EMPLOYMENT TRIBUNALS

Claimant: Ms C Raison

Respondents:
1. DF Capital Bank Limited
2. Carl D'Ammassa
3. Reality HR Limited

HELD AT: Liverpool Employment Tribunal **ON:** 15 January 2024
13 March 2024 (in chambers)

BEFORE: Employment Judge Shotter (by video CVP)

REPRESENTATION:

Claimant: Mr Bronze, counsel
Respondent: Mr England, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. All claims against the second respondent Carl D'Ammassa are dismissed on withdrawal. The claims remain against the first and third respondent only, and the second respondent no longer has any interest in these proceeding.

2. The emails dated the 25 and 31 January 2023 are without prejudice and subject to the without prejudice rule for the purpose of the detriment claim brought under section 47B of the Employment Rights Act 1996. The claimant's letter of 9 February 2023 and the two versions of the 3 March 2023 meeting notes are redacted in part limited to when there is a reference to a protected conversation and the protected conversation being paused, as they are subject to the without prejudice rule for the purpose of the detriment claim brought under section 47 B of the Employment Rights Act 1996.

3. A public preliminary hearing will take place via CVP video before Employment Judge Shotter on the **8 May 2024** starting at 10am (the parties will be expected to arrive by 9.30am) with an estimated length of hearing of 1-day to decide the following issue on hearing oral evidence from the parties and oral submissions:

    1. Did the claimant waive privilege? Was the "without prejudice" offer contained in the 25 January 2023 email made solely to Ms Charlie Martin, Chief Sustainability & People Officer? Did the claimant refer to the without prejudice offer openly in front of Ms Nicole Coll, a Non-Executive Director, in a letter to Ms Coll on 09/02/23 and in a meeting on 03/03/23?

REASONS

Introduction

1. This has been a remote hearing by video which has been consented to by the parties. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred were numerous and included an agreed bundle, the contents of which I have recorded where relevant below. In addition, the Tribunal was provided with a skeleton argument on behalf of the first respondent, and an authority on behalf of the claimant.

2. This is a public preliminary hearing listed earlier at the preliminary hearing held on the 10 August 2023 to "determine the admissibility of the claimant's emails of 25th January and 31st January 2023, the claimant's letter of 9th February 2023 and any reference to her offer made during the meeting with the 4th respondent; Nicole Coll, on 3rd March 2023."

3. The parties had originally intended that the issue of waiver should also be dealt with, but it became apparent when seeking clarification of the issues to be decided that witness statements and oral evidence was necessary before waiver could be determined, given the parties had conflicting versions as to what transpired at the 3rd March 2023 meeting and its aftermath, particularly with regard as to how the protected discussions were dealt with and in what way.

4. After promulgation of this Judgment the parties will liaise and agree as to whether I need to deal with the issue and effect of any possible waiver by the claimant of the without prejudice communications referred to below, at the re-convened hearing listed for **8 May 2024**. In addition and on the same day, a further private preliminary hearing dealing with case management will take place with a view to reaching a final agreement on the list of issues which has been problematic. The parties are aware of the overriding objective and the need to work together. It is in interests of all, bearing in mind the 8-day allocation for the final hearing, for a realistic view to be taken of the number of protected disclosures relied on by the claimant, which could be reduced taking into account the difficulty the claimant may have causally connecting one specific disclosures with a detriment. The claimant may be satisfied to rely on a number of the important disclosures starting with the first and

then the final detriment, concentrating on those from which she will argue were causally connected to detriment, thus reducing the unwieldy schedule.

5. I do not intend to repeat all of the oral closing submissions and refer to the Skeleton Opening Submissions prepared by Mr England that sets out the undisputed legal principles as recorded below.

The issues

6. The following issues to be decided today were agreed as follows;

1.1 Whether the claimant's emails of 25th January and 31st January 2023, the claimant's letter of 9th February 2023 and any reference to her offer made during the meeting with Nicole Coll on the 3 March 2023 are admissible? Should there be any restrictions on references to relevant documents or events?

Documents

7. I have before me an agreed bundle of 352 pages that includes a number of emails and minutes of the Grievance/whistleblowing meeting amended by the claimant with her comments inserted.

Background

8. The background to this preliminary hearing has been succinctly set out in the Case Management Summary following a preliminary hearing held on 10 August 2023 sent to the parties on 22 August 2023 which I do not intend to repeat other than to record paragraph 14 under Case Summary "Ms Raison worked for the respondent between 26th September 2022 and 17thFebruary 2023 as Chief Commercial Officer. She was dismissed on grounds of gross misconduct relating to the booking of a hotel room in the name of a junior colleague for use by a friend. Ms Raison does not dispute that she made the booking but asserts that this incident was not the real reason for her dismissal which was because of a series of disclosures she had made. Ms Raison claims she has been automatically unfairly dismissed and subjected to detriments because of those disclosures."

9. A public preliminary hearing took place on the 18 December 2023 it is recorded that the claimant alleges the third respondent, an agent engaged by the first respondent, subjected her to a detriment when it allegedly "failed to respond to my questions about minutes they had taken on 3rd March 2023". A Judgment on a Preliminary Hearing was sent to the parties on the 28 December 2023 dismissing the claim of automatic unfair dismissal brought under S.103A of the Employment Rights Act 1996 ("the ERA").

10. Unsurprising, given there is no unfair dismissal complaint before the Tribunal, the parties agreed that there is no issue about pre-termination negotiations under s.111A ERA 1996.

11. The claims before now the Tribunal is that the claimant (who accepts she made a hotel booking in the name of a junior colleague for use of a friend which she offered to repay when facing disciplinary proceedings) claims she was subjected to a

number of detriments under section 47B ERA. There is no claim for automatic unfair dismissal or sex discrimination which are allegations the claimant included in the 25 January 2023 email referenced below.

12. Having considered the oral submissions, the agreed bundle, and the respondent's skeleton argument (which I have not repeated in full but attempted to incorporate within the body of this Judgment with Reasons) I have has made the following findings of the relevant facts. These "facts" are recorded for the purpose of this hearing only, and does not bind any judge at future hearings.

Findings of Provisional Facts

13. The claimant was employed as the chief commercial officer by the first respondent from 26 September 2022 to 17 February 2023 until she was summarily dismissed for gross misconduct after booking a hotel room on the 27 November 2022 payable via the first respondent's corporate account in the name of "an ex colleague."

14. The matter was raised with the claimant, who according to the Grounds of Response, verbally indicated her intention to resign to Charlie Michael, chief people and sustainability officer which she followed up by an email to Carl D'Ammasa, the CEO stating she will not be at work on the 23 January 2023.

15. It is undisputed the claimant walked out of a meeting on the 20 January 2023 and did not return to work for the respondent after that date.

16. There followed an exchange of emails culminating in the claimant's emails to Charlie Michael sent on the 25 January 2023 at 10.32. and 11.50 referenced below. One of the emails was sent by the claimant on the 20 January 2023 to Carl D'Ammasa, complaining about being "belittled, humiliated and indeed victimised, " a "toxic environment" and referencing a "WhatsApp message from Charlie asking whether I intended to resign…I will be seeking some further advice and do not feel comfortable to work in this environment on Monday."

17. Charlie Michael emailed the claimant on the 24 January 2023 at 13.57 asking her to "establish your intentions at this point...We need to be clear on your intentions, **at this time, you remain employed**…" [my emphasis]. I took the view that the reference "at this time" could be interpreted to mean that there could come a time when the claimant was not employed by the respondent.

18. The claimant emailed Charlie Michael on the 25 January 2023 concerning a number of matters including her absence, being told not to engage in business activities "until we have spoken" and that "I am in the process of taking independent advice about my employment situation and will reach out…on next steps."

19. The claimant sent a second email at 11.50 on the 25 January 2023 to Charlie Michael. In direct contrast to the earlier email it was clearly marked in bold "**Without Prejudice & Subject to Contract**." The claimant wrote: "I have now been able to properly consider my position and to take some advice since the turbulent events of last week…I'm now at a bit of a cross-roads. On the one hand, it's clear that I could pursue the legal route (formal whistleblowing complaint, resignation followed by whistleblowing related automatically unfair dismissal claim, sex discrimination complaints, data subject access requests etc)…this route would undoubtedly be

disruptive, distracting and could result in public proceedings which could have reputational and regulatory implications…On the other hand I could follow a more pragmatic and constructive option…would involve me leaving the business on agreed terms…" The claimant set out the "proposed arrangements" which including ending employment on the 31 January 2023 and a substantial financial settlement including "payment of all reasonable legal costs." The claimant attached a further copy of the 25 January 2023 email to an email sent on 31 January 2023 at 12.47 marked "Without prejudice and Subject to Contract."

20. The claimant sent the respondent under the heading a "Letter on Detrimental Treatment I Have Experienced Following Protected Disclosures made under the Public Interest Disclosure Act 1998" ("PIDA") on 9 February 2023 referring to a meeting with Nicola Coll on 30 January 2023, discrimination, detrimental treatment and the disclosures allegedly made, the "serious allegations" and disciplinary investigation facing the claimant . The letter totalled 26 pages of allegations and accusations including the claimant's view of a possible report to the Financial Conduct Authority ("FCA") the conduct regular relevant to the respondent and her own employment with it. The letter refers to an email from Nicole Coll sent Tuesday 31 January 2023: 12:30pm and the following "Nicole then introduced Charlie's presence as they wished to have a protected conversations with me, to which I agreed. Charlie then explained that Nicole's role would continue investigating my concerns and that she would not be part of any ongoing protected conversations. The meeting concluded with Charlie stating that she would speak to the chairman with regards agreeing a Without Prejudice offer for her to leave the business by mutual consent."

21. The investigation into the alleged gross misconduct continued.

22. The claimant attended a "whistleblowing/Grievance Hearing" on 3 March 2023 with Nicole Coll. Notes were taken by a notetaker. There are two versions in the bundle, the respondent's notes and notes to which the claimant had made additions. I have read both versations. In the respondent's version there is a reference to the following "CR asked for clarification as she was aware the protected conversation had been paused. NC clarified that the protected conversation was a separate process."

23. In the second version annotated by the claimant the claimant referred to the letter of 9 February 2023 but there was no reference to the without prejudice offer and protected conversations until later in the note (p.336 in the bundle) when the claimant inserted the following: "NC…made a reference to the protected conversation being paused. CR stated that NC was now bringing in a third process… CR repeated her question that yes the protected conversation was being paused whilst an investigation into the conduct of CR was ongoing…NC clarified that the protected conversation was a separate process."

Relevant Law

24. The relevant law is undisputed between the parties, and I have followed the legal principles as referenced and expanded by Mr England in his Skeleton Argument and Mr Bronze in oral closing submissions who provided copies of the case law. I am grateful to both Mr England and Mr Bronze for the clarity in which they have set out the relevant law.

25. The EAT in **Faithorn Farrell Timms LLP v Bailey** [2016] ICR 1054 [2016] IRLR 839 (paras. 30-31) held**:**

"The principle provides that where there is a dispute between parties, any written or oral communications between them **amounting to a genuine effort to resolve the dispute** will not generally be admitted in evidence at a subsequent hearing of the claim. This enables parties to negotiate frankly without the risk that anything said in negotiations will be used against them in subsequent legal proceedings. Without prejudice privilege is, however, not invoked merely by the parties' description of negotiations as such: **if there is no extant dispute, or no genuine efforts at resolving the dispute, the rule will not apply**, regardless of the label used. Conversely, absence of the label "without prejudice" will not be fatal if the negotiations meet these criteria: the principle is one of substance, not form.

Given that without prejudice privilege renders inadmissible evidence that might otherwise have been considered probative of the issues to be determined in subsequent legal proceedings, the confidentiality thus bestowed should not be extended further than necessary to promote the general policy objective (**Barnetson v Framlington Group Ltd** [2007] 1 WLR 2443 CA). Where the line will fall may not always be easy to determine. As Mr Rees contends, it may include the broader discussions between the parties: the positioning, not solely the offer (**South Shropshire District Council v Amos** [1987] 1 All ER 340). If those broader discussions are, however, not properly to be described as part of such negotiations, then I do not read the decision in **Amos** as saying that they will still be covered. Mr Milsom seeks to draw upon the European Convention of Human Rights to argue against a broad approach to the privilege against admissibility. Whilst I agree that respect for Convention rights should underline the need to apply the without prejudice principle with restraint (see, *obiter*, paragraph 27 **Prudential Assurance Company Ltd v Prudential Insurance Company of America** [2002] EWHC 2809 (Ch)), that seems to me to be reflected in the balance already struck under domestic law (**Barnetson**)" (my emphasis).

26. Drawing the legal principles together there has to be a dispute and confidentiality must not be extended further than necessary.

There has to be a dispute.

27. There can be a dispute even though there is no litigation, see the Court of Appeal in **Barnetson** (above) in particular at paragraphs 22 to 35. **The key consideration is whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree** (my emphasis).

28. The rule of evidence that without prejudice communications are privileged from disclosure and inadmissible in evidence applies to proceedings before an Employment Tribunal: **BNP Paribas v Mezzotero** [2004] 509, EAT. The EAT held that the employee's raising of a formal grievance did not bring subsequent

negotiations between employer and employee within the 'without prejudice' rule. The facts of the case were as follows. M raised a formal grievance and was called to a meeting. Upon entering the room she was informed that the discussion would be 'without prejudice' and that the meeting was independent of her formal grievance. M was told that her job was no longer viable, that there was no other position available in the bank, and that it would be best for both parties if her contract was terminated. She was also told that the matter would be regarded as a redundancy rather than a termination, and was offered a settlement package. M did not agree to the package and in March 2003 brought several claims, including sex discrimination. In the EAT's view, the act of raising a grievance does not by itself mean that parties to an employment relationship are necessarily 'in dispute' and **it unrealistic to conclude that the parties had expressly agreed to speak 'without prejudice' given their unequal relationship, the vulnerable position of the claimant in such a meeting, and the fact that the suggestion was made by the employer only once that meeting had begun"** (my emphasis). The EAT held that the tribunal was entitled to conclude that by the time of the meeting there was no existing dispute between the parties. The meeting was not a genuine attempt to settle, as M's grievance concerned her discriminatory treatment whereas the meeting was concerned with terminating her employment. The 'without prejudice' rule did not, therefore, apply to prevent the statements made at the meeting being admissible in evidence before the tribunal.

29. For a communication or discussion to fall within the without prejudice rule it is not essential that the words "without prejudice" be used as long as it is clear that the discussion was aimed at seeking to compromise a matter in dispute: Rush and Tompkins Limited v Greater London Council [1989] AC 1280 at 1299H per Lord Griffiths). As recorded in the finding of facts above, the claimant clearly understood she was seeking to compromise the future threat of litigation relating to sex discrimination and whistleblowing detriment, resolving the impasse caused by her decision not to return to work pending a negotiation of her exit from the business on suitable financial terms.

There has to be an attempt to settle the particular dispute that has been raised.

30. Mr England referred to IDS at Volume 9 - Practice and Procedure I: Employment Tribunals, Chapter 15 – Evidence, Evidence of settlement negotiations, 'Without prejudice' negotiations, para. 15.90:

> At first glance, there may appear to be inconsistency between the Court of Appeal's decision in *Barnetson* and the EAT's decision in *BNP Paribas v Mezzotero* (above). The former appears to suggest that most parties can reasonably be expected to have contemplated litigation by the time a formal grievance has been raised, whereas the latter suggests that the mere fact that a grievance has been raised does not necessarily mean that there is a dispute in existence. **However, any difference is best explained by concluding that the 'without prejudice' rule can only apply in relation to correspondence that seeks to settle the particular dispute that has been raised. In Barnetson, the 'without prejudice' correspondence related to B's claims arising out of the termination of his employment. The dispute related to B's employer's proposal to terminate his**

> **employment early and so, if the parties contemplated litigation in relation to the dispute, it would have been about termination of employment**. In the *Mezzotero* case, by contrast, if there was an extant 'dispute' at the time of the meeting, it arose out of M's grievance about her perceived treatment on return from maternity leave. The employer therefore could not invoke the 'without prejudice' rule in relation to its out-of-the-blue proposal to terminate her employment. In so far as M might have contemplated any litigation at that stage, it would have been a claim of discrimination, which would not depend on the termination of her employment. Thus, although there might have been an extant dispute about *discrimination*, there was no extant dispute about *termination*, and so the employer could not claim 'without prejudice' protection.

31. Mr England submitted that the Tribunal is therefore required to identify if there was a dispute at the relevant time, if so what was the dispute and then is that the same as the dispute about which the claimant claims the without prejudice protection.

Conclusion: applying the law to the facts and incorporating submissions made on behalf of the parties

32. I have taken into account the factual matrix in which the claimant's emails were sent in addition to the words written in the communications satisfied that there was a dispute between the parties as clearly set out in the claimant's email of 25 January 2023, the identical copy email dated 25 January 2023 attached to the second email sent on the 31 January 2023 and the references to "protected conversations" in the letter of 9 February 2023 and both sets of the notes taken at the 3 March 2023 meeting.

33. Turning to Framlington (above) the Court of Appeal in the judgment of LJ Auld paras. 22 onwards dealt with the "without prejudice" rule which to give "full effect to the public policy underlying it, a dispute may engage the rule, notwithstanding that litigation has not yet begun"- para. 27 and "A good instance of the working of the rule can be seen in the "opening shot" cases, in which an initial proposal in negotiations before commencement of proceedings may be protected by the privilege" – para.29. "Early settlement of disputes is as important in the employment field as elsewhere, notwithstanding the existence of special provisions governing compromise of statutory employment claims. Such restrictions do not bear on the "without prejudice" nature of communications arising in proceedings to which they apply" – para. 31. "The claim to privilege cannot, in my view, turn on purely temporal considerations. The critical feature of proximity for this purpose, it seems to me, is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so, they could avoid the need to go to court over the very same dispute? On that approach, which I would commend, the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree" – para.34.

34. The principles set out in **Framington** assists the claimant, given the fact that the "without prejudice" communication was her attempt was an "opening shot" to settle litigation threatened if the respondent did not agree to meet her terms, and that is exactly what unfolded in this case after the claimant was summarily dismissed on the grounds of gross misconduct with no settlement proposals offered by the respondent. The claimant made it very clear that litigation would take place in the future if the impasse relating to her employment was not settled in accordance with the terms she proposed.

35. I took the view that Ms Raison's case can be differentiated from the circumstances set out in Paribas (above) as there was a dispute between the parties at the time of the discussion, the claimant had threatened to resign and had made it clear she no longer wanted to work for the respondent, which culminated in the claimant's attempt to negotiate her exit with a substantial lump sum payment the alternative being the threat of public embarrassment for the respondent, involvement of the regulator, litigation and legal costs. It is notable that on the 25 January 2023 the claimant sent two emails to the respondent, one unmarked and the other clearly highlighted and described as "Without Prejudice subject to the Contract" having taken legal advice (hence the reference to repayment by the respondent of her legal costs) in the knowledge that the communication was a genuine attempt to settle and privileged. In contrast to the claimant in BNP Paribas (above) the claimant's opening gambit was a genuine attempt to settle because she no longer wished to remain employed by the respondent either as a result of the disclosures she had made coupled with allegations of discrimination and/or because she was facing a disciplinary investigation that could have resulted in her dismissal and report to the financial services regulator. This was not the case of a naïve employee being taken by surprise at a grievance meeting when without prejudice discussions took place without notice, and I conclude given the clear heading to the 25 January 2023 email the claimant, having taken advice, was fully aware that she was proposing what was described after as a "protected conversation," in other words, financial settlement and an exit strategy against the threat of litigation, and the respondent understood a dispute existed between them which could be compromised..

36. As recorded in the finding of facts above, the claimant clearly understood she was seeking to compromise the future threat of litigation relating to sex discrimination and whistleblowing detriment, resolving the impasse caused by her decision not to return to work pending a negotiation of her exit from the business on suitable financial terms. The claimant made it clear her communications were "Without prejudice & Subject to Contract" having taken legal advice and I infer that she set the ball rolling in the full knowledge of the protection that these words will provide to both parties when they are attempting to negotiate a compromise including speaking freely and without inhibition (as evidenced by the contents of the second 25 January 2023 email) without concern that what is said or written may be used against them in any ensuing litigation. There was clearly a dispute and the discussion was aimed at seeking to settle the dispute**:** Rush and BNP Paribas referred to above. The 25 January 2023 email was sent against the factual background of the claimant refusing to return to work, and only possible way forward was either disciplinary proceedings resulting in dismissal on the grounds of gross misconduct or resignation on the part of the claimant who was being investigated and time was running out if she wanted to avoid being dismissed given the seriousness of the misconduct alleged and the claimant's offer to repay the hotel costs, with the likely outcome being Employment Tribunal proceedings for

discrimination and detriment as threatened. This is exactly the scenario that without prejudice meetings cover with a view to a settlement agreement being reached. By the time the respondent received the 25 January 2023 email litigation was in the minds of the parties and I accepted the submission put forward by Mr Bronze the only sensible reading was that there was a dispute following the claimant walking out of a meeting and refusing to return to work due to the "toxic" environment with resignation a distinct possibility followed by litigation. Mr Bronze described it as the **Normura** case in reverse, and I accepted that the claimant does not have to resign for a dispute or a potential dispute to be reasonably contemplated by both parties given the factual matrix.

37. Mr England submitted that it was unclear when the "dispute" had arisen and "at best, there could be said to be a dispute about termination of employment, which was not relevant as the claim for automatic unfair dismissal had been dismissed and the claimant had not brought a claim of sex discrimination. I concluded the "proposed arrangements" suggested by the claimant in the 25 January 2023 email included what she described as a "formal whistleblowing complaint" and whilst there is no specific reference to detriment or injury to feelings, the claimant demanded an ex gratia sum and made it clear that if her demands were not met she would "pursue a legal route; a formal whistleblowing complaint. Mr England is correct that this is a statement that litigation could occur in the future, however, there is no requirement for proceedings to have been issued; "The key consideration is whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree" **Framington** (above).

38. Taking into account the principles set out by the Court of Appeal in **Framington** (above) in cases where litigation has not started, the ambit of the "without prejudice" rule should not be extended any further than is necessary to promote the public policy interest underlying it, namely to encourage parties to a dispute to settle their differences without recourse to litigation, I accepted the submission put forward by Mr England that referring to the words "protected conversation" may not necessarily fall foul of the without prejudice rule, however in this case there is clearly a link between the 25 January 2023 email and to the use of the words "protected conversation." The email sent on 29 January 2023 falls under the same protection as the 25 January 2023 email, the letter dated 9 February 2023 and two sets of the notes of meeting dated 3 March 2023 have a very limited protection despite the fact that they do not mention any specific settlement details/proposals and refer only to the words a "protected conversation" being outside the ambit of the 3 March 2023 meeting. I accept Mr England's submission that having found that an aspect of the relevant document cannot be disclosed, I should proceed to specify the without prejudice communication which is to be redacted. I have minimised as best as possible the impact of the without prejudice rule on the documents and pleadings in this case, and evidence to be given at the final hearing giving effect to the public policy interest of encouraging disputing parties to explore settlement and avoid litigation in the courts and employment tribunal.

The documents that are to be redacted and the information that is not to be referred to in evidence.

39. Following the same numbering as that set out in the preliminary hearing bundle parts of the claimant's letter dated 25 January 2023 and the pleadings will be

redacted as follows if it is found at the next preliminary hearing that the claimant had not waived privilege:

40.1 **Grounds of Resistance** – para.25 from "within that email"…to "sex discrimination."

Para.15.18 in its entirety.

Para.51 from "and then a second email setting out"…to "cyber security system."

Para.92.4 from "and the First Respondent's refusal…" to "money."

Para.109.12 from "if the first respondent" to "exit terms". I propose that the clause is redrafted to delete the financial agreement reference but making it clear the claimant had a regulatory responsibility as a senior manager to raise whistleblowing concerns formally and she did not do so without any reference being made to the settlement proposal. The drafting is a matter for the respondent.

Para. 109.2 from "and the First respondent's refusal" to "money."

Para. 117 from "and after she had" to "25 January 2023."

Para. 128.3 from "she instead chose" to "that" and it is proposed that the final sentence reads "There was no interest or desire on her part to return to her role."

Amended Grounds of Resistance

40. The following is to be redacted;

41. Para. 14.18 in its entirety.

42. Para.50 from "and then a second email setting out"…to "cyber security system."

43. Para.87.4 from "and the First Respondent's refusal…" to "money."

44. Para.98.5.2 from "if the first respondent" to "exit terms". I propose that the clause is redrafted to delete the financial agreement reference but making it clear the claimant had a regulatory responsibility as a senior manager to raise whistleblowing concerns formally and she did not do so without reference to the settlement proposal. The final drafting is a matter for the respondent.

45. Para.98.6 from "and the First respondent's refusal" to "money."

46. Para. 108.3 from "and the First respondent's refusal" to "money."

47. Para.115.1.2 from "if the first respondent" to "exit terms". I propose that the clause is redrafted to delete the financial agreement reference but making it clear the claimant had a regulatory responsibility as a senior manager to raise whistleblowing concerns formally and she did not do so without reference to the settlement proposal. The drafting is a matter for the respondent.

48. Para. 115.2 from "and the First Respondent's refusal to pay the Claimant substantial sums of money."

49. Para. 123 from “and after she had requested a financial settlement on 25 January 2023.”

50. Para.134.4 from “She instead chose to send exit terms to the Respondent on 25 January 2023 showing that there was no interest or desire on her part to return to her role.”

51. The claimant’s email marked “without Prejudice & Subject to Contract” sent on the 25 January 2023 is to be redacted as follows;

52. The heading.

53. Paras. 2, 3, 4 and 5 to in their entirety.

<u>The claimant’s letter on detrimental treatment etc 9 February 2023</u>

54. The following is to be redacted:

55. Under the heading “31 January 2023: 12.0pm” para. 1 from “As they to have a protected conversation with me, to which I agreed.”

56. Para.2 from “and that she would not be part of any ongoing protected conversations. The meeting concluded with Charlie stating” to “by mutual consent.”

57. Under the heading “Thursday 2nd Feb 2023 9.55am from “I was surprised” to “leaving the business.”

<u>The notes of the “Whistleblowing/Grievance Hearing with Ciara Raison 3 March 2023 including the second version amended by the claimant as highlighted in yellow.</u>

58. The following is to be redacted including all references to the protected conversation being a separate process and to the protected conversation being paused:

59. Page 336 bottom para from “and made reference to the protected conversation being paused. CR stated that NC is now bringing in a third process and that was not what CR was asking. CR repeated her question that yes the protected conversation was being paused.”

60. Page 337- all references to the protected conversation and pausing the protected conversation should be redacted.

<u>The next steps in this litigation</u>

61. We discussed the next step in this litigation leading to the preliminary hearing listed for 1-day on the **8 May 2024** which is to take place before myself via CVP. The issue to decided is whether the claimant waived the without prejudice effect by referring to the offers openly at meetings. This was a matter which could not be dealt with at the first preliminary hearing given the conflicts in the evidence between the parties which can only be resolved when oral evidence is given and the contemporaneous documents relevant to this issue referred to. The parties should take a realistic view of the contemporaneous documents, including the two versions of the 3 March 2023 meeting notes and question whether a preliminary hearing is

required in accordance with the overriding objective, given the complexity of this litigation so far. It appears that the question of the claimant waiving privilege refers to the meeting of 3 March 2023, which I understand to have been conducted by an employee of the respondent, and I query how the claimant can waive the without prejudice communications by making reference in that meeting with that manager to a ”protected conversation” and “protected conversation being paused.2 I have no doubt that the parties will assist me in resolving this issue, both in their witness statements and written submissions together with copy case law/legal principles highlighted where relevant.

62. In conclusion, all claims against the second respondent Carl D’Ammassa are dismissed on withdrawal. The claims remain against the first and third respondent only, and the second respondent no longer has any interest in these proceeding. The emails dated the 25 and 31 January 2023 are without prejudice and subject to the without prejudice rule for the purpose of the detriment claim brought under section 47 B of the Employment Rights Act 1996.

63. The claimant’s letter of 9 February 2023 and the two versions of the 3 March 2023 meeting notes are redacted in part limited to when there is a reference to a protected conversation and the protected conversation being paused.

Case Management Orders

64. It was also agreed that I would issue case management orders leading to the next preliminary hearing which are as follows:

1. The parties will jointly confirm to the Tribunal that the redactions set out above are the only ones required I order to comply with the judgment in this case no later than **2 April 2024**.

2. The respondent will send to the claimant no later than **2 April 2024** a witness statement from the relevant witness detailing how the claimant waived the effect of the without prejudice rule, no later than **2 April 2024.**

3. The claimant will send to the respondent a witness statement detailing how she did not waive the effect of the without prejudice rule, no later than **2 April 2024.**

4. Both parties will refer to the relevant documents in an agreed bundle in their witness statements.

5. The parties will exchange Skeleton Arguments including copies of case law/legal principles, highlighted where relevant, no later than **16 April 2024.**

6. The parties will agree a list of issues for the preliminary hearing and a draft list of issues for the final hearing in order that a case management discussion can take place after a decision is made on waiver, for final agreement. The draft list of issues will not include the automatic claim for unfair dismissal and will relate only to protected disclosures and

detriments. This document will be provided no later than **23 April 2024.**

7. The parties will agree provisional case management orders leading to the final hearing starting on the 22 April 2024 that includes a list of witnesses they intend to give evidence, the relevance of their evidence and how long they are likely to be giving evidence for. I will be exploring whether the 8 day hearing allocation can be reduced by agreement without any risk of it going part-heard, which will be of benefit for both parties.

Employment Judge Shotter
Date: 20 March 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

25 March 2024

FOR THE TRIBUNAL OFFICE