EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102668/2019 Reconsideration Judgment per Written Submissions

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:

REASONS

1. In this case, the Tribunal issued a Judgment on 11 September 2019 in which it dealt with a number of applications made by the claimant.

2. Included within the Judgment was a finding that "The transcript and recording of the meeting of 9 January 2019 between the claimant and respondent are admissible as evidence in these proceedings.

3. The respondent applied for reconsideration of that aspect of the Judgment by letter dated 24 September 2019, which application was opposed by the claimant.

4. Following correspondence between the Tribunal and the parties, the Tribunal determined that it was appropriate to deal with the application for reconsideration by way of written submissions.

5. It is also noted that the claimant submitted an application for reconsideration of the Judgment of 11 September 2019, but that that application was rejected on initial consideration on the basis that there was no reasonable prospect that the decision would be revoked or varied.

6. It is therefore appropriate to record the terms of the application, and the claimant's objections, before addressing the issues and confirming the Tribunal's decision on this application.

The Application for Reconsideration by Respondent

7. The respondent set out a number of reasons for the application in their letter of 24 September 2019.

8. It is not disputed that the meeting of 9 January 2019 took place between the claimant and the respondent on a without prejudice basis, and accordingly they argue that the contents of the meeting are therefore protected by without prejudice privilege and are inadmissible in evidence unless one of the limited categories of exceptions apply.

9. The claimant's argument is that one of the comments made by the respondent to him in that meeting falls within the exception of unambiguous impropriety.

10. Reference is made to paragraphs 123 and 124 of the Judgment, in which it is stated that the claimant's allegation could fall within the exception of unambiguous impropriety and therefore should be admitted to proof. The respondent submits that this decision is incorrect because it appears to have been taken without reaching any conclusions as to the effect of what

was said at the meeting. What they say is the correct approach is for the Judge to consider the transcript and listen to the recording and to determine whether or not there was unambiguous impropriety, as a preliminary issue at this stage of the proceedings. They refer to **Woodward v Santander UK Plc [2010] IRLR 834** as a case in which this was dealt with as a preliminary point.

11. They submit that if after reading the transcript and listening to the recording it is necessary to hear witness evidence, the appropriate approach is to list a Preliminary Hearing for evidence to be heard.

12. If it were suggested that the hearing on the merits should hear evidence upon which to determine admissibility, this is not appropriate, they submit, and should be avoided at this stage.

13. As a secondary point, the respondent submitted that it was already stated to the Tribunal that this was not a matter upon which the claimant raised any specific allegations in his ET1; in particular, he does not make any allegation that he was threatened with a gagging clause. The respondent challenges the finding that the content of the meeting of 9 January 2019 may well be relevant to the other allegations before the Tribunal, an approach which they submit goes wider than the position as set out in the case of **BNP Paribas v Mezzotero [2004] IRLR 508**, where there was a direct relationship between an allegation of discrimination and the alleged unambiguous impropriety.

14. The respondent therefore seeks to persuade the Tribunal that it would be in accordance with the overriding objective and in the interests of justice to reconsider the relevant part of the Judgment and to determine the question of whether there was unambiguous impropriety on the part of the respondent at this stage of the proceedings. It is inappropriate for this to be carried over to a hearing on the merits in this case.

The Claimant's Objections

15. The claimant set out his objections in a letter dated 25 September 2019.

16. He submitted that the decision to allow the recording and transcript of the meeting of 9 January 2019 was the correct one, and that while he disputed the fact that this was a without prejudice meeting, the respondent's conduct at that meeting did amount to unambiguous impropriety.

17. The claimant referred to the **BNP Paribas** decision, and observed that in that case, the court found that it was unrealistic to refer to the parties as having agreed expressly to speak without prejudice.

18. Furthermore, he said, there was no extant dispute between the parties as to termination prior to this meeting, in which the respondent's statements were made at a genuine attempt at compromise of that dispute; rather, the claimant stated that he wanted the relationship to continue and improve. The grievance submitted by the claimant on 5 and 7 November 2018 clearly showed, he said, that the claimant was unhappy about how he was being treated and decided to complain about it, that he wanted his grievance to be dealt with promptly and fairly and that he wanted the relationship between himself and the respondent to continue and to improve.

19. When the meeting of 9 January 2019 took place, the claimant said, there was no extant dispute between the parties as to termination to which the respondent's statements were made in a genuine attempt to compromise that dispute. Accordingly, references to gagging clauses and redundancy offers among others could not reasonably be adjudged to serve any other purpose "save for the furtherance of unambiguous impropriety". This is particularly so, he argued, because the claimant had promised to make a victimisation claim together with a public interest disclosure where the respondent failed to address wrongdoing. Accordingly, the without prejudice rule should not prevent the meeting transcript and audio recording being admissible in evidence before the Tribunal.

20. With regard to the relevance of the recording, the claimant submitted that in his ET1 he made reference, at paragraph 21, to confirmation that he was in possession of an audio recording of the meeting of 9 January 2019; alternatively he should be permitted to amend his claim.

21. The claimant therefore invited the Tribunal to reject the respondent's application for reconsideration of its Judgment and to allow the matter to proceed to a final hearing.

Discussion and Decision

22. The basis upon which the respondent seeks reconsideration of the Judgment is essentially that they challenge the finding made by the Tribunal that the words used in the meeting of 9 January 2019, as represented in the transcript seen by the Tribunal, were capable of amounting to "unambiguous impropriety" on the part of the respondent towards the claimant. What the respondent says is that in order to find that the transcript and recording of the meeting were admissible, the Tribunal has to reach a firm conclusion as to whether or not the word used were, in fact, unambiguously improper.

23. I have not reached such a conclusion, at least in part because I have not heard the recording nor heard evidence from the participants in the meeting. I have heard the claimant's submissions about what was said in the meeting, and how he interpreted it, but he did not deliver evidence under oath or affirmation and therefore, as the Judgment made clear, no findings in fact were made by me on this point.

24. It seemed to me that the issue before me was not to draw a firm conclusion as to the propriety of the respondent's comments in the meeting of 9 January 2019, but to decide whether or not the transcript and recording should be admitted to proof, as falling within the exception of unambiguous impropriety. The respondent, respectfully, says that I am wrong in this, and that the admissibility of the evidence must be determined at this stage in the proceedings by an assessment of whether or not the respondent acted with unambiguous impropriety, rather than leaving the matter open for the hearing on the merits.

25. Having reflected upon this, I recognise that there may be some force in the respondent's position. The issue for me to determine was one of admissibility. I decided to admit the evidence in order to allow the Tribunal

to draw a firm conclusion about that meeting, and determine whether or not a "threat", as the claimant alleges, was made by the respondent there, particularly when considering how that meeting falls into the wider context of the evidence relating to the relationship between the parties.

26. If I were to decide that there was unambiguous impropriety on the part of the respondent at this stage, it seemed to me that such a finding would give rise to a risk that the Tribunal hearing the evidence in the hearing on the merits would be bound to reach a particular view of that meeting, specifically to the respondent's disadvantage. Without having heard evidence, I did not see how the Tribunal could reach such a conclusion.

27. What the respondent proposes now is, in effect, a mini-trial of the facts on this particular point, to allow the Tribunal to reach a firm conclusion as to whether or not the respondent acted with unambiguous impropriety at that meeting. In so proposing, they wish me to revoke my original decision but to leave the matter still to be determined by the Tribunal following a further Preliminary Hearing.

28. The **Woodward** case provides some useful guidance at this point. The EAT held in that case that the unambiguous impropriety exception did not apply in the absence of blatant discrimination, and refused to extend the exception to include comments from which an inference of discrimination might be drawn. Extending that reasoning, the EAT held that while words which are unambiguously discriminatory should be admissible as an exception to the without prejudice rule, words that only could be discriminatory should not.

29. Having considered the matter in light of the respondent's application for reconsideration, and taking into account the principles arising from **Woodward**, it seems to me that it is in the interests of justice to revoke the decision taken in the Judgment of 11 September 2019 to allow the recording and transcript of the meeting of 9 January 2019 to be admitted to proof, and to refuse the claimant's application to allow evidence of that

meeting to be admitted to the hearing on the merits in this case, as matters currently stand.

30. It is the necessity to determine at this stage that the impropriety was unambiguous on the basis of the information before me which persuades me that my earlier decision should be altered. It is not appropriate to approach this on the basis that a final hearing would find it to be improper or not: that is not the test which the Tribunal would be asked to apply in that hearing. It is for this Tribunal to decide whether or not the respondent has acted with unambiguous impropriety at the meeting of 9 January 2019.

31. The conclusion I reached having read the transcript of that meeting, and heard from the parties, was that it was possible that such impropriety had occurred. However, I cannot conclude that unambiguous impropriety has taken place. It might be open to a Tribunal to draw that conclusion after hearing evidence from the parties involved but at this stage the reality of the Judgment of 11 September is that it makes clear that no such conclusion can be reached.

32. It is then necessary to determine what, if any, further procedure should be followed.

33. I am reluctant to engage the parties in further hearings at this stage, prior to allowing this matter to proceed to a final hearing on the merits. However, I consider that it would not be in the interests of justice to refuse to allow the evidence of that meeting to proceed without hearing the evidence to enable a firm conclusion to be reached as to whether or not unambiguous impropriety actually took place at the meeting. The previous Judgment approached this on the basis that it was alleged, or that it was possible, that this was the case; I am now persuaded that it is necessary for the Tribunal to make a decision as to whether or not that actually happened.

34. On the information I currently have, I cannot find that there was unambiguous impropriety on the part of the respondent at that meeting. There is a factual dispute about this, which relates not to precisely what was said but how it was said and how it is reasonable to interpret it.

35. Although I have heard a strike out application in this case, and accordingly should not be the Employment Judge to hear the merits hearing, it would fall to me to conduct this evidential hearing in order to determine this matter and reach a final conclusion on the admissibility of the evidence relating to the meeting of 9 January 2019. One day should be sufficient and parties are invited to attend the case management PH set down for 10 December 2019 with suitable dates upon which to list such a hearing.

36. The respondent's application for reconsideration is therefore granted.

Date of Judgment: 20 November 2019

Employment Judge: Murdo Macleod

Entered Into the Register: 20 November 2019

And Copied to Parties