Appeal No. UKEAT/0092/13/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 10 April 2013

Before

THE HONOURABLE MR JUSTICE KEITH

(SITTING ALONE)

A APPELLANT

B & C RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL DYAL (of Counsel)
For the Respondents	MR TOBY BISHOP (of Counsel)

SUMMARY

PRACTICE AND PROCEDURE – Admissibility of evidence

Whether particular communications between the parties could properly be characterised as coming within the "without prejudice" rule and were therefore immune from production.

THE HONOURABLE MR JUSTICE KEITH

1. This appeal relates to the admissibility of without prejudice communications. For reasons which will become apparent shortly, the case is one in which the Appellant's anonymity has been preserved by an order prohibiting anyone from publishing anything which might lead to his identification. The Appellant has therefore been called A, and the Respondents B and C.

2. B is a local education authority, and C is the governing body of a special school for children whose educational progress has been disrupted by social, economic or behavioural difficulties. A was employed as a teacher at the school from 1 September 2001 until he was dismissed with effect from 31 March 2012. He brought a claim of unfair dismissal. At a case management hearing on 1 November 2012, A's legal team sought a ruling that certain documents could be produced in evidence even though they formed part of a chain of correspondence and attendance notes which had begun with an e-mail marked "without prejudice", and which had referred to discussions which had been "off the record". Employment Judge Brooks ruled that the documents could not be produced in evidence, and that no reference could be made in evidence to the contents of the documents or the discussions which they purported to record. It is from that ruling that A now appeals.

3. It is necessary to say something about the context in which the ruling was made. In March 2011, the police disclosed to B and C that A appeared to have had inappropriate relationships with young female pupils between 2000 and 2004. A's case is that he was "largely successful in appealing" against those disclosures, but before the disclosures were corrected, he was required to attend a disciplinary hearing before a panel of C's Staff Discipline, Grievance and Appeals Committee to answer allegations which included an

allegation based on those disclosures that his conduct outside working hours had become prejudicial to the interests of the school. The disciplinary hearing took place on 22 September 2011. The panel decided to give A a final written warning, and it looks from the minutes of the disciplinary proceedings which the employment judge had that that decision was made that day. A was not told of the decision there and then. According to the witness statement of the chair of the panel which the employment judge also had, "this was due solely to the fact that there were some discussions between the representatives of the school and [B] and [A's] union about the possibility of an agreed parting of the ways, but ultimately this did not transpire". Those are the discussions to which the employment judge's ruling related, and I shall refer to them shortly, but if the chair of the panel is right, that rather suggests that the possibility of an agreed parting of the ways had already begun to be discussed.

4. On 11 November 2011, A was formally notified of the decision to issue him with a final written warning. However, by then further information about A had been given to B's Children's Planning and Review Team by the police. That information was that in 2003 a girl known to be involved in prostitution had been seen getting into a car of which A was the registered keeper, and that in 2009 A had been found in a property which the police had searched in connection with an investigation into a missing girl. Those allegations were investigated by the headteacher of the school. Fresh disciplinary proceedings ensued, and following a further disciplinary hearing on 27 March 2012, A was dismissed. The panel's conclusion was that A's behaviour had caused his professional judgment to be called into question, and the school needed to be seen to act decisively to safeguard the welfare of vulnerable young people.

5. I return, then, to the discussions in 2011 "about the possibility of an agreed parting of the ways". The discussions were between Bridget Dolan, a regional officer of A's trade union, and

Chris French who worked in B's Human Resources Department. Ms Dolan sent Ms French an e-mail on 13 October 2011 marked "without prejudice" in which she referred to C's willingness to offer £20,000 "in a compromise agreement, with no reference". For the reasons which Ms Dolan set out in that e-mail, the offer was rejected. On 27 October 2011, Ms Dolan spoke to Ms French on the telephone. Ms Dolan's attendance note of that call is the next relevant document. It referred to the two of them speaking "off the record". Ms French told Ms Dolan that the panel had wanted to dismiss A, but that she had had to advise it that there were no grounds for dismissal, which was why the panel had decided to issue A with a final written warning instead. The attendance note went on to say that Ms Dolan has asked if there was any prospect of an increased offer, to which she was told that C could go up to £30,000 with B's help, but that there was no prospect of anything above that being available.

6. The next document is Ms Dolan's attendance of her call to A the same day, in which she expressed the opinion that it "may" be better for him to accept the offer. On 14 November 2011, Ms Dolan sent an e-mail to Ms French in which she confirmed that A was "prepared to accept an increased offer of £30,000 to terminate his contract by way of a compromise agreement", and she talked of a reference limited to the dates of A's employment at the school and the subjects he taught. Ms Dolan spoke to Ms French again on 24 November 2011, and the final document is her attendance note of that call. Ms French referred to the fact that information about A had been given by the police to what she described as B's "child protection people", and the police had agreed for that information to be released to A and C. It is now common ground that the employment judge should not have ruled that this last document should be immune from production, and it has been agreed that the appeal should be allowed to that extent at least.

7. The document which A's legal team really want the tribunal which hears the case to see is the attendance note of 27 October 2011. They wish to be able to point out to the tribunal that that shows that even before the second set of disciplinary proceedings got under way, the panel had expressed a wish to dismiss A. A wants to argue that the ultimate decision to dismiss him was based, in part at least, on the panel's unfulfilled earlier wish for A's employment to be terminated. For that reason, A was prepared to compromise the appeal on the basis that he was permitted to rely on what the attendance note of 27 October 2011 said about that. B and C were not prepared to agree to that course, and of course I do not hold that against them. But if all five documents are admissible, A's legal team will no doubt want the Tribunal which hears A's claim to know that B and C were prepared to pay A as much as £30,000 to get him to go quietly. It will be said, no doubt, that they were prepared to pay that much because they realised that if he were to be dismissed his dismissal might be of questionable fairness.

8. It was originally contended on behalf of A that even if these documents would otherwise have been privileged, and therefore immune from production, that privilege had been waived. That argument was rejected by the employment judge, and there is no challenge to that finding. A's case is that the employment judge erred when he came to apply the "without prejudice" rule.

9. The law about communications which are expressed to be "without prejudice" or "off the record" is tolerably clear. Communications which are made for the purpose of a genuine attempt to compromise an existing dispute and to avoid litigation arising from it will, generally speaking, not be admissible in evidence. The underlying policy behind the rule was expressed by Oliver LJ (as he then was) in **Cutts v Head** [1984] 1 Ch 290 at p.306C-G.

> **"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 … may be used to their prejudice in the course of the proceedings.**

> **They should … be encouraged fully and frankly to put their cards on the table … The public policy justification … 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."**

10. It is important to note that calling your communications "without prejudice" or "off the record" is not necessarily decisive. The absence of words of that kind does not automatically mean that your communications will be admissible. If it is clear from all the circumstances that you are genuinely trying to compromise the dispute without resort to litigation, the normal rule will apply. Similarly, there are some circumstances in which the words "without prejudice" or "off the record" are used, but where the communications are nevertheless admissible. That commonly occurs where the communications set out the parties' respective cases but not for the purpose of attempting to settle the dispute without resort to litigation.

11. A's case before the employment judge was that the "without prejudice" rule did not apply to the communications between Ms Dolan and Ms French because there was at that stage no question of there being any litigation between A on the one hand and B and C on the other. In **Barnetson v Framlington Group Ltd** [2007] ICR 1439, the Court of Appeal considered the application of the "without prejudice" rule to communications which came into existence before the commencement of proceedings. Having reviewed a long line of authorities and having concluded that the rule was not restricted to communications made in the course of litigation, Auld LJ posed this question at [32]:

> **"[H]ow proximate, if at all, must unsuccessful negotiations in a dispute leading to litigation be to the start of the litigation to attract the 'without prejudice' rule?"**

Auld LJ answered that question at [34] in this way:

> **"… the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree."**

There is one other principle at play here. There must be a real dispute which has come into existence and which is "capable of settlement in the sense of compromise (rather than in the sense of simply payment or satisfaction)". That is what Lord Mance said in **Bradford & Bingley Plc v Rashid** [2006] 1 WLR 2066 at [81].

12. There were originally two grounds of appeal. The first was that the employment judge did not apply the right test. The second was that even if he did, there could have been only one answer on the facts, which was that litigation could not reasonably have been contemplated by the parties even if their dispute was not compromised. The first ground of appeal is no longer pursued, and the second ground of appeal which has been modified by Mr Daniel Dyal who came into the case recently because A's previous counsel was unable to appear today, goes like this. The negotiations to which it is said the "without prejudice" rule applies took place before the second set of disciplinary proceedings had commenced. They had taken place at the time of the first set of disciplinary proceedings after the panel had decided what the outcome of the disciplinary proceedings should be, but before it had been publicly announced. Until the panel had announced the decision publicly, or at the very least until A had been notified of the decision even privately, there was no dispute between the parties which could have led to litigation.

13. I do not agree. A did not know what the outcome of the disciplinary proceedings would be for quite a while. For all he knew, he might be dismissed. If he was, the only way in which he could vindicate himself was by bringing a claim for unfair dismissal which would examine the reasonableness of any conclusion which the panel might have reached about his suitability to remain as a teacher at the school. The way of avoiding such an outcome was to leave his employment in circumstances in which no finding could be made about his suitability as a teacher, and with a sum sufficiently large for him to be able to put a suitable "spin" on it.

14. That was, in effect, what the employment judge found in para. 14 of his reasons. He said:

> **"It is plain to me that at the time these negotiations commenced [A] believed himself to be faced with the real possibility of dismissal, that those acting on his behalf took his instructions as to an acceptable sum and that these negotiations were well advanced. It might well be that [A] did not, at that stage, have a clear idea of what his cause of action might be, however I have no doubt that the potentially catastrophic consequences of his employment being terminated by reason of the allegations made against him in the first disciplinary would have, been obvious to him. Such an outcome would have been effectively 'career ending' and if so terminated then it would be reasonable that he would at least be considering litigation as a possible route back to respectability, indeed he is here today litigating the effects of the second disciplinary which also involved gravely serious allegations."**

The employment judge returned to the topic in para. 15 of his reasons when he said:

> **"At the relevant time [A] was undoubtedly concerned that the outcome of the disciplinary might have been not merely unfavourable to him, but potentially destructive of his career … [A] would have had considerable motivation for seeking to avoid what he would reasonably have seen as the possibility of his employment coming to an end in a career damaging way. It seems to me that is precisely why the Parties entered into settlement negotiations. [A] to avoid, so far as he was able, adverse and potentially career damaging consequences, and [B and C] to avoid possible Employment Tribunal proceedings."**

That last point is important. It shows that the employment judge found that it was not just A who thought that litigation was at least a possibility if a compromise could not be reached. B and C thought that as well.

15. In my opinion, it was reasonably open to the employment judge to find that A thought that litigation was at least a possibility if a compromise could not be reached. I am less convinced that it was reasonably open to the employment judge to find that B and C thought that as well. Unlike A, they knew that A was not going to be dismissed, but that he would only be getting a final written warning. What were the "possible Employment Tribunal proceedings" which they were seeking to avoid? The employment judge did not spell that out, but that does not matter, because the employment judge found in para. 13 of his reasons that for the "without prejudice" rule to apply, it was sufficient for just one of the parties to the negotiations to have been negotiating because they might reasonably have contemplated

litigation if a compromise could not be reached. There has been no suggestion that such a view was erroneous in law.

16. That deals with the period up 27 October 2011, in other words with the period in which the e-mail of 13 October 2011 was written. But different considerations apply to the period from and including 27 October 2011. Ms Dolan's attendance note of her call to Ms French that day referred, as I have said, to Ms French telling Ms Dolan that the panel had wanted to dismiss A, but that she had had to advise them that there were no grounds for dismissal, which was why the panel had decided to issue A with a final written warning instead. From then on, A's advisers – and A himself when he was given this information later that day – knew that his dismissal was not being contemplated, at least not at that stage. To the extent that the negotiations continued thereafter, what was the litigation which any of the parties might reasonably have contemplated would be commenced?

17. The answer to that question could lie in what Ms Dolan said when she telephoned A that day to bring him up to speed on what Ms French had told her. It is necessary here to spell out what she said in her attendance note of that conversation with A. The attendance note reads:

> **"I informed him that the school had decided to issue a final written warning and outlined the basis of that warning, as I had been informed by Chris French. He said he was very surprised at this. I said that if he decided not to take their offer and wanted to return to the school then we would of course appeal against this decision but I said that I was not optimistic about an appeal being successful. He would therefore be returning under a final written warning, which is normally for two years and it may be that the school would try to find other grounds to bring further disciplinary or capability proceedings after he returns. I said that we would of course represent him should that happen but it could be very difficult for him to return and it is quite clear that the school does not want him back. He has already told me that he is now on anti-depressant medication and I said he should consider the possible effects on his health. He said he might prefer to wait to get the letter before saying whether or not he accepts the offer. I said that it was his decision but my opinion was that it may be better for him to take the offer as I think it would be very difficult for him to return to the school. I asked him to get back to me on Monday to let me have his views. I said that I thought we ought to try to get back to the school next week to respond to the offer."**

So at that stage Ms Dolan thought that it was at least possible that if A returned to work, the school would try to find other grounds to bring disciplinary or capability proceedings against A after he returned. Although she did not say so in so many words, she unquestionably had in mind the possibility that those proceedings might result in his dismissal. If that happened, there would have been a dispute about the fairness of his dismissal which, if not compromised, could have resulted in the lodging of a claim for unfair dismissal.

18. But the critical question is whether such a dispute had come into existence by the time of those negotiations. I do not think that it had. It might in the future, but it had not done so then. It follows that although the "without prejudice" rule applied to the e-mail of 13 October 2011, it did not apply to the attendance note of 27 October 2011 or the subsequent documents.

19. In the circumstances, I propose to allow the appeal. Although the e-mail 13 October 2011 may not be admitted in evidence, the subsequent documents can be. However, the attendance note of 27 October 2011 and the e-mail of 14 November 2011 will need editing because otherwise the tribunal will be alive to what was in the e-mail of 13 October 2011. I leave it to the parties to come up with suitable suggestions, but subject to what they have to say, I suggest that instead of the third paragraph of the attendance note of 27 October 2011, there should be something along these lines in square brackets so that it does not purport to be what Ms Dolan actually said:

> **"There was then a discussion about whether the school would be prepared to pay A to leave his employment. Ms French said that the school simply had no money left and were only able to offer £30,000 with the assistance of the local authority. There was therefore no prospect of anything above £30,000."**

And when it comes to the e-mail of 14 November 2011, it seems to me that the word "increased" in the first line should be redacted, so the effect of the redactions would be to prevent the tribunal knowing that there had been a previous offer of £20,000, and that that offer

had been rejected which is what was said in the e-mail of 13 October 2011, which I have ruled is immune from production.