EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M. Thomas	**V**	**(1) McDowell & Co Limited** **(2) DMC Plc**

Heard at: London Central (by video) **On**: 15 March 2021

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: Mr D. Walton (solicitor)

For the Respondent: Ms L. Halsall (of Counsel)

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

JUDGMENT

1. The respondent's application dated 11 March 2021 to re-amend the Grounds of Resistance is granted.

2. The telephone conference call between Mr Davey and the claimant on 18 March 2020 and Mr Davey's email to the claimant of 26 March 2020 ("protected conversation") are pre-termination negotiations within the meaning of section 111A of the Employment Rights Act 1996 ("ERA") and therefore are inadmissible in the tribunal proceedings on the claimant's complaint of unfair dismissal.

3. The respondents acted unreasonably in the way they conducted part of the proceedings in relation to the issue of admissibility of the protected conversation and are ordered to pay the claimant a sum of £3,120 in respect of the costs incurred by the claimant.

REASONS

Background and Issues

1. By a claim form presented on 06 November 2020 the claimant brought a complaint of unfair dismissal and money claims in respect of outstanding commission pay. In paragraphs 5 and 8 of the particulars of claim the claimant refers to a telephone conversation with Mr Simon Davey (CEO of the second respondent), which took place on 18/03/2020 and Mr Davey's email of 26/03/2020 ("**protected conversation**").

2. The respondents presented a response on 6 January 2021 on a "protected basis" and on 20 January 2020 an amended response ("**Amended Response**"). In the original response the second respondent sought to be removed from these proceedings on the ground that at all material times the claimant's employer was the first respondent. This issue was not part of the respondents' application to be dealt with at the today's preliminary hearing, and therefore remains to be determined late in the proceedings.

3. In the Amended Response the respondents submitted that the protected conversation was on a "without prejudice" basis and therefore was inadmissible in the proceedings. The relevant paragraphs of the Amended Response read:

> **Without Prejudice**
>
> 4. The information at paragraphs 5 and 8 of the Claimant's Particulars of Claim relate to material exclusively from Without Prejudice correspondence and discussions. The Claimant confirms this in his Particulars of Claim.
>
> 5. The Respondent request that these paragraphs be struck out because they breach the rule against admissibility of Without Prejudice correspondence.

4. The case was listed for the full merits hearing on 15,16 and 17 March 2021.

4. On 22 January 2021, the parties' solicitors had a telephone conversation to discuss case management issues and the issue of admissibility of the protected correspondence. The claimant's position was that the protected correspondence was not without prejudice because at the relevant time there was no extant dispute between the parties.

5. On 29 January 2021, the claimant's solicitor confirmed in an email to the respondents' solicitors that his client intended to rely on the protected conversation as set out in paragraph 5 and 8 of the particulars of claim.

6. A further telephone conversation took place between the parties' solicitors, during which the claimant's solicitor suggested that a preliminary hearing should be requested to determine the issue of admissibility of the protected conversation.

7. On 5 February 2021, the respondents' solicitor wrote to the claimant's solicitor in relation to that suggestion and setting out the respondents' position on the protected conversation in the following terms (my underlining):

> "*You will of course be aware that the WP rule prevents statements made in a genuine attempt to settle an existing dispute, whether made in writing or orally, from being put before the court as evidence of admissions against the interest of the party that made them. The caselaw makes it clear that where there is either a present or potential dispute, the discussions are protected by the WP veil. Furthermore, the relevant correspondence was marked WP and it would not have been so marked if "there had not been a thought in the sender's mind…that the issue between the parties might lead to litigation" Conegate Limited v HMRC [2018] UKFTT 082 (TC).*
>
> *Notwithstanding this your client states that such correspondence could not properly or reasonable be regarded as WP (emphasis added in the text above), yet does not explain why. For instance, none of the legal exceptions apply in this case, there having been no improper behaviour, forms of harassment, bullying, intimidation and/or discrimination. This is supported by the Particulars of Claim which makes no refence to any impropriety in this regard, save of course for the alleged "threat of compulsory redundancy" which by any logical analysis of discussions of this nature would have been referred to as a possible outcome should discussions prove unsuccessful.*
>
> *To this end, our client does not accept that the discussions or any written communication relating to settlement are admissible. Should your client insist on applying for a Preliminary Hearing to determine this point, we put him on notice of our client's intention to pursue him for the costs associated in defending the application.*"

8. There were further exchanges between the parties' solicitors on case management issues and the issue of admissibility of the protected conversation.

9. On 19 February 2021, the claimant's solicitor wrote to the respondents' solicitors reiterating the claimant's position that the protected conversation was not without prejudice and agreeing that it would be sensible to determine the issue at a preliminary hearing, suggesting that the respondents should make an application to the tribunal to which the claimant would consent. The relevant passage of his email read (my underlining):

> "*As was conveyed to you in the clearest terms during our telephone conversation on 18 February, it is my client's position that under no circumstances could any of those exchanges be said to amount to a settlement of an existing dispute (as genuine "without prejudice" communication has to be). Again, I note from the terms of your email that you have given no information as to what dispute your client claims to be able to refer to and rely upon in supporting its position that the relevant exchanges are inadmissible. In the circumstances, and on this point in particular, I and my client consider your client's position to be unsustainable and unreasonable. On the basis that it now appears that this issue is going to have to*

> *be addressed and dealt with separately, I must reserve the right to show this correspondence to the Employment Judge at the relevant time, not least in support of an application for costs against your client, in adopting the position that it has without any proper justification. In such circumstances, I consider it is open to the Claimant to suggest that your client's approach is deliberately obstructive and unreasonable which would of course support an application for costs.*"

10. On 23 February 2021, the respondents' solicitor made an application to convert the first day of the full merits hearing to determine the admissibility issue. The application was made on the basis that the protected conversation was inadmissible because it was "without prejudice" (my underlining).

> "*We act for the First and Second Respondent (together the "Respondents") in the above proceedings and request that a preliminary hearing ("PH") be held to determine the admissibility of the details discussed and correspondence sent on a without prejudice basis ("WP") prior to the Claimant's termination.*
>
> *The discussion in question took place on 19 March 2020, followed by an email sent on 26 March 2020 marked "WP".*
>
> *The Respondents' do not accept that the discussions or any written communication relating to settlement are admissible, as set out in paragraphs 4 & 5 of the amended ET3 filed on 20 January 2021*"

11. The claimant confirmed his agreement, and the application was granted by Employment Judge Baty on 9 March 2021.

12. On 11 March 2021 at 18:33, the respondents' solicitors made a further application to the tribunal seeking to change the Amended Response to replace paragraphs 4 and 5 to read ("**Re-amended Response**"):

> **Protected Conversation**
>
> 4. The information at paragraphs 5 and 8 of the Claimant's Particulars of Claim relate to a protected conversation undertaken in accordance with S111A of the Employment Rights Act.
>
> 5. The Respondent request that these paragraphs be struck out because they breach the rule against admissibility of S111A correspondence.

13. The respondents' solicitors explained the reason for seeking the change as follows:

> "*We had initially understood that the discussion and subsequent correspondence (sent confirming details of the same) had been communicated on a without prejudice basis however, as part of our clients' preparation in advance of the Preliminary Hearing listed for this coming Monday, our client disclosed a script that had been used for the purpose of conducting the discussion on 19 March*

2020. The script makes it clear that the discussion was being held in accordance with section 111A of ERA 1996 and as part of our ongoing duty of disclosure, we have today advised the Claimant's solicitor of this and our client's intention to rely on privilege pursuant to section 111A at Monday's hearing.

…….

We have raised this issue as soon as reasonably practicable so that both parties have sufficient time to prepare in advance of the Preliminary Hearing. We do not believe that this will prejudice the Claimant's position, given that it will be a question of fact as to whether the discussion took place as per the Respondent's evidence which the Claimant will be able to address in oral testimony.

We consider that an order in the terms requested would assist the tribunal in dealing with the proceedings efficiently and fairly and in accordance with the overriding objective because it will ensure that the Employment Tribunal is able to determine the question of admissibility based on the correct information, thus ensuring that a fair hearing is able to take place."

14. At the hearing the claimant was represented by Mr David Walton (solicitor) and the respondents by Laura Halsall (of Counsel). I was referred to a bundle of documents of 115 pages the parties introduced in evidence. The parties submitted two witness statements of the claimant and Mr Davey for the respondent. However, the issues were resolved without the parties needing to call them to give evidence.

15. At the start of the hearing Ms Halsall said that her instructions were to pursue the admissibility issue on both grounds, "pre-termination negotiations" under section 111A of ERA and as a "without prejudice" communication. She, however, accepted that in the Re-amended Response the respondents no longer sought to argue that the protected conversation was "without prejudice", and therefore that ground was abandoned.

Leave to Re-amend

16. The first issue I needed to determine was whether the respondents' application to present Re-amended Response should be granted.

Submissions

17. In support of the application Ms Halsall argued that:

    a. the application of that nature could be made at any stage in the proceedings,
    b. it was not unusual that I new line of defence was put forward;
    c. there was some confusion around "without prejudice" and the section 111A statutory rule,
    d. the respondents' solicitors spoke with her and then acted quickly to make the application,
    e. the factual matrix upon which the admissibility issue was argued never changed,

f. the claimant would not be prejudiced by the change because he was aware that the issue of admissibility of protected conversation was contested;
g. the overriding objective required tribunal to be flexible and deal with cases fairly and justly.

18. Mr Walton for the claimant opposed the application. He argued that:
    a. the application was made very late. He took me through the history of his exchanges with the respondents' solicitor on this matter.
    b. it was clear that from the outset that the respondents were pursuing this issue on the "without prejudice" ground and not under section 111A,
    c. in doing so they had threated the claimant with costs consequences if he did not concede that the protected conversation was "without prejudice",
    d. they had now changed tack and completely abandoned their "without prejudice" case,
    e. the respondents had countless opportunities to consider their position on this issue, and it was inconceivable that the discovery of the script for the call on 18/03/20 was the real reason for the late change in the respondents' stance,
    f. the case had been prepared by the claimant on the basis that the admissibility issue would be argued on the without prejudice rule basis,
    g. the respondent's application had been made just one clear business day before the hearing and it was insufficient time for the claimant to prepare his case to deal with the admissibility issue on the newly advanced basis.

19. Mr Walton reserved his position to make a costs application pending my decision on the respondents' application.

The Law and Conclusions

20. Under Rule 29 and Rule 41 of the Employment Tribunals Rules of Procedure 2013, tribunals have broad power to make case management orders and regulate their own procedures in the manner they consider fair having regard to the overriding objective in Rule 2. This includes tribunals' discretion to allow the parties to make amendments to their pleaded cases.

21. Rule 2 requires the tribunal to deal with a case fairly and justly, "including so far as practicable—
    a. ensuring that the parties are on an equal footing;
    b. dealing with cases in ways which are proportionate to the complexity and importance of the issues;
    c. avoiding unnecessary formality and seeking flexibility in the proceedings;
    d. avoiding delay, so far as compatible with proper consideration of the issues; and
    e. saving expense.

22. In exercising discretion, tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it (Cocking v Sandhurst (Stationers) Ltd and anor 1974 ICR 650, NIRC).

23. The Presidential Guidance on General Case Management guide tribunals to have regard to all relevant factors in carrying out balancing exercise in deciding whether to grant an application to amend. Such balancing exercise should include the tribunal deciding whether the amendment applied for is a minor matter or a substantial alteration, any time limit issues arising from the application, the timing and manner of the application. If the amendment sought is substantial, "*[r]egard must be had to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. If necessary, leave to amend can be made conditional on the payment of costs by the claimant if the other party has been put to expense as a result of a defect in the claim form*".

24. I find that the application was a substantial alteration of the respondents' position on the admissibility issue. I reject the respondents' contention that the disclosure of the script for the telephone call on 18/03/2020 was a new material fact previously unknown to the respondents, and without which the respondents could not have advanced their case under section 111A.

25. First, it is the content of that telephone conversation and not the script, which is the protected conversation. Details of the telephone conversation were known to the respondents and were the basis of their application on the ground that the conversation was on a "without prejudice" basis. The script is no more than an additional documentary evidence to support the respondents' case.

26. Further, documents should have been exchanged by the parties on 20/01/2021, and therefore by that date the respondents should have been aware of the existence of the telephone script and provided it to their solicitors.

27. I reject the respondents' contention that the issue was raised "as soon as reasonably practicable". In my judgment, it was raised extremely late, and after the claimant had been put at a substantial expense in preparing to defend the respondent's application of 23/02/2021, which was advanced on a different ground.

28. I also note that the respondents' solicitors' explanation for the lateness of the application does not mention the issue of "confusion", which Ms Halsall argued was the reason for the late application. Whether the confusion was on the part of the respondents' or their solicitors, in my judgment, it makes no difference. It was reasonably practicable for the respondents and their legal advisers to deal with this issue much sooner, and they failed to do so.

29. However, the issue of admissibility of the protected conversation remains an issue that needs to be determined before substantive issues in the case can

be dealt with. Refusing the respondents' application will not finally settle this issue. The respondents will be able to raise it again at a later stage in the proceedings, which would lead to further cost and delay.

30. The issue of admissibility of evidence under section 111A of ERA goes to the question of proper conduct of the proceedings. There are strong policy reasons why certain information must not be put in evidence in front of the tribunal.

31. The balance of prejudice lies in favour of the respondents. The claimant, although being put into inconvenience and expense by having to prepare for the preliminary hearing to deal with the admissibility issue on a different legal basis, will not suffer injustice or hardship as a result of the amendment being allowed. His claims remain intact, and the Re-amended Response will not cause him unjust hardship in pursuing his claims or make him to incur further expense. His costs already incurred in respect to this issue could be dealt with through a costs order application.

32. For these reasons, I have decided to grant the respondents' application to present Re-amended Response and to argue the admissibility issue on the ground of section 111A of ERA.

33. After the determination of this issue, the parties requested a short adjournment to take further instructions.

Admissibility Issue

34. When the hearing resumed, Mr Walton confirmed that the claimant accepted that the protected conversation was the "pre-termination negotiations" within the meaning of section 111A of ERA and therefore the admissibility issue no longer required determination.

35. Mr Walton further stated that, as section 111A of ERA applied only to proceedings on a complaint of unfair dismissal, the claimant might still wish to refer to the protected conversation in the context of his money claim.

36. The parties need to consider how to deal with this issue, bearing in mind that the unfair dismissal and money claims will be listed to be heard together by the same judge.

Costs Application

37. Mr Walton then proceeded to make an application for costs under Rule 76(1)(a) on the ground that the respondents' conduct was unreasonable by making the late change in relation to the admissibility issue.

<u>Submissions</u>

38. In support of his application, he referred to the same grounds upon which he resisted the respondents' application to re-amend the grounds of resistance (see paragraph above18 above).

39. He further submitted that:

    a. if the respondents had put forward their application on the proper basis under section 111A of ERA, this issue could have been resolved between the parties and this hearing would not have been required,
    b. the respondents were professionally represented throughout, and therefore any "confusion" was not a valid excuse not to present the case properly,
    c. the respondents were put on notice that a costs application would be made if they continued to pursue their case on the admissibility issue on the ground that the protected conversation was without prejudice,
    d. they continued to pursue it on that basis until the eleventh hour when they conceded the original ground and replaced it with a new ground, which had not been advanced before,
    e. by then the claimant had already incurred substantial legal costs which would have been avoided if the respondents did not act unreasonably,
    f. the total costs incurred between 22 January 2021 (the first communication with the respondents' solicitors on this issue) and the completion of the today's hearing was £6,240.

40. Ms Halsall argued that no costs order should be made. She said that:
    a. costs orders were exceptions in employment tribunals,
    b. the respondents' conduct was clearly not vexatious, abusive or disruptive, it was also not unreasonable,
    c. the respondents were duty bound to make disclosure of the telephone script and that was not unreasonable for them to do,
    d. there was no improper behaviour by the respondents,
    e. the claimant knew of the respondents' changed position before the hearing and if he had conceded the issue then and not at the hearing, the need for the hearing would have been avoided,
    f. it was a narrow issue of admissibility and the costs claimed was disproportionate,
    g. the hearing was listed also to deal with case management issues,

    Therefore, in the circumstances, any costs order would be inappropriate.

<u>The Law and Conclusion</u>

41. Rule 76 provides:

    76 (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

    (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success.

42. The amount of a cost order a tribunal can make is set out in Rule 78

78.— The amount of a costs order

(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

43. The following key propositions relevant to costs orders may be derived from the case law:

44. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order (Oni v Unison ICR D17).

45. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (AQ Ltd v Holden [2012] IRLR 648).

46. For term "vexation" shall have the meaning given by by Lord Bingham LCJ in AG v Barker [2000] 1 FLR 759:

> "*[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be , its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.*" (Scott v Russell 2013 EWCA Civ 1432, CA)

47. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' (Dyer v Secretary of State for Employment EAT 183/83).

48. In determining whether to make a costs order for unreasonable conduct, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct — (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA)

49. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. In Yerrakalva v Barnley MBC [2012] ICR 420 Mummery LJ said:

> "*41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances*".

50. I find that in the respondents' conduct was unreasonable for the following reasons. My findings and conclusions set out in paragraphs 24 to 28 are equally relevant to my determination of this issue.

51. Furthermore, I reject Ms Halsall contention that the claimant should have conceded the issue before the hearing. At that time, the respondents' application to re-amend the grounds of resistance had not yet been determined. Therefore, it was not unreasonable for the claimant to continue with his position until the application to amend was decided at the hearing. In any event, by that time he had already incurred a large proportion of his total legal costs in relation to the admissibility issue.

52. I find that the real reason for the late change of tact by the respondents on the issue of admissibility was not the discovery of the script, but the so-called "confusion", or to put it simply, the respondents and their solicitors for some reason not realising that there could advance the admissibility issue under section 111A of ERA. The respondents were professionally represented and therefore, in my judgement, such "confusion" cannot be a valid excuse for unreasonable conduct.

53. In my judgment the respondents' conduct in pursuing their case on the admissibility issue on the "without prejudice" ground, taking it all the way, and in the process not only insisting that it was a proper ground for the

admissibility issue to be determined, but also threatening the claimant with costs consequences, just to abandon that ground a day before the hearing, and replace it with an alternative ground, which was perfectly available for them to advance from the outset, was unreasonable conduct and caused the respondent to incur unnecessary costs.

54. In these circumstances, and having considered the nature, gravity and effect of the respondents' conduct, I consider it is appropriate for me to exercise my discretion and make a costs order against the respondents.

55. I take into account that the claimant's cost incurred from 22 January 2021 was not exclusively related to the admissibility issue, as the parties also discussed other case management matters. I also consider that the total time of 20.48 hours claimed by the claimant is excessive for dealing with the admissibility issue alone.

56. Therefore, I make an award for 50% of the claimed costs, that is for £3,120.

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Employment Judge P Klimov
London Central Region

Dated: 15 March 2021

Sent to the parties on:

16/03/2021

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For the Tribunals Office

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