EMPLOYMENT TRIBUNALS

Claimant: Ms Sarah Garrod

Respondent: Riverstone Management Limited

Heard at: London South by MS Teams **On:** 24 and 25 February 2022

Before: Employment Judge Jones QC

Appearances:

For the claimant: In person.
For the respondent: Mr Deshpal Panesar, Queen's Counsel

JUDGMENT

1. The tribunal makes a costs order in favour of the Respondent in the sum of £3,400.

REASONS

Background

1. The Claimant was formerly employed by the Respondent in the role of Company Secretary.

2. From 3 October 2018 until 15 July 2019 the Claimant was on maternity leave.

3. On 17 October 2019 she informed the Respondent that she was pregnant with her second child.

4. On 30 October 2019 the Claimant raised a formal grievance. The grievance comprised a number of complaints. She describes them in her originating application in the following terms:

   "(1) Bullying and harassment from her line manager;

(2) The Respondent's failure to permit her to return to the job in which she was employed before her maternity leave absence;

(3) The detrimental treatment that she suffered following her return from maternity leave;

(4) The change to her role following her maternity leave and the significant reduction in her responsibilities; and

(5) The detrimental treatment/being treated unfavourably following advising the Respondent that she was pregnant with her second child."

The Respondent denies the allegations.

5. On 8 November 2019, the Claimant was invited to a meeting. She attended accompanied by her husband, Dr Matthew Garrod. Attending on behalf of the Respondent was Mr Harry Sherrard, a solicitor in private practice.

6. There has been a dispute between the parties as to what happened at that meeting. On the Respondent's case, there was a without prejudice meeting. They say, therefore, that it is cloaked in without prejudice privilege and they object to Claimant having made reference to the meeting in her ET1. The Claimant's consistent position has been that the meeting is not covered by privilege. First, she says, there was no dispute at that point. Second and in any event, she says that Mr Sherrard's conduct at the meeting was such that to invoke the privilege would be to conceal unambiguous impropriety.

7. The dispute over whether the meeting was covered by without prejudice privilege was resolved by at a hearing before EJ Harrington conducted on 28 May and 3 and 5 August 2021. The Employment Judge considered an application made by the Respondent to have references to the meeting removed from the ET1. The Employment Judge concluded that the meeting was "covered by the principle of without prejudice" and the application succeeded. Her reasoning was as follows:

> "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 here 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 would 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."

8. The parties are agreed that I am (barring a successful review or appeal) bound by the Employment Judge's findings of fact. The summary at Paragraph 55 of EJ Harrington's judgment captures the essence of her more detailed findings of fact. There was evidence on oath given by both sides and the Employment Judge did not accept that given by the Claimant and her husband. At paragraph 32.2 of her decision the Judge describes the evidence given by and on behalf of the Claimant as "exaggerated". At paragraph 32.3 she finds that "multiple aspects of the Claimant's description of that Mr Sherrard said and how he acted [seemed] entirely unlikely".

9. The application to have references to the meeting removed from the ET1 was contained in a letter dated 14 October 2020. The same letter contained an application for a costs order. It was put in the following terms:

> "The Respondent applies under rule 30 of the Employment Tribunals Rules of Procedure for the following orders:
>
> …
>
> - The Claimant to pay the Respondent's costs of making this application pursuant to rule 75 of the Employment Tribunals Rules of Procedure 2013.
>
> It is the Respondent's case that the continuing insistence by the Claimant of the inclusion of the without prejudice matters in the pleadings of the case, notwithstanding ample opportunity to remove them, amounts to the unreasonable conduct of proceedings. Therefore, having had the opportunity to remove these, and having refused, the Claimant should pay the costs occasioned by having to make this application and any hearing necessitated thereby."

I note that the costs sought were limited to the costs of the application and that the ground upon which they were sought was "unreasonable conduct of the proceedings".

10. **Rule 76** of the Employment Tribunal Rules makes provision for a two stage test. The first part of the test looks at whether a threshold criterion has been met. In this case the relevant criterion is whether a party has acted unreasonably in the way the proceedings have been conducted within the meaning of **Rule 76(1)(a)**. I will call that stage the "Threshold Stage". If a tribunal is satisfied that the threshold criterion has been met, it is obliged by the rule to consider whether to exercise the discretion conferred on it by the rule to make a costs order. I will call this second stage the "Discretion Stage".

11. Employment Judge Harrington did not make a costs order. At Paragraph 58 of her decision she sets out a summary of **Rule 76** and identifies the basis for the Respondent's application:

> "the Claimant's repeated refusal to remove the relevant references from the ET1 and/or the allegations of impropriety made by the Claimant".

She then goes on to say: "I do not have a costs application before me at this time". Since she did have a costs order before her, it is not immediately clear what it is that she means. She does go on, however, to say "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." Mr Panesar QC, for the Respondent says that the Employment Judge was persuaded to, in effect, half decide the costs application, that is to say that she determined the Threshold Stage but not the Discretion Stage. I am, he suggests, bound by the determination that she made at the Threshold Stage.

12. The Employment' Judge's determination was as follows:

> "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."

13. On 12 December 2021, the Respondent wrote to the Tribunal saying:

> "Further to paragraph 60 of the Reasons for the Judgement (sic) dated 6 November 2021 (sent to the parties on 10 December 2021), the Respondent applies for a costs order against the Claimant."

14. I will turn immediately below to a short summary of the relevant legal principles. However, I must record my concern about the Employment Judge's determination of the Threshold Stage and, more particularly, the suggestion that I am bound by it. The essence of the problem is this: if the Claimant were to appeal that determination she would face the insuperable problem that it had not resulted in a costs order and that, therefore, there was nothing to overturn. However, if I were now to make a costs order based upon it, I would have been bound by a determination that was at no point open to challenge. It is possible that the Appeal Tribunal might treat the making of the costs order as comprising the two determinations, but that, the Claimant says, is a risk that she should not be required to run. Unless there was a costs application live before the Employment Judge, there was no basis for her to be determining any part of it. In the light of that concern, I have looked at the Threshold Stage afresh.

The Law

15. Both parties provided extensive summaries of the relevant law in their skeleton arguments, but the principles are not controversial:

    Factors particularly relevant to the Threshold Stage

    1. Unreasonable has its ordinary meaning and does not mean something similar to vexatious (**Dyer v Secretary of State for Employment** UKEAT/183/38);
    2. The tribunal must bear in mind that more than one course of action may be reasonable (**Solomon v University of Hertfordshire and another** UKEAT/0258/18);
    3. In assessing the reasonableness of the conduct of the proceedings, a litigant in person should be judged less harshly that someone who is professionally represented (**AQ Ltd v Holden** [2012] ILRL 648 EAT); and
    4. Untruthful evidence is capable of amounting to unreasonable conduct but need not necessarily do so (**HCA International Ltd v May Bheemul** UKEAT/0477/10);

    Factors particularly relevant to the Discretion Stage

    5. Costs orders are the exception and not the rule (**Yerrakalva v Barnsley Metropolitan Council** [2012] ICR 420 CA);
    6. The discretion must be exercised judicially, taking into account facts and circumstances (**Doyle v North West London Hospitals NHS Trust** UKEAT/0271/11);
    7. The party claiming costs does not have to establish a direct causal link between the unreasonable conduct and the costs incurred (**D'Silva v NATFHE** UKEAT/0126/09);
    8. However, a cost award is intended to compensate the party to whom it is paid and not to punish the payer (**Lodwick v Southwark London Borough Council** [2004] ICR 884 EWCA; and
    9. The means of the paying party may be taken into account both in deciding whether or not to make an order and, if so, when considering how much to award (**Rule 84**).

Discussion

(1) The Threshold Stage

16. The Respondent contends that the Claimant has conducted the proceedings unreasonably in two respects:

    (1) By refusing to remove without prejudice material from the ET1 notwithstanding multiple opportunities to do so; and

    (2) By giving untruthful evidence "with the potential to do very significant professional harm to others".

    The "others" referred to is, I understand, a reference to Mr Sherrard. The two grounds are closely related to (if not exact matches for) the two points identified by EJ Harrington in paragraphs 60.1 and 60.2 of her judgment. I consider each in turn below, although, as will become apparent, I consider that they overlap.

(a) Unreasonable conduct of proceedings: Refusing to remove without prejudice material

17. There were two passages in the ET1 to which the Respondent took objection. The first is to be found at what was, before it was struck out, Paragraph 28 of the ET1. It read as follows:

    > "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.**" [Emphasis added]

    The emphasised words are those specifically objected to as being covered by the without prejudice privilege. There has been no objection, as I understand it to reference being made to the fact that there was a meeting on 8 November 2019, nor to the attendees being identified. The first part of the passage objected to appears to be something that Mr Sherrard denies occurred. The last part is key since it makes explicit reference to an offer "to terminate employment" which must be read, as EJ Harrington's judgment effectively concludes, as an offer to resolve a dispute.

18. The second passage was contained in Paragraph 31 of the ET1:

    > "The Claimant anticipates that the Respondent will argue that the meeting that took place on 8 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."

    The second passage makes no specific reference to any offer, but the reference to s. 111A necessarily implies the existence of pre-termination negotiations.

19. The Respondent's ET3 "invited" the Claimant to "agree, without further application" to the removal of the without prejudice matters from her pleading. The Respondent's submissions identified a number of other points at which the issue was raised, each providing an opportunity to agree to remove the references.

20. The Claimant's position has been and, indeed, still is, that the material is not covered by without prejudice privilege. She has advanced two bases for that contention: first, she says that no dispute had arisen by the time of the meeting sufficient to engage the without prejudice principle. Second, she says that Mr Sherrard' conduct of the meeting amounted to unambiguous impropriety. Neither argument succeeded before EJ Harrington.

21. Whilst EJ Harrington concluded that there was a dispute between the parties, she did not conclude that the Claimant took the position in bad faith or that, notwithstanding that she was entirely satisfied on the issue, that it had not been properly arguable. It does not appear at Paragraph 60 of her judgment as something that amounts to unreasonable conduct. Nor does she conclude that failing to concede the question of without prejudice privilege was unreasonable conduct. For my part, I take the same position. It may not have been a strong point, but given that she was a litigant in person and even taking into account the fact that she has had legal training, I do not think it was unreasonable for her to take the point as to the existence of a dispute. If it was not unreasonable to take the point, it was equally not unreasonable to require that it be determined.

(b) Unreasonable conduct of proceedings: Untruthful Evidence

22. EJ Harrington focused on two matters: whether the Claimant was telling the truth when she said she had not understood what "without prejudice meant"; and whether her description of Mr Sherrard's conduct at the 8 November 2019 meeting was truthful.

23. As to the first matter, I do not think EJ Harrington's first sentence at Paragraph 60.1 reflects how the matter was put before me. The Claimant's position was that she did not understand the without prejudice principle when she was at the meeting. However, she had what she described as a "general understanding" of the principle by no later than 8 January 2021 (which was the date of the first preliminary hearing in this matter). The necessary consequence is that not knowing what without prejudice meant could not be a reason for refusing to remove the material from the pleading once asked to do so in the ET3 in December 2020.

24. However, I think that what EJ Harrington had in mind was a different point. The Respondent's position has been that the Claimant knew full well at the original meeting what "without prejudice" meant. The Claimant's position – that she did not – was, the Respondent contended, untruthful. At Paragraph 28.1 of the judgment, the Employment Judge made a finding by which I am bound:

> "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."

EJ Harrington is explicit that she has reached her conclusion by rejecting the accounts given by the Claimant and her husband. The Employment Judge goes on at Paragraph 28.2 of the judgment to reiterate the finding and to explain it. If the Claimant had understood the principle, but claimed to the tribunal that she had not, it would not be a matter that one could

put down to poor recollection. It would, instead, be a matter of seeking to mislead the tribunal. I do not think that the requirement to treat a litigant in person less harshly when considering the Threshold Stage stretches to overlooking untruthful evidence of that kind. Save in the most exceptional circumstances, all parties must be taken to understand that one may not tell untruths to advance a case. I have taken into account that the Claimant was, at the time of the hearing, "vulnerable", on medication and suffering from what her written submissions describes as "mental health conditions". However, I do not consider that any of that could be said to explain the advancing of a dishonest case, still less one that involved a matching account being given by her husband.

25. In the circumstances, and bound as I am by EJ Harrington's findings of fact, I consider that misrepresenting her past understanding of the without prejudice principle amounted to unreasonable conduct of the proceedings.

26. Turning to the second matter, EJ Harrington also found that the account of Mr Sherrard's conduct both at the meeting and the hearing before her (which rose to an allegation of perjury) was "without foundation". The Claimant's evidence is described as being, in part, "exaggerated" and "entirely unlikely". It is not a question of a single detail. The whole tone and content of the meeting is misdescribed from Mr Sherrard's affect through to whether he had a settlement agreement with him.

27. It was put to me that there were what amounted to aggravating factors. It was said (and indeed demonstrated) that the Claimant's account of Mr Sherrard's position had evolved to meet difficulties across a number of accounts. I have not taken that into account since I am satisfied that the Employment Judge's findings amount to a determination that the Claimant and her husband gave an untruthful account and that is sufficient for me to be satisfied that the Threshold Stage is met. The second factor was that their untruthful account called into question Mr Sherrard's professional reputation. That is indeed reprehensible, but I would be reluctant to be seen to adopt a principle that it is more unreasonable to call a lawyer a liar than anyone else. Other people's reputations are no less valuable.

28. I have concluded that I am bound by EJ Harrington's judgment on the facts and that the consequence of her findings is that the Claimant must be taken to have given the tribunal an untruthful account and that, what is more, the account was known to be untruthful. I determine, therefore, that the Claimant has conducted the proceedings unreasonably.

(2) The Discretion Stage

29. I accept that the making of a costs order is (and should be) an exceptional step. I also recognise the importance of the principle that a costs order is intended to be compensatory and not punitive. Both parties made extensive written and oral submissions. They were sufficiently extensive that I have not thought it appropriate to try to reproduce them here. I have taken into account everything put before me.

30. I am clear that the Claimant genuinely believed (and continues to believe) that the effect of **BNP Paribas v Mezzoterro** [2004] IRLR 509 EAT was that there was no dispute upon which the without prejudice principle could bite by the time of the 8 November 2019 meeting took place. In those circumstances, it was not unreasonable for the Claimant to have wanted the point determined. That means that it was not unreasonable to require a hearing. Even taking

account of the fact that there is no requirement for the costs incurred to be directly caused by the unreasonable conduct, I do not think it would be proportionate or just to award the Respondent costs on the basis that a hearing was simply unnecessary and that all costs incurred were wasted.

31. However, I do think that the running of a case which the Claimant knew to be untruthful very substantially complicated an issue which might otherwise have been more quickly determined. It necessitated the giving of evidence, cross-examination and the making of submissions that should never have been required. For that reason, I have concluded that it is appropriate to make a costs order.

32. The Claimant invites me to take into account her means. I had before me a witness statement on the issue. The Claimant supplemented her evidence orally and was cross-examined. The Claimant's direct earnings are very low and arise from a small business that she has established. The business turned over only £638 the three months to January 2022. She has two small children. Her husband is in full time employment. They own two properties. One is the family home. The Claimant and her husband have approximately £100,000 of equity in that property. The other is a flat which the Claimant suggested is held on trust for her children. The equity in that property is substantially more than £100,000. It generates rent at a rate of £850 per calendar month. The income is used to pay down the mortgage on and defray other expenses relating to the flat. Any excess pays down the mortgage on the family home.

33. Having considered the Claimant's means I do not consider that they militate against the making of an order. Nor do they substantially affect her ability to pay costs at the level I consider appropriate in this case. Turning to that question directly, I consider that the Claimant should pay to the Respondent the sum of £3,400.

Employment Judge Jones QC
24 March 2022