniels [1961] 1 QB 237,* referred to in *Singh*, where it was held that immunity did not apply. However, *White* was decided a considerable time after that case. I note, from paragraph 5 in *White,* that reference was made to *Lincoln v Daniels,* albeit in the context of a case cited by the editors of *Gatley on Libel and Slander* in support of a statement that absolute privilege attached to statements made before the GMC, amongst other bodies, "and also to statements contained in any petition, information or letter of complaint by which such bodies are set in motion, or in any statutory declaration made in support or in answer." It appears, therefore, that *White* was decided in the knowledge of the decision in *Lincoln v Daniels.* I do not consider, therefore, that *Lincoln v Daniels* is authority which should lead me to hold that privilege does not apply to the letters to the GMC in this case.

27. I conclude that *Singh* does not overrule *White.*

28. I conclude that absolute privilege or immunity applies to the letters to the GMC and the claimant cannot rely on them for the complaint of detriment at paragraph 60.5. I, therefore, strike out that complaint of detriment on the grounds that it has no reasonable prospect of success.

The application to strike out the paragraph 60.13 complaint

29. There are two bases on which this application is made. One is that judicial immunity applies. The other is that legal privilege applies to the annotations which the claimant seeks to rely on and that such privilege has not been waived.

30. Mr Gorasia, on behalf of the claimant, during the course of submissions, accepted, correctly in my view, that the annotations, since they appeared in the response to the claimant's first claim, attracted judicial immunity. The claimant cannot, therefore, rely on them to found the complaint of detriment in paragraph 60.13. For this reason, the complaint must be struck out as having no reasonable prospect of success.

31. The issue of legal privilege is of wider importance than as a further potential reason for saying why the claimant cannot rely on the annotations in the response; if legal privilege applies to these annotations then the claimant cannot rely on them in

any part of either case so he will not be able to rely on them to assist his claim of unlawful deduction from wages. It is, therefore, necessary for me to determine the issue of whether privilege was waived and whether the claimant can rely on the annotations in the proceedings, even though I have decided, on the basis of the judicial immunity point that the claim at paragraph 60.13 must be struck out. As noted earlier, Mr Gorasia accepted on behalf of the claimant, correctly in my view, that legal privilege applied to the annotations which were clearly comments from the clients to their legal adviser.

Submissions

32. The claimant contends that the respondent has waived privilege by filing its ET3 with annotations to its defence. The claimant submits that, by including privileged material within its pleading, the respondent has waived privilege in relation to its contents both to the tribunal and the claimant and the claimant should not be prevented from relying on it. Mr Gorasia relied on *Great Atlantic Insurance v Home Insurance & Ors [1981] 1 WLR 529* in support of this submission. Mr Gorasia said he had been unable to find any authorities dealing with the situation where privileged material was mistakenly included in the pleadings. Mr Gorasia submitted that it did not matter whether the material had been included by mistake or not, the claimant could still rely on it. He drew a distinction between material which has been disclosed between the parties and material disclosed to the court. He submitted that once the material was in the court's record, it is admissible.

33. The respondent contends that the annotations were clearly included by mistake and the claimant should not be allowed to rely on the comments included in the response by mistake. Mr Morgan submitted that the authorities are clear that inadvertent disclosure is not a waiver of privilege and any material inadvertently disclosed may not be relied upon by an adverse party to the litigation. He relied on *Al Fayed v Metropolitan Police Commr [2002] EWCA Civ 780* in support of his submissions.

34. Mr Morgan submitted that a ruling of the employment tribunal to preclude the claimant from relying on the comments does not impede the claimant's ability to put forward his claim; any information the claimant was able to harvest from the comments would be an inappropriate windfall. There was no intentional waiver and would be no injury to the claimant if he was not allowed to rely on the material.

35. Mr Morgan submitted that the *Great Atlantic Insurance* case was concerned not with a waiver of privilege but a collateral waiver of privilege. There had been an intentional disclosure of two paragraphs of a document. Counsel who then read out these paragraphs in open court did not know that this was part of a longer document. There was nothing to alert the recipient that disclosure was a mistaken act. Mr Morgan submitted that the *Al Fayed* case had been decided since *Great Atlantic Insurance* and this made it clear that the court may recoup evidence or material which would otherwise be subject to privilege where it is clear there has been a mistake and it would be unjust for the material to stand.

The law

36. In *Great Atlantic Insurance v Home Insurance & Ors [1981] 1 WLR 529,* the Court of Appeal rejected an appeal from a decision to order the plaintiffs to disclose the whole of a memorandum where two paragraphs of the memorandum from the plaintiffs' legal advisers to the plaintiffs had been disclosed to the defendant and then read out in court by counsel for the plaintiffs. The plaintiffs' legal advisers had regarded the undisclosed part of the memorandum as privileged. Counsel had been unaware that the document was part of a longer document and had not intended to waive privilege. The Court of Appeal held that the whole of the memorandum was privileged. It held that privilege could not be waived as to part and asserted as to the remainder; the introduction of part of the memorandum into the trial record had waived privilege with regard to the whole memorandum.

37. The Court of Appeal in *Al Fayed v Metropolitan Police Commr [2002] EWCA Civ 780* considered whether a party who was inadvertently allowed to inspect legal opinions subject to legal professional privilege should be ordered to return the opinions and prevented from making use of them. At paragraph 16, the Clarke LJ set out the relevant principles derived from authorities:

> *"(i) A party giving inspection of documents must decide before doing so what privileged documents he wishes to allow the other party to see and what he does not.*
>
> *(ii) Although the privilege is that of the client and not the solicitor, a party clothes his solicitor with ostensible authority (if not implied or express authority) to waive privilege in respect of relevant documents…*
>
> *(iii) A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived.*
>
> *(iv) In these circumstances, where a party has been given inspection of documents, including privileged documents which he has allowed the other party to inspect by mistake, it will in general be too late for him to claim privilege in order to attempt to correct the mistake by obtaining injunctive relief.*
>
> *(v) However, the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires, as for example in the case of inspection procured by fraud.*
>
> *(vi) In the absence of fraud, all will depend upon the circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake.*
>
> *(vii) A mistake is likely to be held to be obvious and an injunction granted where the documents are received by a solicitor and:*

a. the solicitor appreciates that a mistake has been made before making some use of the documents; or
b. it would be obvious to a reasonable solicitor in his position that a mistake has been made;

and, in either case, there are no other circumstances which would make it unjust or inequitable to grant relief.

(viii) Where a solicitor gives detailed consideration to the question whether the documents have been made available for inspection by mistake and honestly concludes that they have not, that fact will be relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made, but is not conclusive; the decision remains a matter for the court.

(ix) In both the cases identified in (vii) (a) and (b) above there are many circumstances in which it may nevertheless be held to be inequitable or unjust to grant relief, but all will depend upon the particular circumstances.

(x) Since the court is exercising an equitable jurisdiction, there are no rigid rules."

Conclusions

38. I consider that the principles set out in the *Al Fayed* case should be applied in this case in considering whether the claimant may be allowed to rely on the comments inadvertently included in the response to the first claim.

39. It is clear that the comments boxes were included in the response by mistake. It appears, from the wording of the complaint at paragraph 60.13, that this mistake was apparent to the claimant's solicitors; this refers to the comments as being inadvertently included. Even if this had not been stated in paragraph 60.13, I would have concluded that it would have been obvious to a reasonable solicitor that a mistake had been made.

40. I consider there are no circumstances which would make it unjust or inequitable to prevent the claimant from relying on the material inadvertently included in the response. Whilst, as the court in *Al Fayed* states, there are no rigid rules, it appears to me that this is a situation where the circumstances are such that the claimant should not be allowed to rely on the comments inadvertently included. The claimant is also prevented by reason of judicial immunity from relying on the comments to found the complaint at paragraph 60.13. The claimant will not be prevented from pursuing his wages complaints and relying on evidence relevant to those complaints if he is not allowed to rely on the privileged material inadvertently included in the response.

41. I do not consider that the *Great Atlantic Insurance* case means that there should be a different outcome because the material was mistakenly included in the response form, rather than just disclosed between the parties. It appears to me that the *Great Atlantic Insurance* case does not preclude the correcting of an error at the pleadings stage of proceedings. The court notes at p.537 G that, in interlocutory

proceedings and before trial it is possible to allow a party who discloses a document or part of a document by mistake to correct the error in certain circumstances. In *Great Atlantic Insurance,* the document had been read out in court and the Court of Appeal did not consider that they could put the clock back and undo what has been done. I consider it is possible, in these tribunal proceedings, to correct the error. The comments inadvertently included in the response can be deleted and not read by the tribunal hearing the case. The claimant can be prevented from referring to these comments in his evidence and from cross examining respondent witnesses about the comments.

42. In separate case management orders, I make orders to prevent the use of the material inadvertently included in the response for any purposes in either claim.

43. Since the claimant is precluded from making use of the comments inadvertently included in the response to the first claim I conclude, for this reason also, that the complaint of detriment set out in paragraph 60.13 of the grounds of claim should be struck out as having no reasonable prospect of success.

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Employment Judge Slater

Date: 11 September 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

22 September 2017

FOR THE TRIBUNAL OFFICE