CASE NUMBER: 1400770/2022

EMPLOYMENT TRIBUNALS

Claimant: **Ms N Paterson**

Respondent: **Vinegar Hill Pottery Limited**

Heard at: Southampton **On:** 29 January 2025

Before: Employment Judge Dawson

Appearances
For the claimant: Mr Green counsel
For the respondent: Mr Jones, solicitor

REASONS

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Claimant's Costs Application

1. Between the 5 and 7 June 2023 the tribunal heard and decided the liability part of this case. Amongst other things it dismissed the claimant's claim of race discrimination and, in the course of its judgment, found that Ms Woodington of the respondent had used the phrase "Turkish delight" about a former colleague but had not said that Turkish Italian and other southern or eastern European people had a Mediterranean attitude to timekeeping. It did so, having accepted Ms Woodington's evidence

2. An oral judgment was given and at the end of the hearing the claimant indicated that she wished to apply for costs based upon an email sent by the respondent's solicitor dated 25 February 2022.

3. The tribunal directed that the application should be put in writing and on 27 June 2023 the claimant did so.

4. The primary part of the application asserts that properly considered, the email of 25 February 2022 is not entirely a without prejudice communication and in the part of the email which is not without prejudice, the respondent solicitor had written

   It is accepted that one of my client's employees referred to an ex-employee (a friend of hers with whom she is in regular contact) as "a Turkish delight" and said that she was "a bit Mediterranean" in her time keeping.

5. This is the hearing of the cost's application. The parties have agreed that it should be decided by me, sitting without members. At the outset of the hearing, I was told by counsel for the claimant that he is not seeking to challenge the findings of fact made by the tribunal but asserting that it is unreasonable behaviour for a party to say something in correspondence that is inconsistent with the evidence which is then given at trial.

6. The parties invited me to consider, as a preliminary issue, the question of whether the relevant part of the email of 25 February 2022 is admissible. This is the judgment on that issue.

7. I was not referred to any authority on behalf of the claimant beyond an authority which refers to the principles of "unambiguous impropriety" in respect of without prejudice correspondence, however the claimant does not seek to rely upon that principle.

8. In those circumstances I, with counsel, considered the White Book and in particular paragraph 31.3.39. That section describes the rule thus:

   The rule applies to exclude all negotiations genuinely aimed at a settlement, whether oral or in writing, from being given in evidence. The purpose of the rule is to protect a litigant from being embarrassed by any admission or acknowledgment made purely in an attempt to achieve a settlement.

9. Counsel for the claimant argues that in circumstances where the email of 25th of February 2022 is not headed "without prejudice", I should regard the email as being composed of different parts. The first part of the email with the headings "Pay and Status" and "Victimisation Claim" should be regarded as distinct from and severable to the section headed "Settlement". The admission upon which the claimant seeks to rely is in the section of the letter headed " ictimization claim".

10. I am willing to accept that it is conceptually possible for a letter to be composed of such different parts that part of it can be said to be subject to the without prejudice rule (because it is attempting to settle the claim) whereas another part of it is not. However, whether or not that is the case here is a question of fact.

11. The email of the 25 February 2022 is written in answer to the claimant's letter of 11 February 2022. That letter has the same headings. It is headed "Without prejudice and subject to contract". The structure of the letter is that under the heading "Pay and Status" the claimant sets out why she says she

is entitled to be treated as a worker and entitled to the sums she claims. The section headed "Victimisation Claim" sets out why certain acts are capable of amounting to an act of harassment, that the claimant had raised concerns and that she was then dismissed which, she says, is an act of ictimization. The section headed "Settlement" starts with the words "Given the above, any resolution of this subject matter must also include a compensatory award…" and goes on to set out an amount which the claimant would be willing to settle for. It is clear, therefore, that the section headed "Settlement" is not distinct from the earlier parts of the letter. The letter read as a whole is constructed as an argument whereby the early parts of the letter lay the groundwork for the settlement offer which is being made.

12. The reply, as I have indicated, follows the same structure. A concession is made under this section headed "Pay and Status" that the respondent will be paying to the claimant the amount she is claiming in respect of outstanding pay and holiday pay. Under the heading "Victimisation Claim" the letter recounts part of the claimant's argument, makes the admission relied upon and goes on to argue why that comment did not have the purpose or effect of violating the claimant's dignity or creating an intimidating hostile etc. environment. It goes on to refute the allegation that there was a connection between the claimant's allegations of racism and the decision to terminate her employment and under the heading "Settlement" states "My client will not be making any further payments in addition to those referred to above. As a self-employed individual worker she has no entitlement to notice. Her discrimination claim is hopeless. While costs awards in the tribunal are rare I am confident my client would recover their legal costs from your client were she to pursue a discrimination claim."

13. The claimant's argument is not that the "settlement" part of the respondent's email is not a negotiation genuinely aimed at settlement, she is not arguing that in so far as it makes no attempt to compromise the discrimination claim, it is not seeking to settle the claim. I have, therefore, not addressed this potential argument. The claimant's argument is, as I have said, that the settlement part of the claim, which she accepts is subject to the without prejudice rule, is separable from the earlier parts of the claim.

14. In my judgment that argument is wrong. The claimant's original offer has to be read as a whole. The settlement part of the claimant's letter of 11 February 2022 makes no sense unless the earlier parts are taken into account. The same can be said of the respondent's email of 25 February 2022. The early parts of the letter, including the parts under the heading "Victimisation Claim" are leading up to and part of the respondent's argument that it will make some payments as set out "above" but no other payments.

15. In my judgment the whole email falls within the without prejudice rule and within the public policy of encouraging litigants to settle their differences rather than litigate them to a finish.

16. Mr Green, realistically, accepts that if I am of that view that disposes of his application. He cannot rely upon the email in order to pursue his application

for costs. This is not a case where he can rely upon the principle of "without prejudice save as to costs".

17. I make, however, a further observation. Even if the email was admissible and even if the behaviour of the respondent in changing its position as to what was said by Ms Woodington was unreasonable, my provisional view is that I would have been slow to exercise my discretion in favour of the claimant in respect of this application.

18. If the letter is admissible, it should have been put to Ms Woodington during the course of her evidence for her to give an explanation as to the apparent inconsistency. It is not appropriate for that point to be held back (albeit I am prepared to accept inadvertently) until the tribunal has given its decision and the claimant is unhappy with the findings of fact which the tribunal has made. Had the claimant made an application for reconsideration of the tribunal's decision based on the letter, the application would have been refused on the basis that the claimant was seeking to have a second bite at the cherry and the letter should have been deployed at trial. My provisional view, having not heard full submissions on the point, is that in making an application for costs, the claimant is effectively seeking to have a second bite at the cherry by a different route. However, it is not appropriate for me to say more than that in circumstances where I have not heard full argument,

19. The application is dismissed.

Respondent's Costs Application

20. By email dated 26 July 2023, the respondent applies for costs on the basis that the claimant behaved vexatiously and unreasonably in fabricating her evidence and making statements on oath which she knew to be untrue.

21. It is trite to say that in deciding a costs application the tribunal must go through three stages, firstly considering whether the threshold has been met, secondly to consider whether it is appropriate to make an order in all circumstances and thirdly to consider the amount of costs.

22. Where a tribunal makes a finding of fact that a witness has lied, that can form the basis for finding that a party has behaved unreasonably. The tribunal, in this case, did not find that the claimant had lied. It rejected her evidence in favour of the respondent's evidence. As stated in *Elgamal v Westminster City Council* [2021] EWHC 2510 "Judges frequently hear from witnesses who have persuaded themselves as to the existence of certain facts, but where the judge takes a very different view. Such witnesses are not, or at least not necessarily, untruthful or dishonest". That of course is consistent with the important decision in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* about the nature of memory and the and reliability of eyewitness testimony.

23. The tribunal did not find that the claimant had lied in this case and Mr Jones has not persuaded me that the claimant's evidence comes close to passing the threshold of vexatious or unreasonable behaviour. Indeed, the tribunal

accepted the claimant's evidence in relation to phrase "Turkish delight" although, ultimately, it did not find that amounted to harassment.

24. In those circumstances, the threshold has not been passed. In any event, I would have been slow to exercise my discretion in this case in circumstances where the respondent took a point about the claimant's employment status which, it might be said, never had a very good prospect of success.

25. At the end of his application, Mr Jones suggested that a costs order should be made in respect of this hearing because of the application for costs made by the claimant which failed. He indicated that his client would not have made its application for costs, if the claimant had not made hers. It cannot be said that the claimant's behaviour in making her costs application was unreasonable or that it had no reasonable prospect of success. Mr Jones had not headed his email "without prejudice" and on the face of it, it contained a striking inconsistency with the evidence which he called at trial. That inconsistency was bound to cause upset and frustration for the claimant and remains a cause of disquiet even though it is not admissible.

26. The application is refused.

Employment Judge Dawson

Date: 7 March 2025

JUDGMENT SENT TO THE PARTIES ON

21 March 2025

Jade Lobb
FOR THE TRIBUNAL OFFICE