EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr D Herry		**Dudley Metropolitan Borough Council**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON A PRELIMINARY HEARING

HELD AT Birmingham **ON** 1 & 5 March 2018

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **In Person**
For the Respondent: **Ms S Garner (Counsel)**

JUDGMENT

The Judgment of the tribunal is that: -

1 Documents numbered 5 – 16 in the parties' agreed bundle of without prejudice communications are inadmissible and shall not be referred to in evidence at the substantive Hearing scheduled to commence on Monday 5 March 2018.
2 The claimant's application to add Dudley Academies Trust as a second respondent to this claim is refused.
3 The claimant's application to amend the claim to include a further act of victimisation arising from the respondent's email to the Information Commissioner dated 8 February 2017 is refused.
4 The claimant's application for documents to be removed from the trial bundle is withdrawn.
5 The claimant's witness statement shall be redacted to exclude references to the without prejudice communications referred to in Paragraph 1 above.
6 The claimant's application for Employment Judge Gaskell to recuse himself from the substantive hearing of these claims is refused.

REASONS

1 The substantive hearing of these combined claims is listed to commence before a full panel on Monday 5 March 2018 with a time allocation of 15 days. Several matters have been identified as preliminary issues to be determined by

the trial judge sitting alone in advance of the substantive hearing. I have ruled on each preliminary issue as above and my reasons below.

Without Prejudice Communications

2 The parties have agreed a bundle comprising 17 documents and running to some 27 pages of without prejudice communications. The claimant wishes this documentation to be included in the trial bundle; the respondent objects. The claimant fully understands the general proposition that without prejudice communications are privileged and should not be placed before the tribunal in evidence. But, in this case, he argues that two exceptions to that rule are applicable: -

(a) That the without prejudice correspondence reveals "unambiguous impropriety" on the part of the respondent and on the part of one of its officers Mr Roger Owen.
(b) that at the time of the correspondence there were no proceedings in contemplation and therefore any proposals contained in the correspondence were not proposals for settlement of this litigation.
(c) That the privilege has in any event being waived.

3 The correspondence comprises letters between the claimant and the respondent; and between the claimant's representative and the respondent; in which possible terms of settlement of these claims are explored. By the time of that correspondence the claimant had previously brought two unsuccessful claims before the tribunal one of which had resulted in an adverse costs order in the sum of £110,000. (The order has since been set aside on appeal – as to the amount of the costs, not as to the principle and the costs are to be re-assessed by the tribunal in due course.) During the course of the correspondence, Mr Owen advanced a proposal for settlement which included the respondent waving its entitlement to enforce the costs order; but making clear that, in the event that the terms offered were not agreed, the respondent would proceed to enforce the order by a petition for the claimant's bankruptcy. The terms suggested also included the claimant waving the right to bring any further proceedings against the respondent; and the claimant agreeing to desist in making any further Freedom of Information requests.

4 The claimant's case is that the suggestion of these terms of settlement (requiring him to give up his rights to bring further proceedings – he remained employed by the respondent as a part-time youth worker; his rights as a citizen to make FoI requests; and the threat of bankruptcy proceedings; all amounted, either individually or collectively, to unambiguous impropriety which should not be hidden behind the cloak of without prejudice communications.

5 My judgement is that there is nothing improper in the proposals for settlement set out by Mr Owen: -

(a) It is permissible to contract out of the right to bring further claims before an employment tribunal provided that the provisions of Section 203 of the Employment Rights Act 1996 are properly complied with. The claimant would have needed to take independent legal advice; and no doubt his legal advisers and those advising the respondent would ensure that the relevant statutory requirements were met.
(b) It may well be the case that any agreement to desist from making further FoI requests would not be enforceable: but this does not equate to it having been improper for Mr Owen to suggest this.
(c) So far as the threat of bankruptcy is concerned, the position at the time was that the respondent was entitled to enforce the order for costs there was no obstacle to its so doing. A petition for bankruptcy is a legitimate enforcement tool; Mr Owen was perfectly entitled to raise this possibility during the course of negotiations for settlement.

6 The claimant's suggestion that there were no proceedings in contemplation at the relevant time is simply wrong: the relevant correspondence is dated on or after 10 August 2015; by that time, the claimant had contacted ACAS in contemplation of the current proceedings; the Early Conciliation Certificate was issued on 11 August 2015.

7 The claimant asserts that privilege in this documentation has been waived because the letters had previously been included in a trial bundle when the case was listed for trial before Employment Judge Warren (the trial was subsequently aborted). My judgement is that the mere inclusion of documentation in a trial bundle does not operate to waive privilege: a party is entitled to assert privilege and asked for exclusion of the document at any time before it is formally adduced in evidence.

8 In the circumstances, my judgement is that the without prejudice communications must be excluded from evidence at the forthcoming trial. Miss Garner has helpfully confirmed that there is no longer any objection to documents 1 - 4 and 17 being included in the trial bundle. I therefore order that documents 5 - 16 should be excluded and no reference should be made to them at the forthcoming trial at least until a judgement on liability has been given. There are circumstances where either party may be permitted to refer to such correspondence in connection with any application for costs at the conclusion of the trial.

Dudley Academies Trust

9 These proceedings relate to the claimant's employment as a teacher at Hillcrest School and Community College (Hillcrest) between 4 January 2008 and 15 May 2015. When the proceedings were commenced, Hillcrest were named as a second respondent. On 29 August 2017 Hillcrest ceased to exist: The College was subsumed into the Dudley Academies Trust (the Trust). This was effected by a commercial transfer agreement which included provisions for Dudley Metropolitan Borough Council (the respondent) to accept full responsibility for all liabilities of Hillcrest including any liability to the claimant. At a Preliminary Hearing on 23 January 2017, I dismissed Hillcrest from the proceedings: no purpose could be served by them remaining a party as the entity no longer existed. The claimant now applies for the Trust to be joined as a second respondent.

10 There is no basis in law upon which the Trust could find itself liable to the claimant in respect of any of these claims. He was no longer employed at Hillcrest at the time of the transfer, and so the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 are not be engaged. In any event, no purpose can be served by joining the Trust as a party at this stage bearing in mind that the respondent accepts full responsibility for any liabilities attaching to Hillcrest. The trial of this action commences in two working days' time; to join an additional party at this stage would inevitably cause delay with no possible benefit to the claimant.

11 Accordingly, the application is refused.

Amendment Application

12 The claimant applies to amend his claim to assert a further act of discrimination/victimisation arising from the contents of an email between Mr Lewis Bourne of the respondent and the Information Commissioner which is dated 8 February 2017. The claimant claims to have been unaware of the existence of the email until February 2018.

13 The allegation is that, when responding to an enquiry from the Commissioner, Mr Bourne made false allegations against the claimant. There is already a discrimination/victimisation claim arising from the same allegedly false information provided to the Commissioner in a letter dated 24 March 2016 in response to an earlier enquiry.

14 I have considered the principles set out in the case of ***Selkent Bus Co Limited v Moore*** **[1996] ICR 836**: I have concluded that it would be inappropriate to allow an amendment of this type at this time. The allegation is peripheral in nature; the ground which it covers will already be explored; and the

substantive trial is due to commence in two working days' time. My judgement is that there is too great a risk of delay and uncertainty to allow an amendment now on a matter which does not go to the heart of the issues before the tribunal.

15 Accordingly, the application is refused.

Removal of Documents from the Trial Bundle

16 The claimant had indicated an intention to make application for some documents currently included in the trial bundle to be removed. He has today indicated that this application is not pursued. I will treat it as withdrawn.

Redaction of Witness Statement

17 Passages contained in the claimant's witness statement included reference to the without prejudice correspondence referred to above. With the assistance of both parties, I have redacted a master copy of the statement. That is the version which will be made available to the tribunal at the trial; upon which, the respondent should base its cross-examination.

Recusal

18 At the Preliminary Hearing on 23 January 2018, it was known to the parties that Employment Judge Gaskell had been assigned to chair the full panel which would hear the substantive trial to commence on 5 March 2018. At that Preliminary Hearing I ordered today's Open Preliminary Hearing to consider the question of the disputed without prejudice correspondence. I expressly raised with the parties whether today's hearing should be conducted by me or by one of my colleagues - bearing in mind that, in order to conduct today's hearing, it would be necessary for me to consider the very correspondence which was in dispute. Both parties agreed that there was no obstacle to me conducting today's hearing and then going on to chair the substantive hearing - the claimant has now applied for me to recuse myself from the substantive hearing solely on the basis that I have conducted today's hearing.

19 I refuse the application; and decline to recuse myself. Both parties agreed to me conducting both hearings: but, more importantly, the only party potentially prejudiced by my having seen the disputed correspondence is the respondent - not the claimant. The respondent does not object to me continuing as the chairman of the full panel - there is no basis for the claimant's objection.

Employment Judge Gaskell
25 July 2018