EMPLOYMENT TRIBUNALS

Claimant: Mrs S E Barker-Smith

Respondent: Jayne Greer t/a Dennison Greer

HELD AT: Manchester **ON:** 29 March 2018

BEFORE: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Ms A Niaz-Dickinson, Counsel
Respondent: Mr C Breen, Counsel

JUDGMENT

1. The claimant's application for the response form to be struck out, or for the respondent to pay a deposit as a condition of defending the claim, is refused.

2. The respondent's application for a stay of proceedings is refused, but the final hearing listed between 23 April and 8 May 2018 is postponed. It will be re-listed on dates in 2019 once the parties have had an opportunity to provide dates to avoid.

REASONS

Introduction

1. This preliminary hearing was convened to determine two matters. The first was the application made by the respondent for a stay of proceedings, or in the alternative for the final hearing fixed for 23 April – 8 May 2018 to be postponed and re-listed. The second was an application by the claimant for an order striking out the respondent's response, or in the alternative for a deposit to be ordered. Both applications were made as a consequence of an intervention by the Solicitors Regulatory Authority ("SRA") in the respondent's practice. That decision was communicated to the respondent by a letter of 5 December 2017. In order to explain the reasons for my decision it is necessary to summarise the background to this case.

Background

2. The claimant is a solicitor and was a salaried partner in the respondent's practice. She resigned her employment in June 2016. She alleges that prior to her resignation she made a series of protected disclosures under Part IVA Employment Rights Act 1996 in relation to breaches of solicitors' accounts rules. She complains that she was subjected to detriments as a consequence of those protected disclosures, and that those detriments also amounted to a fundamental breach of the implied term of trust and confidence which meant that her resignation should be construed as a dismissal. She complains of detriment in employment on the ground of protected disclosures contrary to section 47B ERA 1996, and of unfair constructive dismissal. She says that the reason or principal reason for the treatment which caused her to resign was her protected disclosures, which would render dismissal automatically unfair under section 103A, or in the alternative that it was an "ordinary" unfair dismissal under section 98. Finally, the claimant also pursues complaints of breach of contract and unlawful deductions from pay in relation to holiday pay, sick pay and bonus.

3. The claim form was presented on 19 September 2016. A response form resisting all the complaints on the merits was filed on 24 October 2016. I conducted a case management preliminary hearing on 9 November 2016 at which the legal issues were identified and a case management timetable set bringing the case to a final hearing arranged for late October 2017.

4. In accordance with the Case Management Orders I made, the claimant supplied further particulars of her claim in December 2016 and the respondent amended her response form in February 2017. Those amendments had been envisaged in the Case Management Order and there has been no suggestion from either party that the List of Issues in Annex B to my Case Management Order should be amended.

5. At a preliminary hearing by way of telephone conference call before Employment Judge Howard on 4 October 2017 the final hearing set to begin later that month was postponed. The claimant was ordered to provide further documents and information to the respondent, including details of the client files on which the claimant alleged (claim form paragraph 15) that there were accounts discrepancies. The list of files (more than forty of them) was provided by the claimant's solicitors by a letter of 17 November 2017. Employment Judge Howard also made further Case Management Orders. The claimant was to send to the respondent a draft index to the agreed bundle of documents by 22 November 2017, and the bundle was to be agreed by 6 December 2017. Witness evidence was to be served by 5 March 2018. The order did not specifically require simultaneous exchange. Employment Judge Howard re-listed the case for an eleven day final hearing between 23 April and 8 May 2018.

6. On 12 December 2017 the respondent applied for the case to be stayed and the final hearing to be postponed. She had been notified that the panel of adjudicators at the SRA had decided to intervene into her practice. The ground for that intervention was that there was reason to suspect dishonesty on her part and that she had failed to comply with SRA rules.

7. This was confirmed to the claimant by a letter of 5 December 2017. The letter made clear that it was not a finding that the respondent had been dishonest. The letter recorded that intervention agents had attended the offices of the firm the previous day and "uplifted the files and records, took control of the bank accounts and started contacting clients".

8. By email of 12 January 2018 the claimant through her solicitors indicated that she opposed the request for a stay or a postponement, and made an application for the response to be struck out or for the respondent to be required to pay a deposit. Employment Judge Ross decided that these applications should be listed for a preliminary hearing. It was arranged for 19 March but re-listed for 29 March on account of the availability of counsel for the respondent.

The Hearing

9. At the hearing both parties were represented by counsel. An agreed bundle of documents had been prepared running to 200 pages. I did not hear any evidence, but I had the benefit of oral submissions from both parties.

Strike out/deposit applications

10. I heard the claimant's applications first. Ms Niaz-Dickinson submitted that the changed circumstances meant that the respondent had either no reasonable prospect of defending the claim, or little reasonable prospect. She recognised that the SRA had made no finding of dishonesty, but there was clearly reason to suspect it on the part of the respondent. The respondent was herself saying that she had no access to the files she needed to defend the proceedings properly, and therefore had either no reasonable prospect of little reasonable prospect of success in her defence at the forthcoming final hearing.

11. I rejected this submission. I did not need to trouble Mr Breen to respond to it. Ms Niaz-Dickinson rightly recognised that the absence of the files was relevant only to the question of whether protected disclosures were made. They were potentially relevant to whether the claimant reasonably believed that there was a breach of a legal obligation and/or reasonably believed that her disclosures were made in the public interest. However, if the final hearing were to proceed on 23 April the absence of that material would not hamper the respondent in defending the claim on the other issues to be determined, including the key issue of whether there was any causal link between protected disclosures and subsequent detrimental treatment. I rejected the contention that the SRA intervention itself, or the practical difficulties caused to the respondent by it, could be said to be such as to result in a conclusion that there was no reasonable or little reasonable prospect of the other aspects of her defence succeeding. I declined the applications.

Application to stay/postpone the final hearing

12. Mr Breen then made his application for the final hearing to be postponed and/or the case to be stayed. It was only on receipt of the claimant's letter of 17 November 2017 that the respondent had been informed of the files that were at issue in the claimant's pleading. The SRA had intervened and taken those files on 4 December 2017, eleven working days later. The respondent had not been able to have access to those files since then, although the respondent had recently been

informed that access was now possible. There was a practical difficulty because some of those files were with the SRA, some with Capita and some may have been returned to the client. Mr Breen submitted that without access to that material the respondent would not be able to defend herself fairly on two matters:

(a) The issue of whether the claimant had a reasonable belief that there was a breach of the solicitors' accounts rules, going to whether any protected disclosures had been made; and

(b) The allegation made on page 17 of the further particulars (bundle page 70) that part of the fundamental breach of trust and confidence was the actions of the respondent "in committing potentially fraudulent acts…[causing] the claimant's reputation and practising certificate to be jeopardised, [exposing] her to investigation by the SRA and causing her to suffer ill health".

13. Mr Breen submitted that this was an extremely serious allegation made by one solicitor against another, and because of the way the case was pleaded it would be inevitable that the Tribunal would have to make an adjudication within the constructive dismissal complaint on whether the respondent had been behaving in a fraudulent way. It would not be fair to determine so serious a matter without the respondent having full access to the files in question. There was insufficient time to do that before the final hearing.

14. On behalf of the claimant Ms Niaz-Dickinson opposed the application. She pointed out that the respondent had disclosed three lever arch files of documents in November 2017, before the SRA intervention. She suggested that it would have been apparent to the respondent that the material to be disclosed should include those files about which the claimant had raised concerns. The case should originally have been heard in October 2017, and any further delay would be contrary to the overriding objective.

15. In response to my query Ms Niaz-Dickinson confirmed that the claimant had not prepared the draft index to the agreed bundle as directed by Employment Judge Howard, because the parties had not been in a position to agree the bundle. There was still disclosure outstanding. She also confirmed that no witness statements had been served by 5 March 2018 as directed by Employment Judge Howard, although that was because the respondent had not been in a position to exchange witness statements.

16. I considered the submissions from both sides and the circumstances of this case. The respondent's application had to be considered against the overriding objective, which is to deal with the case fairly and justly. That includes so far as practicable dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay so far as compatible with proper consideration of those issues. Following an enquiry of the Tribunal's administrative staff, I took into account that the effect of postponing an eleven day final hearing due to start in late April 2017 would be that the Tribunal could not accommodate it until January 2019 at the earliest. That was an extremely significant delay, particularly in a case which was presented in September 2016 and which should have been heard by now in any event. Those considerations weighed heavily against granting the application.

17. However, the following factors persuaded me that it was in accordance with the overriding objective to postpone the final hearing.

18. Firstly, the allegations against the respondent made by the claimant in the further particulars were extremely serious. Had the allegation of a breach of trust and confidence been restricted to the alleged protected disclosure detriments, there might have been merit in the contention that the Tribunal would not have to make a decision on whether the respondent had been operating fraudulently, but only whether the claimant had a reasonable belief that there were accounts irregularities. The clear pleading in the further particulars, however, took the case into a different sphere: it was said to be part of the breach of contract that the respondent was operating fraudulently. In deciding whether there was a breach of trust and confidence the Tribunal would have to make a determination on that issue.

19. Secondly, the respondent was able to explain why the documents in question had not already been disclosed prior to the SRA intervention. The claimant had only identified the files in question in late November 2017. Ms Niaz-Dickinson submitted that the respondent did not need the files themselves, because the claimant had already disclosed the accounts ledgers for those files, but it seemed to me that with a serious allegation of fraud there was merit in the argument that the accounts ledger would provide only part of the relevant evidence. Accordingly the failure of the respondent to have disclosed this material prior to the SRA intervention was not as great a concern as it appeared at first sight.

20. Thirdly, the claimant was not in a strong position in relation to compliance with Case Management Orders. The draft index to the bundle should have been prepared in November 2017 as directed by Employment Judge Howard, and the claimant could have prepared witness statements for service on a unilateral basis by 5 March, or in the alternative to have been held ready to be served when the respondent indicated that she was ready. These steps had not been taken. Ms Niaz-Dickinson accepted that there would be a great deal of work to be done in a very short time on the claimant’s side for the case to be ready to proceed on the dates allocated.

21. I noted that the overriding objective includes avoiding delay so far as compatible with proper consideration of the issues. I concluded that to avoid any delay and reject the application in its entirety would not be compatible with the proper consideration of the serious allegation of fraud made by the claimant. I noted that Employment Judge Howard had reminded the parties of their responsibility to ensure that the case was properly prepared, and had said that a further postponement would only be countenanced in exceptional circumstances (paragraphs 2 and 3 of the note of discussion at the hearing on 4 October 2017). However, I was satisfied that the SRA intervention was an exceptional circumstance which prevented the respondent from preparing her defence to these serious allegations properly, and which meant that it would not be possible to have a fair hearing between 23 April and 8 May 2018. I therefore decided that the final hearing should be postponed and re-listed at the earliest opportunity, even though that was not going to be before 2019.

22. I did not consider it appropriate, however, to stay the proceedings. I did not accept that either the conclusion of the SRA intervention in the Practice, or any determination to be made in due course by the Solicitors Disciplinary Tribunal, would have any significant bearing on the issues for the Tribunal to decide. The reason for

postponement was to recognise the practical difficulty for the respondent in getting access to files which she needed to defend the allegations, and the inevitable consequence of a postponement would be that there would be ample time to address this practical issue. The proceedings were not stayed.

Case Management

23. Having given judgment with brief reasons on the applications I engaged in case management. Dates were agreed for the respondent to update the Tribunal and the claimant on the position with access to the files, and for the parties to confirm whether there were any other outstanding disclosure issues. A date for a further telephone case management hearing was fixed at which those matters could be reviewed. Details are set out in a Case Management Order which will be promulgated separately.

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Employment Judge Franey

4 April 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

12 April 2018

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