



EMPLOYMENT TRIBUNALS

Claimant: Mr D Sherratt

Respondent: Life's Great Group Limited

Heard at: Manchester Employment Tribunal (by CVP)

On: 21 February 2022

Before: Employment Judge Mark Butler

Representation

Claimant: Mr S Brochwitz-Lewinski, of Counsel

Respondent: Mr M Humphreys, of Counsel

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because of the ongoing pandemic and all issues could be determined in a remote hearing.

DECISION AT PRELIMINARY HEARING

The meeting of 14 September 2020, and the contents of the discussion at that meeting, are excluded as evidence in this case by reason of it being privileged.

REASONS

Introduction

1. This case came before me at a Preliminary Hearing on 21 February 2022. This was a closed Preliminary Hearing, and was for the sole purpose of determining the following:

A preliminary hearing by CVP has been listed for 2 hours on 21 February 2022. The hearing will determine, whether the claimant should be able to rely on evidence relating to a meeting with another employee or, whether it should be excluded by reason of it being privileged by reason of either the doctrine of 'without prejudice' or s111A Employment Rights Act 1996.

2. I was assisted by a bundle that ran to 118 pages. Within that bundle there were two witness statements. One was from the Claimant. The other, from Mr Richard Hayes, who was the person who met with the Claimant on 14 September 2020.
3. I had evidence from both the Claimant and Mr Hayes.

Closing Submissions

4. I was provided with opening submissions from Counsel on behalf of both the Claimant and the Respondent. And I was also assisted by closing submissions made on behalf of both the Claimant and the Respondent. I do not repeat them here, but considered them carefully in reaching this decision.

Law

Without Prejudice Communications

5. In terms of without prejudice communications, I was reminded that the tribunal will need to first consider two matters:
 - a. First, whether there is an existing dispute between the Parties.
 - b. And if there is an existing dispute, the tribunal must then consider whether the communications (oral or in writing) were made with the aim of genuinely attempting to settle that dispute.
6. There are a number of established exceptions to the privilege. The Claimant in this case was relying solely on the exception of unambiguous propriety.
7. Mr Humphreys helpfully provided the relevant case law for this matter. Mr Brochwitz-Lewinski agreed that the case law provided was relevant to the matters in this case.
8. The following case law was thus considered in reaching a decision on this matter:
 - a. *Framlington Group Ltd v Barneston* [2007] IRLR 598
 - b. *Portnykh v Nomura International PLC* [2014] IRLR 251
 - c. *South Shropshire DC v Amos* [1986] 1 WLR 1271
 - d. *Woodward v Santander UK PLC* [2010] IRLR 834
9. Given the findings below, it was unnecessary to consider the position under s.111A of the Employment Rights Act 1996.

Findings of Fact

10. The Claimant and Mr Hayes have co-owned a number of companies together. And have enjoyed a good working relationship since before 2008. They considered each other to be friends as well as work colleagues.
11. Mr Hayes is the Respondent's Chief Executive Officer. He is a member of the

Respondent's Board of Directors. Mr Sherratt was, until his employment was terminated, the Respondent's Managing Director.

12. The Claimant through the material period was the company designated SMF16. He was the designated compliance officer, and matters relating to FCA compliance would have been his responsibility.
13. On 04 September 2020, around 11.48, Mr Hayes met via Teams with Mark Cappell (Executive Chairman of the Respondent), Lisa Emsley and Sarah Fellowes, and was made aware of a potential issue concerning completion of a compliance due diligence, which could result in a need to notify the Financial Conduct Authority. Notification would be of both the potential breach, but also that the Claimant had not come forward with the information despite knowing of it.
14. On 04 September 2020, at 15.46, the Claimant emailed Mr Cappell explaining that an issue had been identified with regards protection insurance sales, and recommending that the Respondent undertake a route cause analysis, and that protecting insurance sales be suspended temporarily whilst the investigation was completed (see p.88).
15. It was decided by the Respondent that it would undertake a route cause analysis investigation into the potential FCA breach.
16. On 04 September 2020, at 20.37, Mr Cappell sent an email to the Claimant (see p.89), identifying that following a potential breach of ICOB that his role was now subject to reduced responsibilities. This email placed the following restrictions on the Claimant:

You are to have no involvement with sales (insurance and mortgages), advice (insurance and mortgages), quality, customer experience, compliance or risk.

You are to have no communication with Boyd, sales (insurance and mortgages advisers), Lisa Wyse, Christine Hayes or Simply Biz.

You are not to discuss this pending investigation with anyone inside or outside of the business.

17. Around this same time, Mr Hayes had had phone conversations with the Claimant concerning the FCA breaches. During which the Claimant denied having any responsibility for them. Although this is disputed by the Claimant, having these conversations, I found on balance that they probably did. The Claimant and Mr Hayes were close friends and so it is likely Mr Hayes would call the Claimant where a serious issue concerning the Claimant was known. And the content of the discussion as described by Mr Hayes is consistent with the contemporaneous documents in the bundle. It is therefore entirely plausible that Mr Hayes did call the Claimant and had these discussions.
18. Mr Hayes called the Claimant in the few days before the 14 September 2020. It was explained to the Claimant in this meeting that the Board was taking the issues seriously, and that there were some serious allegations against him. Mr Hayes made it clear to the Claimant that if he did not take time out of the business then the Company would need to suspend him. Mr Hayes's witness statement at paragraph 8, is consistent with the events that then took place. What was discussed in the meeting of 14 September 2020, the draft suspension letter, and the Claimant requesting annual leave from 15 September 2020.
19. On 10 September 2020, a 'slack' call took place between the Claimant and Ms Fellowes (pp.90-91). During this conversation Ms Fellowes advised the Claimant that there was a 'strong possibility that this matter would be taken through disciplinary and the FCA notified of the outcome. The Claimant responded to this

by indicating that he would fight any decision legally and he had to, as it would end his career (p91). Although the Claimant accepted words to that effect was said he denied that they were said concerning him, but rather referred to Matthew Dennis. However, this does not seem plausible given all the conversations that were taking place concerning the Claimant's involvement in the issue raised. That this conversation took place following the Claimant having had his duties restricted, and given the overall context of the discussion recorded at pp90-91.

20. In advance of meeting with the Claimant on 14 September 2020, Mr Hayes was provided with a script that had been prepared by the Board to be used in that meeting. This is the clear evidence of Mr Hayes, and some of the commentary added throughout the document support that this was a document that was created jointly, rather than just by Mr Hayes. For example, on p.97, a question is posed in square brackets, of 'Do we want to say...'. Further down that page a note is added, which states 'Note for Adam: I think we do want the suspension letter prepared. Either way I think Monday ought to be the last day in his business'. On balance I consider that there was likely a script. Although the Claimant disputes the existence of a script, much of the discussion that was accepted by the Claimant followed the contents of the script, and in particular, the option of taking annual leave, which the Claimant then did do, supports that the discussion was around those matters on the script.
21. On 14 September 2020, the Claimant met with Mr Hayes. During this meeting the following was discussed:
 - a. The broad allegations against the Claimant
 - b. That there are two ways forward for the Claimant.
 - c. The first option is to await action from the Respondent. This may result in suspension, and potential termination for gross conduct. The implications of suspending the Claimant were further discussed, which included having to notify the FCA, and that he would leave as a 'bad leaver'
 - d. The second option would be to bring the Claimant's employment with the Respondent to an end through other means, subject to agreement by the Board. This involved the Claimant taking two weeks annual leave immediately, resigning on completion of leave and leaving as a 'good leaver'.
 - e. It was explained to the Claimant that he probably needed to accept today that his time with the Respondent has to come to an end.
 - f. Mr Hayes at no point indicated to the Claimant that if he did agree to option 2 that he would be prepared to misrepresent what had happened to the regulator. Rather, it was explained to the Claimant that Mr Hayes could not see how the Respondent would be in a position to inform the regulator that he was a fit and proper person for any future SMF role, or being able to give a clear regulatory reference.
 - g. That option 2 would only be taken to the board by Mr Hayes, if the Claimant was absolutely clear in his own mind that he was accepting option 2.
 - h. No specific offer was given to the Claimant, but Mr Hayes explored through option 2 the outlines of a settlement.
22. In the meeting of the 14 September 2020, Mr Hayes attended in the capacity of CEO, and not as an independent mediator or as an agent of the Claimant.
23. Following this meeting, on 14 September 2020 at 17.47, the Claimant emailed Mr Hayes to request two weeks' holiday, starting the following day. Given this is consistent with that explained to be discussed in the meeting by Mr Hayes, this supports the accuracy of the script to be used at pp.94-97.
24. On 23 September 2020, the Respondent, through Mr Hayes, entered a without

prejudice conversation with the Claimant.

25. The Claimant raised a grievance on 09 October 2020 (pp.106-116). In his grievance, the Claimant describes himself as having been 'stripped of my responsibilities', that he was he was 'absurdly not permitted to run or assist with the RCA', that 'controversially both these roles were allowed to continue working in their full capacity' and that it 'is a complete farce that he is permitted to remain in the workplace whilst I was excluded from the workplace...' (see paragraph 26, p.113).

Conclusions

26. There is a clear dispute between the Claimant and the Respondent before the meeting of 14 September 2020. Mr Hayes, and others, had had conversations with the Claimant explaining the seriousness of the situation, to which the Claimant had responded with denials as to his involvement, and intimating to Ms Fallows that he would fight any decision legally. And this was in circumstances where the Claimant's career was at risk, through his role as designated compliance officer for the Respondent and breaches that had potentially taken place, for which he had regulatory oversight.
27. Further indicative of the dispute that existed before 14 September 2020 is that the Claimant was subjected to clear employment restrictions whilst the investigation was ongoing, which the Claimant described in his grievance (albeit some months later) as absurd, controversial and a complete farce.
28. I conclude that Mr Hayes, being a Board Member of the Respondent, and later involved in without prejudice negotiations, met with the Claimant on 14 September 2020 not in his individual capacity, but as a representative of the Respondent. This was an inevitable conclusion given that I have found that a script was prepared on behalf of the Respondent, to which Mr Hayes would speak to at this meeting.
29. Mr Hayes in this meeting was exploring the shape of a potential deal with the Claimant. And this was in the shape of the 6 points on pp.95-96. Although no offer was put forward on behalf of the Respondent, the discussion was clearly with a view to establishing the parameters of a potential deal, which may have resolved the dispute. This is preliminary discussions of an outline deal, that was being explored by Mr Hayes n behalf of the Respondent.
30. Mr S Brochwitz-Lewinski submitted on numerous occasions that this was not negotiations by the Respondent as Hayes was indicating that any such position would need to be taken back to the Board for it to consider. However, in my decision this is simply the practical reality of exploring the outlines of a deal. Inevitably, if there was agreement by the Claimant to the position being put forward by Mr Hayes it would have to be subject to Board approval. However, this does not detract from my conclusion that this was part of the broader negotiation of a deal in this case.
31. Given my findings above, I conclude that this is not an example of without prejudice communications being used as a cloak for unambiguous impropriety. It does not satisfy the high hurdle that applies to set aside the privilege. Indeed it was found that Mr Hayes was not suggesting that option 2 would avoid FCA sanctions, but made it clear that even where such an option was agreed to, there would still be implications for the Claimant. Any impropriety alleged does not reach the level of being unambiguous in this case.
32. Consequently, the meeting of 14 September 2020, and the contents of the

discussion at that meeting, are excluded as evidence in this case by reason of it being privileged.

Employment Judge **Mark Butler**

Date __04 March 2022__

JUDGMENT SENT TO THE PARTIES ON

18 March 2022

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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