# EMPLOYMENT TRIBUNALS

**Between**

**Mr D Jenkin**

**Claimant**

**and**

**IBM United Kingdom**

**Respondent**

**Heard at London South Employment Tribunal on 15 March 2017**

**Before Employment Judge Baron**

**Representation:**

**Claimant:** ***Edward Capewell***

**Respondent:** ***Judy Stone***

## JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal as follows:

1 The applications by the Respondent for the claim to be struck out under rule 37 of the Employment Tribunals Rules of Procedure 2013, or for an order to be made under rule 39, are dismissed;

2 The effective date of termination of the Claimant's employment for the purposes of section 97 of the Employment Rights Act 1996 was 10 October 2016;

3 That the email of 20 July 2016 from the Respondent to the Claimant's solicitors is not a privileged document.

## REASONS

*Introduction*

1 The Claimant presented a claim to the Tribunal on 25 November 2016 claiming that he had been unfairly dismissed by the Respondent, and that he had been the subject of both direct and indirect discrimination based upon the protected characteristic of age. The claim of indirect discrimination was subsequently withdrawn and consequently dismissed. The claims arise in the context of a redundancy exercise.

2 There was a telephone preliminary hearing for case management purposes on 24 January 2017. At that hearing it was ordered that there be this hearing to consider or determine the following matters:

2.1 Whether to strike out any aspect of the Claimant's age discrimination claim if it has no reasonable prospect of success;[1]

2.2 Whether to order the Claimant to pay a deposit in respect of any aspect of the Claimant's age discrimination claim if it has little reasonable prospect of success;

2.3 Whether the letter from the Respondent's solicitors dated 20 July 2016 referred to in the Claimant's claim at paragraph 46 is privileged and, if so, what redactions should be made to the claim and the response.[2]

*Prospects of success*

3 The facts assumed to be correct for the purposes of this hearing are as follows. The Claimant was employed by the Respondent in the Product Management Team. The exact structure of teams and business units is somewhat obscure, but it is agreed that the Claimant fell within the UK Risk Analytics team or department. The structure of the management responsibilities for the Claimant is also somewhat obscure, but it is agreed that his day-to-day manager was Mr McFadzean, his functional manager was Mr Boettcher, and his 'Blue Pages' manager was Mr Dodgson. The latter role was principally for HR related matters, rather than matters relating to the Claimant's role.

4 There was a management decision to reduce headcount in the Risk Analytics team. That was the pool for redundancy selection purposes. It was planned that there would be 123 redundancies. Employees were elected for collective consultation purposes and there were the appropriate meetings. Nothing turns on that point.

5 The Respondent decided upon five criteria by reference to which the employees to be made redundant were to be selected. They were as follows: current skills and experience, impact on the business, performance, skills for the future, adaptability, and skills and practices.

6 The Claimant was scored against each of those criteria by Mr Boettcher in consultation with Mr McFadzean. His total score was 140, against a cut-off score of 135. His score, and that of others at risk, underwent what was referred to in the response and documents in the bundle as a 'normalisation process'. The details of that process which were provided were scanty. There is a summary of its purpose on page 79 of the bundle, being part of the proposals provided at a collective consultation meeting on 23 February 2016. In the Grounds of Resistance the Respondent stated as follows:

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[1] The Claimant's claim of indirect discrimination had not been withdrawn at the date of the preliminary hearing.

[2] The paragraph number was wrongly referred to as paragraph 49.

> Mr Dodgson was responsible for the normalisation process in respect of the UK Risk Analytics team, and worked with Mina Wallace, Vice President Risk Analytics, to confirm the final scores.

The result of that process was that the Claimant's score was reduced to 120, below the cut-off point. Two of his scores were decreased. None was increased. The Claimant says that he was told by Mr McFadzean that Ms Wallace had taken the decision to dismiss the Claimant and that it was a political decision.

7 In the claim form the Claimant alleged that he had been the subject of direct age discrimination, and compared his treatment in particular with that of Stepan Zid and Catherine Duggan. The Claimant was born in 1961. It is said by the Claimant (without demur from the Respondent) that Mr Zid is about 15 years younger than the Claimant, and Ms Duggan about 19 years younger. Mr Zid was in the pool, but Ms Duggan was not. Mr Zid's initial score given by Mr Boettcher in consultation with Mr McFadzean was 135. After the normalisation process it was increased to 155. Some of his individual scores had been increased, and some decreased.

8 The position of Ms Duggan is not certain. I was shown evidence that her employer is the South African arm of IBM, and that she was at a higher grade than the Claimant, and more senior in the reporting chain. The Claimant says that he was told by Mr McFadzean that she had replaced him.

9 Miss Stone went through the scoring record sheets of each of the Claimant and Mr Zid, and said that it was apparent that care had been taken during the normalisation process, and that there were justifiable reasons for varying the scores. The purported reason for the dismissal, being 'political', was not age discrimination, she said. Miss Stone submitted that there was no room for any finding of age discrimination, and that it was totally speculative.

10 The basic and straightforward submission of Mr Capewell was that there needed to be disclosure (which had not yet taken place) and the Tribunal needed to hear oral evidence, particularly from Mr Dodgson and Ms Wallace. Mr Capewell properly accepted that in the papers presented to me there was no specific evidence of age discrimination. However, he pointed out that the scorings of the Claimant and Mr Zid were altered by individuals who had little experience of his work on a day-to-day basis. That was a matter which justified being explored in evidence as there was a clear dispute of fact. Further, the issue as to the apparent change of status or position of Ms Duggan was one which needed to be explored.

11 I was of course referred to *Anyanwu v. South Bank Student Union* [2001] ICR 391 HL. The passage to which reference is usually made, certainly on behalf of claimants, is paragraph 24 in the judgment of Lord Steyn as to the importance of not striking out discrimination claims. Less well known is paragraph 39 in the judgment of Lord Hope where he says that such claims ought to be struck out if there really is no reasonable prospect of succeeding at trial. The other 'standard' authority to which

reference was made is *Ezsias v. North Glamorgan NHS Trust* [2007] ICR 1126 CA as to not striking out a claim where there is a central dispute of fact as the reason for the dismissal.

12 Mention was also made of *Madarassy v. Nomura International plc* [2007] ICR 867 CA. The difficulty I have with the relevance of that authority for the purposes of this hearing is that it seems to me that the principle in it can only apply after hearing all the evidence, or where there is no dispute about the facts.

13 I was also referred to *ABN Amro Management Services Ltd v. Hogben* UKEAT/0266/09 and *Daly v. Northumberland Tyne & Wear NHS Foundation Trust* UKEAT/0109/16. Neither of those cases assists me in these circumstances. In *ABN Amro* the claim was said to be *prima facie* implausible on the undisputed facts and an appeal was upheld against the decision of the Employment Tribunal not to strike out the age discrimination claim. In *Daly* an appeal by the claimant against a striking out was upheld because, very briefly, whether the reason for the employer's conduct in question was on the ground of the claimant having made a protected disclosure was a fact to be established at a full hearing. *Daly* was thus an example of the application of the *Ezsias* principle.

14 The powers to strike out a claim or make a deposit order are in rule 39 and 37 of the Employment Tribunals Rules of Procedure 2013. Both parties are represented and I do not need to set them out. I did not hear any evidence at this hearing. I have to be satisfied on the basis of the case as presented that there is no, or little, reasonable prospect of the claim succeeding. I note that the tests are as set out in the Rules. In particular I do not have to be satisfied that there is no prospect of success.

15 It is my conclusion that neither order ought to be made. I entirely accept that at this stage there is no specific evidence of age discrimination. Further, the scoring process as set out on paper appears to be unassailable, but one would not expect to see any specific reference to a reduction in marks because of the Claimant's age. Without seeking to limit the extent of cross-examination on behalf of the Claimant, the matters which have caused me to decide that the evidence needs to be tested is the fact that the Claimant was marked down by people not immediately responsible for him, together with the assertion that the Claimant had been told that it was for 'political reasons'.

16 I have also taken into account that full standard disclosure has not yet taken place, and if there are any matters to be disclosed which are disadvantageous to the Respondent, then it would be wrong for the Tribunal to strike out the claim so as effectively to benefit the Respondent.[3]

[3] I am not suggesting that the Respondent has deliberately concealed any material documents.

17 I have considered separately whether to order the payment of a deposit. I have decided not to do so for the same reasons as above, and also one further reason. To my mind, the real purpose of a deposit order is to put a party, usually a claimant, on notice that an order for costs will have to be considered if the claim (or response) fails for substantially the same reason as the order was made.[4] In this case there is a claim of unfair dismissal and therefore all the circumstances surrounding the selection of the Claimant will have to be investigated. It is likely that it would be very difficult to separate out any extra costs involved in dealing with the discrimination claim.

*Effective date of termination*

18 The facts are straightforward. The Claimant was given notice of termination of his employment because of redundancy by a letter dated 13 May 2016, which was given to him on 20 May 2016. It was stated that the notice was to expire on 5 August 2016. It set out a variety of matters of no relevance to the point at issue. In paragraph numbered 8 the Claimant was given the right to appeal against the termination of the employment within five working days by sending the appeal to a specified email address set up for the purpose of considering redundancy appeals.

19 The Claimant sent an email on 25 May 2016 to Georgina Staplehurst, HR Business Development Consultant, stating that he had decided to dispute the dismissal. She replied advising that the appeal should be sent to the email address stated in the dismissal letter. The Claimant sent a one line email to that address on 26 May simply saying that he intended to appeal. Lynda Smurthwaite then dealt with the matter. The Claimant was asked for evidence in support of the appeal, and he replied on 27 May 2016 with some information. On 2 June 2016 the Claimant then sent much fuller grounds of appeal set out in an email of over two pages. The details are not relevant.

20 The Claimant sent a chasing email to Ms Smurthwaite on 16 June 2016 which she acknowledged the same day, saying that the matter was under review. On 17 June 2016 Ms Smurthwaite sent an email which commences as follows:

> Further to my email yesterday and your note of 2nd June 2016, Thank you for providing this detail which has been reviewed and considered. IBM has made the decision that your dismissal will be reversed effective today. From today you are therefore <u>at risk</u> of redundancy . . .

21 It is the Respondent's case that there were then further consultations, and that the Claimant's employment ended by reason of redundancy on 10 October 2016 in accordance with notice given in a letter of 18 July 2016. It is the Claimant's case that the employment ended on 5 August 2016, and that any payments made to the Claimant thereafter were paid by mistake, for which he would have to give credit. I was not addressed on any significance there may be in any other matters which occurred

[4] See rule 39(5).

between the two dates which could only be explicable by a continuing employment relationship.

22 Miss Stone referred me to the following passage from Harvey[5]

> The general principle is that a successful appeal has the effect of negating the original decision to dismiss and so it revives the contract of employment which continues without interruption. However, this apparently simple proposition was only reached after some uncertainty as to whether: (1) it operated automatically under the statute or required contractual coverage; and (2) it only operated if the employer expressly took steps to 'reinstate' the employee as a result of the appeal decision. It now seems settled that it operates automatically and irrespective of any particular actions by the employer. However, more complex points can still arise if, instead of being simply an appeal decision to quash the dismissal, the appeal panel decides to allow the appeal *on terms*, in particular by substituting a lesser penalty - what if the employee objects to some or all of those terms?

23 The authorities to which I was referred were as follows:

> *Roberts v. West Coast Trains* [2005] ICR 254 CA
> *Salmon v. Castlebeck Care (Teesdale) Ltd* [2015] ICR 735 EAT
> *Folkestone Nursing Home Ltd v. Patel* UKEAT/0348/15

24 In *Roberts* the employee was dismissed, and then on appeal reinstated but demoted. There was a contractual procedure which included a provision for a range of sanctions to be applied to an employee, either at a disciplinary hearing or on appeal. The Court of Appeal held that the reinstatement to employment, but with the sanction of demotion having been applied was in accordance with the contractual procedure and was valid.

25 In *Salmon* it was accepted that there was a contractual right to appeal, although the relevant provisions were not in evidence. The real issue was whether following a successful appeal it was necessary for there to be an express reinstatement. Langstaff P held that it was not necessary. *Patel* merely applied the *Salmon* principle.

26 Paragraphs 36 and 37 of the judgment in *Salmon* are as follows*:*

> **36** I therefore have no hesitation in this case in thinking that the tribunal was in error in looking for a separate decision, consequent upon a successful appeal, that there should be 'reinstatement'. The word 'reinstatement' itself may mislead because it may be seen in the light of one of the remedies available should a claim for unfair dismissal succeed before a tribunal. The word reinstatement here, I emphasise, is used in the sense of reviving the contract, the expression used in *Roberts* which, in my view, is more appropriate. I see no reason in principle why in any event it would be necessary for there to be an express revival or reinstatement. It must be implicit in any system of appeal, unless otherwise stated, that the appeal panel has the right to reverse or vary the decision made below. Where a decision is to dismiss, being the most draconian of sanctions, any success on appeal means that the decision is one in which dismissal does not take effect, though some lesser sanction might.
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> **37** I see no reason in principle why an outcome on appeal against dismissal which is favourable to an employee should not, and every reason in principle why it should, therefore automatically revive the contract which, but for the successful appeal, would have terminated on the earlier dismissal.

[5] Division D1/2/D/(6) edited by Professor Ian Smith. My underlining.

27 Miss Stone submitted that there was no need for there to be a contractual right to appeal for the *Roberts / Salmon* principle to operate. In the alternative, the offering of a right of appeal to the Claimant, and the acceptance of that offer by the exercising of that right created a contract, or a variation to the contract of employment. I ought to add that any document(s) forming the Claimant's contract of employment were not before me. There was a document giving guidance to an appeals investigator, but I cannot conclude from that document that there was a pre-existing contractual appeal procedure.

28 Mr Capewell cited a passage from *Gisda Cyf v. Barratt* [2010] ICR 1475 SC summarised in the headnote as follows:

> *Held* , dismissing the appeal, that section 97 of the Employment Rights Act 1996 was a statutory construct which should be interpreted in its setting as part of a charter protecting employee's rights and, therefore, an interpretation that promoted those rights, as opposed to one which was consonant with traditional contract law principles, was to be preferred;

29 Having said that, he then relied upon the uncontentious contractual principle articulated in *Willoughby v. CF Capital plc* [2012] ICR 1038 CA once a notice has been given then it cannot be withdrawn without the consent of the other party. He submitted that the letter of 13 May 2016 was an unambiguous notice of dismissal.[6] However, he said, the Respondent was not assisted by either *Roberts* or *Salmon* because in both those cases there had been a contractual procedure which had the effect of reviving the contract of employment if an appeal were successful. He further distinguished them on the basis that they were cases of misconduct, and not redundancy.

30 Mr Capewell submitted that if the document providing guidance in conducting redundancy appeals, then the Respondent could not rely on it as in fact the Respondent had not followed the procedure set out in it.

31 Both counsel mad reference to an email of 20 July 2016, which is the subject of the next section of these reasons. I do not consider that document to be relevant for the purposes of the point now before me. Either the email of 17 June 2016 had the effect of reinstating the Claimant, or it did not.

32 I find that the effective date of termination was 10 October 2016, as contended for by Miss Stone on behalf of the Respondent. I entirely accept that the authorities cited to me were cases where there was a contractual appeal procedure. That does not mean that the presence of a contractual appeal procedure was necessarily essential to the outcome. In *Roberts* there was the specific point as to being reinstated to an inferior position, and the Court of Appeal did not have to consider what the position would have been absent a contractual provision. I also note the judgment of Arden LJ in *Roberts* as follows:

> The applicant's demotion was not a dismissal and the decision of the appeal process of the employer, made pursuant to the applicant's contract with the employer, to demote the

[6] That was not disputed by Miss Stone.

> applicant, resulted in the continuation of the original contract of employment. That is the normal result of an internal appeal procedure unless the contract otherwise expressly provides: see per Lord Bridge in *West Midlands Co-operative Society Ltd v Tipton* [1986] ICR 192, 198. The other members of the House agreed with Lord Bridge.

33 I have looked at the passage from the judgment of Lord Bridge, which itself refers to other judgments, and do not consider it necessary to reproduce it. I have also borne in mind particularly the comment (probably) made *obiter* by Langstaff P in paragraph 37 of his judgment in *Salmon.*

34 Finally on this point, I consider it would be highly unsatisfactory for there to be two different results depending upon one small point. If Mr Capewell were correct, then the reinstatement principle would only apply where there was a contractual appeal procedure in some form or other, however brief. On the other hand, the reinstatement principle would not apply in circumstances where there was a very elaborate appeal procedure set out in a staff handbook or elsewhere which, as is so often the case, was specifically stated to be the procedure which the employer would normally expect to follow, but which was not contractual. It is a commonplace that the question as to whether the whole or parts of a staff handbook are contractual occupy the time of the Tribunal. The position of an employee who is successful in an appeal and is fully reinstated should not depend upon such niceties.

*Privilege*

35 The issue is whether the whole or part of an email of 20 July 2016 (17:52) from Amelia Cowell , a solicitor in the Respondent's legal department, to the Claimant's solicitors was privileged or not. The chronology is as follows:

35.1 On 22 June 2016 the Claimant's solicitors wrote to Ms Smurthwaite a letter headed 'Without prejudice and subject to contract'. That letter set out the Claimant's formal position. It made mention of unfair dismissal, and also the possibility of there being age discrimination. Terms of settlement were proposed. There cannot be any doubt that at least part of that letter was privileged.

35.2 On 11 July 2016 Ms Cowell wrote two letters in reply. The open letter stated that the Claimant had not at that date been dismissed and therefore she was not replying to the allegations. She also wrote a letter headed 'Without prejudice' in which she simply stated that the settlement terms were not accepted.

35.3 The Claimants solicitors then replied in kind on 13 July 2016 with an open letter and also one marked 'Without prejudice'. The latter letter simply asked Ms Cowell to reconsider the position. In the open letter the Claimant's solicitors maintained that the Claimant had been dismissed.[7]

[7] It appears that I was only provided with the first page of that letter, but does not appear to be important.

35.4 The correspondence now moves to email. On 14 July 2016 The Claimant's solicitor sent an email to Ms Cowell, again asserting that the Claimant had been dismissed, and that further redundancy consultation could not take place. It was said that the Respondent should deal with the Claimant's appeal. There was a further exchange of correspondence that day along the same lines. Miss Stone accepts that that was open correspondence.

35.5 There is then the disputed email of 20 July 2016 sent by Ms Cowell and headed 'Without prejudice'.

35.6 The Claimant's solicitors replied on 21 July 2016 in an email also headed 'Without prejudice'.

36 I do not propose to seek to write a long dissertation on the history and development of the without prejudice rule. Both counsel cited by one means or another the following passage from the speech of Lord Griffiths in *Rush & Tompkins Ltd v. Greater London Council* [1989] AC 1280:

> The "without prejudice" rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in *Cutts v. Head* [1984] Ch. 290, 306:
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> > "That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in *Scott Paper Co. v. Drayton Paper Works Ltd.* (1927) 44 R.P.C. 151, 156, be encouraged fully and frankly to put their cards on the table**....** The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."
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> The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission.

37 My attention was drawn to the summary by HHJ Eady in the EAT in *Fairthorn Farrell Timms LLP v. Bailey*[8] and I note her comment that the application of the rule should not be extended further than necessary to promote the general policy objective and further:

> Where the line will fall may not always be easy to determine.

[8] [2016] ICR 1054

38 Quite so. One factor not mentioned is that some recognition ought to be given to the label put on the correspondence by the parties. In *South Shropshire County Council v. Amos* [1986] 1 WLR 1271 CA it was said by Parker LJ that the use of the phrase meant that '*prima facie* it was intended to be a negotiating tool.' The use of the phrase was referred to as creating a 'rebuttable presumption' by Arnold J in *Williams v. Hull* [2009] EWHC 2844 (Ch). Another factor is that the rule is to be used sparingly, and only when it is justified.

39 Miss Stone submitted that two references in the second paragraph of the email of 20 July 2016 can only refer back to the first letter of 22 June 2016 referred to above. Thus it is in a chain of correspondence which was initiated on a 'without prejudice' basis by the Claimant's solicitors, and further there was then a response to that letter also marked 'without prejudice'.

40 Mr Capewell submitted that the email of 20 July 2016 did not form part of negotiations with the genuine intention of settling the dispute. There was no offer, nor any admission, contained in that email.

41 I prefer that simple submission of Mr Capewell. I have concluded that the document does not have the protection of the without prejudice rule, despite its heading, save possibly for the final paragraph if considered important enough to redact. I do not consider that there was any course of correspondence (meaning exchanges between the parties) in which the parties were seeking to settle the matter. The Claimant's solicitors made a proposal which was clearly an attempt to resolve the dispute in the letter of 22 June 2016, although it also contained an assertion as to the Claimant's position. That proposal was simply rebutted in the reply of 11 July 2016. On 13 July 2016 the Claimant's solicitors invited the Respondent to reconsider its position. There was no reply to that invitation until the final paragraph of the email of 20 July 2016 which simply stated that the position would not be reconsidered. There were no negotiations.

42 Miss Stone referred me to the second paragraph of the email of 20 July 2016 as ultimately referring back to the first letter 22 June 2016. Even if the whole of the letter of 22 June 2016 can properly be said to an attempt to settle the matter, as opposed to an assertion of the Claimant's position, then I do not accept that the references in the second paragraph of the email of 20 July 2016 create protection. There was simply a denial that the redundancy process was unfair, and also a denial that there had been any age discrimination. There was no genuine attempt to seek to resolve the matter.

43 For those reasons I find that the email is not a privileged document.

**Employment Judge Baron**
**17 March 2017**