

IN THE EMPLOYMENT TRIBUNAL

Case N° 22 of 2018

JACQUELINE FRANCES GORLEY

Claimant

-and-

CENTURION ADMINISTRATION LIMITED

Respondent

DECISION

BACKGROUND

On the 20th day of November 2018, a directions hearing was held with reference this case and I made various orders including the following one:-

“10. Each party do give by the 10th day of January 2019 standard disclosure to the other party by list with inspection and/or copies to be provided within seven days thereafter”.

In the Claim Form filed by the Claimant with the Employment Tribunal on the 17th July 2018, the Claimant states that since the termination of her employment relationship with the Respondent she has not had “another job”; at no point is there a reference in the Claim Form to the Claimant resigning as she had another job to go to. It is the Claimant’s case that the conduct and actions of the Respondent gave her no option but to resign.

On the 4th day of July 2019, the Claimant filed her witness statement in which she alleges that she was constructively dismissed by the Respondent. Thus, at paragraph 37 of her witness statement she states:-

“I was forced out of my employment. No reasonable and honest licensed person could possibly have remained at post whilst the Respondent was being run without due regard to morality, propriety and legality”.

In the Response Form filed by the Respondent with the Employment Tribunal on the 7th August 2018, the Respondent avers that it acted fairly and lawfully at all times and that the Claimant’s decision to terminate her employment was not due to any breach of contract by the Respondent as alleged or at all. At paragraph 15 of the said Response the following statement appears:-

“On the 11th April 2018, during her authorised sick leave, the Claimant (again through her partner) requested a meeting with Mr Britton to take place on 19th April 2018. During this meeting the Claimant informed the

Respondent that she “had another job to go to” and gave her written resignation terminating her employment. It was clear to Mr Britton that her resignation was genuine and that she had thought it through”.

On behalf of the Respondent, John D Britton has filed two witness statements dated 17th and 20th September 2019. In the second witness statement Mr Britton states as follows:-

“20. During this short meeting, lasting about 10 minutes, the Claimant told us that she had another job to go to and it was clear to me that her resignation was genuine and that she had thought it through. She had given the required amount of contractual notice, three months, under her contract of employment which correctly states the effective date of termination as 19th July 2018. Her resignation was accepted on 19th April (both orally and in writing) and she was informed that she would be required to work her notice period”.

The statement alleged to have been made by the Claimant to the effect that “*she had another job to go to*” has to be put in the following factual context.

During the first six months of 2018, the Respondent was in negotiations with Whitmill Trust Company Limited which, had they been successful, would have ended up with the take-over of the Respondent. The Claimant was not only aware of but actually took effective part in, at the very least, providing information about the Respondent’s business to Whitmill Trust Company Limited, which I am led to believe is a Jersey company. These take-over negotiations at one point or another collapsed and both Whitmill Trust Company Limited and the Respondent continued their respective separate paths.

It would appear from the witness statements filed to date, and the exhibits thereto attached, that in April 2018, whilst the above-mentioned take-over negotiations were taking place the following events occurred:-

- Mr Martin Dawson, who was the Respondent’s pensions office manager resigned on the 14th April 2018 and subsequently appears to have been employed by one of the companies under the Whitmill umbrella; and
- the Claimant resigned on the 19th April 2018, allegedly making the “I have another job to go to” comment, and is now apparently employed with one or more of the Whitmill umbrella companies.

I pause to point out that according to Mr Hillman the Respondent only became aware that the Claimant was employed with Whitmill at some point in September 2019.

On the 10th August 2018, Whitmill Pension Trustees Limited and Whitmill Pension Administration Limited were incorporated in Gibraltar. Company profiles of both these companies filed with the Tribunal show that the Claimant was appointed a director of both companies on the 18th March 2019.

On the 20th September 2019, Mr Hillman wrote to the Claimant’s solicitors in the following terms:-

“Your client is now employed by Whitmill. She has failed to disclose this fact and her ETB Terms of Engagement Form. Can we please be provided with a copy within the next 7 days”.

A number of e-mails then flew back and forth between Counsel until the 4th October 2019, when the Claimant’s solicitors gave the following reply:-

“Nick is away from Gibraltar but I write to inform that Mrs Gorley started working with Whitmill Trust on the 18th March 2019 as Pensions Director. As such we fail to understand what this has to do with the Claim before the Tribunal”.

Apart from this reply, the Claimant has refused to provide any further information and/or documentation as they believe the Respondent to be on a fishing expedition. This belief is based on the contents of an e-mail which Mr Hillman sent them on the 3rd October 2019, in which he stated:-

“its relevance will only become apparent once we have had sight of it (as I submitted) to the issue of liability as well as quantum”.

Mr Hillman has informed me that in this statement he was referring to the weight of the evidence rather than to anything else.

The Law

Rule 30 of the Employment Tribunal (Constitution and Procedure) Rules 2016 provides that:-

“The Tribunal may order any person to disclose documents or information to a party (by providing copies or otherwise) or to allow a party to inspect such material as might be ordered by the Supreme Court”.

This provision mirrors the law in English employment tribunals.

In *Plymouth City Council v White* (UKEAT/0333/13) Judge McMullen suggested the following procedure on an application for disclosure:-

- “(1) The judge must first consider if the document sought is relevant (if it is not, then it will not be ordered to be disclosed).*
- (2) If it is relevant, the next question is whether it is necessary for the fair trial of the case for it to be ordered to be disclosed. Where there is objection, the judge should examine the document itself so as to consider whether or not in a contention that it is confidential it should still be disclosed*
- (3) If the document is relevant and necessary and is to be disclosed, the judge should consider whether there is a more nuanced way of disclosing the material so as to respect confidentiality and the judge may then decide to order the document to be disclosed wholly or partially, usually by the system now known as redaction.*

- (4) *The disclosure judge having read the disputed documents should not conduct the full hearing unless the parties agree”.*

In the Court of Appeal case of Scott v Commissioners of the Inland Revenue (2004 EWCA Eur 400) Sedley L J in the course of the judgement stated as follows:-

“The tribunal chairman in January 2002 had ordered High Court disclosure, which by Civil Procedure Rules 31.11 is made a continuous obligation throughout the currency of the proceedings, and the Inland Revenue’s initial disclosure had included their original retirement policy”

and

“The tribunal chairman had in January 2002 ordered High Court disclosure, CPR 31.6 includes in a party’s standard disclosure any documents which adversely affect its own case or support another party’s case”.

I adopt for the purposes of this decision the learned words of Judge McMullen and Sedley L. J.

Each Parties Case

It is part of the Respondent’s case that the real reason for the Claimant’s resignation on the 19th April 2018, was that she had another job to go to, as the Claimant had herself stated, and if this is true it, at the very least, puts into question the Claimant’s claim that she was forced out of her employment; ie was constructively dismissed. Thus, it is relevant and necessary for the Respondent to clearly establish when the Claimant commenced negotiations and began employment with Whitmill Trust Company (Gibraltar) Limited since this has a bearing on the central issue of whether or not the Claimant was constructively dismissed. Moreover, if the Claimant had been employed with Whitmill Trust Company (Gibraltar) Limited after the disclosure order of the 20th November 2018, at which point she could not have produced the information/documentation because it did not at that point exist, she should have produced it subsequently because there was a continuing duty of disclosure on the Claimant. Such a continuing duty had not been complied with even after the Respondent in September and October 2019 had requested production of limited information/documentation, and therefore the Claimant was in breach of the order of disclosure made on the 20th November 2018. This being the case, the Respondent seeks an order for the production of the following:-

- (a) *all correspondence exchanged between the Claimant and Whitmill Trust Company (Gibraltar) Limited between the 1st March 2018 and the 18th March 2019 in relation to her engagement/employment with Whitmill Trust Company (Gibraltar) Limited;*
- (b) *a true copy of the Employment Service Notification of Vacancy Form submitted by Whitmill Trust Company (Gibraltar) Limited relating to her employment;*
- (c) *a true copy of the Whitmill Trust Company (Gibraltar) Limited offer of employment letter to the Claimant;*

- (d) *a true copy of her contract of employment with Whitmill Trust Company (Gibraltar) Limited; and*
- (e) *a true copy of the Claimant's Employment Service Notice of Terms of Engagement form relating to her employment with Whitmill Trust Company (Gibraltar) Limited;*

and for an order that if the Claimant fails to provide disclosure that her claim be dismissed and for costs.

It should be noted that in the course of the hearing Mr Hillman accepted Mr Gomez's statement that the document referred to in (b) above could not be in the Claimant's possession. Moreover, on my insistence that I could not see the relevance of what the terms and conditions of the Claimant's employment contract (see (d) above) could have with respect to this case, Mr Hillman seemed to concede the point.

As I understood Mr Gomez's submissions on behalf of the Claimant these were threefold and as follows:-

- (1) the Respondent was on a pure fishing expedition as Mr Hillman himself had confirmed when in his e-mail of the 3rd October 2019, he had stated that "its relevance will only become apparent once we have had sight of it (as I submitted) to the issue of liability as well as to quantum". This being the case, the Respondent had not shown or could show the relevance and/or necessity of making an order for the disclosure of documentation;
- (2) this issue had only been raised by the Respondent well past the date when the order for disclosure had been made, by which time the period of discovery had finished, since the issue had only been raised for the first time in October 2019, which was eleven months after the date of the 20th November 2018 order. Moreover, the application was based on a fleeting passing comment allegedly made by the Claimant in the course of a meeting and therefore there were no substantial grounds for the request; and
- (3) the Respondent had filed the wrong application because it should be seeking an order for specific and not standard disclosure. The documents sought by the Respondent did not adversely affect the Claimant or support the Respondent's case and therefore they were not documents which formed part of standard disclosure. What the Respondent should be seeking was specific disclosure and this had to be supported by evidence, which in this case had not been filed.

Mr Gomez therefore invited this tribunal to dismiss the application filed.

As the information was not provided to me in the course of the hearing and as I thought it pertinent to know, I personally enquired at Companies House (Gibraltar) and ascertained that Whitmill Trust Company (Gibraltar) Limited was incorporated on the 15th January 2009.

Conclusion

Whilst I would to an extent accept that the wording used by Mr Hillman in his e-mail of the 3rd October is unfortunate, I do not accept Mr Gomez's contention that the Respondent is on a pure fishing expedition. In my view it is "relevant" for the Respondent to ascertain, and this tribunal to know, whether at the time of handing in her resignation on the 19th April 2018, the Claimant had been in or was in employment negotiations with Whitmill Trust Company (Gibraltar) Limited since this could arguably be said to (i) support Mr Britton's evidence that the Claimant had said she "had another job to go to" when handing in her resignation and (ii) ostensibly cast a shadow on the Claimant's assertions that the conduct and actions of the Respondent had given her no option but to resign.

Having said this, I do not agree with Mr Hillman that all the documentation referred to in paragraph's (a) to (e) of pages 4 and 5 of this decision necessarily needs to be disclosed for the purposes of ensuring that the stated relevant considerations designed to achieve a fair trial of the case are met. Hence the extent of the order made below.

I do not accept Mr Gomez's submissions to the effect that the Respondent is somehow debarred from seeking disclosure of the documentation in question simply because the application is based on a fleeting passing comment allegedly made by the Claimant on the 19th April 2018 and/or that the request for disclosure was made some eleven months after the order made by the Tribunal on the 20th November 2018. Standard Disclosure, as the authorities hold, is a continuous obligation throughout the currency of the case and therefore it matters not whether Mr Hillman's request for disclosure was made one, three or eleven months or at any other time after the date of the order. Similarly, it matters not whether the request for disclosure arises from or is connected to some alleged fleeting comment made since what is material is whether the application for disclosure sought relates to documentation which is relevant and necessary for the fair trial of the case. I am of the opinion that it is.

I also do not accept Mr Gomez's submission that the Respondent should be seeking an order for specific and not standard disclosure. The order of the 20th November 2018 specifically refers to each party having to give "*standard disclosure to the other party*" and it is this order the Respondent is seeking to enforce with the application it has made. Moreover, if it is shown as a result of the documentation disclosed that the Claimant was either in employment negotiations with Whitmill Trust Company (Gibraltar) Limited or had agreed to take employment with said company at the time that she handed in her resignation, such evidence would support the Respondent's contention that the Claimant genuinely resigned and, conversely, adversely affect the Claimant's assertion that she was forced out of employment.

In the light of the above, I find that the Claimant should have disclosed, pursuant to the on going duty of disclosure under which she was following on from the order of the 20th November 2018, the document sought in Mr Hillman's e-mail of the 20th September 2019. The Claimant having refused to disclose the document or indeed any other document relating to employment negotiations with Whitmill Trust Company (Gibraltar) Limited, I herewith order that the Claimant produce to the Respondent by no later than 5pm on the 31st day of January 2020 photocopies of the following documentation:-

- (i) all correspondence (existing in whatever medium) exchanged between the Claimant and Whitmill Trust Company (Gibraltar) Limited between the 1st March 2018 and the 19th April 2018 relating to the Claimant's potential or actual employment with Whitmill Trust Company (Gibraltar) Limited or any associated company of the same; and
- (ii) if in existence, a copy of the ETB Terms of Engagement form signed by the Claimant with respect to her employment with Whitmill Trust Company (Gibraltar) Limited.

In the event that the Claimant is not able to comply with either of the provisions as ordered by sub-paragraphs (i) and (ii) above, then the Claimant shall provide her reasons for not being able to so comply in writing to the Tribunal and the Respondent, which reasons are to be verified by a statement of truth and are to be filed and served by no later than 12:00 noon on the 24th January 2020.

Should the Claimant fail to comply with paragraphs 1 and/or 2 above then her claim is dismissed without further order.

As I have said before in this case, costs do not follow the event in employment tribunal cases. No order as to costs is made.

Dated this 17th day of January 2020.



Joseph Nuñez
Chairman