EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr H Bansal	**v**	Pitney Bowes Software Europe Ltd

PRELIMINARY HEARING

Heard at: Reading **On:** 3 April 2017

Before: Employment Judge Gumbiti-Zimuto

Appearances
For the Claimant: Mr G Menzies (Counsel)
For the Respondent: Mr N Smith (Counsel)

JUDGMENT

1. The letter dated 30 November 2015 from the respondent to the claimant is not covered by the without prejudice privilege and the said letter may be admitted into the evidence at the full merits hearing.

REASONS

1. The claimant made an application that the letter dated 30 November 2015 ("the letter") should be admitted into the evidence in the case. The respondent resisted the claimant's application contending that the letter was covered by without prejudice privilege and could not be relied upon as evidence in the case. This preliminary hearing has been listed for me to determine whether the letter should be admitted into the evidence in the case.

2. The parties have been represented by Counsel; I have been provided with skeleton arguments on behalf of the claimant and on behalf of the respondent. There is no significant dispute between the parties as to the relevant law that I must apply in this case. How the relevant law applies to the facts of this case is very much disputed as is clear from the skeleton arguments. There are two matters that I am required to decide.

    2.1 There was a relevant dispute so that the without prejudice privilege arises in respect of the said letter; and

2.2 If so, whether there was any unambiguous impropriety to entitle the claimant to rely on the letter in circumstances where the without prejudice rule ceases to apply.

Was there a relevant dispute?

3. The question whether there was a relevant dispute is a matter of fact that I must determine. The material before me from which I must make that determination is contained in the bundle prepared for the preliminary hearing and in the witness statement of Sarah Thomas.

4. The claimant was given a first written warning and placed on a performance improvement plan by his manager on 28 April 2015. On 20 May 2015, the claimant had a telephone call with Sara Thomas. She describes the claimant as irate, incoherent and ranting during this call. On 21 May, Sara Thomas sent the claimant an email explaining that he could appeal against the decision to place him on a performance improvement plan.

5. The claimant appealed against the decision to issue the final written warning and place him on a performance improvement plan. The appeal was considered at a meeting on 10 July 2015 by Kieran Kilmartin. The appeal outcome letter informed the claimant that his complaints that he was treated differently in respect of his territory and compensation plan were not upheld. The claimant's complaint regarding his first written warning was upheld and the first written warning was held to be invalid.

6. The following recommendations were made [pages 68-69]:

> "Recommendations
> I am recommending that your manager brings to your attention his on-going concerns regarding your performance formally and in line with our Performance Improvement Policy. I am also recommending that the Employee Relations team contacts Gareth in the week following the receipt of this letter to support both parties with the next steps.
>
> With regards to the other issues raised during your discussions with Sara Thomas and Gareth Evans, which you did not wish me and look into as part of this appeal, I again request that these are escalated to the Employee Relations team so that they can support you in resolving these issues. They will make contact with you separately regarding these matters."

7. The other matters raised in discussions with Sara Thomas and Gareth Evans that the claimant did not wish to raise essentially consisted of complaints that the claimant made about the way that he was treated in his employment. It is important to note that during the course of the appeal hearing conducted by Mr Kilmartin, the claimant was not wishing to pursue those matters as complaints. In respect of those matters, there was no dispute between the claimant and the respondent.

8. Following the appeal meeting, the claimant had meetings with his line manager and also with members of the respondent's HR team, including Sara Thomas and Sue Seagrave.

9. In one meeting with the claimant's line manager, the line manager noted that the claimant was not ready to return to work full time and "probably needs to see occupational health doctor". It was noted by a member of the HR team that the claimant's health was deteriorating and not improving.

10. The claimant, in meeting with his line manager, raised concerns reporting to Sara Thomas following a meeting on 12 August 2015, the claimant's line manager stated:

> "I honestly cannot see how Harg is going to succeed in this job until he gets through his thinking that everyone is against him and intentionally trying to make him look bad. He is in a bad place and will really struggle to rebuild his credibility as he just sees that everyone is against him. Hence I think we need to suggest the medical support. I also think that whenever we bring up the performance topic (which id didn't mention at this meeting), he will simply be not completely back again. I guess what I am saying is that he needs to review whether this is the right role/place for him going forward."

11. It is important to note hat at this stage there is no dispute between the claimant and the respondent or his line manager. The observations made by Gareth Evans are his views as to what was in the best interests of the claimant.

12. The claimant had also raised concerns in a meeting with Sue Seagrave, HR adviser, on 6 August 2015. The claimant was asked to put his concerns in writing so that they could be formally addressed. The nature of the claimant's concerns as understood by Sue Seagrave was set out in an email dated 12 August 2015 [page 77] which includes the passage that:

> "The outstanding issues that we need to resolve through the grievance process are around:
>
> - Deliberate exclusion from the team
> - An inappropriate racial comment made by a colleague
> - Not being supported by colleagues in relation to customer interactions"

13. The claimant however was not willing to raise a grievance and on 10 December 2015, was sent an email stating that he was being bullied and harassed by the respondent setting up meetings with occupational health and in relation to the grievance that he did not wish to pursue. The respondent instigated its formal grievance policy even though the claimant refused to do so. The claimant was invited to a grievance hearing which he did not attend. Despite the claimant refusing to attend the grievance hearing and making it clear that it was not his grievance, the respondent continued with the grievance and rejected the grievances under the headings of "Deliberate exclusion from email correspondence, meetings and interactions with customers by members of the sales team",

"Inappropriate comment of racial nature to you by a colleague Alex Mathieson on 18 March 2014" and "Lack of support from colleagues in the confirm team" [see pages 98-99]

14. The claimant met with his new line manager on 14 October 2015 and agreed a way forward. The respondent took the decision to carry out a without prejudice conversation with the claimant and wrote to the claimant the letter of 30 November 2015. The claimant's solicitor and the respondent then exchanged correspondence which did not result in any agreement between the claimant and the respondent to terminate the claimant's employment.

15. The claimant states that there was no relevant dispute and therefore the matter was not covered by without prejudice privilege. The respondent contends that there was clearly a dispute between the claimant and the respondent. The claimant's relationship with the respondent had broken down and the letter was therefore covered by without prejudice privilege.

16. The starting point is "To determine whether the without prejudice principle is engaged at all is the communication in the course of bona fide negotiations with a view to settlement of a dispute." (Phipson: paragraphs 24-30.) I am not satisfied that there was a dispute between the claimant and the respondent at the time that the letter was written. The position was that the claimant was not fully engaged in his role; he had been on a phased return to work. On his full return to work, there were issues which had been identified as in need of resolution relating to his performance. The claimant had raised concerns about issues relating to his employment and it was the respondent's perception through its HR advisers that the claimant considered that his relationship with the respondent had broken down.

17. I am not satisfied that there was a dispute in respect of which the without prejudice privilege could attach. There was no extant grievance brought by the claimant. The claimant's dispute with the respondent about the first written warning had been resolved in his favour. The performance improvement plan issues would be determined on the claimant's full return to work.

18. There may or may not have been a future dispute concerning his performance. While there was clearly a history of disputation between the claimant and respondent, there was no dispute when the letter was written to which the without prejudice privilege could attach. I am therefore satisfied that the without prejudice principle is not engaged in the circumstances of this case.

19. The second issue that I have to determine is in relation to whether or not there was an ambiguous impropriety. Because of my decision in respect of whether the without prejudice principle was engaged, it is unnecessary for me to make a decision in respect of this issue. However, if my decision in

relation to the engagement of the without prejudice principle is wrong, my conclusion in respect of an ambiguous impropriety is as follows.

20. Firstly, I bear in mind that the policy underlying the without prejudice rule applies to cases where discrimination has been alleged as it applies to any other form of dispute. In the case of Woodward v Santander, it was stated that

> "Indeed, the policy may be said to apply with particular force in those cases where the parties are seeking to settle a discrimination claim".

21. The judgment in the case of Woodward also contains the following passage at paragraph 62:

> "What are the limits? To our mind, they are best stated in terms of existing exceptional impropriety. This exception as we have seen applies only to a case where the tribunal is satisfied that impropriety alleged is unambiguous. It applies only in the very clearest of case. A court or tribunal is therefore required to make a judgment as to whether the evidence which is sought to adduce meets this test. Words which are unambiguously discriminatory will of course fall within the exception."

22. The letter in my view contains no unambiguous impropriety. The letter should be seen as a whole. In the first three paragraphs, the letter sets out things as they are viewed to have occurred in the past. In the passage which is said to contain the unambiguous impropriety, the following passage appears:

> "You have recently disclosed to us that you have been diagnosed with bipolar. Even though you state this is not affecting your ability to do your role, we have concerns that this may be having an impact as you appear very susceptible to stress and the role requirements are pressurised. Now that you have a new manager in the United States, it is even more difficult to make sufficient reasonable adjustments to help you to continue in the role given the stretch of resources and difficulties of managing from abroad It therefore appears to us that you continue to remain unhappy in the role and we remain unhappy that you are not actually fulfilling the role requirements and are finding it challenging to sustain the basic requirement to attend work and carry out meetings with colleagues. In the circumstances one option is to offer you a settlement agreement to bring our employment relationship to an end and we invite you to consider the proposal set out below."

23. That passage taken in the context of the whole matter does not contain any unambiguous impropriety. The words used are not unambiguously discriminatory.

24. The unchallenged evidence of Sara Thomas in respect of this letter included that

> "The fact of the matter was that he [the claimant] was not attending work. He was not engaging with your efforts to resolve matters. He was not engaging with his colleagues and he was not engaging with our customers. We were concerned that

> he was therefore not capable of performing in a role that he had been recruited to perform."

25. She goes on to state that the fact that the claimant had bipolar was irrelevant to Sara Thomas and to the respondent. That evidence is unchallenged. In my view, it is an evidential feature of the whole circumstances of this case that the claimant had bipolar. The fact that the claimant had bipolar was not a relevant consideration to Sara Thomas or the respondent. There was therefore no unambiguous impropriety.

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Employment Judge Gumbiti-Zimuto

Date: 8 May 2017……..

Judgment and Reasons

Sent to the parties on: .....

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For the Tribunal Office