EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr S Saeed	v	**(1) Legal & General Investment Management (Holdings) Ltd** **(2) Mr A Eser** **(3) Mr C Reedie** **(4) Mr U Patnaik** **(5) Mr J Houdain**

PRELIMINARY HEARING

Heard at: London Central **On: 2 and 3 July 2019**

Before: Employment Judge Elliott

Appearances:

For the Claimant: **Mr A MacPhail, counsel**

For the Respondents: **Mr J Laddie, one of Her Majesty's counsel with Mr N Roberts, junior counsel**

JUDGMENT ON PRELIMINARY HEARING

The respondents' application to strike out paragraphs 514-518 of the Particulars of Claim is granted and by consent extends to paragraph 513, with a declaration that the material is inadmissible because it is without prejudice.

REASONS

1. This decision was given orally on 3 July 2019. The respondents requested written reasons.

2. A preliminary hearing took place in this matter on 15 February 2019 before Employment Judge Brown at which Case Management Orders were made and the case was listed for a full merits hearing over 25 days in November and December 2019.

3. This claim is for whistleblowing detriment, disability discrimination for failure to make reasonable adjustments, discrimination arising from disability and unlawful deductions from wages. The respondents defend the claims.

4. This was an open preliminary hearing as it had the potential to be determinative of part of the ET1.

The issues for this preliminary hearing

5. At the outset, counsel for the claimant said that the claimant did not wish to be bound by any findings made by the tribunal at this hearing and was concerned that this tribunal might make findings that would affect his claim under section 47B Employment Rights Act. I informed the claimant that I was not sure that a party could tell the tribunal what it should and should not make findings upon. If a tribunal oversteps its remit there are routes open to parties. I would not give assurances as to what the tribunal would or would not make findings upon before hearing the arguments. No witness evidence was given at this hearing.

6. At the preliminary hearing on 15 February 2019, Judge Brown listed this hearing to determine the respondents' application to strike out paragraphs 514 – 518 of the Particulars of Claim because they were said to concern protected and/or privileged discussions between the parties. As stated by counsel for the respondents, this in effect amounted to an application for a declaration of inadmissibility of evidence.

7. The claimant alleged "unambiguous impropriety", so as to justify the inclusion of the disputed paragraphs which related to correspondence marked "without prejudice". He relied upon this correspondence as one of 65 whistleblowing detriments relied upon.

Documents

8. The tribunal had three bundles from the respondents: an authorities bundle, a bundle of inter partes correspondence and a hearing bundle of 464 pages. I had a written skeleton argument from the respondents plus the ACAS Code of Practice referred to above.

9. The claimant wished to rely on two additional documents which had not previously been disclosed and which had not been disclosed and included within the bundle in accordance with paragraph 9 of Judge Brown's Order. The respondents did not formally object but said it was "disappointing" for these documents to be added at this late stage. The documents were the first respondent's disciplinary and performance procedures and they were admitted within the documents before this tribunal.

10. I had oral submissions from both sides and a detailed written submission from the respondents. All submissions made were fully considered including any authorities referred to, whether or not expressly referred to below.

The factual context

11. The claimant worked for the first respondent as a Senior Fund Manager. For the purposes of these proceedings he remained in employment at all material times. He has since resigned and I was informed that he has brought a claim for constructive unfair dismissal.

12. Paragraphs 513-518 of the ET1 in the present case relate to a letter dated 27 July 2018 from one of the first respondent's HR employees to the claimant. The relevant letter was at page 456 of the hearing bundle and marked "**without prejudice, subject to contract**". It is referred to hereafter as "the Letter".

13. The respondents say that it is correspondence by which the first respondent sought to compromise a dispute that was brewing with the claimant. The respondents submitted that as it was marked without prejudice it was inadmissible and should not be referred to and should not form part of the documentation to go before the tribunal for the full merits hearing.

14. It was introduced and relied upon by the claimant as being an act of detriment under section 47B ERA. The Particulars of Claim rely upon 25 protected disclosures and 65 detriments.

15. The respondents submitted that the claimant knew that they were likely to say that the materials were without prejudice and should not be placed before the tribunal. They anticipated this in the Particulars of Claim (paragraph 516, bundle page 249) by asserting that it was not a valid use of without prejudice.

16. The paragraphs in question are set out as follows:

> *514 She then handed me a fourth letter which I opened when I got home. It told me that I should be aware that there is a significant chance that my employment would be terminated at the conclusion of the meeting on seventh August. LGIM made me an offer to leave employment with payment of only six months pay in lieu and £80,000 with agreed messaging. I was told it was not an invitation to trade. I was told the offer was only open until 1 August, which was the next Wednesday.*
>
> *515 I felt that I was being put under deliberate and cynical pressure to shut me up and get rid of me and my disclosures. I did not respond to the offer.*
>
> *516 I did not consider that there was a valid without prejudice dialogue (or dispute) in play. There had been a grievance raised and whistleblowing reports, but I will say those do not amount to a dispute (unless LGIM suggest that by raising whistleblowing disclosures they consider you are effectively in dispute with them). Also, the whole purpose of my reports was to have the matters addressed ethically not buried in a cover-up settlement involving me losing my job.*
>
> *517 Alternatively, I will say their improper actions were an example of unambiguous impropriety as well as improper behaviour in breach of the ACAS Code on protected conversations.*
>
> *518 This inappropriate offer to me and its manner in the context of telling me "there was a significant chance" I would be dismissed was, I contend, detriment 50. In particular, I will say that effectively deciding or threatening*

to dismiss a senior employee who has quite properly blown the whistle on serious and valid issues and in doing so, before even hearing his side of the story, was a flagrant breach of FCA Rules and duties owed to act in the best interests of the Company. It also calls into question the regulatory fitness and propriety of those involved. I contend this would be an example, par excellence, of unambiguous impropriety.

17. The Letter of 27 July 2018 was at page 456 and is set out as follows:

Dear Omar

Without prejudice and subject to contract

You will now be aware that you have been invited to a hearing on 7 August 2018 to consider whether your employment can continue in the light of your performance. You should be aware that there is a significant chance that your employment will be terminated at the conclusion of that meeting. Our preference is to find an alternative solution, if possible. We are therefore willing to make the following offer:

1 *We will work with you to agree the internal and external messaging in relation to your departure in the light of the proposed future direction for the fund.*
2 *Payments would be made as follows (subject to the necessary deductions):*
   A. Six months pay in lieu of notice including benefits;
   B. A compensation sum of £80,000; the first £30,000 of which will be tax-free.

Time is short. This is a deliberately generous offer and is not an invitation to trade. It is open for acceptance in principle until midday on 1 August 2018, which leaves time to complete a settlement agreement before the hearing if the offer is accepted.

Yours sincerely

R….M….

HR Business Partner

18. On the same day, namely 27 July 2018, the claimant was also handed at the same time, an open letter inviting him to a meeting on 7 August 2018 (page 454.) This letter said as follows:

Dear Omar

In light of the concerns about your performance regarding the Legal & General Dynamic Bond Trust, we have serious concerns as to whether your employment with the company can continue. We attach a summary of our concerns.

We would therefore like to invite you to a meeting at on Tuesday 7 August, the purpose of which will be to decide whether or not your employment should be terminated (and, if not, whether other arrangements or sanctions should be put in place). We will be in touch shortly to confirm the time of the meeting.

You will be entitled to be accompanied at that hearing and will have a full opportunity to set out your position before a decision is made. To the extent that there are points raised in your most recent grievance which have not already been considered as part of the ongoing investigations, they will be considered at the same hearing.

We have noted your request to be referred to Occupational Health. However as requested in your most recent grievance, we consider it in everyone's interests to try to resolve matters as quickly as possible. We note that you are not currently not signed off from work, but if there are any adjustments which would assist you in attending the hearing please let us know so that those can be considered.

The arrangements regarding your agreed leave will continue.

We remind you that the Company offers its employees an Employee Assistance Programme [details given].

Yours sincerely

R….M

HR Business Partner

19. On 4 July 2019 the first respondent had decided that in the light of performance concerns the claimant should be placed on paid leave of absence and this took place with effect from 4 July 2018. A substitute manager was put in place.

20. There is further relevant factual context dating back to November 2017. On 9 and 13 November 2017 the claimant had meetings with his line managers, the second and third respondents, about his conduct. The respondents' case is that he had been undermining his managers. I make no finding of fact upon this.

21. The respondents' case is that after the meeting on 13 November 2017 they made a decision to dismiss the claimant and drafted a letter to that effect but did not take this forward. This was because of a letter sent by the claimant to the third respondent on 17 November 2017, setting out matters upon which he relies in these proceedings as protected disclosures and whistleblowing detriments.

22. What is also material about 17 November 2017 is that it is the date upon which the claimant sent an email to the third respondent headed "*without prejudice*". It was at page 392 of the bundle. It referred to the present situation being "*very unfortunate*" and said in the fourth paragraph "*I would prefer to try to amicably resolve this matter if possible, to "clear the air" and find a means to interact and operate in a better way."*

23. Less than an hour later the claimant sent a further email to the third respondent, copied to others, identifying himself as a whistleblower (page 393) and asserting that he was being treated detrimentally for raising his whistleblowing concerns.

24. In a subsequent email of 13 December 2017 (page 398) he said he was not able to share certain information "*for legal reasons*". In his grievance appeal letter sent on or about 13 February 2018 the claimant used language consistent with section 47B Employment Rights Act – speaking of detriments on account of

being a whistleblower and as a result of making protected disclosures. At the end of that letter he asked the appeal panel to investigate the issues he had raised in a way that was thorough, robust and that respected proper procedure and FCA Rules and "*if not, I will regrettably have no option but to take this further*."

25. In an email sent on 20 March 2018 in relation to the grievance appeal he reserved the right to launch a data subject access request ("DSAR"), which he said he was an option he had avoided so far in order "*to be constructive towards a mediation or resolution of this issue".*

26. On 16 July 2018 the claimant's solicitors sent a DSAR and the claimant presented his third grievance (page 436). The solicitors' letter at page 433 said that there were no exemptions from the right of access "*even though civil legal proceedings may be contemplated or ongoing."* The claimant's letter at page 437 said that if his grievances were not resolved to his reasonable satisfaction by 4pm on Friday, 20 July 2018 he would have no option but to commence Employment Tribunal whistleblowing proceedings and/or seek interim relief and refer the situation to the FCA whistleblowers office.

27. The claimant said in his third grievance at page 437: "*I will also commence proceedings immediately in respect of this new situation/detriment as I feel I can have little or no confidence that this new detriment will be fairly or seriously assessed……".* This was a reference to being placed on paid leave from 4 July 2018.

28. The claimant's health became affected. He relies upon being a disabled person. This is conceded as from 31 July 2018 but not prior to that.

29. The claimant relies upon the Letter as detriment 50 and he gives 14 reasons why he says it was detrimental treatment. These are set out in his schedule of detriments in the bundle at paged 305-306 from paragraphs (a) to (n). They are:

    a. *The company had in fact already agreed plan to dismiss me before giving these performance reasons and stated the reasons were not the main reason for my dismissal and/or were effectively an excuse;*
    b. *LGIM grossly ignored its own performance procedures;*
       There had been no prior processes or meetings or warnings;
    c. *The DBT fund (they solely focused on) was only part of my role yet there was no mention of or assessment of my performance regarding the other funds I managed and how they were doing;*
    d. *The views of my Manager Mr Reeves were not obtained or given sufficient weight;*
    e. *They did not mention any support or view from occupational health (and directly rejected this in the open letter);*
    f. *An unreasonable deadline of only five calendar days was given to accept the offer (whilst I was also having to prepare for the hearing – LGIM having taken nearly 300 days to deal with the whistleblowing matters/grievance);*
    g. *The reference to agreed statements implied they would massage the reputational side if I agreed to leave with the implication that they would not if I rejected the offer;*
    h. *That dismissing me for poor performance would maximise and/or increased the damage to my reputation;*
    i. *The offer made no reference to my having the enduring right to ensure the whistleblowing matters were properly handled/investigated as per my s43 rights (and Mr Pistell had already told me the FMOC would not let me speak about whistleblowing issues).*
    j. *They completely ignored my rights as a disabled person;*

k. They did not adopt a proper benchmarking process before sending this letter;
l. They did not treat me comparably to comparators, like Mr Houdain (his LIBOR plus 350 fund was underperforming) and/or as was Mr Patnaik's EM Absolute Return Bond fund (LIBOR plus 350); and/or regarding Mr Eser's ALS 1695 fund;
m. The material purpose of this plan was to try and close down the whistleblowing matters as much as possible and
n. Finally, the reference to a significant chance of dismissal (before having heard from me) was an outright and unreasonable threat;

30. The claimant's case is that when he was given the open and without prejudice letters of 27 July 2018 the HR representative said she wished to have an off the record discussion with him. The claimant's case is that he refused this. The claimant invited the tribunal to accept that paragraph 513 of his Particulars of Claim, which asserts this, was correct. Counsel for the respondents had no instructions on the point and the claimant had chosen not to give evidence. I saw no basis for accepting in my findings that this was correct and did not do so.

31. What the respondents did accept for the purposes of this preliminary hearing, was that there was an oral exchange between the claimant and the HR representative, the gist of which was that the claimant was asked to have a without prejudice discussion. No acceptance is made as to the claimant's response.

Submissions

The respondents' submissions

32. I had a helpful written skeleton argument from the respondents. Oral submissions were made in addition to the written argument.

33. The respondents' submissions were made under three broad headings and the claimant made submissions consistent with those headings: (i) the general purpose of without prejudice; (ii) what is required by way of a dispute for the without prejudice rule to attach and (iii) the law related to unambiguous impropriety.

34. On the first point, the respondents said it was uncontroversial that the purpose of the without prejudice rule is to encourage parties to settle disputes without resorting to, or continuing litigation. It is designed to encourage parties to adopt compromising positions without concern that it will be held against them later. The law cloaks in confidentiality those conversations or exchanges. There is a public interest in the rule.

35. The second point is was there a dispute? The respondents highlighted the fact that the claimant made without prejudice offer long before the Letter.

36. The third point is unambiguous impropriety. The respondents submitted that the final element of the exercise is to decide whether the privilege is dislodged by virtue of unambiguous impropriety.

37. I was taken through the authorities and the full submissions are not replicated here. Relevant principles were analysed in the case of ***Savings & Investment Bank Ltd (in liquidation) v Fincken 2004 1 WLR 667 (CA)***. ***Ferster v Ferster***

2016 EWCA Civ 717 showed how without prejudice privilege could be displaced. It was submitted that the decision of the EAT in ***BNP Paribas v Mezzotero 2004 IRLR 508*** did not change the law.

38. The respondents submitted that the Letter was a "*vanilla offer letter*". Eleven days before it was presented, the claimant sent his third grievance, which gave all the indications that he was going to litigate. The respondents knew the claimant was being invited to a performance meeting. They said that to prevent the parties ending up in a litigious situation, they offered the sum of £80,000 plus 6 months pay in lieu of notice and to terminate employment with agreed messaging to the outside world.

39. It was submitted that there was no impropriety in the Letter, there being no threats and no reference to perjury or blackmail. It was said to be unremarkable and unobjectionable. The respondents referred to the claimant's schedule of detriments and those numbered (a) to (n) set out above. The respondents said that whilst the claimant says this was detrimental treatment, this is not the test. The test was said to be why it was contended to be unambiguously improper.

40. The respondents submitted under ***Fincken*** that there had to be an abuse of a privileged occasion. If the letter had said "*settle for this or you will be sacked*", the respondents said it might be unambiguously impropriety. The letter said there was a "significant chance", which the respondents submitted was a statement of fact. It was the same as conveyed into the open letter which said that the meeting was to decide whether the claimant's employment should be terminated as a result of serous concerns. It was submitted that there cannot be

41. The respondents submitted that correspondence such as this is a regular occurrence between employers and employees who do not get on very well. There is a public policy that they should be encouraged to resolve their disputes and save in the most exceptional cases, without those without prejudice discussions being used against the person who is making the offer.

<u>The claimant's submissions</u>

42. The claimant dealt with submissions under the same broad headings as the respondents.

43. Turning to the issue of dispute, the claimant submitted that question was whether there was an existing dispute. The claimant said that the question then was "*what dispute*", was it about termination or other things? The claimant relied upon ***BNP Paribas v Mezzotero*** (below) at paragraphs 27-31. The claimant submitted that there was a distinction as to whether there was a dispute about termination. In ***Mezzotero*** the EAT had found that the tribunal had not been obliged to find that there was an extant dispute.

44. In relation to ***Portnykh v Nomura*** (below) although the EAT said that the dispute does not have to be precisely the same, it does not mean that "any dispute will do". The claimant also submitted that in ***Portnykh*** there had been a notice of dismissal unlike the instant case and that ***Portnykh*** does not say that ***Mezzotero***

was wrong. In ***Mezzotero*** there was a distinction between the claimant's complaints but there was no dispute about termination. The claimant invited the tribunal to follow the distinction in ***Mezzotero.***

45. On the Letter, the claimant asked the tribunal to consider what it invited the claimant to settle. The Letter states that the first respondent's preference was to find "*an alternative solution*" to dismissal. The claimant submitted that on a natural reading it was not an offer to settle the wider disputes, including the complaints about whistleblowing detriment. There was no attached settlement agreement.

46. The claimant looked at the position pre and post 27 July 2018. The claimant submitted that at no point prior to 27 July 2018 had the first respondent raised the possibility of termination. There were grievances from the claimant and from 4 July 2018 he was on paid leave, but at no point did the first respondent say there was a risk of termination. The claimant submitted that the reference at page 448 in the third grievance to "*removing me*" was unclear as to whether it was a reference to removal from duties or termination of employment. The claimant accepted that there was ambiguity and it could be read as a reference to termination of employment. The claimant said what we do not have is the first respondent saying that the claimant was at risk of dismissal.

47. The open letter of 27 July 2018 was an invitation to a performance meeting. The claimant asked whether this by itself created a dispute about termination for the without prejudice rule to apply. The claimant relied upon there being a reference to termination in ***Mezzotero*** which was not enough for a dispute (see paragraph 31).

48. The claimant said that it would be surprising if the handing of the invitation letter to the performance meeting was enough to trigger a dispute. If that was the effect of an invitation letter, an employer could then simply hand over an invitation letter and conduct inappropriate correspondence without prejudice. There was also said to be an oral invitation from HR to have an off the record conversation and a refusal from the claimant so it was all the more unreasonable for the invitation letter to create a dispute to allow without prejudice to apply.

49. The claimant's submission was that it was necessary for the first respondent to hear from the claimant as to what he said about the performance issue before there could be a dispute in play. It was conceded by the claimant that there was a dispute, but submitted that there was not a dispute as to termination.

50. On the issue of the threshold for unambiguous impropriety, the claimant submitted that on ***Ferster v Ferster***, it was not easy to determine where the threshold lay for unambiguous impropriety.

51. The claimant said that the threshold was crossed for the following reasons: the lack of consent to an off the record discussion, yet the first respondent pressed on with the Letter; the issue of the claimant's health; detriment 50 and the points set out at (a) to (n) above and ignoring his rights as a disabled person.

52. The claimant referred to the Performance Improvement Procedure and said that there had been no adherence to that policy prior to the open letter of 27 July 2018. The claimant contended in his grievance letter at page 451 with a good prior record it was surprising to be invitated to a performance meeting. The claimant's submission was that his performance was not such as to have talk of dismissal being appropriate.

53. The Letter referred to a "*significant chance*" that his employment would be terminated. The open letter referred to "*serious concerns"* about performance and the meeting would be to "*decide whether or not your employment should be terminated*". The claimant submitted that the open letter was implicit that no decision would be made until they had head from the claimant and the Letter took a different stance, by stating that before they heard what the claimant had to say, there was a significant chance of termination.

54. The claimant submitted that initiating the process was very concerning for him and could be damaging to his career and that his performance was not at such a level to be under consideration in any event. Part of the alternative solution was to agree a message to the external world rather than a performance dismissal. The claimant accepts that the Letter does not expressly say that there would be a poor message if he did not "take the deal" but it was implicit. The claimant invited the tribunal to accept that this was a threat, amounting to "*if you don't take the deal something worse is going to happen*" and that it was improper particular taking into account his notified health situation.

55. The claimant also asked the tribunal to have regard to the very short notice he was given to make a decision and in that regard the claimant referred the tribunal to the ACAS Code of Practice on Settlement Agreements (2013), whilst accepting that section 111A ERA did not apply in this case.

56. The claimant submitted that it was not reasonable in this context to read the Letter as not amounting to unambiguous impropriety. The backdrop and implied message was said to be strong and in all the circumstance the claimant's position was that it was enough to amount to an improper threat.

The law

57. In ***Barnetson v Framlington Group Ltd 2007 1 WLR 2443*****,** the Court of Appeal considered without prejudice privilege in the context of a wrongful dismissal claim. The first instance judge had held that privilege was not engaged because there was no extant dispute. Notice of termination had not yet been given and litigation had not been threatened. The CA overturned his decision.

58. The CA noted that the purpose of without prejudice privilege was to discourage parties from resorting to litigation, as well as to encourage discontinuation of litigation. It said that early settlement of disputes is as important in the employment field as elsewhere. As to whether there is an extant dispute, the crucial question is whether "*the parties contemplated or might reasonably have contemplated litigation if they could not agree*" (judgment paragraph 34). This is

a stage that falls before there is an express or implied threat of litigation. Without prejudice privilege therefore applied.

59. In ***Portnykh v Nomura International Plc 2014 IRLR 251***, EAT, the employee was given open notice of dismissal followed by some open discussions about how the reason for dismissal should be labelled. Following the notice of dismissal, and although no litigation had yet been expressly mooted the employer commenced written exchanges marked "without prejudice". Those discussions failed. In the tribunal, the question was whether without prejudice privilege applied to the discussions marked without prejudice.

60. The EAT held that any without prejudice discussions must be seen in their context. On the facts of that case, the employer announcing an intention to dismiss followed by discussions about the label of dismissal, demonstrated at least a potential for a future dispute. The EAT said the fact of offering a compromise agreement "*will very often*" be sufficient to demonstrate a dispute or a potential dispute. At paragraph 35 Hand J said: "*The whole purpose of any compromise agreement … is to reach a compromise and at the same time prevent the claimant from having access to an employment tribunal in order to litigate about his dismissal*."

61. The EAT said that it is not necessary for there to be extant legal proceedings, nor for an employee to allege unfair dismissal. Nor need the ultimate dispute be the same as the dispute as in existence at the time of the without prejudice correspondence. At paragraph 36 the EAT said: "*Mr Martin submitted….. that until an allegation of unfair dismissal was made there could be no dispute. I do not accept that the dispute needs to be anything like so sharply defined…….. it follows that I reject Mr Martin's argument that the dispute which eventuates must be precisely the same as the dispute as is in existence at the time the compromise is proffered*." The EAT concluded that there was an extant dispute at the point where the employer had marked correspondence "*without prejudice*".

62. The test for loss of without prejudice protection from admissibility is one of unambiguous impropriety. It has been held by the CA that it only applies where the privileged occasion itself is being abused and then only in "*truly exceptional and needy circumstances*" (see ***Savings & Investment Bank Ltd v Fincken 2004 1 WLR 667,*** at paragraph 57).

63. The burden is on the claimant to prove unambiguous impropriety**, *Michael Maillis SA Packaging Systems v Harold Supplies plc (unreported High Court 20 March 1996)*** Garland J, in which it was said: "*the privilege continues until the party wishing to change the basis on which the negotiations have been conducted brings this to the attention of the other party. The burden of proving that the privilege has been brought to an end lies on the party asserting it.*" (judgment page 11).

64. The CA also referred to the earlier CA decision in ***Fazil-Alizadeh v Nikbin*****, *19 March 1993, unreported***, which refers to the need for the "*highly beneficial rule [to be] scrupulously and jealously protected*".

65. A recent case in which unambiguous impropriety was made out is ***Ferster v Ferster 2016 EWCA Civ 717***. In that case the CA dismissed an appeal from the High Court's finding that one party had blackmailed another in circumstances where there was a written communication expressly threatening to bring committal proceedings against the other if a varied offer of settlement was not accepted within 48 hours.

66. In ***Woodward v Santander 2010 IRLR 834***, EAT, having reviewed the authorities, Richardson J said, at paragraphs 60-61:

> *"….the policy underlying the 'without prejudice' rule applies with as much force to cases where discrimination has been alleged as it applies to any other form of dispute. Indeed the policy may be said to apply with particular force in those cases where the parties are seeking to settle a discrimination claim.*
>
> *Discrimination claims often place heavy emotional and financial burdens on claimants and respondents alike. It is important that parties should be able to settle their differences (whether by negotiation or mediation) in conditions where they can speak freely….. A respondent must be free to adhere to and explain a position, or to refuse a particular settlement proposal, without the fear that in subsequent litigation this will be taken as evidence of committing or repeating an act of discrimination or victimisation."*

67. The EAT said that *obiter* comments in ***Mezzotero*** about unambiguous impropriety have not created a new or different exception to the without prejudice rule. It was unambiguous impropriety in ***Mezzotero*** in part because there was found to be no genuine dispute between the parties and because the course of action was "*blatantly discriminatory*". The employee's appeal to the CA in ***Woodward*** was rejected with Pill LJ saying that the EAT's reasoning was "*entirely convincing*".

Decision on the without prejudice issue

68. I took the points in the same order as the parties; firstly the purpose of without prejudice; secondly was there a dispute and what is required for the without prejudice rule to attach and thirdly, unambiguous impropriety.

<u>The purpose of without prejudice</u>

69. The purpose of without prejudice did not appear to be in dispute between the parties. It is uncontroversial that the purpose of the without prejudice rule is to encourage parties to settle disputes without resorting to, or continuing litigation. It is designed to encourage parties to adopt compromising positions without concern that it will be held against them later. There is a public interest in this form of privilege.

<u>Was there a dispute and what is required for without prejudice to attach?</u>

70. In submissions the claimant conceded that at the relevant date 27 July 2018, there was a dispute between the parties but submitted that there was not a dispute as to termination of employment.

71. The respondent submitted that this is not the test. The claimant relied upon there being a reference to termination in ***Mezzotero*** which was not enough for a dispute to exist. At paragraph 31 of the decision in that case, the EAT said that

the tribunal was not obliged on the material before it to conclude that by the time of the relevant meeting, there was an extant dispute between the parties as to termination. The EAT said that being so, the without prejudice rule did not apply.

72. The respondents reminded me that the leading authority was that of the Court of Appeal in ***Barnetson,*** decided three years after ***Mezzotero.*** The Court of Appeal said that the crucial question was whether "*the parties contemplated or might reasonably have contemplated litigation if they could not agree*" (judgment paragraph 34). This is about reasonable contemplation and not whether there was an express or implied threat of litigation or whether the dispute was about termination.

73. The parties had been in dispute since November 2017. By 16 July 2018 the claimant had launched his third grievance and instructed solicitors to write to the first respondent. That documentation echoed the wording of section 47B ERA. There was a reference, page 437, to the claimant having no option but to commence employment tribunal whistleblowing proceedings and/or seeking interim relief if matters were not resolved to his reasonable satisfaction by 20 July 2018. He said, page 448, that he was satisfied that a court would completely see through what was really going on and at page 453 that he was sure that multiple independent witnesses would stand up in a court of law and tell the truth.

74. I find that it is not necessary for there to be a dispute about termination of employment for without prejudice privilege to attach. The claimant accepts that there was a dispute. I find based on ***Barnetson*** that the dispute which existed was sufficient for without prejudice privilege to attach. Litigation was clearly contemplated on 16 July 2018 if matters could not be resolved because the claimant said as much (page 437). The Letter in question was sent by the first respondent 11 days later.

75. Also following ***Portnykh*** in which ***Barnetson*** was cited, the ultimate dispute need not be the same as the dispute as in existence at the time of the without prejudice correspondence.

<u>Was there unambiguous impropriety such that the without prejudice privilege is displaced?</u>

76. The claimant submitted that on the authorities, such as ***Ferster*** it was not easy to see where the threshold lay for unambiguous impropriety. ***Ferster*** made reference to improper threats and that it was not necessary for threats to fall within any formal definition of blackmail.

77. In that case, the Court of Appeal found that the threats unambiguously exceeded what was proper, in that the threats went far beyond what was reasonable in pursuit of civil proceedings by threatening criminal action; that there were serious implications for the individual's family; there were threats of immediate publicity being given to the allegations and it was found that the purpose of the threats was to obtain for the other party an immediate financial advantage.

78. The claimant made detailed submissions about the first respondent's procedural irregularities in relation to any performance process. The claimant submitted that it was clear from the Letter and the related open letter that the first respondent had already made up its mind to dismiss him and that this was enough to show

unambiguous impropriety. The claimant submitted that the reference to external messaging was enough to show that unless he agreed to the terms put forward there would be a poor message attached to his departure. The claimant accepted that the Letter does not expressly say this, but it was implicit.

79. The claimant invited the tribunal to accept that there was a threat, amounting to "*if you do not take the deal something worse is going to happen*" and invited the tribunal to accept it was improper, particularly taking into account of the claimant's notified health situation.

80. The respondents drew the tribunal's attention back to paragraph 23 of ***Ferster*** in which the Court of Appeal considered whether the threats in question exceeded what was permissible. On the rather extreme facts of that case, the CA found that it did.

81. My finding is that where the claimant has to rely on an implied or implicit threat, then by its very nature the threat is ambiguous. It is not unambiguous. The claimant has to imply that what the first respondent was saying was "*if you do not take the deal something worse is going to happen*". The Letter certainly does not say this at face value and I find it difficult to say that it is implied. I find that it is not implied.

82. So far as the claimant's health is concerned, it was difficult for me to make any finding on this when no evidence had been given by the claimant. I was not taken to any medical certificate. What I saw from the open letter of 27 July 2018 at page 454 (quoted above) was that the claimant was not signed off work and was therefore well enough to be at work when the Letter was given to him. He was also represented by reputable employment law solicitors and the first respondent knew this as they had received correspondence from those solicitors eleven days earlier (page 429).

83. Desipte the claimant's submission that I should find that there was an implied threat, I find that there was no threat. Even if I am wrong about this and there was some sort of threat, then I find that it came nowhere near the sort of threat that the Court of Appeal found would amount to unambiguous impropriety as in ***Ferseter.*** The CA even envisaged that a threat could be involved, but is should not be a threat which unambiguously exceeded what was permissible in hard fought commercial litigation.

84. I accept the respondent's submission, perhaps not adopting the same terminology of a "*vanilla offer letter*", yet accepting that it is a relatively routine and unexceptional offer letter. I find no impropriety in it, let alone unambiguous impropriety.

85. For the above reasons I find that the without prejudice letter of 27 July 2018 properly attracts without prejudice privilege and as such it is inadmissible in evidence in these proceedings. As such paragraphs 514 to 518 should not be included in the claim form that is before the tribunal at the full merits hearing.

86. When the point was raised by the respondents, the claimant conceded that paragraph 513 of the Particulars of Claim should also be included within my decision in addition to paragraphs 514-518.

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Employment Judge Elliott

4 July 2019

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Sent to the parties on:

…….8 July 2019…….

For the Tribunal:

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