EMPLOYMENT TRIBUNALS

Claimant: Ms J Llewelyn

Respondent: Oyster Bay Systems Limited

Heard: via telephone **On:** 28 April 2020

Before: Employment Judge S Jenkins

Representation
Claimant: Mr S Atherton (Solicitor)
Respondent: Mr R Prais (Solicitor)

JUDGMENT

The Respondent's application that certain correspondence between the parties should be ruled inadmissible due to the "Without Prejudice" rule is refused.

REASONS

1. The hearing took place to consider the Respondent's application that certain correspondence between the parties should be considered to be subject to the "Without Prejudice" rule, and therefore judged inadmissible.

Background Circumstances

2. I did not hear any evidence in relation to the Respondent's application and therefore make no formal findings of fact. However, the background to the disputed correspondence and the application is that the Claimant was employed by the Respondent, a small family-run technology company, as HR and Recruitment Coordinator from January 2016. In February 2019 there appears to have been a falling out amongst the family which led to the appointment of a new external Managing Director. The Claimant alleges various aspects of maltreatment by the new Managing Director during the month of February 2019, which led to her commencing sickness absence on 1 March 2019 and, it appears, never returning.

3. On 20 March 2019, the Claimant raised a grievance about her treatment. I have not seen that grievance but it was accepted by the Respondent that it summarised the Claimant's concerns about the way she had been treated and did not raise any threat of litigation. The grievance was not dealt with, although there appears to have been an indication that it would be dealt

with by someone appointed externally by the Respondent once the Claimant was well enough.

4. By June 2019 however, it appears that the externally appointed Managing Director had been removed and that the previous family directors had returned to take control of the Respondent, in particular, Michael Breach and his son, Martin Breach.

5. The letter which is said to form the basis of the "Without Prejudice" discussions was dated 8 June 2019 and went from Mr Michael Breach to the Claimant. The letter appears to have come rather out of the blue but seemed to respond to the Claimant's grievance letter of 20 March 2019. The letter contained seven short paragraphs, the first six of which comprised a very clear, indeed what could perhaps be described as abject, apology from Mr Breach to the Claimant for the way she had been treated.

6. In particular, the letter referred to the introduction of the Managing Director as "*a stupid and unforgivable thing to do*" and a "*terrible lack of judgement*". It also referred to Mr Breach being appalled by the treatment the Claimant experienced at the hands of the external Managing Director and that he had let that happen. Mr Breach also referred to the external Managing Director being allowed to "*fabricate lies*", and that Mr Breach had gone along with what she had said, "*believing it the right way to behave*". He noted that he "*accepted those lies concerning [the Claimant] in an act of blind faith and complete betrayal*". He also indicated that the Claimant had done nothing wrong, that any accusations against her were false, and had been designed to divide the company. He stated that he was sorry that he could not undo what he had done and that it had made the Claimant ill.

7. The concluding paragraph to the letter was as follows:

   "*I apologise to you without reservation, and I understand if you wish to take legal action against the company, and possibly [the new Managing Director] and myself. I would not try to dissuade you from doing that, but ask if you would first consider talking to me or to Martin about a private settlement.*"

8. The letter, whilst dated 8 June 2019, was not sent to the Claimant until Monday, 10 June 2019 under cover of an email which stated:

   "Dear Jo,

   I attach a letter of my sincere apology to you. My hope is that this can be a start to the process of bringing closure to this terrible situation.

   Best wishes

   Michael"

   The letter was attached to that email and had been given the title of "MRB apology to Jo 8 June 2019.docx".

9. The Claimant replied to Mr Breach by an email of 13 June 2019, acknowledging the apology and taking satisfaction from Mr Breach's and the company's recent change in direction. In the email, the Claimant

referred to having taken legal advice and that when she felt well enough, she had fully intended to bring proceedings against the company. She stated however that her desire to enter litigation "*when the company is in its current form is diminished for obvious reasons*". She commented that she agreed that an attempt to reach a private settlement seemed a realistic first step. She also noted that she did not feel well enough to talk to either Michael Breach or Martin Breach and preferred for Mr Breach first to set out what he considered reasonable in further correspondence.

10. In the event, Michael Breach did not write further to the Claimant, and it appears instead that Martin Breach send an email to the Claimant on 18 June 2019. I have not seen a copy of that email, but the pleadings suggest that Martin Breach resiled from the need for an apology, and felt that as the transgressors (the externally appointed Managing Director and one other) had been removed, nothing stood in the way of the Claimant's return.

11. The Claimant then responded by a letter attached to an email of 25 June 2019, referring to her correspondence with Michael Breach and the fact that she was awaiting a response. She went on to say that she felt that she was now receiving mixed messages from the Respondent and that she felt that she had no option other than to formally tender her resignation. Mr Breach replied later that day, imploring the Claimant to reconsider, but it appears that she did not, and she has now brought proceedings, complaining that she felt that she had been constructively unfairly dismissed.

12. I had sight of some further correspondence between the parties in August 2019, which was marked "Without Prejudice" and which the parties have accepted was indeed without prejudice.

Issues and Law

13. The issue for me to consider was whether the letter from Mr Michael Breach to the Claimant of 8 June 2019, and the ensuing correspondence between the parties in June 2019, was "Without Prejudice" and therefore inadmissible.

14. In terms of background law, probably the principal authority in relation to "Without Prejudice" communications is the House of Lords decision in Rush & Tompkins Limited v GLC [1989] 1 AC 1280. In that case, Lord Griffiths noted that the rule of evidence that without prejudice communications were privileged from disclosure, and inadmissible in evidence, was derived from the public policy of the desirability of encouraging litigants to settle their disputes by agreement rather than litigate them to finish, and of ensuring that negotiations are not troubled by the fear that what is said will be used in evidence.

15. It is clear from the cases, and was accepted by both parties, that it is not essential that the words "without prejudice" are used to qualify correspondence if it is clear from the surrounding circumstances that the parties were seeking to compromise the action. However, it was made clear in Rush & Tompkins and in several other cases that for the without prejudice rule to apply 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. If neither of those requirements is

fulfilled then statements made in the course of discussions and correspondence will not be privileged.

16. In the context of grievances, the EAT, in BNP Paribas v Mezzotero [2004] IRLR 508, made clear that the mere act of raising a grievance does not, by itself, necessarily mean that the parties are in dispute, and suggested that, because a grievance might be upheld or resolved, the parties may never reach the stage where they could properly be in dispute.

17. A qualification of that arose in the Court of Appeal decision of Framlington Group Limited v Barnetson [2007] IRLR 598, which made clear that discussions could be considered to be without prejudice even before formal proceedings were contemplated. Auld LJ noted that, "The critical feature of proximity [i.e., of the communication to the threat of proceedings]… is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation, it was aired…. Would they have…lowered their guards…if they had not thought… that, by doing so, they could avoid the need to go to court? …the crucial consideration would be whether in the course of negotiations the parties…might reasonably have contemplated litigation if they could not agree."

18. The Barnetson case therefore suggests that it is more likely to be the nature of the grievance, and the manner and circumstances in which it is raised, that are relevant to the question of whether or not a dispute exists, than the fact that a satisfactory outcome might be reached to resolve it.

19. Another aspect of guidance from the Mezzotero decision is the direction that if there is no existing dispute, then the parties cannot seek to engineer a termination by mutual agreement under the guise of a without prejudice discussion, and that the statements made in the course of such a discussion will be admissible.

20. It is also clear from the authorities that, when considering whether a dispute exists, regard should be had not just to the correspondence but to the factual matrix around it, and if that shows an actual dispute or the potential for a future dispute, then the rule will apply.

The parties' submissions

21. The Respondent relied on the Barnetson decision, that the crucial consideration was whether, in the course of their discussions, the parties contemplated or might reasonably have contemplated litigation. The Respondent noted the summary of this area in Harvey's which suggested that it is likely that, following Barnetson, most discussions and grievances would now be subject to the without prejudice rule, notwithstanding the Mezzotero decision.

22. The Respondent also relied on an EAT decision of Brodie v Nicola Ward, trading as First Steps Nursery (UKEAT/O526/07), which concluded that a without prejudice letter, which included a proposal for termination, could not

be disclosed, despite the fact that the claimant was arguing that that proposal was the very "last straw" for the purposes of her constructive unfair dismissal claim. However, I could see that the EAT in that case proceeded

on the basis that the underlying decision of the Employment Tribunal, that the without prejudice rule applied to the relevant correspondence, was not appealed, and that the appeal focused purely on the application of one or both of two exceptions to the "Without Prejudice" rule. It was not therefore relevant for my deliberations.

23. The Claimant contended that the she had raised the claim for constructive dismissal having raised an appropriate grievance with her employer and should be entitled to adduce evidence of the employer's response to that grievance during the course of the tribunal proceedings. The Claimant noted that it was the Respondent who raised the issue of potential proceedings and suggested that the Claimant should consider talking beforehand, that the letter did not mention any proposal for settlement, and nor did it contain any settlement details or any kind of route for resolution as opposed to litigation.

24. The Claimant also contended that the letter contained admissions in respect of the agreement that the Claimant had suffered the conduct of which she complained within her grievance, and that if it was excluded under the ambit of the without prejudice rule, that would mean that any acknowledgements by an employer of any grievance raised during the course of employment would be excluded.

25. The Claimant also contended that the letter contained apologies from the Respondent in relation to behaviour which it had been accepted had taken place. The Claimant contended therefore that any "dispute" which might be considered to have been raised by the Claimant would have been concluded, and therefore there would not have been any extant dispute at the time the letter was issued.

26. Finally, the Claimant contended that even if the document could be considered to arise from a dispute, and thus be a potentially privileged document, it would be difficult to assess it as a genuine attempt to reach a settlement when considered in light of the Respondent's subsequent conduct.

Conclusions

27. In reaching my conclusion on the Respondent's application I went back to the basic principle set out by the House of Lords in the Rush & Tompkins case, which was that, for the without prejudice rule to apply, there must be an existing dispute between the parties at the time the alleged communication was made and also a genuine attempt to settle that dispute. In this case, I was not satisfied that either of those requirements was fulfilled.

28. The Claimant had sent a grievance letter to the Respondent on 20 March 2019, and it was accepted by the Respondent that that letter contained a summary of the concerns that the Claimant had over the way that she had been treated during the month of February 2019 and did not contain any threat of litigation. Whilst I was not provided with a copy of the grievance letter, it seemed reasonable for me to proceed on the basis that the grievance had been sent on the basis that the areas of concern outlined by the Claimant would be addressed and that whilst, as with all grievances, a

possible falling out between the parties, and possible litigation, may have been in the background, it was not sent, on the part of the Claimant, in relation to any dispute.

29. The letter from Michael Breach was then sent nearly three months later and, as I have noted, appeared, for the vast majority of its content, to contain a very clear acceptance as to what had gone before, and an apology for that. It was only in the concluding paragraph that Mr Breach expressed his understanding that if the Claimant wished to take legal action he would not try to persuade her from doing that, but instead would ask if she would first consider talking to either his son or himself about a private settlement.

30. Notwithstanding the potential qualification of it provided by the Barnetson decision, I considered that the communication fell within the ambit of the Mezzotero judgment. The Claimant had raised concerns about the way she had been treated and had anticipated that those concerns would be addressed. In my view, the stage had not been reached where, even taking into account the impact of the Barnetson case, it could be considered that there was a dispute between the parties.

31. However, even if I had considered that there had been an existing dispute between the parties at the time that the letter of 8 June 2019 was sent, I would not, in any event, have considered that the letter amounted to a genuine attempt to settle that dispute. The letter did not put forward any form of proposal and, when the Claimant indicated that she would prefer the Respondent first to set out what it considered reasonable in further correspondence, no such proposal was forthcoming. Indeed, the Respondent's next response was to resile from the apology contained in the earlier letter.

32. It seemed to me therefore that the factual matrix, both before and after the particular letter, did not show either an existing dispute between the parties or a genuine attempt to settle it. I therefore concluded that the relevant correspondence, in the form of the Respondent's letter of 8 June 2019, and the parties' subsequent correspondence in June 2019, was not covered by the without prejudice rule and was therefore admissible for the purposes of the Claimant's claim.

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Employment Judge S Jenkins

Date: 29 April 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON 5 May 2020

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FOR THE TRIBUNAL OFFICE