EMPLOYMENT TRIBUNALS

Claimant **Mr G. Seers**

Respondent **Metroline Limited**

v

Heard at: Watford (by Video - CVP)
On: 10 September 2019

Before: Employment Judge Bloch QC

Appearances:

For the Claimant: In person For the Respondent: Mr D Brown, counsel

RESERVED JUDGMENT
(To be filed separately from main file and not to been seen by the tribunal for the full merits hearing)

So much of the conversation between the claimant and Mr Darren Hill, Managing Director of the respondent, on 17 June 2019, as related a potential settlement of an employment dispute between the parties and the alternative to such settlement, shall not be admissible in evidence at the full merits hearing of this claim and all records of that

conversation shall be redacted accordingly or the purposes of the full merits hearing.

REASONS

Introduction

1. This matter was listed as a preliminary hearing by video (CVP) to resolve a question of admissibility, regarding part of a conversation between the claimant and Mr Darren Hill of the respondent on 17 June 2019, in relation to the full merits hearing, which is listed for 7 to 11 December 2020. It was initially intended that this question would be resolved on the first day of the full merits hearing but, following postponement of the full merits hearing, by order dated 8 September 2020 Regional Judge Foxwell directed a separate hearing on 10 September 2020 to resolve it.

The issue

2. It was common ground between the parities that (by virtue of subsection (3) thereof (relating to claims of "automatically unfair dismissal"), s.111A ERA 1996 (regarding pre-termination negotiations) did not apply. The respondent relied on the common law 'without prejudice' rule. There were accordingly three key issues I have to decide::

    a. was there by the time of the alleged "without prejudice" part of the 17 June 2019 conversation 'a dispute' between the parties?
    b. was the conversation between the parties a without prejudice discussion regarding potential settlement of that dispute? and
    c. if so, was there 'unambiguous impropriety' on the part of the respondent such that the cloak of without prejudice protection was lost?

The hearing/standard of proof

3. The hearing took one day, during which I heard evidence from the claimant and two witnesses for the respondent. There were delays during the day caused by problems with electronic equipment, so that it was not possible to complete the hearing that day. I instead

directed the parties to provide written submissions to me. There was then delay in the transmission of those submissions to me.

4. The parties appeared before me with witness statements, ready to give oral evidence and they produced an agreed bundle of documents (to key pages numbers of which I make reference below in square brackets). I expressed some concern to the parties about the nature of such a "mini-hearing" with my being required to make making findings which might depend on the credibility of key witnesses, without hearing the entirety of the evidence which will be adduced at the full merits hearing. Both parties were, however, content for me to hear the evidence and given the way the matter has come before me (a day's hearing well before the full merits hearing), that seemed to be the appropriate way forward. It was in any event possible for me to take a clear view on the contents of a very limited part of a one conversation, in which I would be in as good a position (or nearly as good a position) as a judge at the full hearing to decide what occurred. In any event, given the nature of this hearing, my findings would not be available so as to affect the decision of the judge.

5. The parties did not actually address me on the standard of proof. In cases concerning legally privileged material, the test of a "strong prima facie case" (of unambiguous impropriety) is the usual test: see *Barrowfen Properties v Patel* [2010] 9 WLUK 237 23.9.20). However that case (as many other such cases) was decided only on the papers (a disclosure application), while I had the advantage of hearing the tested live evidence of the parties. So, it seemed right for me to resolve the matter on the balance of probabilities – and neither party suggested otherwise.

The conversation on 17 June 2019

6. The claimant stated (paragraph 128 of his witness statement): "17 June: I attended Cricklewood garage for a meeting with Mr. Hill; this was in the company of my Union representative. The invitation email … did not mention it was without prejudice discussion, and as such I was unaware of the conditions surrounding such a process. It was at this meeting that Mr. Hill made a statement that I believe falls outside the recommended guidelines for a without prejudice conversation. He stated that if I did not accept the

settlement agreement I would be dismissed via the alternative method. Although this brought a remark about pre-determination from both me and my union representative, I did not realise the significance of what he had said… I assert that the notes [at pages 438 to 452 of the bundle] do not reflect the meeting correctly.

7. In Mr. Hill's witness statement he states that Miss Yesufu came with him to take notes while Mr. Fadil accompanied the claimant. So far as he could recall neither Mr. Fadil nor the claimant took notes. He confirmed the accuracy of Ms. Yesufu's notes typed at pages 438-440, and handwritten at 441-452 though they were not a transcript. He said that after a break in the meeting he told the claimant that the relationship between the claimant and the respondent appeared to have broken down irretrievably [paragraph 46]. . At paragraph 47 of the witness statement he said: " I explained that one option would therefore be to agree terms through a settlement agreement. If that was not viable, a hearing would take place to determine whether the relationship had indeed broken down irretrievably ie not a misconduct hearing but it might lead to [the claimant's] dismissal". The claimant appeared to have taken legal advice saying he had been told he had a strong case but he also said that he wanted to take further advice from the Union solicitor.

8. Mr. Hill denied that he threatened the claimant and had said that if he did not take the settlement option the respondent would find some other means to dismiss him, or words to that effect. He recalled that Mr Fadil had said that the matter was "predetermined" but Mr. Hill had denied that and said there would be a separate hearing to determine if the relationship had broken down. He referred to Ms Yesufu's hand written note at page 451: Darren explained that he could decide to accept the settlement or the option will be implemented" and confirmed that he had said this. He was referring to the settlement as the first option, the second option - If the claimant rejected the offer - being a hearing to determine whether the relationship had broken down. Clearly, (he added) the claimant understood that that was what he meant because he replied that he wanted a meeting to discuss "both options" (as recorded at page 451).

9. In Ms Yesufu's handwritten contemporaneous note of 17 June 2019 meeting the claimant is recorded as having said that he had

a negative attitude toward senior management and that there was no trust between himself and senior management and vice versa. He confirmed that he did not want to engage in the "Drum" meeting (see below). He stated that he would work with particular members of senior management but it would not be a happy relationship. After a 10 minute adjournment and reflection that the recent medical report had stated that there were no mental health issues, Mr. Hill stated that the relationship between the claimant and the respondent had deteriorated. [**449**] There were two options. The first, was a meeting to decide whether the relationship had deteriorated. This was a formal meeting not a disciplinary. "It could lead to termination to the contract". The second was that they could mutually go their separate ways. Mr. Hill asked if the claimant would be happy to proceed with the latter which would lead to a binding agreement. The claimant said that he had been advised that he had a strong case as the respondent did not abide by its own rules.

10. In Ms Yesufu's typed up note (recorded as not being verbatim) it said at the relevant point: "DH [Mr Hill]] advised that the relationship between GS [the claimant] and the company appears to be irretrievably broken and provided GS with two options which were to conduct a formal meeting to decide whether the relationship between the company and GS has irretrievably broken down, which could potentially lead to GS's termination of employment… The other option was to discuss if there was an amicable alternative."

11. In the course of the hearing before me Ms Yesufu insisted that the typed up notes were simply a neatened, grammaticallycorrected version of the handwritten notes. They are plainly much more than that, changing and adding to the text to give a somewhat embellished version of the language used, as a cursory examination of both reveals. I regard it as safe to rely only on the handwritten notes and consider that, however unwise, Ms Yesufu did not have bad intent in "improving" the notes to the extent that she did. I do not believe that she was trying to change the substance of the notes. Indeed, it is noteworthy that both sets of notes were retained and disclosed in these proceedings by the respondent. I am fortified in that view by the fact that the claimant regarded that note as broadly accurate (otherwise than in regard to the critical alleged "without prejudice" part of it and one

paragraph which is not crucial in this respect). In regard to the handwritten notes it is right that the claimant pointed out that in "option one" the words "it could lead to termination to the contract" seem to have been added into the text. Given the "improvements" of the typed version of the notes I am prepared to consider it as a real possibility and even likely that there has been that addition so that the first option was stated by Mr Hill stated as " a meeting to decide whether the relationship is deteriorated – it's a formal meeting – not a disciplinary".

The law

12. In his written submissions Mr Brown accurately set out the applicable principles and approach of the courts to this area, as set out in the ensuing paragraphs.

13. In *Unilever PLC v The Proctor & Gamble Co* [2000] 1 WLR 2436, Robert Walker LJ stated that:

> [T]he rule, if not "sacred" (*Hoghton v Hoghton* (1852) 15 Beav. 278, 321), has a wide and compelling effect. That is particularly true where the "without prejudice" communications in question consist not of letters or other written documents but of wide-ranging unscripted discussions… At a meeting of that sort… a threat of infringement proceedings may be deeply embedded in negotiations for a compromise solution [p2443H2444B].
>
> Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders [p2448H-2449B].

14. The without prejudice rule may not 'act as a cloak for perjury, blackmail or other "unambiguous impropriety"' but the Court of Appeal has 'warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion' [p.2444G].

15. In *Berry Trade Ltd & Anor v Moussavi & Ors* [2003] EWCA Civ 715, it is recorded that [para 35]:

> .. Thus the British Columbia case of *Greenwood v Fitt* involved the defendant threatening in those negotiations that he would give perjured evidence and bribe other witnesses to perjure themselves unless the claimants withdrew their claim. Hoffmann LJ said:
>
> > "These are clear cases of improper threats, but the value of the without prejudice rule would be seriously impaired if its protection could be removed from anything less than unambiguous impropriety. The rule is designed to encourage parties to express themselves freely and without inhibition. I think it is quite wrong for the tape recorded words of a layman, who has used colourful or even exaggerated language, to be picked over in order to support an argument that he intends to raise defences which he does not really believe to be true."

16. In *Savings & Investment Bank Ltd (in liquidation) v Fincken* [2004] 1 WLR 667, Rix LJ held that 'the public interest in [the without prejudice] rule is very great and not to be sacrificed save in truly exceptional and needy circumstances' [para 57].

17. The ACAS Code of Practice on Settlement Agreements (Code of Practice 4) (2013), gives examples of 'improper behaviour' for the purpose of s.111A ERA 1996 at paragraph 18. Those examples include, paragraph 18(ii), '[a]n employer saying before any form of disciplinary process has begun that if a settlement proposal is rejected then the employee **will** be dismissed'. But it goes on to state that 'the test of "unambiguous impropriety" is a narrower test than that of improper behaviour' (paragraph 21).

    I am satisfied that the Guide correctly reflects the authorities in stating that "unambiguous impropriety" test is a narrower test than that of 'improper behaviour' under s.111A ERA 1996.

18. In *Framlington Group Ltd v Barnetson* [2007] IRLR 598, the Court of Appeal held that, when determining if there was 'a dispute' at the material time, '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' [para 34].

19. The EAT discussed the without prejudice rule in *Portnykh v Nomura International Plc* [2014] IRLR 215 (EAT). His Honour Judge Hand QC held:

> It is, after all, very obvious that the operation of the [without prejudice rule] is likely to cause a forensic disadvantage to one party or another but the public policy supporting the exclusionary rule is predicated on that disadvantage being overridden by the need to create the most beneficial circumstances so as to encourage and facilitate the settlement of disputes and avoid litigation [para 25]:
>
> I do not need to go to the extreme of suggesting that in *every* case where the parties reach the stage of proffering and considering a compromise agreement… that axiomatically there is a "dispute" or "potential dispute", although when that stage is reached I think that will very often be so… If an employer announces an intention to dismiss the employee for misconduct and there are then discussions around the question of the alternative of the dismissal being for redundancy, no matter how amicable all that might be, it seems to me beyond argument that it either demonstrates a present dispute or contains the potential for a future dispute [emphasis added] [para 34]

Was there a dispute?

20. In my judgment for the reasons submitted by the respondent, by the 17 June 2019 there was on the agreed facts (including the agreed chronology) a dispute between the parties. In particular:

    a. On 23 November 2018 there had a conference with management and the union at "The Drum". In crossexamination, the claimant accepted that he was 'disengaged with the process' and that his relationship with his childhood friend, Mr Harris was beginning to sour. The claimant was publically critical of management at the conference and he accepted that his manager suggested to him that he had caused embarrassment.

    b. In cross-examination, the claimant accepted that he was critical of numerous employees;

    c. As regards Mr Harris, the claimant confirmed in crossexamination that he considered him to have acted in a 'deliberately misleading' way;

    d. The claimant was spoken to by his manager in advance of a second conference at "The Drum" on 3 May 2019. The claimant was told to behave in a respectful manner. The claimant's evidence is that he was also told 'to behave' by the company solicitor;

e. Notwithstanding the above, the claimant referred to feeling disconnected at the conference on 3 May 2019. He made comments about the honesty and integrity of staff.

f. The respondent referred the claimant to Occupational Health following the 3 May 2019 conference due to concerns about whether his personality or conduct was due to an underlying health condition;

g. In cross-examination, the claimant accepted that, aside from the specific comment in issue **[449]** (and another paragraph at [**443]** , not material in the present context) , the handwritten notes taken by Ms Yesufu **[441-452]** were 'largely accurate';

h. During the alleged "open" part of the 17 June meeting, the claimant accepted that 'he does have a negative attitude towards senior management' **[441]**. When asked 'how would you describe the culture of the company', he replied 'there is no trust between himself and senior management and vice versa' **[441]**.

21. In the alleged 'without prejudice' part of the meeting, Mr Hill stated that 'from the company's perspective the relationship has deteriorated [and] there are two options' **[449]**. The claimant asked about mediation **[449]**. He accepted in cross-examination that he recognised that relationships needed rebuilding.

22. He referred to going 'to tribunal' **[450]**, the claimant having been advised, as he accepted in cross-examination, before the second part/without prejudice part of the meeting, that 'he has a strong case' **[450]** and he referred to his desire to 'discuss whistleblowing/constructive dismissal with the union solicitor' **[452]**.

23. I accordingly accept the respondent's submission that by the time of this conversation litigation was in contemplation. There was at the very least was a state of affairs which, if not resolved by agreement, had the potential to result in litigation: *Framlington Group Ltd v Barnetson* (as quoted above).

Without prejudice

24. It follows that I also accept that the conversation about the options of settlement and the meeting regarding the deterioration of the relationship between the parties was an attempt to find an agreed solution to the dispute and therefore (on the face of it) "without prejudice"

Conclusion regarding the evidence of the meeting

25. There was very little on which I could decide which of the claimant and Mr. Hill was to be preferred simply based upon the oral evidence to me. Both were possible. The position was not materially advanced by the oral evidence of the claimant, Ms Yesufu or Mr Mr Hill. The safest source of what was said, is in my judgment, the contemporaneous handwritten note of Ms Yesufu, but making the limited deletion referred to above. There was no note before me from the claimant's trades union representative and in the event little reliance was or could be placed on anything emanating from him.

26. The question which I must decide is whether what was said on behalf of the respondent at the meeting amounted to unambiguous impropriety. In my judgment it did not. The alternatives put to the claimant were settlement agreement or a formal meeting to decide whether the relationship between the parties had irretrievably broken down. What was said was that if the relationship had broken down, this would lead to dismissal not for misconduct but because the relationship could not be repaired.

27. I can well see that there may have been a perception by the claimant or his union representative that the issue of dismissal had been pre-determined. Indeed Mr Hill had already referred to the deterioration of the relationship between the claimant and the respondent. However, that was, to at least a certain extent common ground, given what the claimant was himself saying (see above). In these circumstances, dismissal on that ground was on any view a very likely outcome. This is very different from a potential misconduct dismissal where the assumption of guilt in advance would be a serious error - and the threat of dismissal as an alternative to a settlement agreement would on the face of it be improper, for the purposes of s.111A ERA 1996 (had that section applied) as indicated by the ACAS Code. Here, however, it was clear to the parties that the relationship between them had deteriorated, and while it would not be right for there to a predetermination of "irretrievable breakdown" of that relationship , it is easy to see how the claimant and/or the trades union representative may have assumed that in reality the choice was between settlement or dismissal. On the balance of probabilities I

conclude that the matter was not put in that way suggested by the claimant but I also conclude that even if the language had slipped towards that way of putting it, would not have amounted to unambiguous impropriety. I consider that this is exactly such a case where the words of the parties should not be picked over in order to consider finding unambiguous impropriety. Put differently, the factual dispute is essentially whether Mr Hill said that the claimant '*would'* be dismissed or that he '*could'* be dismissed and picking over words runs counter to the public policy of enabling parties to speak freely without having to monitor each sentence uttered with lawyers on their shoulders.

28. Accordingly, I accept the respondent's submission that, taking the claimant's case at its highest the 'threat' relied on by him was he would be dismissed. While in some circumstances that might amount to 'improper behaviour' for the purpose of s.111A ERA 1996, it falls well short of the 'unambiguous impropriety' test: a submitted by the respondent, dismissal was the very thing likely to bring about the litigation in respect of which settlement was proposed. The 'without prejudice' rule permitted the parties to speak freely and without inhibition about that matter.

29. I also reject the submission of the claimant that the behaviour of the respondent in regard to their evidence in support of maintaining without prejudice protection over the relevant conversation itself amounts to unambiguous impropriety. Even if that were possible in principle (which I doubt, since the "iniquity" concerns the subject or circumstances of the "protected" conversation itself, not what the parties thereafter seek to make of it) their conduct (and in particular that of Ms Yesufu) in judgment falls well short (on the authorities cited above) of the impropriety necessary for a party to lose that protection.

Conclusion regarding admissibility

30. Accordingly I accept the respondent's submissions that on the evidence and even put at its highest for the claimant there was no unambiguous impropriety sufficient to set aside the protection of the without prejudice part of conversation. I find this on the balance of probabilities and (if that is the appropriate standard) I find that there is here no strong prima facie case of unambiguous impropriety

Employment Judge Bloch QC

Date:5 October 2020

Judgment sent to the parties on

.09/10/2020

Jon Marlowe
For the Tribunal office