Appeal No. UKEAT/0287/16/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 November 2017

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

MR D MARTIN — APPELLANT

(1) MR D McDEVITT
(2) COMMUNITY LEGAL SERVICES CIC — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TOM CARTER (of Counsel)
For the Respondents	No appearance or representation by or on behalf of the Respondents

SUMMARY

PRACTICE AND PROCEDURE - Preliminary issues

PRACTICE AND PROCEDURE - Admissibility of evidence

In the course of without prejudice communications regarding potential claims, the Respondent through ACAS sent an email to the Claimant containing what could be construed as threats. In deciding that the Claimant was entitled to rely on the email because of the "unambiguous impropriety exception" to the "without prejudice" rule, the Employment Judge misdirected himself by considering whether the words used were unambiguous rather than whether they constituted unambiguous impropriety. **Unilever plc v Procter & Gamble Co** [2000] 1 WLR 2436, **Forster v Friedland** [1992] WL 1351421, **Interactive Technology Corporation Ltd v Ferster & Others** [2015] EWHC 3895 (Ch) considered. Appeal allowed and remitted to the same Employment Judge to determine the issue.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Mr Martin (the Respondent to proceedings in the ET) appeals the Decision of Employment Judge Ahmed on a Preliminary Hearing sent to the parties on 1 June 2016 ("the Judgment"). The Preliminary Hearing took place in proceedings brought by Mr McDevitt ("the Claimant") against his former employers, Community Legal Services CIC who play no part in this appeal, and Mr Martin who is "the Respondent" for practical purposes.

2. The claim was for wages, notice pay, holiday pay, and compensation for disability discrimination and failure to make reasonable adjustments. The Decision of the Employment Judge, from which the Respondent appeals, is that the Claimant is entitled to rely on a chain of email correspondence - including an email of 20 November 2015 from ACAS to the Claimant - in respect of which the Respondent claimed that there was without prejudice privilege from disclosure. However, the Claimant sought to rely on that correspondence using the exception for unambiguous impropriety to the "without prejudice" rule in order to bring proceedings for victimisation against the Respondent.

3. The Claimant, who suffers from physical disabilities, has not attended this appeal hearing. Although at an earlier stage he indicated he would not be resisting the appeal, he now does. His skeleton argument of 23 October 2017 is treated as his Answer. The Claimant also emailed written submissions opposing the appeal. I am told they were received by the Respondent this morning after 8am. Subject to deleting paragraph 5, which I am told contains without prejudice material, these form part of the material before the Court. Both these documents have been considered on this appeal.

The Facts in Outline

4. Mr Carter, counsel for the Respondent, agrees that the Employment Judge fairly summarised the background facts. The Employment Judge set out those background facts in paragraphs 6, 7 and 8:

> **"6. The background for the purposes of this hearing is as follows: Mr Dominic McDevitt (born 24 November 1979) was employed by the First Respondent as a Legal Assistant from 18 August 2015 to 24 September 2015. Mr McDevitt is seriously disabled with cerebral palsy. The First Respondent is a not-for-profit organisation providing legal support and services to those who are otherwise unable to afford representation before courts and tribunals. This includes CCSSA (social security and child support) tribunals and employment tribunals. He was dismissed alleged incompetence [sic].**
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> **7. It is the Claimant's case that he was summarily dismissed without being given a reasonable opportunity to establish his competence. He does not have the qualifying period of service to bring a complaint of unfair dismissal. He brings complaints of disability discrimination which are complaints of direct disability discrimination, discrimination arising from disability, indirect discrimination and a failure to comply with the duty to make adjustments. All of the complaints are disputed.**
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> **8. The Claimant, who has been legally represented throughout with the exception of the preliminary processes, contacted ACAS to comply with the Early Conciliation procedure. During the course of early conciliation, there was an exchange of emails between ACAS and the First and Second Respondent. It is the content of the email exchange which leads to the present issue. It is unnecessary to set out the full exchange. The only material email is that of 20 November 2015 timed 08:08 from ACAS to the claimant essentially forwarding an email from the respondents which was as follows:-**
>
> > **"Mr McDevitt**
> >
> > **This is the response from Darren Martin and Community Legal:**
> >
> > ***Mr McDevitt needs to seek redress from the Employment Tribunal, please remind him of my costs warning.***
> >
> > ***We have accepted the mistake made with his wages and will settle his wages claim, there is not even a legal basis for any entitlement to the other rubbish in his email (not being able to get a reference etc) and his discrimination claim is nonsense in law and fact. Mr McDevitt should require no reminding that I am an expert in the area of employment law and disability discrimination in employment; he simply has neither a basis for those claims nor evidence to support the same.***
> >
> > ***Further, please advise Mr McDevitt that should [he] bring his spurious claims, as a result of the Employment Tribunal being a public forum, we will ensure that the local political establishment, local employers and the public are made aware of our opinion that he is attempting to grossly abuse the protection afforded within the Equality Act, to enrich himself based on a claim that has no basis whatsoever. lability [sic] to find employment locally and his fledgling political career. I am happy for you to copy this email to Mr McDevitt. We will not negotiate further. The offer will remain able to be accepted until the end of the 14 day extension period. After that we will not negotiate any settlement at all, and Mr McDevitt's only remedy will be following a full Tribunal hearing and an order to do so by the Tribunal, which we anticipate, using the current listing time as a guide, to be around May 2016: when I am of the opinion the Tribunal will award him the exact amount as the offer amount.***
> >
> > ***Since I am confident that I can show the Tribunal that the remainder of his claims are nonsense, he will not succeed in those claims, he will be shown to have acted vexatiously and unreasonably and will not even be entitled to a costs order for the fees he will be required to pay to the Tribunal.***

> ***As a result, please urge Mr McDevitt to put aside his unwarranted indignation at a decision to terminate his employment and encourage him to realise the reality of his position.***
>
> ***If he accepts the settlement offer, we will agree to a non disclosure clause, we will further honour our offer made within the termination letter, to draft a reference on his merits. Failure to accept the settlement offer by the end of the 14th [sic] day extension period will result in those terms being revoked." "***

The Judgment of the Employment Judge

5. The Employment Judge referred to, and set out the material *dicta* from a number of authorities, including **Hawick Jersey International v Caplan** QBD [January 1988], **Forster v Friedland** [1992] WL 1351421, and in particular the Employment Judge referred to the case of **Unilever plc v Procter & Gamble Co** [2000] 1 WLR 2436, **Muller v Linsley & Mortimer** [1996] PNLR 74, and **Rush & Tompkins Ltd v Greater London Council** [1989] 1 AC 1280 (referred to in the **Unilever** case).

6. The Employment Judge cited passages from the **Unilever** case and in particular the judgment of Walker LJ in **Unilever**, in which he quoted Lord Griffiths in **Rush & Tompkins** setting out the basis of the "without prejudice" rule, as being 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 the finish.

7. The Employment Judge also set out, in paragraph 14, the passage in **Unilever** in which Walker LJ quoted from Hoffmann LJ in **Muller v Linsley & Mortimer** :

> **"Thus, when the issue is whether without prejudice letters have resulted in an agreed settlement, the correspondence is admissible because the relevance of the letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. They are relevant because they contain the offer and acceptance forming a contract which has replaced the cause of action previously in dispute. Likewise, a without prejudice letter containing a threat is admissible to prove that the threat was made." (Employment Judge's emphasis)**

8. Further the Employment Judge considered guidance given in **Woodward v Santander UK plc** [2010] IRLR 834, in which Cox J laid out certain principles in paragraphs 61 and 62, including passages quoted by the Employment Judge in which Cox J considered the exception for unambiguous impropriety to the "without prejudice" rule, in which the Judge said:

> **"62. What are the limits? To our mind they are best stated in terms of the existing exception for impropriety. This exception, as we have seen, applies only to a case where the tribunal is satisfied that the impropriety alleged is unambiguous. It applies only in the very clearest of cases. A court or tribunal is therefore required to make a judgment as to whether the evidence which it is sought to adduce meets this test. Words which are unambiguously discriminatory will of course fall within the exception …"**

9. Having summarised the contentions of the Respondent and that of Mr Lewis, the solicitor for the Claimant, the Employment Judge held in paragraphs 19, 20 and 21:

> **"19. I have no doubt that what Mr Martin was intending and actually doing was to threaten the Claimant that if he should bring the proposed proceedings that Mr Martin would then inform the local political establishment, local employers and the public of at least the fact that the Claimant had brought a claim and that he was "*attempting to grossly abuse the protection afforded within the Equality Act, to enrich himself based on a claim that had [no] basis whatsoever*". There can be no real doubt as to what was meant or intended to be meant.**
>
> **20. I am satisfied that this represents the clearest category of cases where the unambiguous propriety rule can and should apply. It is not a case where the potentially discriminatory words are ambiguous. The treat is clear. It was designed to put pressure on the claimant to forget any thought of issuing proceedings. Mr Martin was not seeking to resolve a genuine dispute nor to genuinely engage in any form of negotiation. The powerful policy reasons for excluding without prejudice communications do not apply in this case. There has never been any defence to the holiday pay and wages claims and it cannot legitimately be said that what was taking place was a genuine settlement exchange. Mr Martin was making inappropriate threats.**
>
> **21. In those circumstances, I am satisfied that the threat amounted to an impropriety. Despite efforts to introduce ambiguity, I am satisfied that the message was crystal clear and the reader would not have been left in any doubt as to its meaning and effect. I am conscious of the restrictions placed upon the exceptions to the without prejudice rule set out in the authorities referred to above but they do not prevent the claimant from relying upon the contents of the message in this case. Accordingly, the Claimant is entitled to pursue his complaint of victimisation."**

The Grounds of Appeal

Ground 2

10. Mr Carter, counsel for the Respondent, first made submissions on ground 2 of the Notice of Appeal because, he said rightly, logically it is first in time. By ground 2 it is contended:

> **"<u>Misdirection as to whether without prejudice status attached</u>**
>
> **(2) Wrongly concluded that the communication did not constitute a genuine settlement exchange because there was no defence to elements of the claim, namely holiday pay and wages, contrary to authority that a party should be free to admit weaknesses in their case without being penalised and conflating the questions of whether without prejudice applied with whether an exception to the policy applied (misdirection)."**

11. Counsel contended that the Employment Judge misdirected himself by considering whether the "without prejudice" status applied to the challenged communication at all, rather than deciding whether the communication fell within the unambiguous impropriety exception.

12. Counsel drew attention to paragraph 2.1 of the Judgment, in which the first of two issues to be determined by the Employment Judge were set out. It reads:

> **"2.1. Is the chain of email correspondence contained in schedule 4 to the Claimant's "further and better particulars of claim and discrimination" dated 26 January 2016 - which all parties agree would otherwise be inadmissible because of the 'without prejudice rule' - nevertheless admissible because of the 'unambiguous impropriety' exception to the without prejudice rule?"**

13. Counsel pointed out that the issue was predicated on both parties having agreed that the email of 20 November 2015 was a "without prejudice" communication. The issue was whether it fell within the exception to that protection because of the "unambiguous impropriety exception to the rule". Mr Carter contended that paragraph 20 of his Judgment, shows that the Employment Judge conflated the question of whether the 20 November 2015 communication was a "without prejudice" communication - which was agreed - with whether it contained an unambiguous impropriety, which would remove it from the restriction on use to which it would otherwise attract.

14. In this regard Mr Carter referred to four sentences in paragraph 20 of the Judgment, in which the Employment Judge said:

> **"20. … Mr Martin was not seeking to resolve a genuine dispute nor to genuinely engage in any form of negotiation. The powerful policy reasons for excluding without prejudice communications do not apply in this case. There has never been any defence to the holiday**

pay and wages claims and it cannot legitimately be said that what was taking place was a genuine settlement exchange. Mr Martin was making inappropriate threats."

15. It was contended on behalf of the Claimant that the Employment Judge did not misdirect himself as to whether "without prejudice" status attached to the email of 20 November 2015. It is pointed out that the Employment Judge considered whether impropriety of threats made took the communication out of the "without prejudice" exclusion.

16. In my judgment, it is clear that the Employment Judge proceeded on the basis that the relevant communication could not be relied upon unless it fell within the category of unambiguous impropriety. The reference to this category and extensive citation of authority on the exception to the "without prejudice" protection of communications unarguably establishes that the Employment Judge did not conflate "*the questions of whether without prejudice applied with whether an exception to the policy applied*". If the Employment Judge had not proceeded on the basis that "without prejudice" protection for the email of 20 November 2015 from reference applied in proceedings, he would not have considered and reached his decision on the basis of whether or not that email fell within the exception to the "without prejudice" protection. Ground 2 does not succeed.

Ground 1

17. By ground 1, the Respondent contends:

"<u>Misdirection as to the legal test for unambiguous impropriety exception</u>

(1) Wrongly based the decision on whether the contents of the communication were unambiguous rather than applying the correct test of whether the contact was unambiguously improper per Robert Walker LJ in *Unilever v Procter & Gamble* [2000] 1 WLR 2436 at 2449B-C [paragraphs 18 to 21]."

18. Mr Carter rightly drew attention to the importance attached in the authorities to the public policy which underlies the "without prejudice" rule. It was expressed by Hoffmann LJ

(as he then was) in **Forster v Friedland** [1992] WL 1351421 as "*designed to encourage parties to express themselves freely and without inhibition*" in negotiations.

19. Counsel also referred to a passage in the speech of Lord Griffiths in **Rush & Tompkins Ltd v Greater London Council** [1989] 1 AC 1280, where at page 1299D-F, he said:

> **"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 LJ 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. …" "**

20. Mr Carter contended that the authorities clearly demonstrate that the exception to the "without prejudice" rule for unambiguous improprieties applied to serious misconduct. As Hoffmann LJ observed in **Forster**: "*the value of the without prejudice rule would be seriously impaired if its protection could be removed from anything less than unambiguous impropriety*".

21. Mr Carter referred to the facts in the various authorities which have been categorised as unambiguous impropriety. These were making bogus claims to put pressure on a defendant to negotiate over another matter than the subject of proceedings (**Hawick v Jersey**). Other instances were referred to in the judgment of Rose J in **Interactive Technology Corporation Ltd v Ferster & Others** [2015] EWHC 3895 (Ch), at paragraph 14, referring to **Boreh v Republic of Djibouti** [2015] EWHC 769 (Comm) in which there was a threat to bring terrorist charges against Mr Boreh in order to pressure him into settling.

22. Mr Carter rightly submitted that the authorities show that the "without prejudice" protection cannot be used as a cloak for blackmail, but he submits that the facts in this case do not amount to such threats. Mr Carter submitted that the Employment Judge wrongly concentrated on whether the words of the threat made by the Respondent were unambiguous, rather than whether the making of the threat was unambiguously improper.

23. Whilst Mr Carter recognised that it is apparent from paragraph 17 that is was the Respondent who argued that the language of the threat he made was ambiguous, he contended that this became the focus of the determination of the decision of the Employment Judge on ambiguity. In paragraph 19, the Employment Judge decided "*There can be no real doubt*" about the words. In paragraph 20, the Employment Judge held "*It is not a case where the potentially discriminatory words are ambiguous*".

24. After some exchanges with the Court, Mr Carter crystallised his argument saying that the Employment Judge failed to decide the issue before him, on whether the statements in the email of 20 November 2015 were unambiguously improper, rather than whether what was said was ambiguous or unambiguous. The Claimant contended that the Employment Judge did not err. He directed himself, it was said, in accordance with the appropriate authorities and reached a permissible conclusion.

Ground 1 - Discussion

25. The Judgment of the Employment Judge has to be read as a whole. I have considered whether paragraph 19 shows that the Employment Judge decided the issue before him on the basis of whether the threat expressed in the email of 20 November 2015 was unambiguously improper. However, I have concluded that the contention in ground 1 is well made.

26. In paragraph 19 of the Judgment of the Employment Judge concludes "*There can be no real doubt as to what was meant or intended to be meant*". In paragraph 20, the Employment Judge states that this "*is not a case where the potentially discriminatory words are ambiguous. The threat is clear*". The threats made in the email of 20 November 2015 were undoubtedly serious. Mr Carter rightly said that they were close to the line of unambiguous impropriety. It is the impropriety which must be unambiguous and/or in other words clear.

27. In my judgment, the Employment Judge erred in considering that the issue was whether the words were ambiguous. It appears that he based his decision on this erroneous approach. Accordingly, ground 1 succeeds.

Ground 3

28. By ground 3, it is contended:

> **"Misdirection as to the relevance of any impropriety being a threat**
>
> **(3) Placed improper weight on a passage from the judgment of Hoffmann LJ in *Muller v Linsley & Mortimer* [1996] PNLR 74 without sufficient context and wrongly proceeded on the premise that the question of whether the unambiguous impropriety exception should apply would be determined by whether there was a threat [paragraph 14)] (misdirection)."**

29. The criticism made in this ground of appeal is directed to the quotation by the Employment Judge of a passage from **Muller v Linsley & Mortimer**, which reads as follows:

> **"Thus, when the issue is whether without prejudice letters have resulted in an agreed settlement, the correspondence is admissible because the relevance of the letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. They are relevant because they contain the offer and acceptance forming a contract which has replaced the cause of action previously in dispute. Likewise, a without prejudice letter containing a threat is admissible to prove that the threat was made." (Employment Judge's emphasis)**

30. Mr Carter submitted that the judgment of Hoffmann LJ in this passage was doubted in later cases, in particular in **Unilever v Procter & Gamble**. It is right that a passage in the judgment of Hoffmann LJ in **Muller** was doubted in **Unilever**, however that was on a different

issue. Where the difference arose was in a challenge to the following passage in the judgment of Hoffmann LJ in **Muller**: "*the public policy rationale is, in my judgment, directed solely to admissions*".

31. In **Unilever** and other cases, the public policy justification and rationale for the "without prejudice" protection is much wider than that referred to in the judgment of Hoffmann LJ in the paragraph just referred to. However the passage cited and relied upon, or referred to by the Employment Judge in this case was not concerned with the scope of the "without prejudice" policy, but with the exception to that policy for the type of contract with which the Employment Judge was concerned in this case. It was concerned with the exception to the rule, not with the scope of the "without prejudice" rule, before an exception was considered. Accordingly, in my judgment, ground 3 does not succeed.

Ground 4

32. By ground 4 it is alleged that the Judgment of the Employment Judge was perverse. The overall introduction of ground 4 is:

> **"(4) Concluded that the "unambiguous impropriety" exception to the inadmissibility of without prejudice communications applied where it was impermissible to do so"**

33. The particulars of perversity given in the grounds of appeal, are:

> **"i. Where the facts involved a threat to disclose matters that would be [publicly] disclosable in any event given rule 50 of the Employment Tribunals Rules of Procedure 2013 and the fact that no application had been made for a direction that the proceedings be private.**
>
> **ii. When the threat related only to an expression of opinion that the claim was misconceived or pursued for an improper motive. Such opinion being protected by the appellant's right to freedom of expression under Article 10 of the European Convention on Human Rights in any event and further recognised in rule 50(2) of the Employment Tribunals Rules of Procedure 2013.**
>
> **iii. When the employment tribunal would have jurisdiction to find that a party had acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of proceedings or in the way of conducting them, including in respect of a claimant bringing a [claim] under the Equality Act 2010.**

iv. Against the backdrop of authorities where the threshold exception was not applied in the case of a criminal offence such as perjury in *SIB v Fincken* [2003] EWCA Civ 1630 or in the case of a statutory tort as in *Unilever v Procter & Gamble Co* [2000] 1 WLR 2436 both of which concerned conduct significantly more serious than in the instant case.

v. Against the framework established by the authorities that any exception to the without prejudice rule should not be applied too readily."

34. Mr Carter contended that the threat contained in the email of 20 November 2015 is to disclose matters which would in any event be public. There was no application to hear the claim in private and what was set out in the letter was an expression of opinion. It was said that what was expressed in the email of 20 November 2015 was close to the line of unambiguous impropriety. Nonetheless, Mr Carter contended it was just on the right side of the line and not on the wrong side of the line.

Ground 4 - Discussion and Conclusion

35. It is necessary to refer to the words used in the email of 20 November 2015 in order to reach a conclusion as to whether the decision of the Employment Judge was or was not perverse.

36. In my judgment, the words in that email do not just bring to the attention of the Claimant that the hearing of his claims would be in public, but the Respondent is saying that he will ensure that the local political establishment and local employers would be made aware that the Claimant was attempting to abuse the protection of the **Equality Act 2010** to enrich himself. It is said that this would affect his ability to find employment locally and could harm his fledgling political career.

37. The meaning expressed in these words is clearly unacceptable. They were given various categorisations by Mr Carter ranging from unfortunate to more serious, and less serious.

38. It is clearly acceptable to draw attention to the fact that an ET hearing is in public and that the press may be there. It is even acceptable to draw attention to the fact that the press may be notified that the case is to be heard. It is also acceptable to allege that the Respondent will take the position that the claims are spurious. However, the words in this email could well be said to go beyond those acceptable limits in that it is said that steps will be taken which could or would affect the Claimant's future employment chances locally, and damage his putative political career.

39. Those threats, it may be said, go beyond the scope of the proceedings themselves. However in my judgment, it cannot be said that it would have been perverse of the Employment Judge to hold that the email of 20 November 2015 did not contain a threat which was unambiguously improper. Nor can it be said that it would have been perverse for the Employment Judge to come to the contrary conclusion. The grounds of appeal do not, in any event, ask for a substituted decision which would necessarily follow from the conclusion that the decision that the words used were not unambiguously improper was perverse.

40. Accordingly this appeal succeeds on ground 1. The Judgment of the Employment Judge is set aside and the issue of whether the words used by the Respondent in the email of 20 November 2015 constituted unambiguous impropriety is remitted for hearing.

41. I have considered whether the remission should be to the same Employment Judge and have concluded that it should be. This Preliminary Hearing was conducted in the course of other proceedings which are due to be heard, namely the hearings relating to pay, the disability discrimination claim, and the failure to make reasonable adjustments claim. All of which are to be heard by Employment Judge Ahmed. It is not suggested that there is any bias or impropriety

or any other reason why the matter should not go back to the same Employment Judge and that is the Order that this Employment Appeal Tribunal makes.

42. If of course it proves impracticable for the same Employment Judge to hear these issues, then the Regional Employment Judge will make appropriate arrangements.