EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102668/2019

Employment Judge: M A Macleod

Michael Ehidiamen	Claimant In Person
J.P. Morgan Bank Luxembourg S.A.	Respondent Represented by Ms J Cradden Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. The claimant's application to strike out the respondent's response is refused;

2. The transcript and recording of the meeting of 9 January 2019 between the claimant and respondent are admissible as evidence in these proceedings; and

3. The emails of 14 February and 11 March 2019 by the respondent to ACAS, and the email to the claimant by DAC Beachcroft LLP dated 24 May 2019, are inadmissible on the basis of privilege.

REASONS

1. In this case, a Preliminary Hearing took place on 19 June 2019 by telephone conference call.

2. In the course of that discussion the claimant made clear he wished the Tribunal to strike out the respondent's response. The following direction was issued by the Tribunal in the Note following that PH:

   Within 7 days of this PH (that is, by 26 June 2019) the respondent will confirm to the Tribunal whether it insists on a hearing to determine the claimant's application to strike out the response in this case;

   If the respondent is content to proceed by way of written submissions, (as the claimant has already confirmed he would be), parties will then set out their written submissions in draft to each other by no later than Friday 19 July 2019, and send their final written submissions to the Tribunal and to each other by no later than Friday 26 July 2019;

   The written submissions must cover the following points:

   a. **Whether the ET3 should be struck out on the basis that the respondent has failed to submit a proper defence to the claim; and**

   b. **Whether the correspondence on which the claimant seeks to rely as part of his claim that he was subject to victimisation in terms of section 27 of the Equality Act 2010 is admissible in the Tribunal proceedings**

3. On 25 June 2019, Messrs DAC Beachcroft, Ms Cradden's instructing agents and the primary solicitors for the respondent, wrote to the Tribunal to confirm that the respondent was content for the parties to make written submissions about the claimant's application for strike out rather than having to attend a hearing.

4. That letter also explained that the respondent had raised, in an agenda submitted in advance of a Preliminary Hearing for case management purposes, the question of whether a claim made by the claimant sought to rely on matters which were res judicata, as it appeared to them that the claimant was referring to matters which were the subject of earlier proceedings. However, in the claimant's further particulars, the respondent noted that references to the claimant's previous claim were only made by way of background information, and that the claim itself (4102668/16) was referred to as the protected act in his claim of victimisation. As a result, the respondent no longer wished to pursue the res judicata argument, but reserved their position on the basis that it had unintentionally misunderstood the claimant's position, or that the claimant may seek to add in matters which are res judicata.

5. Parties then presented their submissions to the Tribunal by 26 July 2019.

6. It is appropriate to summarise the claimant's submission first, this being his application, and then to summarise the respondent's submission. The submissions are not rendered in full here, but the Tribunal takes the full submissions into account in reaching its decision.

Claimant's Submission

7. The claimant provided an index at the front of his submission, setting out the contents and the order in which he was presenting the documents. The submission consisted of a number of different parts, which were essentially structured as follows:

- Relevant facts and letters;
- Admissibility of "without prejudice" correspondence;
- "Law to facts" – "without prejudice" correspondence;
- Strike out application
- "Law to facts" – strike out application;

- Other factors to consider when determining proportionality; and
- Citations

8. The claimant set out a timeline of correspondence which he considered relevant to this matter of admissibility.

Admissibility of Without Prejudice Meeting and Correspondence

9. He said that he raised a grievance with the respondent on 5 November 2018; that he wrote to the respondent on 28 and 29 November 2018 specifying the "exact scope grievance"; that on 30 November 2018 he initiated ACAS Early Conciliation; that on 12 December 2018, ACAS contacted the respondent; that on 18 December 2018, ACAS wrote to the respondent; that on 20 December 2018 the respondent presented its findings to the claimant; that on 24 December 2018, the claimant wrote to the respondent pointing out "gross inconsistencies, misrepresentations and false assertions"; that on 2 January 2019 ACAS wrote again to the respondent; and that on 7 January 2019, the claimant wrote to the respondent requesting clear directives on how he should proceed with work, set out how he thought the grievance should be resolved and expressed frustration at the respondent's "wilful refusal to address injustice, harm and unhealthy working conditions".

10. The claimant then set out the terms of his letter of 7 January 2019, which I do not repeat here, but which is referred to for its terms.

11. The claimant continued to set out the timeline of correspondence. On 8 January 2019, he wrote to Human Resources with further evidence. On 9 January 2019, he referred to Lorna Cuthill approaching him with a redundancy offer. This does not appear to have been an offer expressly made in correspondence. The claimant then sent emails from 9 to 14 January 2019 to the Chief Executive Officer, Jamie Dimon, and other senior officers, "for true account of facts deliberately misrepresented". Tommy Sheppard MP wrote to Mr Dimon on 14 January 2019. On 16 January 2019, the claimant states that he was asked to leave the premises by

William Innes, Human Resources Executive Director, as being unfit for work. On 29 January 2019, the claimant states, he was asked by Mr Innes to stay away from the office, threatened him with a disciplinary investigation into his actions and said that the outcome of the investigation would determine how they approached his working relationship. The claimant then sets out the terms of that letter, which he describes as a "suspension letter".

12. The claimant alleges that the respondent, on 29 January 2019, gained illegal and unauthorised access to the claimant's official mailbox and destroyed material evidence central to a fair hearing.

13. He then referred to Mr Innes writing to the claimant in connection with the respondent's approach to ACAS, on 1 February 2019, and the claimant's own response to that letter on 4 February 2019. On 11 February 2019 the claimant said that he invited settlement offers to determine the relationship.

14. In his submission, the claimant refers to the next two matters as "WITHOUT PREJUDICE DIALOGUE" and "WITHOUT PREJUDICE".

15. The first, dated 12 February 2019, he describes as the respondent engaging Early Conciliation and making the claimant an offer to terminate the employment relationship, which he rejected that day.

16. The second, dated 14 February 2019, he described as a "Threat", in which Caroline Parr, Vice President and Assistant General Counsel (Legal), introduced the disciplinary threat into without prejudice dialogue unless he were to reached an agreement concluding with his employment ending. He then sets out the terms of that correspondence, which is referred to here for its terms (as quoted by the claimant).

17. On 24 February 2019, the claimant presented his ET1 to the Employment Tribunal.

18. On 11 March 2019, the claimant stated that a letter was sent to him by Caroline Parr (described by him as a "without prejudice letter", and containing the phrase "without prejudice and subject to contract" above the

words “Dear Michael” in the letter). What followed (and the claimant again sets forth the terms of that letter) was an offer in settlement, the terms of which are not repeated herein. The claimant noted that the respondent stated that the investigation had concluded at that point, but that when the respondent’s grounds of resistance were subsequently presented to the Tribunal on 29 March 2019, this was contradicted on the basis that a holding response was submitted due to ongoing investigations being carried out by the respondent. The claimant described this as “dishonest”.

19. The claimant went on to refer to further correspondence from the respondent, relating to an investigation to be carried out into his alleged conduct.

20. He then referred to a letter sent dated 24 May 2019 by the respondent to him, under the hearing “Without Prejudice”, by Kate Galloway, the respondent’s solicitor, whose terms are referred to herein but not repeated. The subject of that letter was the discussion of settlement terms between the parties, and the effect and practical implications of entering into judicial mediation.

21. The claimant responded on 24 May 2019 withdrawing his consent to judicial mediation, to Ms Galloway.

22. On 17 June 2019, the claimant stated, the respondent reiterated dishonest statements, in its response to his further and better particulars.

23. The claimant then set out references to a number of authorities setting out the law in relation to without prejudice correspondence and its admissibility in subsequent legal proceedings.

24. In his next section, the claimant addressed some of the meetings and correspondence which are understood to be said to be without prejudice and thus, in the respondent’s view, inadmissible.

25. The meeting of 9 January 2019, said the claimant, was not a without prejudice meeting, but an “open discussion” proposed by Lorna Cuthill with a view to discussing the claimant’s concerns. He submitted that it was, in

fact, intended to victimise the claimant by attempting to end his employment in a bid to prevent disclosure of documents evidencing illegal, unethical and discriminatory practices, and a deliberate scheme to cover up these wrongs by referring him to a gagging contractual clause.

26. He denied that he, as the respondent alleged, had invited the respondent to have privileged discussions, or that the meeting was of a "concessionary nature". He said that Lorna Cuthill had written to him on 4 January 2019 to invite him to the meeting, because, he alleged, he had promised litigation and a public interest disclosure in his email of 24 December 2018. He responded to the respondent's request as to how he wished to have his grievance resolved (referring to clause 34 of the ACAS Code of Practice on Disciplinary and Grievance Procedures). He related the terms of the correspondence leading to and following the meeting of 9 January 2019, and asserted that the sole intention of Lorna Cuthill at the meeting was to end the employment relationship and conceal evidence of wrongdoing at all costs including making references to "gagging clauses".

27. He submitted that if it were held to be without prejudice, the act of making the claimant a redundancy offer in response to his request for justice was not a genuine attempt to settle the existing dispute, but to prevent disclosure of documents evidencing improper conduct, which therefore amounted to an abuse of privilege discussions. The reference to a gagging clause in a settlement agreement was to suppress the truth, he said, by preventing the production of documents in Tribunal or in Parliament. No reference was made to a without prejudice discussion; rather, the claimant was referred to a gagging contractual clause, which was meant to intimidate the claimant, and was not concerned with what would happen if he accepted the offer, but if he declined it. The primary purpose of the meeting was to end the claimant's employment, an act of victimisation.

28. The claimant moved to the without prejudice email of 14 February 2018.

29. He maintained that this was not a genuine attempt to settle a dispute but mere positioning in an attempt to impose with an outright threat of adverse

treatment to the claimant (that is, disciplinary proceedings with intent to dismiss him) where he failed to agree settlement terms. He asserted that the respondent disingenuously made use of the privileged communication to conceal this threat. He argued that justice in this case merits that it be admissible in evidence.

30. With regard to the without prejudice email of 11 March 2019, the claimant asserted that this demonstrated that the respondent "knowingly and deliberately made dishonest assertions" in its holding grounds of resistance, by alleging that there were ongoing investigations when Caroline Parr confirmed that they were not.

31. The claimant referred to the without prejudice email of 24 May 2019, and said that it demonstrated that the investigation was long concluded or that none was ongoing, or that it had decided on a premeditated outcome. He also stated that the findings of the "so-called appeal" were an attempt to mislead the Tribunal by showing that some ongoing process was still in place after the point when the ET3 was produced.

32. He suggested that justice merited that this email be admissible as a further act of unambiguous impropriety.

33. The claimant suggested that there were other misdemeanours evidence by these without prejudice emails. He said that the respondent had no intention of carrying out a fair and just investigation into the claimant's concerns nor of providing an active defence in the Employment Tribunal; and that the email exchange shows the existence of "an enterprise consisting of the Respondent's global, regional and national leadership conspiring to perverse (sic) the course of justice and undermine the judicial system by going so far as destroying documentary evidence. He submitted that there is a corresponding public policy interest in deterring parties from using privilege dialogue as a medium for unethical practices particularly in discrimination cases, and should be adjudged to fall within the exceptions laid down in **Unilever plc v The Procter & Gamble Co**.

Strike Out Application

34. The claimant then set out the law relating to strike out, particularly referring to Rule 37 of the Employment Tribunals Rules of Procedure and the overriding objective set out in Rule 2.

35. He referred to a number of cases on this subject.

36. The claimant then submitted that it was no longer possible to have a fair hearing of the case for a number of reasons:

- The respondent deliberately destroyed evidence central to the claim by gaining illegal and unauthorised access to the claimant's mailbox, after which it deleted them once it became clear that litigation and a public interest disclosure was inevitable;

- The respondent deliberately kept the claimant out of the office for 6 months to ensure any evidence intelligently stowed would be automatically purged;

- The respondent refused the claimant access to the premises since 29 January 2019 to have access to further evidence of wrongdoing stored offline on his computer, and apparently destroyed such evidence;

- The respondent, comprising an enterprise of global, regional and national leadership, continued to undermine the judicial process by orchestrating unreasonable delays, evidence tampering and criminal access (and possible undue influence of potential witnesses), compromising the conduct of a fair hearing; and

- The respondent is deliberately failing to cooperate with the Employment Tribunal, by failing to file a substantive defence within the stipulated time through acts of unambiguous impropriety, abuse of process by making unreasonable procedural applications such as the unnecessary application for further and better particulars of the claim.

37. The claimant asserted that the manner in which the respondent has conducted these proceedings has been scandalous, unreasonable or vexatious, and should be struck out for these reasons:

- The respondent removed the claimant from its premises, gained illegal and unauthorised access to the claimant's mailbox and destroyed evidence to pervert the course of justice;

- The respondent has failed to file a substantive defence by alleging ongoing disciplinary investigations, which the claimant asserted were part of a deliberate scheme to coerce the claimant not to pursue legal action;

- The respondent alleged, at paragraph 7 of the response, that it was investigating the claimant's concerns whereas documentary productions, including without prejudice correspondence, showed that the respondent deliberately lied to the Tribunal with the intent to pervert the course of action;

- The respondent requested further and better particulars, and confirmed that the information received amounted to sufficient notice of the claim against it. However, the information provided was the same, or substantially the same, as the material it received in the course of its investigation between November 2018 and January 2019, deliberately misleading the Tribunal to waste time and resources;

- The respondent shared a "so called appeal finding" dated 18 June 2019 to mislead the Tribunal and "act as a cloak for perjury".

- The respondent led the Tribunal into believing, at the PH on 8 May 2019, that it was genuinely looking into the claimant's concerns and prepared to enter into mediation to resolve differences whereas it continued, the claimant alleged, to carry on using without prejudice privilege as a cloak for perjury.

38. The claimant then went on to argue that the respondent had failed to actively pursue the proceedings for a number of reasons:

- The respondent alleged that the claimant raised a number of further queries and concerns about the response received on 24 December 2018 which it was looking into, and was therefore prevented from filing a substantive defence. This was, again, in the claimant's submission, a mere cloak for perjury.

- The respondent alleged that it undertook a review into all of the claimant's other unsuccessful applications as a responsible employer even though the claimant had not raised these in his original claim nor in his letter of 24 December 2018. By widening the scope of the grievance investigation the respondent was seeking to invoke a time bar defence, facilitate evidence destruction and digress the Tribunal's attention from the real issues for consideration.

39. The claimant then sought to draw to the Tribunal's attention other factors to consider when determining the issue of proportionality. He made allegations that the respondent has been guilty of breaches of the ACAS Code of Practice on Disciplinary and Grievance Procedures.

40. Finally, the claimant invited the Tribunal to grant the application to strike out the respondent's defence for the reasons set out, and to accept the submission on admissibility of the without prejudice meeting and correspondence.

Respondent's Submission

41. By letter dated 26 July 2019, the respondent's solicitors set out their submissions on behalf of the respondent in relation to the two matters raised. The respondent's submission addresses the two issues in the opposite order to that followed by the claimant, and I follow the structure of the respondent's submission in setting out a summary of that submission as follows.

Strike Out Application

42. The respondent strongly denied that there were any grounds upon which the ET3 should be struck out. They submitted that there was an obligation to submit an ET3 by no later than 30 March 2019, and they did so. The mandatory information was provided in the ET3 and the response was duly accepted by the Tribunal.

43. The respondent submitted that there is no obligation upon the respondent to present grounds of resistance, so that the respondent would still have presented a valid defence even without the grounds of resistance provided.

44. They argued that the correct way to proceed would have been for the claimant to seek further and better particulars of the defence, had they considered that the defence provided was inadequate. The ET3 presented was valid.

45. In any event, they argued that the submission of holding grounds of resistance was entirely appropriate, because there were ongoing investigations into matters which appeared to be the subject of the claim. There were two separate processes.

46. The first internal process related to concerns raised by the claimant in November 2018 which were primarily, they said, about the unsuccessful applications the claimant had made for two roles within the respondent's organisation, which are the subject of this claim. A response was sent to the claimant on or around 20 December 2018. However, they said, a further set of queries was raised by the claimant on 24 December 2018, in relation to that response. The concerns were related to the points raised in November 2018 and some additional points raised which were closely related to the subject of this claim. The points raised by the claimant on 24 December 2018 were considered by the respondent as part of a further investigation or review, and this was still outstanding as at 29 March 2019, the date upon which the respondent submitted the ET3.

47. The respondent went on to refer to a number of sources of evidence supporting their contentions. They pointed to an email from William Innes to the claimant sent at 2027 hours on 29 January 2019, stating that the

respondent was continuing to investigate the claimant's concerns; the claimant's own claim form stated that the claimant was expecting a response to his letter of 24 December 2018; and the respondent was conducting investigatory meetings as part of the investigation into the points raised on 24 December 2018 after the date upon which the ET3 was submitted; they referred to an email by the respondent to the claimant on 26 April 2019 at 1207 hours, inviting the claimant to an investigatory meeting relating to the second internal process but referring back to the need to get back in touch with the claimant in relation to the first internal process; and the outcome letter of this further investigation and review was not sent to the claimant until 18 June 2019.

48. They submitted, therefore, that this review focussed on substantially the same issues which were in the claim, and that the process had not concluded by 29 March 2019, and that it was therefore entirely appropriate for them to have submitted holding grounds of resistance to the Tribunal.

49. The respondent then pointed out that there was a second internal process which is still ongoing, relating to a separate investigation into the claimant's conduct including the respondent's concerns about various emails which the claimant sent in or around early January 2019. They said that these matters are referred to at paragraphs 22 and 23 of the claimant's particulars of claim, and that the holding grounds of resistance were appropriate because the respondent could not provide a substantive and detailed defence of its actions when the events complained of were inextricably linked to the outstanding investigation into the claimant's conduct. In any event, the respondent required further and better particulars of the claimant's claims, which were unclear.

50. William Innes sent an email to the claimant on 29 January 2019 in which he said that an investigation would be carried out into the claimant's conduct, clear evidence, the respondent argued, of their intention to carry out such an investigation.

51. The respondent then made submissions in relation to the further arguments put forward by the claimant in support of his application.

52. They denied the claimant's allegations that 24 individuals had gained illegal and unauthorised access to the claimant's email inbox and deliberately deleted relevant emails, in the strongest terms. They submitted that there was no evidence to support the allegation and that it was patently untrue.

53. They resisted the claimant's allegation that it is no longer possible to have a fair hearing before the Tribunal due to the respondent's failure to cooperate with the Employment Tribunal. They submitted that it was not clear what that allegation was based upon but that it was entirely unsubstantiated. The submission of a holding grounds of resistance was, they said, reasonable, and done through their legal representatives.

54. They denied the claimant's submission that they had acted in a manner which was scandalous, unreasonable or vexatious, and in particular denied the claimant's assertion that they had misled the Tribunal by denying that evidence had been deliberately destroyed by the respondent.

55. The respondent submitted that the claimant's own conduct, in making such unsubstantiated and serious allegations, called into question his own conduct of the proceedings.

56. The respondent then referred to the claimant's attempt to rely upon an email sent to ACAS by the respondent on 11 March 2019 at 1025 hours, to support his application for strike out. This, they said, was protected by without prejudice privilege. They expressed deep concern about the claimant's attempted erosion of this privilege in this case.

57. Notwithstanding that, the email already having been disclosed to the Tribunal by the claimant, the respondent took the step of responding to the submission. They directed their attention to the claimant's reference to a comment made in the email by its author, Caroline Parr, one of the respondent's in-house counsel, who said that she considered it unlikely that

the claimant would succeed in a claim against the respondent, having carefully investigated the issues over an extended period of time.

58. The respondent observed that the claimant seeks to rely upon this as indicating that the investigation was concluded by 11 March 2019. They said that this is clearly not the case given the evidence presented above, and in any event, Ms Parr was only referring to inquiries made by that stage. The specific inquiries into the issue of the claimant's further unsuccessful job application had already been made as at 11 March 2019, and the respondent considered that those inquiries did not suggest that the claimant had been treated unfairly in any way. She did not intend to imply, they submitted, that the two internal processes had been completed by that stage, as they were still outstanding.

59. The respondent submitted that the claimant's reference to a without prejudice email from DAC Beachcroft LLP on 24 May 2019 did not support the assertion he was relying upon (that the internal investigations had been concluded) but indicated that he was taking an unreasonable approach by not only relying on a without prejudice email but also on one which did not support his argument.

60. The respondent therefore submitted that the claimant's application to strike out the respondent's response in this case should be refused.

Admissibility of Without Prejudice Meeting and Correspondence

61. The respondent's primary contention is that any without prejudice correspondence or conversations upon which the claimant seeks to rely are protected by privilege and inadmissible in these proceedings.

62. The respondent referred to a number of authorities in support of their submissions.

63. They responded to the claimant's assertion that where there is "unambiguous impropriety", there is an exception to the without prejudice rule, and observed that in making that assertion he relies upon three matters, namely a recording of a without prejudice meeting with a member

of the respondent's Employee Relations team on 9 January 2019; email correspondence with ACAS of 14 February and 11 March 2019, and a without prejudice email from DAC Beachcroft LLP of 24 May 2019.

64. With regard to the meeting of 9 January 2019, the respondent submitted that there is no allegation in the ET1 relating to this meeting, and therefore the conduct of the meeting is irrelevant to the complaint. In any event, they submitted that the meeting was agreed to be conducted on a without prejudice basis, in response to the claimant's own suggestion that he wanted to resolve matters. The respondent denied that any threat was made to the claimant with regard to a "contractual gagging clause", but that the HR representative was referring to the respondent's Code of Conduct which prohibits employees from sending confidential information outside the organisation. This was not unambiguous impropriety.

65. The respondent provided with their submission a transcript of the recording of the meeting, initially carried out covertly by the claimant, and suggested that if the Tribunal wished to assess the meeting, the recording should be provided in order to demonstrate that no threat was made at the meeting.

66. With regard to without prejudice email exchanges, the respondent again suggested that the claimant has not made any allegation of victimisation in relation to these exchanges in his claim.

67. The emails, they submitted, are clearly without prejudice and their contents are reasonable and appropriate. The claimant alleges that there was no serious attempt to resolve the dispute with him, but amounted to an outright threat of adverse treatment to the claimant; however, the respondent argued that this was not a reasonable or correct reading of the email which was simply explaining to the claimant what the practical outcome of settlement discussions would be if terms were to be agreed.

68. The respondent then submitted that the Tribunal should note that there is no complaint in the ET1 relating to the conduct of the meeting of 9 January 2019, or the without prejudice emails, and that the Tribunal should not permit any amendment of the claim or should strike out any allegations of

victimisation relating to these matters because they disclose no basis for the allegations, and any such allegations misrepresent their contents. The claims are misconceived and have no reasonable prospect of success.

69. The respondent concluded by reserving its position on making a costs application against the claimant in relation to the unreasonable conduct of the litigation by him.

The Relevant Law

70. Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 provides:

"At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds-

…(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious…

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

71. In **Blockbuster Entertainment Ltd v James 2006 IRLR 630 CA**, the Court of Appeal found that for a Tribunal to strike out a claim based on unreasonable conduct, it has to be satisfied that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, striking out must be a proportionate response.

72. The court went on to say (paragraph 21): *"The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the*

fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist."

73. In **Ashmore v British Coal Corporation 1990 ICR 485**, Stuart-Smith LJ said, *"With all respect to Stephenson LJ, I do not agree that the claim can only be struck out as being an abuse of the process if it is a sham, not honest or bona fide. On the contrary, I prefer the views of the other members of the court that it is dangerous to try and define fully the circumstances which can be regarded as an abuse of the process, though these would undoubtedly include a sham or dishonest attempt to relitigate a matter. Each case must depend upon all the relevant circumstances."*

74. The well known case of **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126 CA** provides helpful guidance in considering whether to strike out a claim involving whistleblowing allegations, and said that the same approach should be taken in such cases as requires to be taken in discrimination claims, which require an investigation to be conducted into why an employer acted in a particular way. It was stressed that only in an exceptional case will a case be struck out as having no reasonable prospect of success where the central facts are in dispute.

75. The parties directed the Tribunal to other authorities, including **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755**, where it is suggested that even where the facts are in dispute, it is "instantly demonstrable" that the central facts in the claim are untrue, for example where the allegations are conclusively disproved by the productions. The Tribunal took account of this and the other cases to which it was referred by the parties.

76. In relation to the question of admissibility of without prejudice meetings or discussions, the parties referred the Tribunal to authorities on this point as

well. It is the concessionary purpose of the correspondence rather than the use of the phrase "without prejudice" which confers the privilege upon the communications. It is not an absolute rule, and as the claimant has pointed out, it does not apply to render inadmissible evidence of communications designed to act as a "cloak for perjury, blackmail or other unambiguous impropriety" (**Unilever plc v Proctor & Gample [2000] 1 WLR 2436**).

77. In the case of **BNP Paribas v Mezzotero [2004] IRLR 508**, Cox j Found that the meeting under consideration did not take place in the context of the parties being in dispute, nor that the meeting was in fact an attempt to settle the claimant's discrimination complaint. In addition, she allowed the terms of the discussions to be admitted to the hearing on the basis that remarks alleged to have been discriminatory cannot be protected by the without prejudice rule, and therefore fell within the unambiguous impropriety exception.

Discussion and Decision

Application to Strike Out Response

78. The claimant's primary submission (paragraph 4.1.1) is that it is no longer possible to have a fair hearing in this case.

79. The reasons he gave were as follows.

80. He submitted that the respondent deliberately destroyed evidence central to the claim by gaining illegal and unauthorised access to the claimant's mailbox; that they kept him out of office deliberately for more than 6 months to ensure that any evidence was automatically purged; that they refused to allow him access to its premises to access further evidence of wrongdoing stored on his computer; that they continually undermined the judicial process by orchestrating unreasonable delays, tampering with evidence and "possibly undue influence of potential witnesses who are all junior employees"; and that they deliberately failed to cooperate with the Tribunal Rules of Procedure by failing to file a substantive defence through acts of unambiguous impropriety.

81. The respondent denies all of these allegations in their own submissions. It is clear, therefore, that the claimant's allegations are not accepted nor admitted by the respondent. The claimant has submitted certain documents and items of correspondence with a view to supporting his allegations, but again the respondent denies that the claimant's perspective is accurate or correct, and submits that he has made allegations which have no foundation in fact.

82. It is quite clear that the claimant's allegations, which unquestionably amount to allegations of the most serious impropriety by the respondent both in relation to the judicial process and to the substantive fairness of the claimant's treatment (in relation to the alleged destruction of evidence and impropriety towards the Tribunal), are strongly disputed as to fact by the respondent. While the claimant has presented documents with his submission, I am not persuaded that those documents, on their face only and without evidence from the authors or participants in the documents, show that it is "instantly demonstrable" that the respondent has been guilty of the conduct of which the claimant accuses them.

83. It is notable, in addition, that the claimant speaks of the "possibly undue influence" of junior employees by the respondent; that amounts to an allegation, again of a grave nature, but in this instance one which the claimant can only assert as a possibility. Again, this falls short of demonstrating that the allegations are clearly proved.

84. The claimant makes an allegation throughout his submission that the respondent has breached the Tribunal's Rules of Procedure by failing to submit a substantive defence to the claim. I will address this below.

85. The claimant then set out, in his submissions, a number of ways in which he alleged that the respondent had conducted the proceedings in a manner which was scandalous, unreasonable or vexatious.

86. Firstly, the claimant alleged that the respondent removed the claimant from its premises, gained illegal and unauthorised access to the claimant's mailbox and destroyed evidence to pervert the course of justice; and

compounded this conduct by denying to the Tribunal that it had destroyed evidence, thus misleading the Tribunal.

87. The respondent denies having gained illegal and unauthorised access to the claimant's mailbox, or having destroyed evidence to pervert the course of justice.

88. This is an allegation which cannot be instantly demonstrated by the claimant. Its strong denial by the respondent requires the Tribunal to hear evidence about this matter before any conclusion can be reached.

89. Secondly, the claimant alleged that the respondent failed to file a substantive defence by alleging ongoing disciplinary investigations, which he maintained showed a deliberate scheme set in motion as a bargaining tool of threat to coerce the claimant not to pursue legal action. Thirdly, and related to this allegation, the claimant alleges that the respondent alleged that it was investigating the claimant's concerns whereas documentary productions clearly showed it deliberately lied to the Tribunal to mislead it and pervert the course of justice.

90. Taking these two allegations together, there are two aspects to the claimant's complaint here: that the respondent failed to submit a substantive defence within the statutory deadline; and then that what they said in their holding grounds of resistance was untrue, and an attempt to mislead the Tribunal.

91. The respondent, it is not disputed, submitted an ET3 within the statutory deadline, which was then accepted by the Tribunal. The Employment Tribunal Rules of Procedure 2013 require, at Rule 16, that the response fulfils certain conditions. It shall be on a prescribed form, and presented to the Tribunal within 28 days of the date after which the Tribunal sent them the claim form. Further, at Rule 17, the Tribunal shall reject the response if it were not made on the prescribed form, did not contain the respondent's full name, address and whether the respondent wished to resist any part of the claim.

92. The respondent submitted that they fulfilled the requirements of the Rules of Procedure, and therefore, even if the response amounted to a "holding" response, it was competent for them to do so and not in breach of any Rule of the Tribunal.

93. I accept this to be correct. It is relatively common for a respondent to submit a "holding" response to the Tribunal while some matters, such as an ongoing appeal or investigation, remain in train whose outcome is relevant or even critical to the defence to be presented by the respondent. As a result, the ET3 in this case did not breach the Tribunal Rules.

94. What is of greater concern is whether the respondent misled the Tribunal by referring to an ongoing investigation. The claimant says this is simply not true, and that no investigation was ongoing at the time the ET3 was presented; the respondent says that there were two internal processes, and that they were entitled to await the completion of both before finalising their position with regard to the ET3.

95. It is not possible for the Tribunal to draw any firm conclusion about this without hearing evidence from the parties. It is quite plain that this amounts to a strong factual dispute between them, and that to reach a view based on quite contradictory statements made in written submissions at this stage would be premature, and contrary to the interests of justice. There is no doubt that if the claimant's allegation were borne out, and it could be proved that the respondent deliberately misled the Tribunal, that would be a serious matter. It is not clear to me at this stage and on the information I have that the respondent has in fact been guilty of such egregious conduct, either themselves or through their legal representatives, and therefore I cannot uphold this allegation on the information before me.

96. Fourthly the claimant alleges that the respondent is guilty of deliberately misleading the Tribunal by seeking further and better particulars in relation to information it had already received through its own investigation. I am not prepared to sustain this allegation at this stage, again because it is denied by the respondent and also because the seeking of further and better

particulars is an attempt by one party to have the other party commit itself to a particular position in its claim or response before the Tribunal. That information has been passed between the parties in an internal process does not mean that that information is to be relied upon by either party in the Tribunal process, and therefore seeking further and better particulars is a normal way of ensuring that clarity on these matters is obtained.

97. Fifthly, the claimant makes an allegation, in terms which are difficult to follow, which seems to suggest that the respondent shared a "so called appeal finding" by Debbie Wigg dated 18 June 2019 to mislead the Tribunal and act as a cloak for perjury. On the face of it, this appears to be a suggestion that the "so called appeal finding" was in fact a document created dishonestly by the respondent in the face of a particular disclosure to be made by the claimant at a forthcoming Preliminary Hearing.

98. It is simply impossible for the Tribunal to draw any conclusions about this matter without understanding the context in which the events are said to have occurred, or to have heard from Debbie Wigg or another witness from the respondent who could set out their position on this document. It would be unsafe, and in my judgment quite unjust, for the Tribunal to make any conclusive finding on this extraordinarily strong allegation without giving those accused the opportunity to respond to it.

99. Sixthly, the claimant makes a further allegation, at 4.1.2.6, of unambiguous impropriety about the respondent having led the Tribunal to believe that it was genuinely looking into the claimant's concerns and prepared to enter into mediation to resolve differences when in fact it carried on using without prejudice privilege as a cloak for perjury.

100. It appears to me that this is an enormously broad allegation, lacking in detail, upon which no conclusion can possibly be reached by the Tribunal on the information available to it at this stage.

101. Having addressed these points, I then turn to the claimant's argument that the respondent has actively failed to pursue the proceedings (4.1.3ff).

102. Firstly, the claimant alleged that the respondent's statement that the claimant had raised a number of further queries and concerns about the response he had received on 24 December 2018 was untrue, since the claimant had not raised any new concern but had simply pointed out inconsistencies in Laura Cuthill's response. Until evidence is heard, and findings as to fact can be made, it is my judgment that no firm conclusion can be reached about this matter simply by viewing and interpreting the written correspondence.

103. Secondly, the claimant said that the respondent misled the Tribunal by saying that it undertook a review into the claimant's other unsuccessful job applications; and did so as a means of delaying the Tribunal process. He described the respondent's actions as a deliberate act to invoke the time bar defence, facilitate evidence destruction and digress the Tribunal's attention from the real issues for consideration. The respondent denies that this allegation is true. Again, it is my judgment that until findings in fact can be made about these matters, no firm conclusion can be reached as to whether or not the claimant's allegations are true.

104. Thirdly, the claimant reiterates that it failed to file a substantive defence due to ongoing disciplinary investigations. This returns to a previous theme: the claimant alleges that there were no ongoing disciplinary investigations while the respondent alleges that there were. This matter is, in my judgment, irreconcilable until evidence is heard from the relevant witnesses.

105. Fourthly, again, the claimant suggests that the respondent has unnecessarily and improperly sought to delay the proceedings by seeking further and better particulars about matters of which it was already aware. For the reasons I have already stated, I am not prepared to reach a firm conclusion on this point on the information available to me.

106. The claimant then takes time in his submission to identify, in paragraph 5.1, "multiple breaches" of the ACAS Statutory Code of Practice. This is not a basis upon which to seek strike out of the respondent's

response but a basis for seeking an uplift in any relevant award ultimately made by the Tribunal. The claimant has not clearly made out a basis upon which this can be said to reflect on the ability of the parties to have a fair hearing; he simply identifies matters upon which he will be entitled to rely, if proved, in demonstrating that he was unfairly treated by the respondent.

107. In conclusion, it is my judgment that the claimant's application for strike out of the respondent's response is refused. The claimant has not provided a persuasive basis upon which it can be said that it would be in the interests of justice to prevent the respondent from participating in these proceedings, or being permitted to advance an explanation or a defence to his allegations.

108. The claimant's allegations against the respondent are framed in extraordinarily strong language, making constant reference to the respondent's alleged attempts to mislead the Tribunal, pervert the course of justice or use material as a cloak for perjury. Such vivid language reveals the strength of the claimant's feelings about these matters, but does not, in my judgment, provide a convincing basis for the Tribunal to take the draconian step of excluding a party from the proceedings where important and serious allegations of substantive unlawful wrongdoing are made against them.

109. It appears to me that it is of the greatest importance that the claimant's claim should be brought to a final hearing of evidence as soon as possible in order to allow parties to move forward. At present, there is a serious risk that the strong feelings demonstrated and engendered in the proceedings before this Tribunal alone may derail the progress of the case, and I am not, on the information available, prepared to give effect to the claimant's application, notwithstanding the lengthy and detailed submissions carefully prepared in support thereof by him.

110. I am not persuaded that it is no longer possible for a fair trial of the claimant's claim to be heard in this case, and accordingly the claimant's application for strike out is refused.

Admissibility of Without Prejudice Meeting and Correspondence

111. The parties are in dispute about the admissibility of correspondence and information relied upon by the respondent as "without prejudice", relating in particular to a recording of a without prejudice meeting with a member of the respondent's Employee Relations team on 9 January 2019, email correspondence with ACAS of 14 February and 11 March 2019 and a without prejudice email from DAC Beachcroft LLP of 24 May 2019.

112. The basic principle of without prejudice communications is that where there is a dispute between parties, any written or oral communications between them comprising genuine efforts to resolve their dispute will not generally be admitted to any hearing of the claim which may follow. This gives parties a liberty to speak frankly without the risk of having their negotiating terms being brought up against their interests at a later stage. It may be in the interest of either the claimant or the respondent in particular cases to rely upon this privilege.

113. In this case, the claimant relies upon what he considers the respondent's unambiguous impropriety to lift the veil on what would otherwise be privileged communications.

114. It is necessary to consider each of the communications in turn.

115. The recording of a without prejudice meeting on 9 January 2019 is the first communication to be considered.

116. The respondent submits that this should be excluded because the ET1 does not make any allegation in relation to that meeting. However, in my judgment, that submission cannot of itself be sustained. The ET1 may not refer to this meeting, but the claimant may wish to rely upon evidence not presented as allegations to the Tribunal, in support of those allegations he does make. The content of the meeting may well be relevant to the allegations before the Tribunal, and accordingly that is not a basis upon which that evidence may be excluded. In any event, the purpose of these submissions, and this decision, is to address not objections to the relevance

of evidence (which may arise during a hearing) but the admissibility in principle of that evidence.

117. It is not disputed that the meeting was held on a without prejudice basis, by an HR professional with the claimant. There is a transcript of the recording of the meeting which has been made available to the Tribunal, which I have read. The respondent submits that this does not support the claimant's allegation that there was "unambiguous impropriety" by the respondent; the claimant, both in his submission and during the course of the meeting, interprets and strongly asserts that the reference to the Code of Conduct relating to confidential information, by which he was told he was bound, as a threat to him, and a "gagging clause".

118. The claimant presented his claim to the Employment Tribunal on 24 February 2019. The Early Conciliation Certificate issued by ACAS was dated 30 December 2018, and was therefore in place prior to this meeting.

119. There is no doubt that at the point the meeting took place there was a dispute ongoing between the parties. The subject of the meeting, as the transcript reads, was a tentative, and apparently quite cagey, discussion about what the claimant wanted the respondent to do. It appears that the HR representative raised with the claimant his comment in an email about discussing a possible compensation package, which the claimant appears to have agreed.

120. It is clear from the **Mezzotero** case that where allegations of discrimination arise out of the discussion under question, the comments should not be protected by the without prejudice rule. The claimant makes reference to this meeting in his claim, at paragraph 21 of the paper apart to his claim form. He says: *"On 9th January 2019, HR made the Claimant a redundancy offer with the alternative option of carrying on in current working conditions, stating that no wrong had occurred. The Claimant is in possession of the audio recording."*

121. No specific allegation is made in the ET1 that the respondent victimised him in this meeting of 9 January 2019, and therefore no specific

unlawful act is raised by him in his claim form about what is said in that meeting. In particular, although he refers to the meeting, he does not make any allegation, as he does now, that the respondent issued him with a threat about a "gagging clause".

122. It is not for the Tribunal to make a finding of fact as to whether or not the meeting included a "threat" by the respondent to the claimant, without hearing evidence under challenge from both parties present at the meeting. The question is whether this allegation – and at this stage it must remain an allegation – that the respondent threatened the claimant during this meeting falls within the unambiguous impropriety exception.

123. On balance, it is my conclusion that this does fall within this exception. If the Tribunal were to find that the exchange between the claimant and the respondent at this meeting were to amount to a threat by the respondent to the claimant, that would be evidence of unambiguous impropriety and therefore admissible. If the Tribunal were to find that the claimant's conduct in that meeting were inappropriate, that may also be a relevant matter to be taken into account by the Tribunal in reaching its conclusions on the merits of the case. Accordingly, without reaching any conclusions as to the effect of what was said at the meeting, it appears to me to be in the interests of justice to admit the transcript, and in addition, the recording made by the claimant, of the meeting of 9 January 2019.

124. I should make clear that I do not find, at this stage, that the conduct of the respondent at that meeting amounted to unambiguous impropriety (nor that the claimant's conduct was inappropriate), but that the allegation made by the claimant about the meeting may amount to such conduct and therefore should be admitted to proof.

125. The second matter under consideration is the correspondence of 14 February and 11 March 2019 to ACAS, in which the claimant suggests that there was no genuine attempt to settle a dispute but an "outright threat of adverse treatment to the claimant". The claimant has quoted the terms of these emails.

126. In my judgment, any correspondence to ACAS from a party's legal representative is self-evidently sent with the purpose of seeking to resolve a dispute. The terms of each of these emails are, in my judgment, standard negotiating terms, making offers in terms designed to persuade the offeree to accept them. It is not apparent to me how the emails could in any way be interpreted as containing a threat to the claimant. It is well-recognised that in any negotiation, language is used in order to persuade a party to see that there may be a downside to a rejection of an offer as well as the benefit of acceptance of that offer.

127. If all such correspondence were to be disclosed and admitted to Tribunal hearings, the without prejudice rule would be rendered meaningless, and the effect is likely to be that parties would be discouraged from making any concessions (which are the fundamental purpose of such exchanges) in order to compromise to reach a negotiated settlement.

128. In my judgment, there is no basis for suggesting that these communications fall within the unambiguous impropriety exception. The difference in the meeting of 9 January 2019 was that the claimant immediately asserted that a threat had been issued to him, whereas here there is no basis, in my judgment, for any suggestion that this was anything other than a normal exchange of correspondence aimed at settling a dispute. Neither email is therefore admissible in this case.

129. Finally, the claimant argues that the respondent's solicitor's email of 24 May 2019 was evidence of unambiguous impropriety, largely because it contradicts the facts pled by the respondent – that the investigation was ongoing – and emphasises termination of the employment relationship.

130. Having read the quoted terms of the email set out in the claimant's submission, it appears to me that these are very similar in tone and effect to the communications with ACAS in February and March, and are designed to attract the claimant to accept an offer in exchange for settlement of the claim and a determination of his employment relationship with the respondent. He clearly did not find the terms of the offer to be acceptable,

but it is my judgment that this is clearly correspondence designed to engage in settlement discussions with a view to resolving the dispute. This clearly falls within the rule that without prejudice discussions are not to be admitted in an Employment Tribunal hearing. It is noted that there had been some discussion of the possibility of judicial mediation. Had such exchanges taken place in the context of judicial mediation, they would have been excluded as inadmissible. The fact that the offer was made in the context of correspondence does not, in my judgment, allow it to fall into any exception to that important and well-established rule.

131. It appears to me that the claimant wishes to suggest that there was unambiguous impropriety in the very fact that the offer was made to include the claimant's "exit from the organisation". In the context of an ongoing dispute – and by that stage, the claimant had already submitted his ET1 to the Tribunal – it was an offer which it was open to the claimant to accept or to reject. Having rejected it, the claimant's right to advance his complaint to the Tribunal remains in place. In my judgment, this was a negotiating offer made to him for acceptance or rejection. There is nothing, on the information available to me, to allow me to find that this is evidence of unambiguous impropriety by the respondent.

132. Accordingly, the email by DAC Beachcroft LLP dated 24 May 2019 is not admissible in these proceedings.

Date of Judgement: 10th September 2019

Employment Judge: M MacLeod

Date Entered in Register: 11th September 2019

And Copied to Parties