Case Numbers: 3330972/2018
3334600/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms I Sibanda	v	Clinisupplies Limited

Heard at: Watford **On**: 15 October 2019

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: Mr O Tahzib, of counsel
For the Respondent: Mr P Chadwick, consultant

RESERVED JUDGMENT ON A PRELIMINARY POINT

The application of the respondent for the exclusion from the evidence before the trial tribunal of the content of the discussions at the meeting between the claimant and the respondent 14 May 2018 and correspondence following on from that meeting in which the respondent sought to compromise the claimant's claims on the basis that she left her employment in return for a sum of money, is well-founded and succeeds.

REASONS

Introduction; the issue which I had to decide on 15 October 2019

1 The hearing which took place before me on 15 October 2019 was concerned with the question of what, if anything, had to be struck out of the content of the ET1 claim forms and the accompanying details of the claims on the basis that it was covered by without prejudice privilege ("WPP"). The issue was described in the notice of the hearing as extending also to the possibility of striking out by

reason of statutory privilege, i.e. "protected conversation", but that aspect of the matter was not pressed by Mr Chadwick on behalf of the respondent. It was the respondent's application that the material was excluded.

2 The factual background was reflected in a series of documents, but the parties both called a witness to give oral evidence (the claimant giving evidence on her own behalf and Mr Paul Cook, the respondent's Chief Executive Officer, giving evidence on behalf of the respondent).

3 The material that was sought to be excluded by the respondent consisted only of the content of discussions which took place at a meeting on 14 May 2018 and of correspondence which (1) followed that meeting and (2) related to the content of the communications at the meeting.

4 By the end of the hearing of 15 October 2019, the issues had been narrowed down to two: namely (1) was the WPP applicable at all, and (2) if it was applicable, was the content of the negotiations admissible on the basis that it involved unambiguous impropriety of the sort discussed in for example paragraphs 18, 23 and 40-41 of the judgment of HHJ Hands QC in *Portnykh v Nomura International plc* [2014] IRLR 251?

5 It was contended on behalf of the claimant that the WPP did not apply at all because by the time of the meeting of 14 May 2018, there was no "extant dispute" between the parties, of the sort that was required for the WPP to apply. That contention was advanced by Mr Tahzib by reference to the approach taken by Cox J in *BNP Paribas v Mezzotero* [2004] IRLR 508 and the final part of the following passage in chapter 14 of the IDS Employment Tribunal Practice and Procedure Handbook:

> "14.68 It is less clear cut when a 'dispute' will arise where the employee raises a grievance, as will commonly be the case. In *BNP Paribas v Mezzotero* 2004 IRLR 508, EAT, the EAT held that the employee's raising of a formal grievance did not bring subsequent negotiations between employer and employee within the 'without prejudice' rule. The facts of the case were as follows. M raised a formal grievance on her return to work from maternity leave, claiming that before and on return from her leave she was singled out for demotion and publicly humiliated. In January 2003 she was called to a meeting by her employer. Upon entering the room she was informed that the discussion would be 'without prejudice' and that the meeting was independent of her formal grievance. M was told that her job was no longer viable, that there was no other position available in the bank, and that it would be best for both parties if her contract was terminated. She was also told that the matter would be regarded as a redundancy rather than a termination, and was offered a settlement package. M did not agree to the package and in March

2003 brought several claims, including sex discrimination. She sought to rely upon the 'without prejudice' meeting as evidence and BNP objected. The tribunal found in M's favour on this point. It held that the meeting between M and her employer had not been genuinely aimed at settling M's grievance. Rather, the meeting had been intended to achieve the termination of M's employment. The tribunal concluded that it would therefore be an abuse of the rule to exclude details of the meeting. BNP appealed to the EAT.

In the EAT's view, the act of raising a grievance does not by itself mean that parties to an employment relationship are necessarily 'in dispute'. A grievance might be upheld, or alternatively dismissed for reasons that the employee finds acceptable, in which case the parties never reach the stage where they could properly be said to be in dispute. M's grievance did not raise any complaint that a decision had been taken to terminate her employment, although she was concerned about her employer's treatment of her. In fact, the employer had made it clear at the meeting that the grievance was going to continue 'independent of any termination'. The EAT also thought it unrealistic to conclude that the parties had expressly agreed to speak 'without prejudice' given their unequal relationship, the vulnerable position of the claimant in such a meeting, and the fact that the suggestion was made by the employer only once that meeting had begun. The EAT therefore held that the tribunal was entitled to conclude that by the time of the meeting there was no existing dispute between the parties. The meeting was not a genuine attempt to settle, as M's grievance concerned her discriminatory treatment whereas the meeting was concerned with terminating her employment. The 'without prejudice' rule did not, therefore, apply to prevent the statements made at the meeting being admissible in evidence before the tribunal.

14.69 In *Barnetson v Framlington Group Ltd and anor* 2007 ICR 1439, CA, the Court of Appeal addressed the question of the point at which, in escalating exchanges between employer and employee, a 'dispute' can be said to have arisen. Lord Justice Auld, who gave the leading judgment, began by repeating the well-established principle that the 'without prejudice' rule will be engaged where there is a dispute between the parties notwithstanding that litigation has not yet begun. As for what amounts to a dispute, he held that this occurs when the nature of the exchanges is such that the parties have contemplated, or could reasonably be expected to have contemplated, litigation if they did not agree. On the facts of the case, that point was reached when B, a senior executive, was informed by the employer that it intended to terminate his contract early, even though formal notice was not given until nearly two months later. Essentially, the dispute

> crystallised when the threat of termination was made. At that point litigation — even though not threatened by B — must have been in both parties' contemplation. As a result of the Court of Appeal's ruling, B had to re-serve his witness statement, omitting references to negotiations made following the date he was informed he was going to be dismissed as these were covered by the 'without prejudice' rule.
>
> At first glance, there may appear to be inconsistency between the Court of Appeal's decision in *Barnetson* and the EAT's decision in *BNP Paribas v Mezzotero* (above). The former appears to suggest that most parties can reasonably be expected to have contemplated litigation by the time a formal grievance has been raised, whereas the latter suggests that the mere fact that a grievance has been raised does not necessarily mean that there is a dispute in existence. However, any difference is best explained by concluding that the 'without prejudice' rule can only apply in relation to correspondence that seeks to settle the particular dispute that has been raised. In *Barnetson*, the 'without prejudice' correspondence related to B's claims arising out of the termination of his employment. The dispute related to B's employer's proposal to terminate his employment early and so, if the parties contemplated litigation in relation to the dispute, it would have been about termination of employment. In the *Mezzotero* case, by contrast, if there was an extant 'dispute' at the time of the meeting, it arose out of M's grievance about her perceived treatment on return from maternity leave. The employer therefore could not invoke the 'without prejudice' rule in relation to its out-of-the-blue proposal to terminate her employment. In so far as M might have contemplated any litigation at that stage, it would have been a claim of discrimination, which would not depend on the termination of her employment. Thus, although there might have been an extant dispute about discrimination, there was no extant dispute about termination, and so the employer could not claim 'without prejudice' protection."

6 As for the contention that the conduct of the respondent at the meeting of 14 May 2018 and subsequently so far as relevant was unambiguously improper, it was the claimant's case that the proposal to terminate her employment that was advanced at that meeting constituted victimisation and should therefore be admitted by analogy with the approach taken by Cox J in paragraphs 35-39 of her judgment in *BNP Paribas*.

The relevant factual background

7 The key document here was the grievance that the claimant raised and which

led to the meeting of 14 May 2018. That grievance was sent to Mr Cook on 4 May 2018 and was at pages 2-6 of the respondent's hearing bundle. It concerned the conduct of Ms Amanda Cass, the respondent's new HR Director. At page 4, the claimant referred to her "right to confront any form of bullying, intimidation and discrimination on any basis that breaches professional conduct in a workplace." On the next page, the claimant referred to Ms Cass going through "bullying and deliberate verbal harassment at the hands of someone who is meant to be my leader". In the same paragraph the claimant said that she had asked Ms Cass:

> "is it because of the color of my skin and that I am being spoken to in a demeaning manner as if my presence is disgusting and I am not worth of having a respectful, acknowledging and appreciative conversation? I am an individual that has never been racially prejudiced, but my experience at the hands of Amanda left me upset and wondering why everyone else has been spoken to properly except for me particularly during my meeting. I value diversity and am always committed to creating a positive working environment free of harassment and bullying, an environment where all people are treated with dignity and respect. I was really victimized and Amanda certainly created an environment that was intimidating, hostile, degrading and humiliating."

8 On 8 May 2018, Mr Cook (in the email sent at 18:17 of which there was a copy at page 20 of the respondent's bundle) wrote this after thanking the claimant for her email of 4 May:

> "Before responding formally to your email or initiating any of the company's internal procedures, I would like to meet with you on a without prejudice basis to discuss your email and how best to progress matters. I would also like to confirm that at this meeting you can bring with you your union representative as support.
>
> If you are happy to meet on this basis then I propose that we meet on Thursday 10th May at 10.30am in the office."

9 At 19:00 on the same day, the claimant replied in the email of which there was a copy at page 21 of the respondent's bundle:

> "Dear Paul
>
> Thank you for your email. I am happy to meet you on a Without Prejudice basis to discuss my email and how best to progress the matters. I would also like to confirm that I will have my union representative accompany me for support."

10 The claimant was at that time on compassionate leave, having started to be so

after sending her email of 4 May, for reasons unconnected with that email. On 9 May 2018, in the email at page 23 of the respondent's bundle, Mr Cook thanked the claimant for her email sent at 19:00 on the day before, and wrote this:

> "Pending the outcome of the discussions on Monday [14 May], you are not expected to undertake any work and therefore I am now placing you on garden leave. You will receive your full pay during the period of garden leave, however access to our systems, including IT, and the offices will be restricted."

11 At the meeting of 14 May 2018, Mr Cook proposed the termination of the claimant's employment with the respondent and the payment to her of a sum of money in compensation for the loss of her employment. The claimant and her trade union representative refused to discuss that, and left the room.

The relevant case law

12 I referred myself to, and reminded the parties of, the decision of HHJ Hands QC in *Portnykh*. That decision in turn highlighted the importance of paragraphs 33 and 34 of the judgment of Auld LJ in *Barnetson*, which were in these terms:

> "33. On the other hand, the ambit of the rule should not be extended any further than is necessary in the circumstances of any particular case to promote the public policy interest underlying it. The critical question for the court in such a case is where to draw the line between serving that interest and wrongly preventing one or other party to litigation when it comes from putting his case at its best. It is undoubtedly a highly case sensitive question, or put another way, the dividing line may not always be clear. The various judicial pronouncements in the leading cases to which I have referred do not provide any precise pointers, and there are seemingly no other authorities directly in point.
>
> 34. However, the claim to privilege cannot, in my view, turn on purely temporal considerations. The critical feature of proximity for this purpose, it seems to me, is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so, they could avoid the need to go to court over the very same dispute? <u>On that approach, which I would commend, the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree.</u> Confining the operation of the rule, as the judge did, to negotiations of a dispute in the course of, or after threat of litigation on it, or by reference to some time limit set close before litigation, does not, with respect, fully serve the public policy interest underlying it of discouraging

recourse to litigation and encouraging genuine attempts to settle whenever made." (Emphasis added.)

13 In addition, in paragraph 36 of his judgment in *Portnykh*, HHJ Hands QC said this:

> "I do not accept that the dispute needs to be anything like so sharply defined and [Mr Martin's, i.e. counsel for the employer's] requirement for clarity from the outset sits very uncomfortably with the concept of the potential for a dispute, particularly as identified by the case of *Framlington*. It also follows that I reject Mr Martin's argument that the dispute which eventuates must be precisely the same dispute as is in existence at the time the compromise is proffered."

14 That was, however, said against a rather different set of facts from those of *BNP Paribas* and those of this case. The facts of this case were analogous with those in *BNP Paribas*. It was on the similarity of the facts of this case with those in *BNP Paribas* that Mr Tahzib relied.

15 As for what amounts to an unambiguous impropriety, I noted that HHJ Hands QC said this in *Portnykh*:

> "41
> I turn then to the alternative finding made by Employment Judge Lewzey that the case 'does fall under the categorisation of "unambiguous impropriety"' (see paragraph 11 of the judgment). In this context also I have come to the conclusion that the learn[ed] judge misdirected herself. It seems to me that she has confused that which might be prejudicial to one of the parties in litigation with the exceptional situation of 'unambiguous impropriety'. I see from paragraph 14 of the respondent's skeleton argument for the PHR (see p.149) that Employment Judge Lewzey was referred to *BNP Paribas* and to that part of the judgment of Cox J at paragraph 20 where she quotes extensively from the judgment of Robert Walker LJ in *Unilever* on the subject of the 'unambiguous impropriety' exception. I do not know whether she was asked in the course of the PHR to go on to read paragraph 22 of the judgment of Cox J, where part of paragraph 57 of the judgment of Rix LJ in *Fincken* [i.e. *Savings & Investment Bank Ltd (in liquidation) v Fincken* [2004] 1 WLR 667] is quoted. Even if she did look at it I am afraid that without considering the whole of that passage of his judgment commencing at paragraph 57 and ending at paragraph 63 she risked not appreciating the true nature of the concept of 'unambiguous impropriety' and how limited the concept actually is.
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> 42
> Indeed, the terms in which she addresses the concept at paragraph 11 of her judgment seem to me the clearest indication that she did not fully

> appreciate that it means something far more than being disadvantaged by the exclusion of evidence. I accept the submission of Mr Pilgerstorfer that she fails to provide any reasoning to justify her conclusion at paragraph 11 that this case falls within the 'unambiguous impropriety' exception. She simply says that '[t]o exclude the evidence would be an abuse of that privileged position'; she fails to explain why this case amounts to such an abuse and completely fails to engage with the distinction drawn by Rix LJ in *Fincken* at paragraph 57 between the exclusion providing an opportunity for perjury, which does not remove the protection provided by the exclusion, on the one hand, and the use of the occasion 'to make a blackmailing threat of perjury' (the example given in the cases), on the other hand. In short Employment Judge Lewzey misdirected herself by equating the potential for the respondent to suffer a forensic disadvantage with an abuse of a privileged occasion. Whilst I entirely accept that the former may be present in the instant case it seems to me that her failure to understand the need for the latter, let alone identify anything in the case that amounted to it, constituted a misdirection."

16 I read paragraphs 57-63 of the judgment of Rix LJ in *Fincken.* I noted that the discussion in those paragraphs concerned a situation where a party to a discussion that it is alleged was covered by WPP appears to incriminate him or herself, and that even that kind of material is covered by the WPP, "distasteful" though it may be that it is. Here, the claimant was seeking to rely on the fact that the respondent had in the meeting of 14 May 2018 proposed her dismissal, and on the submission, i.e. in this context the possibility, that that proposal was victimisation.

17 There is at least one further appellate case which is relevant: *Woodward v Santander UK plc* [2010] IRLR 834. It was referred to by HHJ Hands QC in paragraph 26 of his judgment in *Portnykh*. That paragraph is in these terms:

> "At paragraph 34 of the judgment in *BNP Paribas*, where the submission of counsel for the respondent is summarised, it looks as though the first point made in that paragraph relates to the passage quoted above whereas the alternative point relates to the more orthodox concept of 'unambiguous impropriety'. At paragraphs 35 and 36 Cox J considers what might be termed competing public policy arguments and at paragraphs 37 and 38 she appears to have been prepared to extend the list of exceptions so as to make discrimination cases an exception to the 'without prejudice' exclusion, rather than something to be dealt with on a case by case basis, considering whether on the facts there has been 'unambiguous impropriety'. This led to another division of the EAT presided over by HHJ David Richardson in *Woodward v Santander UK plc* [2010] IRLR 834 expressly repudiating (at paragraphs 56–63 on p.840) any such exception although explaining that was not what Cox J had decided at paragraph 38 of the judgment in *BNP Paribas*. I do not think further consideration of this debate can help me

> resolve the problem in this case but whether or not Cox J relied on it, or, as I think more likely, did not rely on it, I do not think that *In re Daintrey* should be regarded as authority for anything beyond the proposition that the fact of sending a letter, which amounts to an act of bankruptcy, cannot be excluded by labelling it as 'without prejudice'; see paragraph 53 of Lord Walker's opinion in *Ofulue v Bossert* at p.1012G."

18 In *Woodward*, the Employment Appeal Tribunal carried out a very careful analysis of the impact of the judgment of Cox J in *BNP Paribas*. It is certainly to the effect that the approach of Cox J in that case to what amounts to an unambiguous impropriety was obiter, i.e. not binding on an employment tribunal.

19 I note that in *Woodward* reference was not made to *Barnetson*.

20 I also noted the careful discussion of HHJ Hands in paragraph 29 of his judgment in *Portnykh*, where he came to the clear conclusion that the WPP may by the agreement of the parties attach to the content of a discussion.

Evidence of surrounding circumstances

21 The respondent accepted that the events surrounding the discussions which it was claimed were covered by the WPP were not themselves covered by that privilege. Thus, for example, Mr Chadwick accepted on behalf of the respondent that the claimant could rely on the fact that there was a WPP meeting on 14 May 2018, and that the claimant was placed on garden leave and had her access to the respondent's IT systems limited as shown by the email of 9 May 2018 to which I refer in paragraph 10 above.

My conclusions

22 I could not accept the analysis in the passage in the IDS Brief set out in the final paragraph of the extract set out in paragraph 5 above. In my view, there is an inconsistency between the decision of the Court of Appeal in *Barnetson* and *BNP Paribas*, and to the extent that there is, the decision of the Court of Appeal in *Barnetson* prevails.

23 In my view, the email of the claimant of 4 May 2018, even though it was stated as a grievance only and did not refer in terms to the possibility of the making of a claim to an employment tribunal, was in such terms that (applying the words of paragraph 34 of the judgment of Auld LJ in *Barnetson*) the parties might reasonably have contemplated litigation if they did not agree about the matters raised by the claimant. One factor which justified that conclusion was the use by the claimant of the words "intimidating, hostile, degrading and humiliating", as set out at the end of paragraph 7 above. That is because those words are taken directly from section 26(1)(b)(ii) of the EqA 2010, which is in these terms:

"(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

24 I could not accept that the fact that at the meeting of 14 May 2018 the respondent proposed the claimant's dismissal and the payment of a sum of money rather than just the payment of a sum of money meant that the WPP did not apply to what was said at the meeting.

25 In the alternative, the claimant had in terms agreed (see paragraphs 8 and 9 above) to the meeting being without prejudice. As a result, for that reason also the WPP applied to what was said at it.

26 Only if there was unambiguous impropriety at the meeting would any part of its content be admissible in evidence. In my judgment, there was (applying all of the case law to which I refer above, including *Woodward* and *Portnykh*) no such unambiguous impropriety at the meeting as a result of Mr Cook proposing the termination of the claimant's employment in return for a sum of money.

27 Accordingly, the application of the respondent for the exclusion from the evidence before the trial tribunal of the content of the discussions at the meeting of 14 May 2018 and correspondence following on from that meeting in which the respondent sought to compromise the claimant's claims on the basis that she left her employment in return for a sum of money, succeeds.

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Employment Judge Hyams
Date: 18 October 2019

Sent to the parties on:

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For the Tribunal Office