EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms WE Norman	**v**	**De Lage Landen Leasing Ltd**

Heard at: Watford **On:** 23 April 2019

Before: Employment Judge George

Appearances:

For the Claimant: Ms A Woods, CIPD associate
For the Respondent: Ms K Eddy, Counsel

JUDGMENT having been sent to the parties on 25 April 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant, who was employed by the respondent between 1 September 2013 and 2 November 2017, has brought claims before this tribunal that are itemised in the record of the preliminary hearing conducted by Employment Judge McNeill QC on 11 July 2018. I do not set those issues out in these reasons in order that they should not be unnecessarily long.

2. At this preliminary hearing I have had a bundle of relevant documents running to 92 pages in length and page numbers in these reasons refer to the pages in that bundle. I have also heard the evidence of Tanya Lyall, who was called on behalf of the respondent. She had prepared a witness statement which she adopted in evidence and upon which she was cross-examined. The claimant called her foyirmer solicitor, Robert Fay, who had also prepared a witness statement and was cross-examined upon it.

3. The respondent's counsel, Ms Eddy made oral submissions based upon her skeleton argument of Ms Eddy in her submissions and the claimant's representative, Ms Woods, made oral submissions.

4. The preliminary hearing of 11 July 2018 was the first of two conducted by Employment Judge McNeill QC and in it she rejected an application of the respondent for

paragraph 12 of the claim form to be deleted. Her record of that decision is set out in paragraph 10.2 of the Record of the Preliminary Hearing (page 19). In general terms, she stated that paragraph 12 of the claim form was permitted because although it referred to the fact of without prejudice communications in order to explain the passage of time, the claimant did not refer to the content of those discussions. This was necessary because the respondent had alleged that the claimant was not entitled to rely upon the alleged breach of the implied term of mutual trust and confidence, arguing that the claim must fail because she did not resign in response to that breach and relying upon the period of delay in relation to that defence. Hence it was permissible for the claimant to refer to the fact of the discussions to explain the passage of time which might otherwise lead to an inference that she had affirmed the contract of employment.

5. Following that discussion, the claimant and the respondent agreed the dates that were covered by the without prejudice negotiations in an email exchange on about 6 August 2018 which appears at page 45. They agreed that without prejudice discussions were initiated on 4 July 2017 and ended on 27 October 2017. The respondent's representative said in the email by which they proposed this period of dates that if the claimant confirmed her agreement it was their intention that a copy of the email exchange would be placed in the bundle as the sole documentary evidence of the fact that the discussions took place. The claimant did not address that particular paragraph in her response.

6. A further preliminary hearing took place by telephone on 5 March 2019 as a result of an application for discovery made by the respondent. However the respondent also put in an intervening application dated 27 February which Employment Judge McNeill QC was unable to reach in the time allocated. The 27 February application is at page 1 of the bundle, and the claimant's response is at page 4, dated 4 March. By the application, the respondent argue that details of without prejudice discussions appear in the claimant's witness statement and impact statement and should be excluded from evidence. They also object to the inclusion in the bundle for the full merits hearing of particular documents that are marked without prejudice save as to costs. Details of the particular paragraphs and documents to which the respondent objects appear in Ms Eddy's skeleton argument at paragraph 4.

7. Consequently, that application was listed to be heard at an open preliminary hearing which had to be postponed to today from its original listed because it was not going to be reached.

8. The issues in the case, as I say, were set out by Employment Judge McNeill QC in her first preliminary hearing. Her record cross-refers to various paragraphs in the claim form and I am told that an amended claim form has been presented which incorporates amendments that were made following that preliminary hearing. Therefore, in order to understand the issues in the case, it is necessary to cross-refer the preliminary hearing record to the amended particulars of claim and the amended grounds of resistance.

9. There are four particular areas with which I need to be concerned today.

10. First of all, it is argued by the respondent that the claimant seeks to rely on details of a

without prejudice communication between her then solicitor Mr Fay, and Chloe Read, an HR representative from the respondent. According to paragraph 61 of the claimant's witness statement (page 78) the conversation took place in June 2017 but, in fact, it probably took place on about 5 July 2017, according to the oral evidence before me of Mr Fay.

11. Mr Fay's evidence, which I accept, is that the a telephone call initiated by the respondent following an email that he wrote on 4 July (page 25). That email was clearly headed "without prejudice" and the telephone call followed on from that. Mr Fay accepted that that was covered with a without prejudice privilege and the question in relation to the 5 July 2017 telephone conversation is whether any of the exceptions apply or whether there has been any waiver of the privilege.

12. The second passage to which the respondent objects concerns the telephone communication between Mr Fay and Mrs Lyall on or about 31 July, which is referred to in paragraph 62 of the claimant's witness statement an also in a section of her impact statement found at page 42 of the bundle. In about the middle of page 42 there is a paragraph which starts "*Tanya even attempted to mock me further* …" and ends with "*what hope is there of fairness?*". These are the two sections that the respondent says should be redacted because they say they relate to the contents of the telephone communication on 31 July 2017 which was covered by without prejudice privilege.

13. Mr Fay gave clear evidence that this telephone call was a continuation, or was regarded by him as a continuation of the call with Chloe Read. He had been called by Mrs Lyall and his note confirms that it was a telephone conversation between two interlocutors who were speaking after having established they wished to talk on a without prejudice prejudice basis. That that was expressly noted is evidenced by the initials WP on the handwritten note at page 89. It was sensibly accepted by Ms Woods that, in the light of the oral evidence today, the claimant is not going to continue to assert any part of that communication on the telephone on 31 July 2017 was not covered by the without prejudice privilege. The issue for me is therefore whether that privilege has been lost.

14. The third passage which the respondent applies to redact is set out in the impact statement at page 43. There is a sentence at the top of the page which says "*in the words of my solicitor in an email to Tanya, this was a whitewash*", this is a quotation from an email that appears at page 32 of the bundle, the particular comment being at page 37. The email in which is dated 13 October 2017 and is headed "without prejudice" so the claimant has sought to include in the witness statement, a comment made by her solicitor in an email that he wrote that was covered with a without prejudice privilege.

15. The fourth category of matters that I need to consider is an exchange of without prejudice save as to costs communications that are at pages 46-49. Those are the documents that the claimant wishes to adduce in evidence in the full merits hearing and she refers to that exchange of correspondence in paragraphs 82 and 84 of her witness statement. The respondent argues that these matters are inadmissible for two reasons. First, it is argued that they are covered with without prejudice privilege which has not been waived and this situation is not covered by any exception. Secondly, the respondent argues in relation to the unfair dismissal claim, that section 111A of the

Employment Rights Act 1996 precludes the reference to the fact of the communications as well as to their contents in accordance with the explanation of that section in Faithorn Farrell Timms LLP v Bailey [2016] I.R.L.R. 839 EAT and more recently Basra v BJSS Limited [2018] I.C.R. 793.

The Law

16. The general rule is that without prejudice discussions, whether written or oral, which are made for the genuine purpose of compromising a dispute between the parties should not be admitted in evidence: Independent Research Services v Catherall [1993] ICR 1 EAT. The underlying policy behind the principle that without prejudice negotiations are not admissible in litigation and the exception in cases of "unambiguous impropriety" are set out in Savings & Investment Bank v Fincken [2004] 1 WLR 667 CA paragraphs 40 to 52.

17. There is no reason in principle why an employment tribunal should adopt a different attitude with regard to the admissibility of "without prejudice" material from the proper attitude to be adopted by a court: Catherall page 5. The policy may be said to apply with particular force when the parties are seeking to settle a discrimination claim: Woodward v Santander UK plc [2010] IRLR 834 EAT paragraph 60. As noted above, the claimant no longer argues that the correspondence and oral communications referred to in her statements were not covered by without prejudice privilege. I am therefore being asked to consider that one of the exceptions to the rule that such communications are inadmissible applies.

18. The exception in cases of "unambiguous impropriety" should only be applied in the clearest cases of abuse of a privileged occasion: Unilever plc v The Procter & Gamble Co [2000] 1 WLR 2436 cited in Fincken paragraph 48. An example might be where the privilege was being used as a cloak for blackmail or perjury and I note the explanation of how that would carry the quality of abuse of the situation set out in paragraph 57 of Fincken. No matter how important the admission is to the potential litigation unless it can be said to arise out of an abuse of the occasion its significance alone cannot result in it losing the protection of the without prejudice privilege: Portnykh v Nomura International plc EAT/0448/13.

19. Such an example is found in BNP Paribas v Mezzotero [2004] IRLR 508 EAT where an employer invited an employee to a meeting described to be without prejudice and then carried out the act which was said to be unlawful victimisation. Thus the privilege was abused and used as a cloak for unambiguous impropriety. Cox J's *obiter dicta* (in particular at paragraphs 35 to 39 of her judgment) should not be regarded as an extension of the exceptions to the without prejudice rule: Woodward v Santander UK plc [2010] IRLR 834 EAT especially at paragraphs 62 to 63 which, to paraphrase, explains that to take advantage of the cover of privilege to use words which are unambiguously discriminatory would amount to unambiguous impropriety. Indeed it is clear from paragraphs 38 & 39 of Mezzotero itself that Cox J considered that the

conduct with which she was concerned did amount to unambiguous impropriety and she was not extending the categories of exceptions to the without prejudice privilege rule.

20. The principle that without privilege communications are inadmissible contracts with the statutory provisions in s.111A of the ERA. Pre-termination negotiations within the meaning of s.111A(2) are inadmissible on a complaint for unfair dismissal (s.111A(1)) but that does not apply to automatically unfair dismissal, including discriminatory dismissals. That position is modified where there has been improper behaviour and it is not merely the details of the communications which are inadmissible but the fact of them. This applies even where constructive dismissal is alleged (Basra paragraph 39) but should not preclude an employment tribunal hearing evidence of such discussions at a preliminary hearing in order to determine what the effective date of termination was, where that is in dispute.

Conclusions

21. It is now accepted that all of the communications were covered by without prejudice privilege. The question is therefore whether it has been lost. The first point that is raised, certainly in relation to the impact statement is that the draft bundle included the impact statement and that that should be taken as effectively an implied waiver because it was put forward without any comment. That is insufficient to be amount to a clear and unambiguous waiver of the privilege so I do not accept that argument. In any event, the respondents have been asserting for some time that the claimant should not be permitted to refer to the content of the without prejudice communications.

22. I go on to consider the arguments raised by the claimant, in particular in relation to the communications of 31 July and the without prejudice save as to costs communication, that there has been unambiguous impropriety.

23. With dealing with each of the four categories of communications in turn, I accept the respondent's submissions that, taken as a whole paragraph 61 of the claimant's witness statement does refer to the content of the communications and not nearly to the fact of them. It is not argued on behalf of the claimant that there was any unambiguous impropriety in relation to the conversation which probably took place on 5 July which she refers to in paragraph 61. She does detail steps taken by the parties in relation to that and I therefore conclude that paragraph 61 should be redacted so as not to conflict with the agreed position as set out in the email that I referred to earlier.

24. The claimant says that she resigned in response to acts that she claims were discrimination, harassment and victimisation and that therefore, my view is that the agreed position of the parties (in the 6 August 2018 email at page 45) does not contravene section 111A of the ERA.

25. So far as the 31 July 2017 telephone conversation is concerned, there is some dispute between the two witnesses about the detail, in particular about whether Mrs Lyall said that the claimant had created a '*shit storm*' or whether that had been her

earthy description of the situation generally. Although Ms Eddy argues that the manuscript notes of Mr Fay at page 89 do not specifically record him hearing Mrs Lyall saying that it was the claimant who created that situation, he made that allegation very quickly afterwards in his email of 15 August. His oral evidence, which I accept, was that he had supplemented his manuscript notes with his recollection when the events were still fresh in his mind. I therefore regard that email as being a reliable record of the conversation as a reasonably contemporaneous document. He did record in the manuscript note that something had created such a '*shit storm*'.

26. My view is that even if Mrs Lyall did not use the claimant's name, it is clear from her own explanation of her use of the phrase that her pre-occupation at the time was with the effect on the manpower in the department of the steps that had been taken by the claimant. I therefore think that even she said 'it', rather than the claimant herself, she was referring the claimant's actions. My conclusion is that it makes little difference whether she was referring to the actions of the claimant or to the claimant herself. She may have been speaking unguardedly but she did not know Mr Fay at all. She was speaking to the claimant's representative for the first time and it was a wholly inappropriate comment, to use the word in a non-technical sense, in that situation. It is not at all surprising that the claimant was upset by it.

27. However, what the claimant argues is that this comment and the other matters she has drawn to the tribunal's attention - in particular, the description of the view of the head of department and the comment of Mr O'Hanlon - mean that the communications of Mrs Lyall were an abuse of the situation and therefore caused them to fall outside the ambit of without prejudice privilege. She argues in her response to the application that the use of offensive language puts it outside the protection of the ACAS code. This is, however, a reference to improper behavior within the terms of Section 111A of the ERA, which is a different test.

28. In submissions it was argued that the claimant resigned in part in response to the statements, and that this is an act relied on as part of the breach of implied term of mutual trust and confidence. However, it is not pleaded as such and it is not pleaded as an act of discrimination or as an act of harassment. It is not said that the actions of Mrs Lyall, although they offended the claimant, were themselves unlawful under the Equality Act 2010. It's argued in the response to this application that Mrs Lyall's words amount to evidence for which it could be inferred that the respondent was not taking the claimant's complaints about her treatment seriously. That, in my view is insufficient to amount to unambiguous impropriety, taking into account the *dicta* in Fincken about the hallmarks of such behaviour. The claimant wishes to rely on it as evidence of failure to deal with it sympathetically or seriously with her complaint. However, the privilege is not lost except in very rare circumstances of clear manifest abuse of the situation and the matters that she describes do not, in my view, have that quality of abuse of the situation such that they amount to that that will fall within the exception to the rule.

29. As far as the third matter, the email that I have been taken to that includes that comment that claimant wishes to put in her impact statement is a communication by her solicitor and there is no basis for that to be included in the impact statement and the comment should be redacted.

30. So far as the without prejudice save as to costs communications are concerned, I understand that it can be challenging for a self-representing litigant to separate litigation tactics from the actions of her former employers. I accept, based on the content of the document itself, that the aim of the respondent was to seek to avoid incurring costs in a claim that they believe for the reasons they set out in the letter to have limited merit. I am not endorsing that view, I am merely accepting that it was a genuinely held view and therefore that letter was a proper step in the proceedings. The respondents did take steps to prepare the claimant for receipt of the letter by asking the ACAS conciliator to contact her in advance and therefore showed an element of sensitivity to the likely impact on the claimant of receiving such a letter. It does not amount to manifest impropriety in my view.

31. The respondent has effectively agreed to waive privilege in relation to that exchange of communication to allow it to be included in the remedies bundle. The case has been listed for a split trial and a remedies hearing is pre-listed for July. The reason for that is that the claimant alleges that this document is the basis for an aggravated damages claim and that is the point at which it will become relevant. That seems to me to be a sensible way to approach the matter.

32. I have therefore concluded that the application should succeed and that the witness statement, impact statement should be redacted, as set out in paragraph 25 of the respondent's skeleton argument and that the documents to which I have referred should not be included in the bundle.

33. By way of clarification, the without prejudice save to costs correspondence will not go before the tribunal conducting the full merits hearing unless and until there is a remedies hearing.

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Employment Judge George

Date: ……7 June 2019 …….

Reasons sent to the parties on

.....13.06.19.....

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For the Tribunal office