



## EMPLOYMENT TRIBUNALS

Claimant

Respondent

**LEE TOOZE**

v

**DHL GLOBAL FORWARDING (UK) LTD**

### PRELIMINARY HEARING (OPEN) BY CVP

Heard at: **Birmingham Employment Tribunal**

On: **24 & 25 August 2021**

**Before**

**Employment Judge McCluggage**

*Appearances*

For the Claimant

**In person**

For the Respondent

**Ms Ferber (counsel)**

### JUDGMENT

1. Those documents or parts of them identified within the reasons below as being without prejudice are inadmissible and may not be adduced in evidence directly or indirectly at the final hearing of these cases.
2. The claim for automatic unfair dismissal under section 103A of the Employment Rights Act 1996 (public interest disclosure) is struck out as having no reasonable prospects of success pursuant to rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013.

## REASONS

1. I heard these preliminary issues as part of a 2-day case management hearing within this complicated array of cases. I refer to the case management order relating to this hearing for the background.
2. The Claimant was required to specify precisely what material he wished to rely upon at the final hearing (a) which might fall within the likely class of documents constituting without prejudice material and (b) as protected disclosures. He was given overnight to think about this. Of course, this was the fourth case management hearing in the case and the need for issues to be delineated had been emphasised at earlier hearings. The basic principles of the without prejudice rule and its exceptions were outlined to the Claimant at the end of day one. For the second day of the hearing, Ms Ferber at my request produced a written summary of what she contended were the applicable legal principles, to assist both the Claimant and the Tribunal. We went through each of the without prejudice sections of the evidence the Claimant wished to rely upon. I heard submissions from both parties as to whether the material was admissible. The Respondent helpfully prepared a 'mini bundle' of letters and documentation covering both without prejudice material including transcripts of meetings and telephone calls recorded by the Claimant. There were also documents containing potential protected acts to assist with identifying issues in the victimisation claim within that bundle.
3. When the Claimant was asked to identify which "protected disclosures" he relied upon for his whistleblowing claim, it was apparent that they exclusively formed part of the alleged without prejudice material. Hence, I invited submissions as to whether the public interest disclosure claim under section 103A of the *Employment Rights Act 1996* could survive if I ruled the protected disclosures inadmissible because they were made in a without prejudice context.
4. This order and reasons should not be included within the final hearing bundle. If any part of it needs be looked at then no doubt the judge chairing the hearing will be able to see the content.

**Without Prejudice Material**

**Law**

5. The “without prejudice” rule is an important principle of evidence in English law and many other jurisdictions. It is designed to protect negotiations between parties to prevent statements against interest to be later used in litigation.
6. There must be an existing dispute between the parties at the time the alleged without prejudice communication is made, coupled with a genuine attempt to settle it. If neither of these requirements is fulfilled, then statements made in the course of discussions or correspondence will not be privileged: Framlington Group Ltd [2007] IRLR 598
7. The rule cannot, for example, be relied on if the exclusion of evidence of what a party said or wrote in without prejudice negotiations would 'act as a cloak for perjury, blackmail or other “unambiguous impropriety”’: Unilever plc v Proctor & Gamble Co [1999] EWCA Civ 3027 at 2444F–G.
8. It has been emphasised that the latter exception should only be applied in the clearest cases of abuse of a privileged occasion, otherwise this highly beneficial rule will too readily become eroded: Savings and Investment Bank Ltd (in liquidation) v Fincken [2004] 1 WLR 667; Unilever plc v Proctor & Gamble Co [1999] at 2444H.
9. In the employment law context, there has long been a concern that abuse of the without prejudice rule could mask discriminatory or other illegal behaviour. The courts have held that the “unambiguous impropriety” exception does not apply unless there is blatant discrimination; the exception does not apply to comments from which an inference of discrimination might be drawn (because it would inhibit the ability of the parties to speak freely in negotiations, if one or the other could subsequently “comb through the content of correspondence or discussions” for equivocal words or actions to support an inference of discrimination): Woodward v Santander UK plc [2010] IRLR 834
10. There are other exceptions and one that the Claimant picked up from Ms Ferber’s skeleton argument was where a clear statement was made that amounted to an estoppel.

### **Analysis and conclusions**

11. It is clear to me that there was an existing dispute at the time all potentially without prejudice statements were made in this case. This is apparent from the Claimant's email dated 19 December 2019 to Mr Sandison, one of his managers. This contains the following observation by the Claimant which indicates the nature of the dispute and that it was on the cusp of becoming a formal legal dispute:

Since June I have advised to HR that this feels like pre-meditated constructed dismissal, I have asked why Simon Parker was in June telling employees and customers that i was not returning (to date no answers) this came after Julia suggesting I couldn't return to the role on the 14th June, to date this is proving to be fact.

12. We then look at the various extracts from documents the Claimant wished to rely upon. I deal with each in turn:

- a. Email 19 December 2019: *this is not a without prejudice communication and may be relied upon.*
- b. 10 February 2020 email (p10 of mini-bundle) from Claimant to Mr Sandison: making reference to a call with ACAS and representations made by Julia Marsh (a HR officer employed by the Respondent). This refers in detail to the content of the ACAS conciliation discussions. These are plainly without prejudice conversations. While the Claimant disagreed with what was being said there was no material suggesting this conversation was in the nature of impropriety. *If this email is to be relied upon the third paragraph must be redacted.*
- c. 10 February 2020 email (p11 of bundle) from Claimant to Julia Marsh: my conclusion is that this email entirely covers the discussions through ACAS and the whole email constitutes without prejudice material. *The entirety of the email should not be adduced in evidence.*
- d. 10 February 2020 email (pages 13/14 of bundle) from Claimant to Mr Sandison: *the second paragraph relates to without prejudice material and should be redacted.*
- e. 08 February 2020 email (page 16) from Mr Sandison to the Claimant. *The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> paragraphs of this letter relate to without prejudice correspondence and are inadmissible.*

- f. 08 February 2020 email (page 18) from the Claimant to Mr Sandison: *the paragraph beginning "What I do take seriously...." relates to obvious without prejudice material and must be redacted. The remainder of the email is admissible.*
- g. 03 February 2020 chain of emails between Mr Lawrence Wright to the Claimant (pages 28-29): these are all relating to settlement negotiations and are plainly without prejudice and *none of them may be adduced into evidence.*
- h. 14 February 2020 letter (page 27) from the Claimant to Mr Lawrence Wright. This letter directly deals with settlement negotiations referring to the Respondent's letter. It is plainly without prejudice. *The entirety of the letter is inadmissible.*
- i. 08 June 2020 email (page 38) Mr Sandison to the Claimant. This emails directly concerns a substantive settlement negotiation. *The entirety of the communication relates to negotiations and is inadmissible.*
- j. 24 June 2020 email (page 39) Claimant to Mr Sandison: *paragraphs numbered 7, 12, 13 and 14 relate to without prejudice discussions and should be redacted. The remainder of the email is admissible.*
- k. 23 June 2020 email (page 40) Mr Sanderson to Claimant: *this contains no without prejudice material and may be relied upon by the Claimant in its entirety.*
- l. 24 June 2020 email (page 50, repeated page 54) Claimant to Ms Hennessey and others at Eversheds solicitors. *The third paragraph is without prejudice and must be redacted.*
- m. 7 July 2020 email (page 49, repeated page 52) Claimant to Ms Hennessey and others at Eversheds solicitors. The reference in the 5<sup>th</sup> paragraph to "offered a severance package" and in the 8<sup>th</sup> paragraph to "and also, declined to enter into early conciliation with ACAS" and the entirety of the 15<sup>th</sup> paragraph are without prejudice and must be redacted. *The remainder of the email is admissible.*
- n. Transcript of meetings 13 January 2020 (pages 55ff): the first 4 ½ pages relates to a return to work meeting and is admissible. Half-way down the fifth page from "at approximately 38 minutes LT was invited by LW to move to another room for a chat..." relates to an expressly without prejudice conversation. *The remainder of the page after "poor quality tape" is without prejudice and should be redacted and the remainder of the 12 pages should be excluded from the bundle.*
- o. Transcript of meeting 15 January 2020 meeting (page 67-69): this meeting was entirely without prejudice and *should be excluded in its entirety.*
- p. Transcript of meeting 26 May 2020 (page 70-82): *this meeting is not without prejudice and the entirety of the notes of it are admissible.*

- q. Transcript of meeting 8 June 2020 (page 83-85): this meeting relates to offers being made to end employment and is plainly without prejudice. *The entirety of the meeting notes are inadmissible and must not be contained within the bundle.*

13. I have looked at each communication and meeting both individually but also as a whole when standing back and taking in the whole picture to determine with any exception to the without prejudice rule might apply, in particular the unambiguous impropriety exception. My firm conclusion is that the exception does not. Whilst I entirely accept that the Claimant will have felt under pressure from offers being made, to my mind the content of the correspondence and telephone calls was courteous and certainly far from being so threatening as to be analogous to blackmail. Without prejudice negotiations and discussions can be considerably more robust than those evident here without reaching the high threshold required. There is no issue of estoppel evidence in any of the papers.

**Strike out**

14. The Claimant specifically identified his protected disclosures as being the following statements made in conversations with Mr Lawrence Wright of the Respondent:

- a. Minute of meeting 15 January 2021. The Claimant produced a second transcript of this meeting at 13:28hrs on the second day of the hearing (and so it was not contained within the mini-bundle). At the top of page 5 he says this:

LT And then I thought er you know yeah what is the risk well you know I could put another two things through tribunal if I wanted to do and that is without the risk of what I know and I think the risk of what I know if I exposed it is is worth a billion.

LW A billion

LT Yeah a billion globally I think

LW A billion wow ok

LT So I think Nicholas is a little bit naïve in saying well we're squeaky clean because there is no way in the world .....

- b. Minute of meeting 13 January 2020 (page 8/12 internal numbering, page 62 of mini-bundle):

LT I had to go to him you know because it involved the people that worked for him I had nowhere else to go I had to go to him and that's why I went to him as a one to one I says im coming to you as an educated man Michael because I don't want to put a grievance in but these people report to you and where else am I supposed to go with it LW reports about a colleague who had a grievance who went to head of Europe and mentioned whistleblowing LW felt sorry for her he explained that Europe go straight to processes pile and let the managers deal with it and the outcome

15. These statements both fall within expressly stated without prejudice discussions with Mr Lawrence Wright.
16. The Claimant expressly disclaimed a passage in one of the meetings referring to a headbutt incident some 20 years ago as being a protected disclosure he wished to rely upon.

## Law

17. Rule 37 of the Employment Tribunal Rules 2013 reads:

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

- (a) that it is scandalous or vexatious or has no reasonable prospect of success;
- (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
- (c) for non-compliance with any of these Rules or with an order of the Tribunal;
- (d) that it has not been actively pursued;
- (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

18. A tribunal should be cautious about striking out a claim involving discrimination or whistleblowing because of the additional public interest in such matters: Lockley v. East North East Homes Leeds (2011) UKEA/511/10 but there are no formal categories where strike outs are not permitted at all: Ukegheson v. Haringey LBC [2015] ICR 1285. I would have to apply a two-stage process: 1) has one of the strike out grounds

been established on the facts, and 2) if so, is it just to proceed to a strike-out in all of the circumstances: Hasan v. Tesco Stores Ltd (2016) UKEAT/0098/16. I bear in mind the draconian nature of a strike out on the “no reasonable prospect” basis.

19. Under Part IVA of the *Employment Rights Act 1996*, section 43B defines disclosures which qualify for protection:

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

- (a) that a criminal offence has been committed, is being committed or is likely to be committed;
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

20. Only disclosure of information, not making of allegations amounts to a “disclosure”: Cavendish Munro Professional Risks v. Gelduld [2010] IRLR 38. There is no bright line between what constitutes an allegation and information.

21. The “public interest” requirement was analysed in Chesterton Global Ltd v. Nurmohamed [2017] EWCA Civ 979. This is ultimately a matter of fact.



## **Analysis**

22. I bear in mind the high threshold for striking out and that it will be a rare case where a tribunal should strike out part of a claim without a hearing. I heard the Claimant's submissions on why the relevant statements were admissible and why they had prospects. He submitted that the without prejudice issues were closely intertwined with other aspects of the case and the pressure had a prejudicial effect on him as a person suffering disability. He submitted that the Respondent should not be permitted to hide serious misconduct. The Claimant did accept that if his statements were without prejudice and inadmissible then "the law is the law" and he would have to bear the consequences of disclosures not being made correctly.
23. In my view, the main problem for the public interest disclosure dismissal claim is that the alleged disclosures were made in a completely without prejudice and inadmissible context. If the statement is inadmissible then the tribunal cannot hear evidence about it.
24. There is an analogy to be drawn between a without prejudice statement and section 43B(4) which prohibits statements covered by legal professional privilege to constitute a qualifying disclosure. I do accept that section 43B contains no express prohibition on a without prejudice statement and so, for example, had the meetings concerned or part of them fallen under one of the exceptions to the without prejudice rule, I would have been prepared in principle to hold an appropriate representation in one of these meetings to be a qualifying disclosure.
25. However, ultimately, I cannot see how a claim can succeed if it depends upon inadmissible evidence.
26. However, there are further problems with the statements the Claimant wishes to rely upon.
27. In relation to the first statement:
- a. It is in the nature of a threat in negotiation rather than provision of information. I cannot perceive how any tribunal could analyse it otherwise.

- b. It contains no information at all but merely hints that there could be such information.
- c. There is nothing about what has been said that could possibly make it in “the public interest”. Indeed, I would say that if a disclosure is in the public interest, it could hardly be expected to be made *only* in the context of a without prejudice discussion.

28. In relation to the second statement:

- a. I do not detect the Claimant conveying any information at all.
- b. The mention of whistleblowing is not by the Claimant but by Mr Wright.
- c. There is nothing remotely in the nature of “public interest” in what is said.

29. My conclusion is that the section 103A ERA 1996 claim brought in respect of the Claimant’s dismissal is, put bluntly, entirely hopeless. Firstly, the Claimant cannot rely upon the material statements. Secondly, even if he could, it is fanciful to think that a tribunal would conclude that they are qualifying disclosures for the reasons stated.

30. Thus, I conclude when applying the requisite two stage process that (a) there are no reasonable prospects of success, and (b) it is just to strike it out because it is contrary to the Overriding Objective to allow such a weak allegation to continue to a final hearing that has many other live issues to consider and decide. The Claimant still has his ‘ordinary unfair dismissal’ and disability discrimination claims to raise in respect of his dismissal. This decision does not therefore cut him out from the tribunal.

### **Afterword**

31. It is important for both parties to understand that my having ruled on these issues, the substance of the without prejudice material cannot be indirectly referred to at the final hearing. It must be ignored. The tribunal at the final hearing will have the acumen to realise that without prejudice discussions were ongoing in the background. It is legitimate to make passing reference to without prejudice discussions having taken place. It is the substance of the discussions which must not be mentioned. I say this because I realise that the Claimant will be disappointed by

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1317011/2020, 1309325/2020, 1309421/2020(V)

my decision that he cannot rely upon this evidence. However, he cannot seek to circumvent the decision by raising the subject matter of discussions orally.

**Employment Judge McCluggage**

Signed: 5<sup>th</sup> October 2021

Sent to the parties on:

6<sup>th</sup> October 2021