EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr J Martin	and	**Croner Group Limited**

JUDGMENT
(CLOSED PRELIMINARY HEARING BY TELEPHONE)

Heard at: Birmingham **On: 22 July 2020**

Before: Employment Judge Gilroy QC, sitting alone

Appearances:

For the Claimant: Mrs C Thompson (Solicitor)

For the Respondent: Mr J Samson (Counsel)

ORDER

1. The Claimant's application to strike out the Respondent's Counterclaim on jurisdictional grounds is dismissed.

2. The Respondent's application to exclude documents in respect of which it asserts "without prejudice" privilege and confidentiality within the meaning of s.111A(1) of the Employment Rights Act 1996 ("ERA") is allowed. The relevant documents are referred to at paragraph [17] of the Tribunal's judgment.

3. By consent, the Claimant and CT Employment Law Limited shall pay the Respondent the sum of £1,400 plus VAT in respect of the Respondent's costs thrown away in relation to the Preliminary Hearing of 31 March 2020.

4. Directions for the future conduct of these proceedings are set out below the judgment which follows.

JUDGMENT WITH REASONS

Introduction

[1] At a Closed Preliminary Hearing held on 31 March 2020, Employment Judge Dimbylow adjourned to 22 July 2020 a Closed Preliminary Hearing in order that the Tribunal could deal with two applications by way of preliminary issue.

[a] The first matter was the Claimant's application for the Respondent's Counterclaim to be struck out on jurisdictional grounds.

[b] The second matter was an application by the Respondent to exclude material that was said to be "without prejudice" and/or impermissibly included given that it was material that related to "protected" conversations within the meaning of s.111 A(1) of the ERA.

Claimant's application to strike out the Respondent's Counterclaim

[2] Articles 3 and 4 of the Extension of Jurisdiction (England and Wales) Order 1994, "the 1994 Order" provide as follows:

> *"**3 Extension of jurisdiction***
>
> *Proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if -*
>
> *(a) the claim is one to which section 131(2) of the 1978 Act[1] applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*
>
> *(b) the claim is not one to which Article 5 applies; and*
>
> *(c) the claim arises or as outstanding on the termination of the employee's employment.*
>
> ***4***
>
> *Proceedings may be brought before an [employment tribunal] in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for sum due, in respect of personal injuries) if -*
>
> *(a) the claim is one to which Section 131(2) of the 1978 Act applies and which a Court in England and Wales would under the law for the time being in force had jurisdiction to hear and to determine;*
>
> *(b) the claim is not one to which Article 5 applies;*
>
> *(c) the claim arises with outstanding on the termination of the employment of the employee against whom it is made; and*
>
> *(d) proceedings in respect of a claim of that employee have been brought before an [employment tribunal] by virtue of this Order".*

[1] Employment Protection (Consolidation) Act 1978.

[3] The 1994 Order was an innovation, in that it enabled parties to employment tribunal proceedings, which are statutorily based, for the first time, in certain circumstances, to pursue common law claims of breach of contract, but for present purposes it is important to note two specific requirements which must be satisfied before the contractual jurisdiction can be invoked, one on each side. On the Claimant's side, the claim must *"arise"* or be *"outstanding on the termination of the employee's employment"*. On the Respondent's side, a counterclaim can only be raised where the employee has brought a claim *"by virtue of this Order"*.

[4] In this case, the Respondent raised a Counterclaim on the basis that it was the Respondent's contention that in the Claim Form (incorporating Particulars of Claim) the Claimant had made claims which engaged Article 3 of the 1994 Order, thereby triggering an entitlement on the part of the Respondent to pursue a counterclaim under Article 4.

[5] The Claimant maintains that in presenting his claims he did not engage the 1994 Order, and it is his case that a necessary consequence of that is that the Counterclaim is inadmissible.

[6] Rule 37 of the Employment Tribunal rules (*"Striking out"*), provides:

> "*1. 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 -*
>
> *(a) That it …. has no reasonable prospect of success*".

Plainly, a claim made in the absence of an applicable jurisdiction is a claim that has no reasonable prospect of success. The Claimant contended that the Tribunal lacked jurisdiction to hear the Respondent's Counterclaim and that it should therefore be struck out.

[7] It is beyond doubt that the Particulars of Claim contain terminology which is traditionally associated with claims of breach of contract. There are numerous references to *"contractual entitlement"*, to the Claimant relying upon *"the terms"* or *"the full terms of his contract"*, to *"breach of contract"* and the Claimant being *"contractually entitled"*, and the Respondent conversely not being *"contractually entitled"* to certain matters. The Claimant maintains, however, that there is a distinction to be drawn between a pleading which sets out a narrative which contains such terminology on the one hand, and on the other hand a pleading which actually articulates a substantive claim of breach of contract, and the Claimant says that if one analyses the Particulars of Claim from that perspective, this is a case where the breach of contract jurisdiction under the 1994 Order has not been engaged.

[8] However, in the Prayer to the Particulars of Claim, whereas the first 6 paragraphs contain language which plainly refers to statutory jurisdictions (for example, unlawful deductions from wages, unfair dismissal and breaches of The Working Time Regulations), at paragraph (7) the following appears (in terms of the remedy or relief sought by the Claimant):

> *"Compensation and damages for unpaid holiday"*.

Accordingly, whereas the Claimant maintains that the use in the body of the Particulars of Claim of terminology usually associated with claims of breach of contract is merely a narrative which provides the preamble to the substantive claims, when it comes to the articulation of those substantive claims, or more particularly the remedies sought in respect of those claims, separated into 7 different headings, on the face of it, not only is the language of breach of contract engaged, on the face of it the 1994 Order is also engaged.

[9] The Claimant conceded through Mrs Thompson that if paragraph 7 of the Prayer engaged the Order, then the Respondent was entitled pursue a substantive Counterclaim.

[10] Mr Samson for the Respondent made a further point. He submitted that independent of the Particulars of Claim, at Section 8.1 of the pro-forma ET1 form, the Claimant ticked various boxes including the box which indicated that he was owed *"other payments"*. Given that he was certainly claiming unfair dismissal, and had also ticked the *"holiday pay"* box, it was submitted that by ticking the *"other payments"* box he was referring to a contractual claim for unpaid commission.

[11] ***Read v Ryder UK EAT/0144/18/BA***, a decision of the Employment Appeal Tribunal, "EAT", (His Honour Judge Shanks sitting alone) underscores the position that an employer can only bring proceedings in the Employment Tribunal under the 1994 Order if the employee has brought proceedings in respect of a claim *"by virtue of"* the Order (see Article 4(d)). In ***Read v Ryder***, it was held that a claim is brought *"by virtue of"* the Order only if *"it must necessarily have been brought under the Order or if it has unequivocally been brought under the Order"*. Mr Samson emphasised the disjunctive nature of that test, given that in the Response to the Counterclaim (or at least, at this stage, the purported Counterclaim) the Claimant pleaded that the test was conjunctive or cumulative. On this issue, the construction urged by Mr Samson is clearly correct. ***Read v Ryder*** involved a litigant in person who claimed arrears of pay said to be due in his last pay cheque. Such a claim could have been brought under the Order or under Part 2 of the ERA (ie a claim of unlawful deductions) and it was held in that case that there was no unequivocal indication that the relevant claim had been brought under the Order. Accordingly, the EAT held that the Tribunal at first instance had had no jurisdiction to deal with the employer's counterclaim.

[12] In overturning the judgment of the Tribunal below to the effect that the Claimant had made a claim under the 1994 Order, thereby entitling the Respondent to pursue a counterclaim, HH Judge Shanks said this:

> *"8. As I have recited, the ET1 form did indeed include a tick on the box relating to "notice pay". But that phrase is itself ambiguous since it can refer to a claim for damages for summary dismissal or it can refer to a claim for pay due in respect of a notice period. In fact, in this case, it was clear from the text that I have referred to that the Claimant was claiming arrears of pay for work actually done during the notice period which he said should have been included in the final payslip and "holiday pay" in respect of untaken holiday. A claim for "holiday pay" can only be brought in the ET. The claim for arrears of pay could have been brought in the courts and by extension under Art 3 of the 1994 Order or it could have been brought in the ET under Part II of the Employment Rights Act 1996 as an unlawful deduction from wages. The question therefore arises whether a claim that could be brought by an employee in the ET under another provision of employment law but also under Art 3 of the 1994 Order is brought before the ET "by virtue of" the Order for the purposes of Art 4(d).*

> *9. Clearly, the purpose of Article 4(d) is to limit the scope of employers' claims to cases where a Claimant is treading outside the normally understood employment jurisdiction of the ET. It may well have been considered reasonable by the legislature that in a case like that the employer should be entitled to bring some kind of counterclaim. However, it seems to me unlikely that the intention was to allow a counterclaim by the employer in the ET where the employee's claim could have been brought in the ET without reference to the extension of jurisdiction provided by the Order. In my judgment, unless a claim brought by a Claimant either must necessarily have been brought under the Order or is unequivocally brought under the Order, it should not be considered to have been brought "by virtue of" the Order for the purposes of Article 4(d).*
>
> *10. The Claimant's arrears of pay claim could have been brought in the ET under Part II of the ERA 1996 and it was certainly not brought unequivocally under the Order. In those circumstances I do not think that it can be said to have been brought "by virtue of" the Order. Accordingly, Art 4(d) was not satisfied and the ET had no jurisdiction to consider the employer's claim. The EJ was therefore wrong as a matter of law to find that he had jurisdiction to deal with the employer's claim".*

[13] Applying the relevant principles, it is my conclusion that the Particulars of Claim contain numerous references to breach of contract, and that on the face of it, claims of breach of contract, which were outstanding upon the termination of the Claimant's employment, are made within those Particulars of Claim, but if I am wrong to conclude that the various references to the terminology of breach of contract means that the 1994 Order was engaged, in my judgment paragraph (7) of the Prayer is determinative. Whatever else was contained within the Particulars of Claim or the Claim Form generally, by expressly seeking *"damages"*, the Claimant engaged the 1994 Order. In my judgment, by his use of that term, he made it clear that he was bringing a claim which was both necessarily and unequivocally brought under the 1994 Order. If I am wrong in concluding that it was *unequivocally* so brought, I would have held that he made it clear that he was bringing a claim which was *necessarily* brought under the 1994 Order. Unlike the position in ***Read v Ryder***, the Particulars of Claim in this case were drafted by a lawyer (for the avoidance of doubt, not the lawyer who represented the Claimant at the Preliminary Hearing on 22 July 2020). This fortifies my conclusion that in using the above terminology, the Claimant was engaging the 1994 Order.

[14] It is my conclusion, therefore, that the Counterclaim was raised legitimately. The Claimant will need to defend it. Consequential directions are set out below for amended pleadings.

[15] The Claimant's application to strike out the Respondent's Counterclaim on jurisdictional grounds is, accordingly, dismissed.

Respondent's application re: material said to be 'WP' and/or confidential

[16] The Respondent applied to have certain correspondence excluded and rendered inadmissible for the purposes of these proceedings, principally on the grounds that for the relevant material to be admitted would offend against "without prejudice" privilege, and/or in the alternative that to admit the material would contravene s.111A(1) of the ERA, which deals with what has come to be known in the field of employment law as "protected conversations".

[17] The Respondent identified five items of correspondence:

(1) Communication from Respondent to Claimant on 22 March 2019 (PH Bundle, p.88).

(2) Communication from Claimant to Respondent on 26 March 2019 (PH Bundle, p.90).

(3) Communication from Respondent to Claimant on 29 March 2019 (PH Bundle, pp.91 and 96).

(4) Communication from Claimant to Respondent on 2 April 2019 (PH Bundle, p.95).

(5) Communication from Respondent to Claimant on 8 April 2019 (PH Bundle, p.97).

[18] In summary, it was the Respondent's position that the above correspondence amounted to "without prejudice" communications, and/or was inadmissible by virtue of s.111A(1) of the ERA.

[19] On 22 February 2019, the Claimant was signed off by his GP due to "Stress at work". In late January 2019 he had been challenged in relation to his performance and in mid-February 2019 he was written to by the Respondent on the basis that he currently had 9 penalty points on his driving licence and he was reminded of his responsibilities, in terms of driving, in relation to the performance of his role. It is the Claimant's case that as of mid-February 2019 the Respondent had also informed him that it had reviewed his commission payments and was considering a "claw back" of those payments. The Claimant did not agree that there was any legitimate reason for any claw back. It is part of the Claimant's substantive claim of constructive unfair dismissal that giving him a wholly misleading reason for the purported entitlement to deduct his commission caused a loss of trust and confidence. It is the Claimant's case that in or around the first week of March 2019 the Respondent closed down a group on the WhatsApp direct messaging application for the South West sales team, to which the Claimant belonged. It is the Claimant's case that an instruction was given to a third party to create a new group from which the Claimant was to be excluded. It is the Claimant's case that he was informed of this in or around the week the group was created. It is the Claimant's case that on or before 21 March 2019, the Respondent *"inexplicably"* blocked the Claimant's access to the company system, including the Claimant's access to e-mails, intranet, the pay system and its customer relationship management software, (known as "salesforce"). The Claimant will say that he made several requests for his access to be reinstated or to be provided with hard copies of payslips and commission statements and that the Respondent failed to respond to those requests.

[20] It was against the above background that Peninsula Business Services Limited (the Respondent being a subsidiary of Peninsula) wrote to the Claimant on 22 March 2019 (item (1) at paragraph [17] above), under the heading *"Without Prejudice and Subject to Contract; Proposed Meeting under Section 111 A ERA 1996"*, explaining that it was part of the author's role to oversee internal processes across the Peninsula Group, and inviting the Claimant to attend a meeting to

establish the nature and extent of his illness and, in light of the expected length of his absence and the reason given by his GP for his absence, the intention to have a "protected conversation". The letter concluded: *"The contents of this letter are strictly confidential and any discussions that we hold on the above basis will also remain confidential unless and until we reach any agreement".*

[21] The Claimant responded to the above letter by letter dated 26 March 2019 (item (2) at paragraph [17] above), heading his letter "*Without prejudice"* and stating that he was not well enough to attend a meeting and that his absence had been caused by unfair treatment on the part of the Respondent. He stated "*I intend to tackle this through the internal procedures. If, however, the company want to put an offer to me I am happy for them to do so".* He further indicated that any offer would have to take account of what he maintained were the incorrect claw backs which had been made from his commission payments.

[22] The Respondent then wrote to the Claimant on 29 March 2019 (item (3) at paragraph [17] above). In that letter the Respondent raised the suggestion that the Claimant had decided to set up a competitive business which could give rise to a breach of the Claimant's duty of fidelity to the Respondent. The letter of 29 March 2019 was plainly a continuation of the dialogue with regard to possible resolution of the issues between the parties.

[23] On 2 April 2019, the Claimant responded to Peninsula by e-mail (item (4) at paragraph [17] above). In his e-mail, the Claimant stated: *"If the company wishes to put an offer to me, I would ask you to do so. As I said before, I would expect an offer to be sensible and very reasonable for me to give due consideration to it. After everything I have done for the company, I would expect them to acknowledge this with a fair package and certainly no underhand behaviours".*

[24] By letter dated 8 April 2019 (item (5) referred to at paragraph [17] above), Peninsula indicated that it appeared that the Claimant was unwilling to provide the requested information on the subject of the Claimant apparently setting up a business in competition with the Respondent, leading the author of the letter to assume that it would not be possible to proceed with any discussions on either a "without prejudice" or s.111A(1) basis. The letter concluded: *"Consequently, this issue will be addressed in conjunction with other outstanding matters in open correspondence as you have requested".*

[25] The Tribunal was directed to, and had regard to, a number of well-established propositions, namely that "without prejudice" correspondence is generally regarded as inadmissible, that one has to consider whether during negotiations the parties contemplated, or might reasonably have contemplated litigation, that there is a public policy element in that parties must be free to attempt to resolve disputes or potential disputes where litigation may occur without fear of their communications on that aspect being relied upon by their opponents in the event that litigation ensues, that there is a strong public interest in the protection of the "without prejudice", rule, and that it is not to be put to one side save in truly exceptional circumstances. A court or tribunal may be invited to consider whether, if material said to be "without prejudice" is to be supressed, something amounting to a dishonest case could be put forward by one of the parties in the absence of such material being admitted. There is a well-recognised exception, usually

labelled the “unambiguous impropriety” exception, but that must be applied strictly. It is not an essential element of a dispute that the allegation in a subsequent claim has been made or there is a degree of objection to the course proposed or there is a degree of hostility by one or other party towards the other. The privilege may only be waived by conduct or where neither party objects and pre-termination negotiations extend to the fact of discussions, whether orally or in writing, and not just the content.

[26] Mr Samson submitted that by the time the relevant correspondence began, there was either a dispute or a dispute in the making between the parties, and that was in relation to commission, the Claimant’s performance, including the impact of his motoring offences and the alleged setting up another apparently competitive business. Mr Sampson maintained that these matters amounted to at least the makings of a dispute. He further submitted that the fact that the Respondent contemplated communicating with the Claimant using the “without prejudice” label in the correspondence immediately showed that there was the potential for litigation concerning the Claimant and in particular his position of employment. The letters made clear that the correspondence was to be regarded as “without prejudice” and in fact offers were made, or suggestions were made, in that correspondence that the Claimant should take legal advice. The Respondent maintained that there was nothing within its conduct which showed that it had waived privilege or was responsible for any form of unambiguous impropriety.

[27] Mrs Thompson maintained that the general proposition is that the “without prejudice” rule prevents statements made in a genuine attempt from being put before the Court, but there must be an existing dispute. That feature was lacking here. She maintained that the rule would not apply where the parties were not yet in dispute or where the parties are in dispute, but the correspondence or discussions merely set out the respective positions in that dispute or criticised the other parties’ position. She analysed the five relevant items of correspondence and contended, by reference to each of them, that they were items of communication and correspondence which did not offend against the “without prejudice” rule.

[28] S.111A of the ERA provides as follows:

> *“111A Confidentiality of negotiations before termination of employment*
>
> *(1)Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111.*
>
> *This is subject to subsections (3) to (5).*
>
> *(2)In subsection (1) “ pre-termination negotiations ” means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.*
>
> *(3)Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.*
>
> *(4)In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.*

(5)Subsection (1) does not affect the admissibility, on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved".

[29] The Respondent maintained that there are only three exclusions to s.111A(1), namely that (1) it does not apply where, on the Claimant's case a statutory provision requires them to be regarded as unfairly dismissed; (2) where there is anything said or done which in the view of the Tribunal was improper or connected with improper behaviour, and (3) it does not apply to "without prejudice save as to costs" correspondence.

[30] Mr Samson maintained that nothing in the course of the relevant correspondence indicated any improper behaviour on the part of the Respondent, the parties purpose, as expressed, amounted to a proper attempt to avert a potentially litigious situation, and the fact that the efforts to achieve resolution failed was irrelevant. Mr Samson maintained that the Respondent's offer of a protected conversation, together with a discussion about the Claimant's ill-health and the arrangements that might be required to accommodate that, amounted to a perfectly appropriate use of the statutory provisions. He also submitted that once it appeared that the Claimant had acted in breach of fiduciary duty[2], it had been perfectly proper for that matter to be raised, with the suggestion that the Claimant take legal advice.

[31] Mrs Thompson submitted that pre-termination negotiations purportedly under s.111A will not necessarily be held to be inadmissible in certain circumstances. She referred to the ACAS Code of Practice which indicates that an offer of (and discussions about) a settlement agreement will not be admissible so long as there have been no improper behaviour. Mrs Thompson also cited ***Crespigny v Information Security Forum Limited ET/2300316/14***, a first instance Employment Tribunal decision, where it was held that negotiations will not satisfy the criteria where no settlement offer is made to the employee.

[32] It is my conclusion that the correspondence referred to at paragraph [17] above is firmly within the parameters of "without prejudice" communication. At the material time, before the relevant chain of correspondence was initiated, there was either a dispute or the makings of a dispute between the parties. The public policy that applies in respect of the upholding of the "without prejudice" principle is of paramount importance and in my judgment there is a clear case here that "without prejudice" discussions were taking place and there was nothing in the conduct of the Respondent to indicate that "without prejudice" privilege had been waived, and similarly there was nothing improper in the Respondent's conduct in this regard. The Claimant plainly engaged in the "without prejudice" nature of the relevant dialogue from its very inception. In all of the circumstances, in my judgment, the relevant material is subject to "without prejudice" privilege, that privilege has not been waived, and the material in question is therefore inadmissible at the contested hearing in this matter.

[2] The matter raised was a potential breach of the duty of fidelity as opposed to breach of fiduciary duty. It is questionable whether the Claimant owed fiduciary duties to the Respondent but that is not material for present purposes).

[33] It is also my conclusion that the relevant material is rendered inadmissible by virtue of s.111A(1) of the ERA. The relevant correspondence was plainly engaged in in the context of "pre-termination negotiations", namely discussions held before the termination of the Claimant's employment with a view to it being terminated on terms agreed between the Claimant and the Respondent. There was no applicable provision contained in, or made under, the ERA or any other Act which required the Claimant to be regarded for the purposes of Part X of the ERA as unfairly dismissed (see s.111 A(3)). In engaging in the relevant discussion, the Respondent did not say or do anything which was improper or was connected with improper behaviour.

[34] Accordingly, the Respondent's application to exclude documents in respect of which it asserts "without prejudice" privilege and confidentiality within the meaning of s.111A(1) of the ERA is allowed. Reference is again made to the consequential directions set out below in respect of amended pleadings.

Respondent's costs application

[35] Upon the Tribunal giving its oral reasons in respect of the above two applications, the parties' representatives made submissions on the issue of the Respondent's application for costs thrown away and/or wasted for attendance at the Preliminary Hearing conducted on 31 March 2020. During the course of those submissions it emerged that there was a consensus between the parties as to the appropriate outcome in respect of that application, and for that reason it is necessary to deal only briefly with this aspect. It was conceded on behalf of the Claimant that a costs order was appropriate. Mrs Thompson for the Claimant submitted that it would be unfair for the burden of any costs order to fall on the Claimant's shoulders, and that it should be shared between the Claimant and his representatives. She submitted that the liability in respect of those costs should be joint and several as between the Claimant and his representatives. Mr Samson did not demur.

[36] The jurisdiction to make a costs order against a party is to be found at rule 76 of the Employment Tribunal rules. The jurisdiction to make a cost order against a representative, namely a wasted costs order, is to be found at rule 80. The parties accepted that the figure of £1,400 plus VAT was appropriate. Accordingly, the Tribunal ordered, by consent, that the Claimant and CT Employment Law Limited shall pay the Respondent the sum of £1,400 plus VAT in respect of the Respondent's costs thrown away in relation to the Preliminary Hearing of 31 March 2020.

DIRECTIONS

With the agreement of the parties, the Tribunal made the following Orders.

AMENDED PLEADINGS

(1) The Claimant shall, by no later than 4.00 pm on 23 September 2020, serve on the Respondent and file with the Tribunal an Amended Claim Form, containing Amended Particulars of Claim, such amendments to reflect paragraphs 1 and 2 of the Tribunal's above Order.

(2) The Respondent shall, by no later than 4.00 pm on 30 September 2020, serve on the Claimant and file with the Tribunal an Amended Response Form, containing Amended Grounds of Resistance, and, if so advised, an Amended Counterclaim, such amendments to reflect paragraphs 1 and 2 of the Tribunal's above Order.

(3) The Claimant shall, by no later than 4.00 pm on 7 October 2020, serve on the Respondent and file with the Tribunal an Amended Response to the Counterclaim, if so advised, such amendments to reflect paragraphs 1 and 2 of the Tribunal's above Order.

SCHEDULE OF LOSS

(4) The Claimant shall, by no later than 4.00 pm on 23 September 2020, serve on the Respondent and file with the Tribunal a Schedule of Loss.

(5) The Respondent shall, by no later than 4.00 pm on 30 September 2020, serve on the Claimant and file with the Tribunal a Counter-Schedule of Loss.

ISSUES IN THE CASE

(6) The parties shall, by no later than 4.00 pm on 14 October 2020, agree upon a List of Issues for the Tribunal to determine at the main hearing.

DOCUMENTS

(7) The parties are to provide disclosure to each other by lists by no later than 4.00 pm on 28 October 2020.

(8) The parties shall provide facilities for inspection, or copies of all documents required by the other party, by no later than 4.00 pm on 4 November 2020.

(9) The parties shall agree the contents of the index of the bundle of documents for the main hearing by no later than 4.00 pm on 18 November 2020.

(10) The parties shall agree the contents of a single bundle of documents by no later than 4.00 pm on 2 December 2020. The bundle should contain only those documents that will be referred to in evidence. The Respondent shall be responsible for the production of the properly paginated and indexed, agreed bundle of documents, which shall be tagged or bound.

WITNESS STATEMENTS

(11) The parties shall mutually exchange witness statements by no later than 4.00 pm on 16 December 2020. Each statement shall be paginated and each paragraph will be numbered. No further statements may be served without the permission of the Tribunal.

(12) No witness will be permitted to give evidence at the hearing (without the permission of the Tribunal) unless a statement has been prepared in respect of that witness and exchanged in accordance with this Order.

(13) The witness statements will form the evidence in chief of the witnesses at the hearing and are to be prepared on the basis that they contain all of the evidence of each witness in chief without amplification. Witness statements shall refer to documents by their page number in the bundle. At the discretion of the Tribunal, witness statements will be taken as read.

SKELETON ARGUMENTS

(14) The parties shall mutually exchange (and file with the Tribunal) skeleton arguments and serve one copy of each of the same on the Tribunal by no later than 4.00 pm on 18 January 2021.

LODGING OF DOCUMENTS

(15) One copy of the agreed bundle and one copy of each of the witness statements of each party shall be lodged with the Tribunal by no later than 4 pm on 18 January 2021. It shall be the responsibility of each party to lodge their respective witness statements. It shall be the responsibility of the Respondent to lodge the agreed bundle.

HEARING

(16) All issues in the case, including remedy, will be determined at a final hearing at the Employment Tribunal in Birmingham on **25, 26, 27, 28 29 January 2021**, starting at 10.00 am or as soon as possible afterwards. Notice of these dates was given to the parties by the Tribunal by letter dated 9 March 2020.

(17) No postponement of the main hearing will be allowed, save in exceptional circumstances. All issues of liability and (as appropriate) remedy shall be dealt with at that hearing.

(18) If at any stage either party considers that the time allocated by the Tribunal for the hearing of this case is insufficient, that party shall notify the Tribunal immediately explaining why the allocation is considered to be insufficient and giving a fresh time estimate.

JUDICIAL MEDIATION

(19) The parties did not seek Judicial Mediation.

JUDICIAL ASSESSMENT

(20) The parties did not seek Judicial Assessment.

THE OVERRIDING OBJECTIVE

(21) In accordance with The Overriding Objective, as set out in Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, this case will be managed so as to ensure a fair hearing. This may include limiting the time for witnesses' evidence, cross-examination and the making of submissions.

Employment Judge Gilroy QC
24 July 2020

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.