EMPLOYMENT TRIBUNALS

Claimant: Mrs S Garrod

Respondent: Riverstone Management Limited

PRELIMINARY HEARING

Heard at: Remotely by CVP **On:** 28 May, 3 & 5 August 2021

Before: Employment Judge Harrington

Appearances
For the Claimant: In person
For the Respondent: Mr D Panesar, Queen's Counsel

REASONS FOR THE JUDGMENT DATED 6 NOVEMBER 2021

[The numbers in square brackets within this document refer to either the Claimant's or Respondent's bundle with the reference 'C' or 'R', followed by the page number.]

Introduction

1. The Claimant, Mrs Garrod, brings the following claims against her former employer and the Respondent, Riverstone Management Limited:

    1.1 That she suffered twenty two detriments contrary to Regulation 19 of The Maternity and Parental Leave etc. Regulations 1999 ('MPL Regulations 1999') and Section 47C of the Employment Rights Act 1996 ('ERA 1996);

    1.2 That the Respondent breached Regulation 18 of the MPL Regulations 1999;

    1.3 That she suffered discrimination pursuant to Section 18 of the Equality Act 2010;

    1.4 That she suffered harassment contrary to Section 26 Equality Act 2010; and

1.5 That she was constructively and unfairly dismissed.

2. A Case Management Hearing was held on 30 June 2020 and a Preliminary Hearing on 8 January 2021. In the event, the hearing in January was unable to proceed and a further hearing was listed on 1 March 2021. Unfortunately that hearing then had to be postponed until 28 May 2021, when the matter came before me. The one day time allocation was insufficient and the hearing continued on 3 and 5 August 2021. Whilst these later two dates were listed with time being allocated for the Tribunal to give Judgment on the Preliminary matter, in the event the entirety of these days was taken up with the parties' witnesses continuing to give evidence and with closing submissions. The Tribunal heard evidence from Mr Sherrard, the Claimant and Dr Garrod and closing submissions from both parties. The Claimant was given breaks whenever required and she was further accommodated by being given a much extended time allocation for her cross-examination of Mr Sherrard.

3. On 5 August 2021, and pending this Judgment, I issued a Case Management Order listing the Final Hearing in September 2022 and a further Preliminary Hearing on 16 and 17 December 2021. That Order included the following paragraph,

'At the hearing today, I emphasised the importance of the parties assisting the Tribunal with hearing this case in a way that is consistent with the overriding objective. To date the parties have attended the Tribunal on five different occasions prior to the final hearing beginning. It should be possible for the Tribunal to consider the remaining applications and case management in one day. I have listed a second day primarily for the Employment Judge to have adequate time to deliberate and decide the applications although I have instructed the parties to remain available for that day in case it becomes necessary (as with the Preliminary Hearing I have conducted) for the parties to attend beyond the time originally allocated.'

4. At the commencement of this Preliminary Hearing, the following preliminary issues remained outstanding:

4.1 The Respondent's application, as detailed in a letter dated 14 October 2020, that the paragraphs within the Claimant's ET1 which refer to what the Respondent describes as 'without prejudice matters' be removed, there be a prohibition from making such references in the bringing of her claim and the Respondent's costs of making the application be paid by the Claimant ('the without prejudice issue');

4.2 Disclosure. There is said to be an outstanding dispute between the parties as to whether full disclosure has been made, with the Claimant asserting that the Respondent has failed to disclose all relevant evidence;

4.3 The Claimant's application, detailed in her letter dated 17 May 2021, that the grounds of resistance be struck out.

4.4 Appropriate case management. The case management directions have currently been suspended.

5. With the agreement of the parties, the Tribunal proceeded to consider the Respondent's application as detailed in paragraph 4.1 above, and referred to as the 'without prejudice issue'. As suggested by paragraph 3 above, it has been challenging to complete this Preliminary Hearing in a proportionate way. The parties accuse each other of openly lying and misrepresenting matters that are said to have occurred at the relevant meeting in November 2019. The Claimant accuses the Respondent's witness of deliberately withholding documents from the Tribunal and has gone to considerable lengths to produce the evidence she considers helpful to her case including, for example, logging on to a webinar conducted by Mr Sherrard on 16 February 2021 on the topic of without prejudice and protected conversations, transcribing what Mr Sherrard said in that webinar and producing the transcript as evidence at this hearing.

6. The Tribunal was provided with a substantial amount of documentation as follows:

6.1 Witness statements from Mr H Sherrard, the Claimant and Dr Garrod;

6.2 Skeleton arguments from both parties;

6.3 Preliminary Hearing bundles from both parties (the Respondent's bundle contains 180 pages and the Claimant's 493 pages);

6.4 The Claimant's Curriculum Vitae;

6.4 Excerpt from a Legal Practice Course Civil Litigation Manual 2018/19.

7. The Claimant's ET1 includes the following paragraphs,

'28. On 8th November 2019, the Claimant was invited to a meeting with the Respondent, which she assumed was a meeting to discuss her grievance complaint in more detail. The Claimant was accompanied by her husband, Dr Matthew Garrod. Instead, at this meeting, the Claimant was ambushed by the Respondent's representative, who told her in no uncertain terms that he did not care about her grievance, and he was there to make an offer to the Claimant to terminate her employment.

……...

31. The Claimant anticipates that the Respondent will argue that the meeting that took place on 8th November 2019 is inadmissible in proceedings pursuant to s.111A ERA. Should the Respondent adopt this approach, the Claimant will maintain that the Respondent's conduct was improper behaviour and therefore is not just for such discussions to be inadmissible in accordance with s.111A(4) of the ERA.'

8. The issues for the Tribunal in considering the Respondent's application are as follows:

   8.1 Are the relevant matters referred to in the Claimant's ET1, without prejudice matters?

   8.2 If so, does the exceptional circumstance of unambiguous impropriety apply in this case, such that the references should be permitted to remain in the ET1 and in evidence before the Tribunal?

   8.3 Does the Claimant's repeated refusal to remove the references from the ET1 and / or the allegations of impropriety made by the Claimant amount to unreasonable conduct pursuant to Rule 76 of the ETs (Constitution & Rules of Procedure) Regulations 2013, Schedule 1?

Findings of Fact

9. The findings of fact are set out below. The standard of proof is on the balance of probabilities, namely what is more likely than not.

10. By way of background, the Claimant was employed by the Respondent as a Company Secretary. She has ten years legal and company secretarial experience and a number of legal qualifications. These include a law degree, a masters degree in International Trade and Company Law and the Legal Practice, for which the Claimant studied at the Guildford College of Law in 2008 passing with distinction in every module. Mr Sherrard is a solicitor who has a longstanding professional relationship advising the Respondent. At all relevant times, he was instructed by the Respondent in this matter.

11. The Claimant returned from her maternity leave on 15 July 2019. On 17 October 2019, the Claimant informed her manager that she was pregnant with her second child. Between 18 October - 30 October 2019, the Claimant was signed off sick by her doctor. She felt depressed and anxious at this time.

12. The Claimant submitted a grievance to the Respondent dated 30 October 2019 in which she raised serious allegations against three senior managers within the Respondent's business [R134]. The Claimant complained of mistreatment and pregnancy and maternity discrimination including the following:

    12.1 That she had sustained bullying from her manager for nearly 5 years;

    12.2 That she had been harassed by her manager;

    12.3 That she had sustained a breach of her legal rights – namely, suffering a detriment pursuant to the MPL Regulations 1999.

13. Within the grievance, the Claimant referred to using ACAS mediation or the Early Conciliation process if it wasn't possible for the matter to be resolved 'in-house' [R135].

14. In her evidence to the Tribunal, the Claimant accepted that her grievance included references to how her legal rights had been infringed and that the relevant treatment was ongoing. She also confirmed that in writing her grievance, she had particular legal rights in mind and that she was complaining about an infringement of her employment rights.

15. Following the Respondent's receipt of the Claimant's grievance and on 6 November 2019, Mr Sherrard sent an email to the Claimant [R142]. In the email, Mr Sherrard proposed that he meet with the Claimant to progress matters. The Claimant was invited to attend the meeting with a friend or relative and a legal advisor if she wished. Mr Sherrard proposed that the Respondent would pay a maximum of £500 + VAT for a legal advisor and he requested that the Claimant provide dates and times of her availability to attend for the meeting at a local golf club.

16. The Claimant responded to Mr Sherrard in two short emails and a meeting was arranged promptly for Friday 8 November 2019 [R143-144]. The Claimant stated that she would attend with her husband and that she did not consider a legal advisor was necessary, although she appreciated the offer.

17. The meeting took place on Friday 8 November 2019 in a private room at the golf club. As planned, it was attended by Mr Sherrard, the Claimant and her husband.

18. It is agreed that the start of the meeting was amicable with a discussion about appropriate refreshments and an additional drink and hot water being brought to the room. There was some discussion between Mr Sherrard and the Claimant's husband, during which Dr Garrod referred to working as a lecturer at a local university. I accept Mr Sherrard's account that beyond this, he knew no details about Dr Garrod and, in particular, that he had not googled him prior to the meeting. Whilst the Claimant suggested to Mr Sherrard in cross examination that he had researched Dr Garrod on the internet and had wrongly assumed him to be a solicitor in practice with a well known firm, Mr Sherrard categorically denied these assertions. The Claimant confirmed that the basis for her questions on this issue was an assumption that this is what Mr Sherrard had done, rather than having any evidence to support or suggest that he had. I was satisfied that Mr Sherrard had not carried out an internet search on the Claimant's husband in preparation for the meeting. In preferring Mr Sherrard's evidence on this point, I referred to the following matters:

    18.1 Mr Sherrard was asked numerous questions on this issue and steadfastly denied having googled Dr Garrod to investigate his professional background;

    18.2 I accepted Mr Sherrard's account that he was unaware of Dr Garrod's full name ahead of the meeting on 8 November 2019. In those circumstance, it wouldn't have been possible for him to carry out any meaningful search on Dr Garrod;

18.3 Considering the entirety of the factual context, I considered it was unlikely that Mr Sherrard would have googled Dr Garrod prior to the meeting. At that stage, Mr Sherrard knew little detail of the Claimant's circumstance and had been instructed to have a preliminary meeting with her to include an exploration of agreeing a severance package. Against that factual background, I accepted the Respondent's submission that it was unlikely Mr Sherrard would have gone to the lengths of investigating the Claimant's husband.

19. Mr Sherrard prepared some brief notes for the meeting [R142]. He had the notes with him at the meeting in a folder, together with a copy of the Claimant's Contract of Employment.

20. Dr Garrod took notes at the meeting. I accept Dr Garrod's description of these notes as being 'extensive' and that they included comments about body language and Dr Garrod's own reflections, added shortly after the meeting.

21. At this point I record that it was surprising that it was only during the course of this hearing that the Claimant referred to the existence of these notes. They had not been disclosed, although I am satisfied that it would have been understood by the Claimant that they were important and entirely relevant for this hearing. Following the Tribunal providing additional time for the notes to be produced, and appropriate directions being made, I was informed that the notes could not be found in Dr Garrod's office at the university where he works.

22. Returning to the meeting, I accept Dr Garrod's evidence that he asked Mr Sherrard whether he was acting in a mediator capacity and that Mr Sherrard replied that he was not. He confirmed that he was the Respondent's representative. Following this exchange, Dr Garrod spoke little during the remainder of the meeting.

23. Mr Sherrard asked the Claimant who she considered to be the most appropriate person to hear her grievance in light of the fact that a number of senior managers were implicated in her complaints. The Claimant referred to a number of people including Mr Mark Bannister. Mr Sherrard and the Claimant also discussed the main part of the Claimant's grievance in outline, namely the assertion that the Claimant's duties were not identical when she returned from her first period of maternity leave. Mr Sherrard spoke of a case in which a teacher had returned from maternity leave and had taught a different class. The Claimant responded to this comment with '*yes, the Blundell case'*; referring to the case of Blundell v The Governing Body of St Andrew's Catholic Primary School EAT/0329/06.

24. The conversation then moved on to discuss what the Claimant wanted from the grievance. The Claimant responded that she wanted her reporting line changed to enable her to report to the Managing Director rather than to her current manager. The Claimant referred to the Managing Director having the ability to reverse her current manager's decisions, if necessary. In response to this suggestion, Mr Sherrard commented that the senior management team would

work in a collegiate way rather than, as suggested by the Claimant, in a way that contradicted each other.

25. In making this finding about the use of the word 'collegiate', I have preferred the evidence of Mr Sherrard to that given by the Claimant. I do not accept that Mr Sherrard made a reference to the Claimant's grievance as not being collegiate. In general terms I found Mr Sherrard's evidence to be measured, consistent and straightforward. When he was unsure about something, he readily identified this in his responses to questions. I consider it unlikely that Mr Sherrard would have used such an expression in a meeting held to discuss the appropriate progression of the grievance.

26. Mr Sherrard then told the Claimant that he would like to have a without prejudice conversation. He assumed that the Claimant understood what this meant. The Claimant did not ask Mr Sherrard what it meant. Mr Sherrard described this part of the meeting as an initial exploratory conversation about settlement and the possibility of the Respondent making of a severance payment to the Claimant. He told the Claimant that the employment relationship could be described as *'fractured'* and '*problematic'* and that the Respondent would like to make an offer to terminate her employment. Mr Sherrard referenced a payment in the sum of £80,000.

27. On multiple occasions during the Tribunal hearing, the Claimant referred to her complete surprise about this part of the meeting. I am in no doubt that the Claimant was taken by surprise and that she felt ambushed by Mr Sherrard suggesting that an agreement could be reached between the parties resulting in the end of the Claimant's employment with the Respondent. Mr Sherrard had not pre-warned the Claimant that the meeting would include a without prejudice discussion about the possibility of the Claimant leaving. It is agreed by the parties that when Mr Sherrard made these comments, the Claimant began to cry.

28. I am satisfied that Mr Sherrard's description of this episode and the Claimant becoming tearful but then shortly thereafter composing herself, is what occurred. In reaching this conclusion I refer to my following findings:

28.1 On the balance of probabilities I do not accept the Claimant and her husband's account that they did not understand what without prejudice meant. The Claimant stated that whilst she studied Civil Litigation as part of the Legal Practice Course, she did not think that the without prejudice principle was covered. She referred to the fact that there was no reference to the principle in her Civil Litigation textbook, although she was unable to find that textbook during the course of the hearing. I am satisfied that the principle of without prejudice would have been covered in the teaching of Civil Litigation on the LPC. It is an important principle with relevant case law going back a number years, certainly well before the year in which the Claimant studied for this legal qualification.

28.2 I am also satisfied that, with the legal qualifications and professional experience held by the Claimant, she understood what was meant by the phrase without prejudice in the context of the November meeting. Both the Claimant and her

husband have studied law to an advanced level. As stated the Claimant studied for the LPC and for a Masters in Law. The Claimant's husband, a former police officer, has a first class law degree, a masters degree (with distinction) and a doctorate in law. The Claimant's competency in law is further demonstrated by her view that she was suitable to be appointed to the role of Head of Corporate Legal [R20]. In that context, I consider it more likely than not that both the Claimant and her husband understood what was meant by Mr Sherrard's reference to having a without prejudice discussion. Neither the Claimant nor her husband asked in the meeting what Mr Sherrard meant by the phrase 'without prejudice' and that was because they understood.

28.3 These conclusions are consistent with the email correspondence immediately after the meeting. Mr Sherrard used the phrase on two further occasions in an email sent to the Claimant later on 8 November 2019 [R146] and in an email he sent on 14 November 2019 [R152]. The Claimant did not query what he meant by those references.

28.4 I do not accept the evidence given by Dr Garrod as to his response to Mr Sherrard when the phrase 'without prejudice' was used in the meeting. Dr Garrod described saying '*well, hang on what does without prejudice mean?'* before Mr Sherrard leant over the table and said that he should let him finish and that he had an offer to put. Dr Garrod said that he tried on two further occasions to ask about without prejudice and that Mr Sherrard *'.. put his hand towards my face and said in a loud tone 'shut up''*. Dr Garrod went on to say that he stated *'we have to stop this – I have some questions about without prejudice…'.* I repeat here the general conclusions I have drawn about Mr Sherrard's evidence to this Tribunal set out in paragraph 25 above. Further, I consider it unlikely that Mr Sherrard, an experienced legal professional, would have conducted himself in this way at a meeting where one of his aims was to attempt to secure agreement from the Claimant to a proposal to end her employment. Conducting himself at the start of that discussion in the way described Dr Garrod would have been entirely contrary to that aim.

29 As stated, the Claimant was able to compose herself and continue participating in the discussion. The parties discussed a settlement of the payment of a years salary and a letter acknowledging the Claimant's upset. During this discussion Mr Sherrard referred to accepting a severance offer as being a fresh start for the Claimant. The Claimant referred to the fact that she liked working locally and, following this, there was a discussion about what other financial services companies there were in the area.

30 It is the Claimant's case that Mr Sherrard attended the meeting with a hard copy of a proposed settlement agreement. Mr Sherrard denies having a settlement agreement with him. Upon consideration of the entirety of the evidence on this issue, I accept Mr Sherrard's account that he did not have a copy of a settlement agreement with him. In preferring Mr Sherrard's evidence on this point I have referred to the following matters:

30.1 The Claimant was not given a copy of a proposed settlement agreement at the meeting;

30.2 There was no reference from either Mr Sherrard or the Claimant to any written, draft settlement agreement seen at the meeting in the later email correspondence between them;

30.3 The second email sent by Mr Sherrard to the Claimant on 8 November 2019 refers to an offer being set out in *'more detail in a settlement agreement, a draft which I will email to you next week.'* [R146]. This is consistent with no written agreement having been drafted at that stage;

30.4 Further email correspondence shows the production of the draft agreement on 12 November [R148]. The Respondent has also produced the word properties [R149/150] showing the settlement agreement was created on 12 November 2019;

30.5 The evidence from the Claimant's husband on whether he had seen a copy of a settlement agreement at the meeting was vague. He described seeing a copy of an agreement *'behind the flap'* in Mr Sherrard's folder. I concluded that it was unlikely that Dr Garrod would have been able to ascertain whether the document behind the flap in the folder was actually a draft agreement or, for example, a copy of the Claimant's contract of employment;

30.6 Whilst the Claimant described Mr Sherrard *'hand editing'* the document during the meeting, I accept Mr Sherrard's evidence that he was actually doodling in the meeting and that he drew around the 'total' figure on his notes page [R147].

31 It was following this short discussion prefaced by Mr Sherrard with the phrase 'without prejudice', during which a limited number of matters had been canvassed but no agreement secured, that the meeting came to an end and the attendees left the golf club.

32 It is important to record that the parties have given very different accounts as to the tone of the meeting and Mr Sherrard's conduct. Mr Sherrard described the meeting as '*amicable, calm and professional …. at all times'* and that the correspondence which followed showed a *'polite and professional tone'*. The Claimant describes Mr Sherrard as interrupting and that he was *'overbearing and aggressive … he tried to pressure me into signing the legal agreement'*. The Claimant's husband described Mr Sherrard as *'friendly and welcoming'* for the first couple of minutes of the meeting before he became aggressive. Having carefully considered the entirety of the witness evidence, I am satisfied Mr Sherrard's account is to be preferred. I reach this conclusion noting the following:

32.1 If Mr Sherrard's behaviour had been as described by the Claimant and her husband, I consider that it likely that she would have referred to this and documented it shortly after the meeting. She did not do this and in fact, when responding in her email on 13 November 2019, the Claimant uses the phrase, '*This is not directed at you as a person.'* [R151]. I find that such an email is inconsistent with the Claimant's contention that Mr Sherrard's behaviour was poor in the ways she sets out. Further, I accept the Respondent's submission

that, taking into account the detailed way in which the Claimant has documented her issues within her grievance, if Mr Sherrard had behaved aggressively, the Claimant was more likely to have documented this and reported it directly to the Respondent;

32.2 I was not satisfied as to the accuracy of the description of the meeting, as detailed by the Claimant and Dr Garrod. In many instances I found their evidence to be exaggerated. For example, in Dr Garrod's statement he says, *'I felt intimidated by Mr Sherrard's aggressive and confrontational tone and behaviour.'* He goes on to describe the Claimant as,

'emotionally distraught and continued to cry heavy and uncontrollably for some time. Mr Sherrard slid a packet of tissues to try and dry up the pooling of tears.' [C66, paragraph 25].

These descriptions were not put to Mr Sherrard when he was being asked questions but, in any event, I consider it unlikely that Mr Sherrard would have attempted to continue with a business meeting if the Claimant had been as greatly and visibly affected as described by her husband. Further, I consider it likely that such a significant and marked reaction would have been fully referenced in the correspondence between the parties shortly after the meeting but it was not.

32.3 Further, there are multiple aspects of the Claimant's description of what Mr Sherrard said and how he acted which seem entirely unlikely. For example, that Mr Sherrard stated that the best the Claimant could hope for would be £14,000 and that he said '*this is a clear case of constructive dismissal'*. Mr Sherrard denies making these statements and there would seem no reason for stating that £14,000 would be the limit of what the Claimant could hope for, when the parties have agreed that figures of £80,000 and a years salary were discussed. There would also seem no reason for Mr Sherrard, as the Respondent's legal representative, to state it was a clear case of constructive dismissal when such an admission would obviously be contrary to the Respondent's interests.

32.4 As set out above, I do not accept that Mr Sherrard googled Dr Garrod before the meeting. For the avoidance of doubt I do not accept that Mr Sherrard asked Dr Garrod if he had a practising certificate or that there was a discussion during which Mr Sherrard referred to his understanding that Dr Garrod was a qualified solicitor with a practising certificate.

33 Around an hour after the end of the meeting, Mr Sherrard wrote two emails to the Claimant [R145-146] – the first referenced the meeting and the issues discussed surrounding the Claimant's grievance. Mr Sherrard noted that he would be discussing this matter further with the Respondent and that he would be in contact again [R145]. The second email begins,

'I am writing this second email on a without prejudice basis following our discussion this morning.'

Later in the email he again refers to without prejudice as follows,

'If you wish to email me, it is best to continue the practice that I have established of keeping 'on the record' and without prejudice discussions separate.'

34 On 13 November 2019, Mr Sherrard sent a draft settlement agreement to the Claimant by email [R151]. Very shortly afterwards, the Claimant responded by email stating that she was appalled and that she did not want to leave her job. She referred to feeling '*compelled to take this forward…'* [R151] and that she had calculated her own schedule of loss. Further emails were exchanged in November 2019 [R152].

35 On 3 December 2019, the Claimant's grievance meeting was held.

36 In January 2020 a further exchange of emails between the Claimant and Mr Sherrard included a repeated offer from the Respondent to pay for the Claimant to obtain legal advice. This offer was again refused by the Claimant [C266].

Closing Submissions

37 On behalf of the Respondent Mr Panesar submitted that the Claimant's version of events was a layering of untruths and that there was clearly a dispute between the parties as at the end of October 2019. The Claimant had made multiple detailed allegations against managers at the Respondent. Mr Panesar described the Claimant's contention that there was no dispute as *'a stark and obvious indicator of the unreality of the Claimant's position'*.

38 Mr Panesar submitted that it is not the situation that a party can only make an offer to another if there is an agreement to do so. The Respondent's offers in this case were made in good faith. Subsequently, they have all been withdrawn. With regards to the factual context, he contended that there were five obvious untruths from the Claimant as follows: that the Claimant had been pressured to sign a contract at the meeting, that Mr Sherrard had said that it was a clear case of constructive dismissal, that Mr Sherrard behaved in a way that could be described as aggressive, alarming and terrifying, that Dr Garrod's notes of the meeting have disappeared and that the Claimant doesn't understand the meaning of without prejudice.

39 It was submitted that the meeting on 8 November 2019 partly considered how the Claimant's grievance was to be progressed and partly dealt with a proposed settlement. The Respondent submitted that the Claimant clearly understood what without prejudice meant – it is a trite concept. Further, the suggestion of terminating an employment contract could not amount to victimisation as there would never then be without prejudice discussions, which are a recognisable form of alternative dispute resolution.

40 The Claimant made detailed closing submissions that certain conditions needed to be met before the common law principle of without prejudice applies. When considering these conditions, bringing a grievance or exercising a contractual right to express dissatisfaction with your employer's behaviour cannot automatically give rise to a dispute of a legal nature. In the circumstances of this

case, it was the Claimant's contention that there was no dispute of a legal nature in existence at the time of the November meeting. A dispute might be said to arise following the conclusion of the grievance procedure, which yields no resolution, but not before. Further, the Claimant submitted that Mr Sherrard had attempted to increase the pressure on her by increasing the financial offer on the condition that the Claimant signed the agreement at the November meeting.

41 One of the further arguments raised by the Claimant was that Mr Sherrard was attempting to use the without prejudice principle to confer upon him an invincibility when making statements which were tantamount to *'abuse and victimisation'* at a meeting at which no steps were taken to ascertain the Claimant's consent to such a discussion. The Claimant continued by describing Mr Sherrard's conduct as including *'trickery', 'inducements'* and *'deception'*.

42 The Claimant referred to the '*cloak for perjury'* and that Mr Sherrard *'pleads more than a dishonest case'*.

Legal Summary

43 The rule of evidence that without prejudice communications are privileged from disclosure and inadmissible in evidence applies in proceedings before the Employment Tribunal. The rule promotes the public policy objective of encouraging litigants to settle their disputes by agreement rather than through litigation. To this end, the parties are enabled to negotiate without fear of what is said being used in evidence.

44 For the rule to apply, there must be an existing dispute between the parties at the time of the alleged without prejudice communication, coupled with a genuine attempt to settle it.

45 If those conditions are met, the rule can still not be relied upon if the exclusion of the evidence would 'act as a cloak for perjury, blackmail or other unambiguous impropriety' (Unilever PLC v Proctor & Gamble Co [1999] EWCA Civ 3027). It has been emphasised that the exception should only be applied in the clearest cases of abuse of a privileged occasion.

46 The authorities are clear that 'unambiguous impropriety' is not to be interpreted widely but is reserved for behaviour that shows a serious abuse of the privilege and only in the very clearest of cases.

47 The without prejudice rule can apply to communications prior to the commencement of litigation. The issue is whether in the course of the negotiations, the parties contemplated or might reasonably have contemplated litigation if they could not agree.

48 In the case of BNP Paribas v Mezzotero [2004] IRLR 508 EAT it was held that the mere act of an employee raising a grievance does not by itself mean that the parties are necessarily in dispute. It is necessary to consider the nature of the grievance, the manner and circumstances in which it is raised. What is the

factual matrix which preceded the negotiations – does that show an actual dispute or the potential for a future dispute? If so, the rule will apply.

49 The Claimant has also made reference to the specific statutory provision in Section 111A of the Employment Rights Act 1996. This provides that, in unfair dismissal cases, evidence of pre-termination negotiations is inadmissible. Such negotiations known as 'protected conversations' include 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 employee. This provision enables employers to instigate such conversations without a risk of being said to breach the implied term of trust and confidence and ensuring the conversation is confidential where the without prejudice principle would not apply as there is not deemed to be an existing dispute.

50 As with the without prejudice rule, there are limitations to the scope of Section 111A including if anything that was said or done in the negotiations was in the Tribunal's opinion improper or connected with improper behaviour – then it will only apply to the extent that the Tribunal considers just. It is important to note that whilst evidence of pre-termination negotiations is inadmissible in unfair dismissal claims, this does not render it inadmissible for the purpose of any other claim such as discrimination. Further the term improper behaviour is wider than the term unambiguous impropriety in relation to the without prejudice principle.

Tribunal's Conclusions

51 I have considered the entirety of the documents to which I have been referred, the witness evidence and the parties' closing submissions, including the caselaw identified.

52 I am entirely satisfied that at the time of the meeting on 8 November 2019 there was an existing dispute between the parties. Obviously the meeting took place prior to the commencement of litigation but it is my conclusion that the meeting took place at a time at which the parties contemplated or might reasonably have contemplated litigation. I have considered the Claimant's grievance and the factual matrix prior to and at the time of the meeting. As noted above, in her grievance the Claimant referred to using ACAS mediation or the Early Conciliation process if it wasn't possible for the matter to be resolved 'in-house'. This express reference from the Claimant, in the context of her legal knowledge and experience, supports my conclusion that there was a dispute between the parties. The Claimant is specifically referring to the first steps required for bringing a claim before the Tribunal. Accordingly, whilst the Claimant has referred to the mere bringing of a grievance as not necessarily establishing that there is a dispute between the parties, in the circumstances of this case I find that there was.

53 The communications at the meeting on 8 November 2019 were instigated by Mr Sherrard as a genuine attempt to settle matters between the parties. It is agreed by the parties that the Respondent wished to reach an agreement with the Claimant pursuant to which she would be paid a sum of money and her employment with the Respondent would end. This was in the context of the

Claimant bringing a detailed grievance alleging breach of her employment rights and signposting the next stage as including the option of commencing the Early Conciliation process.

54 Accordingly, I am satisfied that the without prejudice rule applies to the communications at the meeting on 8 November 2019 following Mr Sherrard's statement that the next part of the meeting was to be without prejudice.

55 I have set out my detailed findings of fact above. I have not accepted the evidence given by the Claimant and her husband describing Mr Sherrard's conduct to include aspects which might amount to unambiguous impropriety. For the avoidance of doubt, I do not accept that the exceptional circumstance of unambiguous impropriety applies in this case. My findings as to Mr Sherrard's conduct during the meeting accord with his description of polite and professional. The relevant references to without prejudice matters are therefore unable to remain due to the exceptional circumstances of unambiguous impropriety.

56 Due to these conclusions I have not found it necessary to proceed to consider Section 111A of the ERA 1996 which has applicability in unfair dismissal cases.

57 I allow the Respondent's application in its letter dated 14 October 2020 such that all references to the without prejudice content of the meeting on 8 November 2019 shall be removed from the pleadings and evidence in the case.

58 A Tribunal may make a costs order and shall consider whether to do so, where it considers that a party has acted 'otherwise unreasonably in …..the way that the proceedings (or part) have been conducted' (Rule 76 of the ETs (Constitution & Rules of Procedure) Regulations 2013, Schedule 1). The conduct relied upon by the Respondent is said to be the Claimant's repeated refusal to remove the relevant references from the ET1 and / or the allegations of impropriety made by the Claimant.

59 I do not have a costs application before me at this time but I am asked to consider whether the Claimant's conduct amounts to acting 'otherwise unreasonably' for the purposes of the costs rules, such that a Tribunal <u>may</u> make a costs order, if an application was made.

60 I do accept that the Claimant has acted unreasonably in the way that she has opposed this application made by the Respondent in the following ways:

60.1 Firstly, the Claimant opposed the application on the basis that she did not understand what without prejudice meant. Taking into account the Claimant and her husband's legal education, knowledge and experience, this contention was without foundation. The Claimant referred to her Civil Litigation manual as documentary proof for her assertion that the principle was not covered in her LPC course. However the Claimant had not produced the relevant extract of the manual in readiness for the hearing and, although given further time during the course of the hearing, was unable to find the manual.

60.2 Secondly, the Claimant description of Mr Sherrard's conduct, both in evidence and submissions, as including trickery, perjury and that he pleaded 'more than a dishonest case' was unsupported and in my conclusion, was without foundation. The Claimant and her husband's accounts were supposedly supported by detailed notes taken by Dr Garrod. However neither the Claimant nor Dr Garrod considered that the notes were relevant such that they required disclosure ahead of the Preliminary Hearing and, as with the Civil Litigation Manual, despite additional time being given during the hearing process for their disclosure, the notes could not be found.

61 This case will now proceed to a further Preliminary Hearing at which the remaining preliminary matters will be considered by the Tribunal and further case management directions made, as appropriate.

Employment Judge Harrington

6 November 2021