Case No: 1302574/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr M Iqbal

Respondent: Proactive Personnel Ltd

Heard at: **Midlands West (by CVP)** **On: 6 January 2022**

Before: **Employment Judge Woffenden**

Representation
Claimant: Ms S Javed, lay representative
Respondent: Ms S Jones, legal assistant

Written reasons for the tribunal's decision to refuse the claimant's application to strike out the respondent's defence of the costs application having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, reasons are provided below:

REASONS

Background

1 The claimant's claim (presented on 23 May 2018) was for unpaid wages and holiday pay. There was a final hearing on 15 and 17 October 2019 .That hearing concluded when the parties agreed the terms of a judgment (which was identified as having been made by consent under Rule 64 of the Employment Tribunal Rules of Procedure 2013 ('the Rules')) whereby the respondent was ordered to pay the claimant the sum of £2000 in full and final settlement of his claim.

2 The purpose of today's hearing was to determine the claimant's application for a preparation time order/costs dated 13 November 2019 on the ground that the respondent had acted unreasonably ('the costs application') . The claimant's schedule of costs sought a total of £ 12542.66 . On 21 January 2021 I had ordered the claimant to prepare the costs hearing bundle and to send it to the tribunal and the respondent 14 days before the costs hearing. Ms Javed sent a final form of the bundle (319 pages) to the respondent and the tribunal shortly before midnight on 3 January 2022.

3 On 4 January 2022 Ms Jones made an application that the claimant's costs application be struck out in which she complained about the late receipt of the bundle from Ms Javed and her failure to have attempted to agree its contents and

referred to an attached email she had sent to Ms Javed which enclosed documents the respondent wanted to have included in the bundle for use at the costs hearing but which she said Ms Javed 'will dispute' as she claimed they were 'without prejudice'. Ms Jones asked that the documents be put before me and said the respondent considered the documents extremely relevant to the issue of costs because it had made several offers to settle and the time spent on the case could have been significantly reduced. Her email to Ms Javed (with attached documents) in question was not attached but Ms Jones noticed her omission and sent it to the tribunal at 9.09 am this morning.

4 In an email timed at 9.56 am this morning Ms Javed wrote to the tribunal saying that 'in a gross act of defiance and abuse of power' the respondent had submitted 'without prejudice' correspondence to the court and applied for the respondent's defence of the costs application to be 'thrown out' and the claimant be awarded costs.

5 At the commencement of today's hearing Ms Jones confirmed that she was not pursuing the respondent's application dated 4 January 2022. Ms Javed asked me if I would determine an application that she be permitted to record the hearing. I told her that such an application (and a reconsideration application) had already been decided by Employment Judge Harding (most recently on 5 January 2022) and I could not consider it again in the absence of a material change of circumstances (or a misstatement of fact or law) **Serco Ltd v Wells 2016 ICR 768**.

6 Ms Javed told me Ms Jones had enclosed 'without prejudice' correspondence in her email to the tribunal today which she considered to be an abuse of the court because I had made it clear during the final hearing on 16 to 19 October 2019 that such correspondence could not be relied upon. I was working remotely today and did not appear to have been sent the attachment to Ms Jones' email today so I adjourned the hearing to make further enquiries.

7 When the hearing recommenced there was further discussion to ascertain if Ms Javed wanted to pursue her strike out application. Ms Javed said she thought it would prejudice me if I had sight of the 'without prejudice' correspondence. I said that another judge might have to decide if I should look at it but first I needed to know if the respondent did want to rely on the correspondence Ms Jones had attached to her email. Ms Jones said she did because it showed the respondent's attempts to settle the claim at an early stage before substantial costs were incurred by the claimant. I then adjourned to give Ms Javed the opportunity to decide whether she wanted to proceed with her strike out application.

8 Before asking Ms Javed to confirm what she wanted to do, I said that it seemed to me that the respondent was seeking to rely on the correspondence in question in order to show that ,contrary to the claimant's allegation that it had acted unreasonably, it had acted reasonably in its conduct of the proceedings. I drew the parties' attention to the case of **Kapel v Safeway Stores plc 2003 IRLR 753** in which the respondent had applied for costs and submitted there had been unreasonable conduct by the claimant. The Employment Appeal Tribunal said that a 'without prejudice save as to costs' letter was a factor a tribunal could take into account in deciding if there had been unreasonable conduct. Ms Javed asked if all the respondent's correspondence had been 'without prejudice' or with ACAS. I said I did not know because I had not read the correspondence attached to Ms Jones' email. Ms Javed then confirmed she wanted to proceed with her application to

strike out the respondent's defence of the claimant's costs application and I heard submissions from both parties.

The Strike out Application

9 Ms Javed said that the respondent had submitted 'without prejudice' correspondence to the tribunal at a preliminary hearing and also at the final hearing. On both occasions she had opposed the inclusion of the documents. It had been explained to the respondent at the final hearing that regardless of whether the documents in question had been labelled 'without prejudice' if they contained genuine attempts to negotiate a settlement they could not be admitted as evidence before the tribunal. There was correspondence where she had brought this up with Ms Jones e.g. an email on 19 August 2019 prior to a preliminary hearing in August, though she confirmed this email was not a document which was included in the bundle she had prepared for today's hearing. She said no communications with ACAS should be included .At the final hearing the parties had had discussions and the respondent had sought their agreement to put such documents before the tribunal and she had refused. The respondent could not rely on correspondence which was not marked 'without prejudice save as to costs'. Ms Jones was the respondent's legal adviser so it was not plausible she did not know the rules. Her repeated actions were abuse. Her email of 4 January 2022 was baseless and abuse. There was no doubt that she was aware she was not permitted to do it but she did it anyway.

10 Ms Jones said she was not sure what documents Ms Javed had been referring to when she had talked about the final hearing .Ms Jones said she had discussed the offers to settle made via ACAS with her manager at the time and she had been instructed she could include them because they were not 'without prejudice.' At the final hearing the respondent had agreed to their removal because the hearing was concerned with liability not costs. Tribunals were a new experience and the information she had been given was passed on to her by her manager. If documents ought not to have been submitted this was a genuine error and was not done with malice. She had wanted to make the point the respondent had been reasonable, not unreasonable and that was why they had been submitted. Ms Javed had included in the bundle (at pages 152 and 153) an extract from a letter (not dated in the bundle) which the respondent had written to Ms Javed and redacted a large section within which the respondent had reserved the right **to refer to the letter**.

The Law

11 Under Rule 76 (1) (a) a tribunal may make a costs order or preparation time order ,and shall consider whether to do so ,where it considers that 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 in the way the proceedings (or part) have been conducted.

12 Under Rule 29 of the Rules a tribunal may at any stage of the proceedings, on its own initiative or on application ,make a case management order. A tribunal also has the power to strike out all or part of a claim or a response under Rule 37.

13 Under Rule 2 of the Rules the overriding objective of the Rules is to enable Employment Tribunals to deal with cases fairly and justly .

Tribunal

Dealing with a case fairly and justly includes ,so far as is 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 is compatible with proper consideration of the issues; and
e) Saving expense.

14 A tribunal shall seek to give effect to the overriding objective in interpreting ,or exercising any powers given to it by, these Rules. The parties and their representatives shall assist the tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

15 Employment Tribunals (England and Wales)-Presidential Guidance -General Case Management (2018) (to which tribunals must have regard although they are not bound by it) contains Guidance Note 2 :Disclosure of Documents and Preparing Hearing Bundle. Paragraph 1 of Guidance Note 2 says that 'The Employment Tribunal often requires the parties to co-operate to prepare a set of documents for the hearing. Even if no formal order is made ,the Tribunal prefers that documentary evidence is presented in one easily accessible set of documents (often known as 'the hearing bundle') with everyone involved at the hearing having an identical copy.' Paragraph 3 says that 'Agreeing a set of documents means that all parties agree which documents are relevant and the tribunal will need to see.' Paragraph 9 says that ' A party is usually not required to disclose a copy of a privileged document: for example ,something created in connection with the preparation of a party's Tribunal case (such as notes of interviews with witnesses) ;correspondence between a party and their lawyers ;correspondence between parties marked 'without prejudice'; or part of discussions initiated on a without prejudice basis with a view to settlement of the matters in issue; or records of exchanges with ACAS.' Paragraph 13 says 'The parties then co-operate to agree the documents to go in the hearing bundle .The hearing bundle should contain only the documents that are to be mentioned in witness statements or to be the subject of cross-examination at the hearing, and which are relevant to the issues in the proceedings. If there is a dispute about what documents to include ,the disputed documents should be put in a separate section or folder ,and this should be referred to the Tribunal at the start of the hearing.'

16 Under section 18(7) Employment Tribunals Act 1996 anything communicated to a conciliation officer in connection with the performance of his functions under any of sections 18A to 18C shall not be admissible in evidence in any proceedings before an employment tribunal except with the consent of the person who communicated it to that officer.

17 I first decided that, having considered section 18 (7) Employment Tribunals Act 1996, if the respondent had sent to the tribunal its communications to a conciliation officer as attachments to its email of 4 January 2022 it was implicitly giving consent for those communications to be admitted as evidence in the determination of the claimant's costs application. It seemed to me therefore that it could not be said in relation to those communications that there were not admissible (although this was not so in the case of the claimant's communications to a conciliation officer since the claimant had not given consent).

18 In considering whether a party has acted unreasonably in its conduct of the proceedings a tribunal must look at the whole picture of what happened in the case and ask whether there has been unreasonable conduct and in doing so identify the conduct what was unreasonable about it and what effects it had. Even if the grounds under rule 76 (1) (a) are established the tribunal still has a discretion as to whether to make an order.

19 Ms Jones had made it clear in the email of 4 January 2022 that she intended to make representations in response to the costs application. It seemed to me therefore that the respondent's communications with ACAS were also relevant to the issues I would have to decide and should therefore be included in the bundle of documents for use at the costs hearing.

20 I refused the claimant's strike out application in this regard. There had been no abuse of power by the respondent in its submission of ACAS correspondence to the tribunal. I accepted Ms Jones' submission that she had done so in error. Neither party was aware of section 18 (7) Employment Tribunals Act 1996 ,the effect of which was to permit the admission of communications with a conciliation officer if the person making the communication consented . The respondent was not in any event seeking to oppose the costs application solely on the basis that it had not acted unreasonably ;it had also said in its email to the tribunal dated 14 November 2019 in response to the costs application that it was unnecessary because the claim had been settled 'in full and final settlement'. In my judgment it would be wholly disproportionate to prevent the respondent from defending the costs application because it had submitted ACAS correspondence to the tribunal.

21 The parties then sought clarity on what documents ought be included in the bundle for the costs application hearing . Ms Jones said that there was an email to the claimant in which correspondence with ACAS was referred to and the respondent would also want to rely on a letter to the claimant which had not been labelled 'without prejudice' because the respondent had always intended it to be an open letter. This was in addition to the redacted extract of the respondent's letter to the claimant which was in the bundle at pages 152 and 153 and there were other emails to the claimant which contained offers to settle and which were not labelled 'without prejudice' .

22 I asked Ms Javed to confirm that she had made her earlier submissions on the basis that the respondent had submitted to the tribunal not only communications with ACAS but also 'without prejudice' correspondence. If so , I said I had not considered in my deliberations the inclusion of such correspondence. Ms Javed said that her submissions had indeed been in relation to both types of documents and the respondent had agreed the documents were 'without prejudice' .I reminded her that Ms Jones had evidently not accepted this ;she had described some of the documents she had wanted to be included in the bundle as open correspondence .

23 I decided that having determined the claimant's strike out application in relation solely to the respondent's submission of ACAS correspondence I should now consider whether the respondent's defence of the costs application should be struck out because it had submitted without prejudice correspondence to the tribunal in its email of 4 January 2022.

24 I decided that it should not. It seemed to me there was a difference between the submission to the tribunal of 'without prejudice' correspondence between the parties prior to the determination of liability and the submission to the tribunal of such correspondence in relation to costs applications. In the case of the former, it cannot be referred to during the final hearing, but after judgment has been given, a 'without prejudice' offer to settle by a respondent may be taken into account in determining a costs application if that application is brought on the ground that the respondent has been unreasonable in its conduct of the proceedings and the respondent wants to show that contrary to that assertion it acted reasonably in its conduct of the proceedings .The respondent was effectively seeking to waive any privilege in those documents as far as its offers to settle were concerned .In those circumstances in my judgment it would be wholly disproportionate to prevent the respondent from defending the costs application because it had submitted 'without prejudice ' correspondence to the tribunal. It seemed to me that correspondence (subject to a careful analysis and construction of their contents) would also be relevant to the issues I would have to decide and should therefore be included in the bundle of documents for use at the costs hearing.

25 In any event the tribunal's powers to strike out are confined to the striking out of a claim or a response.

26 I explained to the parties that I had avoided reading the correspondence in question so I had not formed a view as to whether it was correctly labelled 'without prejudice' or was in fact open correspondence or was correspondence which was 'without prejudice save as to costs '.

27 After being given the opportunity during an adjournment to decide how she wanted to proceed Ms Javed applied for a postponement because she intended to appeal to the Employment Appeal Tribunal. Ms Jones opposed that application because of the very considerable delay in determining the application which had already elapsed.

28 I decided to postpone and relist the costs hearing because some further case management orders were needed in relation to the agreement and preparation of a final bundle of documents and the provision of further information from the claimant about the dates of the respondent's alleged unreasonable actions and the page numbers in any agreed bundle which referred to them and the time remaining today was not sufficient for those orders to be complied with by the parties and to hear their submissions on and decide the claimant's costs application .I have made a separate case management order about those costs hearing preparations.

29 I encouraged and I continue to encourage the use by the parties of the services of ACAS or other mediation or other means of resolving the costs dispute by agreement (Rule 3 of Employment Tribunal Rules of Procedure 2013).

30 Parties can appeal to the Employment Appeal Tribunal if they think a legal mistake was made in an Employment Tribunal decision. There is more information here: *https://www.gov.uk/appeal-employment-appeal-tribunal*

Employment Judge Woffenden
28 March 2022