EMPLOYMENT TRIBUNALS

Claimant: **Ms Renata Oterska**

Respondent: **James T Blakeman & Co Ltd**

Heard at: **West Midlands Employment Tribunal**

On: **23rd January 2023**

Before: **Employment Judge Steward**

Representation
Claimant: In person assisted by the interpreter Ms Bailey
Respondent: Mr Islam-Choudhry (Counsel)

JUDGMENT

a. The application by the respondents to redact the without prejudice negotiations in the bundle is granted.
b. The application made by the claimant to adjourn this hearing is refused.

REASONS

1. The case was listed today for an open preliminary hearing to determine the question of whether the claimant was a disabled person within the meaning of section 6 Of the Equality Act 2010. I was informed today by counsel for the respondent that this issue had been conceded last week.

2. Therefore, there were three issues to determine today

    a. Paragraph 31.20 of employment Judge Faulkner's order of the 16th of August 2022 namely between the 8th of October and the 21st of October

2021 Phil Blakeman contacted the claimant in what the respondent says was a without prejudice communication. Part of the claimant's complaint is about that communication.

b. The application by the respondent to amend the response within 14 days which I have granted.
c. Case management directions to prepare for the final hearing which is listed for 13 days from the 7th of August 2023 to the 25th of August 2023.

3. On the morning of the hearing the respondent provided me with two documents. Both documents were from Harvey on Industrial Relations of Employment Law and they dealt with without prejudice communications and conciliation generally.

4. These documents were also provided to the claimant. The claimant applied for an adjournment of this hearing so that her solicitor could consider both these documents. I refuse this application.

5. Though claimant has attended the hearing in person today it would appear that she has had legal representation and guidance throughout the proceedings. She is clearly still being advised by solicitor as she has referred me to her solicitor throughout this hearing. The issue of without prejudice communications has been a live issue for many months. It was addressed in the case management order of Employment Judge Faulkner dated the 16th of August 2022 which is over five months ago. The matter is due to be heard as a final hearing in August 2023. Case management directions need to be made to ensure that the final hearing dates in August can be preserved. I have refused the application to adjourn this case as it would not be proportionate to do so. The claimant has had ample time to consider the application to redact the bundle and the issue of without prejudice communications generally. She has been assisted by a solicitor and they have had time to address this issue.

6. The respondents take issue with the following sections of the bundle

   a. Particulars of claim page 24 **"I asked ACAS for help in resolving the matter, but owner Phil Blackman was offering me a small amount of money and the condition was that I had to leave the workplace"**
   b. Additional particulars of claim page 57 **"Mr Phil does not take my illness seriously so far and he wrote to the representative of ACAS that I should take 12,000 from him and he does not want to see me anymore"**

7. I was also referred to a series of emails from ACAS conciliator Maria Wakeman and the claimant. These did not appear in my bundle for this hearing but they must not appear or remain in any bundle for the final hearing. The first was dated the 19th October 2021 from Ms Wakeman to the claimant and is marked 'without prejudice and subject to terms'. In the body of the email is a without prejudice and without admission of liability offer to settle in the sum of £8000.

8. A further email from the same conciliator at ACAS on the 20th October 2021 refers to the claimants counter offer of £99,000 and a final offer to settle by the respondents in the sum of £12,000.

9. It would appear that these emails have been presented to the tribunal this morning in order to show that nature of the ongoing negotiations between the claimant and the respondent in the context of the guidance, statute and case law.

The Law

10. Anything communicated to a conciliation officer in connection with the performance of his functions under ETA 1996 ss 18A-C is privileged and may only be given in evidence with the consent of the person who communicated it to him ETA 1996 s18(7). The extent to which communications to a conciliation officer are inadmissible was considered with reference to the substantially identical provisions of the IRA 1971 s146(6) in *M and W Grazebrook Ltd v Wallens [1973] 2 ALL ER 868….." The test is whether evidence exists in an admissible form apart from evidence based upon such communication to the conciliation officer. Thus in the absence of consent no evidence can be given of the content of oral statements made to a conciliation officer in connection with the performance of his functions or indeed that such statements were made…'*

11. For a communication to fall within the rule it is not essential that the words without prejudice to be used because if it is clear from the surrounding circumstances that the parties were seeking to compromise the action evidence of the content of those negotiations will as a general rule not be admissible at the trial and cannot be used for establishing admission or partial admission.

12. Although it is well established that the rule can apply to communications during the course of negotiations to settle the dispute prior to the commencement of litigation *Framlington Group Ltd v Barneston [2007] EWCA Civ 502* it is more difficult to identify with precision how approximate the negotiations must be to the start of litigation before the rule will be engaged. In Barneston a wrongful dismissal case in which the negotiations claimed to be without prejudice took place before the commencement or even the threat of litigation. Auld LJ stated that the critical question for the court is where to draw the line between serving the public policy interest underlying the rule and wrongly preventing a party to litigation from putting their case at its best. He stated *"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'*

13. Applied to these facts 6 (a) and (b) above were clearly references made to negotiations between the claimant and the respondent, during the currency of the proceedings, in order to try and settle the claim or dispute.

14. The test in ERA 1996 s.18(7) and *Barnston* are clearly met. These were without prejudiced negotiations between the claimant and the respondent and they are privileged. These references in the bundle aforementioned at para 6 (a) and (b) above must be redacted and the emails I was referred too between the claimant and ACAS must not form part of the bundle at the forthcoming final hearing of the matter. The information referred to at paragraph 31.20 the case management order of Employment Judge Faulkner dated the 16th August 2022 was in the context of without prejudice communications and cannot be relied upon by the claimant.

Employment Judge **Steward**

Date 24/1/2023