THE INDUSTRIAL TRIBUNALS

CASE REFS: 4135/17
1733/18

CLAIMANT: **Anthony McCullagh**

RESPONDENT: **Campbell Catering (NI) Limited t/a Aramark**

DECISION ON A PRE-HEARING REVIEW

The decision of the tribunal is that:-

1. It is ordered that, at page 8 of the claimant's witness statement, "the sentences, **FROM** "at this stage … **TO** … me back" must be struck out/redacted, on the grounds that the matters set out in the said sentences refer to "without prejudice negotiations", which are not admissible in evidence at the substantive hearing and are therefore required to be excluded from the claimant's claim against the respondent.

2. The tribunal refused the application of J. M. to revoke/set aside the Witness Order made against her by the tribunal, dated 23 August 2018.

Constitution of Tribunal:

Employment Judge (sitting alone): **Employment Judge Drennan QC**

Appearances:

The claimant appeared in person and was not represented.

The respondent was represented by Mr C. Hamill, Barrister-at-Law, instructed by Worthingtons Solicitors.

REASONS

1.1 At a Case Management Discussion on 23 August 2018, as set out in the record of proceedings, dated 23 August 2018, this Pre-Hearing Review was arranged to consider and determine the following issue, namely – "whether the tribunal should strike out/redact from page 8 of the claimant's witness statement the sentences on that page, specifically referred to in the respondent's representative's application, dated 26 July 2018". Given that the substantive hearing in this matter is listed for hearing ***on 10-14 September 2018***, the parties properly agreed to "short notice" of this Pre-Hearing Review at the Case Management Discussion.

Given the nature of the issue to be determined by the tribunal, I was satisfied that any determination of the said issue would involve "a determination of a person's civil rights or obligation"; and that, pursuant to Rule 17(2) of the Rules of Procedure, this issue should be determined at a Pre-Hearing Review.

1.2 The claimant brought claims against the respondent (***Case Ref No 4135/17***) for direct disability discrimination and/or failure to make reasonable adjustments, pursuant to the Disability Discrimination Act 1995, as amended, together with a claim for unauthorised deduction from wages on 24 June 2017. The respondent presented to the tribunal on 11 August 2017 a response denying liability for the said claims. The said claim and response were subsequently amended in September/October 2017. The claimant brought a further claim against the respondent (***Case Ref No 1733/18*** on 19 January 2018, in which he made claims, pursuant to the Sex Discrimination (Northern Ireland) Order 1976 and a claim for unfair constructive dismissal, pursuant to the Employment Rights (Northern Ireland) Order 1996. The respondent presented a response denying liability for the said claims, dated 5 March 2018. The said claims (***Case Ref No 4135/17 and 1733/18)*** were made the subject of a "consolidation Order" at the Case Management Discussion on 13 February 2018, allowing both said claims to be combined together and heard by the same tribunal.

1.3 Pursuant to the tribunal's Case Management Order on 27 April 2018, the claimant exchanged with the respondent's representative his witness statement on 15 June 2018. By letter dated 26 July 2018, the respondent's representative made an application that the sentences at page 8 of the claimant's witness statement, **FROM**, "at this stage … **TO …** me back" be struck out/redacted on the grounds that the matters set out in the said sentences refer to "without prejudice negotiations" and are therefore not admissible in evidence at the substantive hearing. As set out in the respondent's said application, the claimant refused, in correspondence, the request for the respondent's representative to remove the said sentences from his witness statement. At a Case Management Discussion on 23 August 2018, as set out in the record of proceedings, dated 23 August 2018, the claimant confirmed his said refusal and the Pre-Hearing Review was arranged, as set out above. Having regard to the issues in this matter and the fact that the claimant is a litigant in person, I ordered, by consent, that the respondent's representative would lodge with the tribunal, with copy to the claimant, by close of business on 28 August 2018, a skeleton argument in relation to the issues, the subject matter of the said application. At the commencement of the Pre-Hearing Review, the claimant confirmed that he had received and read the said skeleton argument, as ordered by the tribunal. Again, having regard to the fact that the claimant is a litigant in person, I arranged that the claimant had an opportunity to seek the assistance of a representative from the Labour Relations Agency, prior to the commencement of the said hearing, which opportunity the claimant accepted. Prior to the commencement of the hearing, the respondent's representative had prepared a bundle of relevant documents and I again ensured that the claimant had a proper opportunity to consider the said documents, with the assistance of the representative of the Labour Relations Agency, before the commencement of the said hearing. The claimant then confirmed that he was ready to proceed with the said hearing.

1.4 The respondent did not call any oral evidence but the respondent's representative relied on his skeleton arguments, as referred to above, which he expanded upon in

the course of his submissions. At my invitation, the claimant gave oral evidence and also made oral submissions during the course of the hearing.

2.1 In a decision of the Court of Appeal in the case of ***McKinstry v Moy Park Limited and Others, [2015] NICA 12,*** to which further consideration will be given elsewhere in this decision, Gillen LJ considered the issue of when it is appropriate for the tribunal to consider and determine preliminary issues at a Pre-Hearing Review, when he stated, in relation to the exercise of the power of the tribunal to deal with issues at a preliminary hearing, pursuant to the Rules of Procedure contained in Schedule 1 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005, as follows:-

> *"39 The exercise of the part deal with issues at a preliminary hearing however does need to be used sparingly, the essential criterion being whether there is a knock out point capable of being decided after only a relatively short hearing. In* ***SCA Packaging Limited v Boyle,*** Lord Hope said at paragraph 9:
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> > *"It has often been said that the power that tribunals have to deal with issues separately at a preliminary hearing should be exercised with caution and resorted to only sparingly. This is in keeping with the overriding aim of the tribunal system. It was set up to take issues away from the ordinary Courts so they could be dealt with by a specialist tribunal as quickly and simply as possible. … there are, however, dangers in taking what looks at first sight to be a short cut but turns out to be productive of more delay and costs than if the dispute had been tried in its entirety … the essential criterion for deciding whether or not to hold a Pre-Hearing is whether … there is a succinct knockout point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary issue cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case it is preferable there should be only one hearing to determine all the matters in dispute."*

2.2 It was in light of the said guidance that, at the Case Management Discussion on 23 August 2018, as set out in the record of proceedings, dated 23 August 2018 when I directed the hearing of this Pre-Hearing Review, that I reminded the claimant's representative "… on hearing the application, the Employment Judge might consider that it was not possible for the issue to be determined at a Pre-Hearing Review and would have to be determined in the course of a substantive hearing and to adjourn determination of the issue to the substantive hearing (see the decision of the Court of Appeal in ***McKinstry v Moy Park Limited***). The respondent's representative acknowledged that this was a matter which would require to be considered but she considered that the ***McKinstry*** case could be distinguished on the facts of the present case. In light of the foregoing, and given the full facts/issues relevant to the matters, the subject matter of the application, were not known to me at this Case Management Discussion, I considered it was appropriate to list this matter for a Pre-Hearing Review but subject to the caveat referred to above. If either party considered it appropriate and necessary for the

determination of the said issue, evidence may require to be call at the Pre-Hearing Review …"

2.3 In light of the facts as found by me at this Pre-Hearing Review and after consideration of the documents in the trial bundle and the submissions of the parties, I was satisfied, for the reasons set out below, that I was able to determine the issue, the subject matter of the claimant's application at this Pre-Hearing Review and that to do so was in accordance with the guidance of Lord Hope in ***Boyle,*** as referred to above. In particular, I was satisfied the issue was able to be divorced from the merits of the case and did not involve a substantial body of evidence and that the tribunal's Order, made at this Pre-Hearing Review, only required a short strike out/redaction to the claimant's witness statement and no further amendment was required of the respondent's witness statement, which has already been exchanged with the claimant; and all of which could take place in sufficient time before the commencement of the substantive hearing on 10 September 2018.

3.1 In paragraphs 21-37 of his judgement, Gillen LJ in ***McKinstry*** reviewed the relevant authorities in relation to this issue. It is not necessary, for the purposes of this decision, to set out all the above paragraphs from the judgement of Gillen LJ; but, in reaching my decision, as set out below, I have considered all of the above authorities referred to in the said paragraphs. The following dicta from the said judgement of Gillen LJ, were of particular relevance to the issues, the subject matter of this Pre-Hearing Review.

> *"22 Communications made between the parties to a dispute that are written or made with the aim of genuinely attempting to settle that dispute cannot usually be admitted in evidence nor made the subject of a disclosure order whether in the proceedings (if any) to which the dispute gives rise or in any other litigation in which similar or related issues arise. There is no privilege over the fact that such communications have occurred, rather the privilege is limited to the contents to such communications.*
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> *23 It is fundamental to the operation of the "without prejudice" rule that such communications are made for these purposes, since the Courts will not apply this privilege to communications which have a purpose other than settlement of the dispute hence In* Re: ***Daintrey, Ex Parte Holt [1893] 2QB 116 at 119*** Vaughan Williams J said:
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> > *"In our opinion the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, in terms are offered for the settlement of the dispute or negotiation … the rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace and unless there is a dispute or negotiations and an offer this rule has no application."*
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> *24 The basis of the rule has traditionally been seen as lying partly in public policy and partly in the express or implied agreement of the parties to the relevant negotiations.*

25 *The public policy aspect was asserted in* ***Rush and Thompkins Limited v Greater London Council [1989] AC 1280 at 1299*** *per Lord Griffiths as follows:*

> *The "without prejudice" rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is no more clearly expressed than in the judgement of Oliver LJ in* ***Cutts v Head [1984] CH 290, 306 …***

26 *That the rule is also apparently based on an implied agreement that enables parties to "without prejudice" negotiations to vary the application of a public policy basis of the rule by extending or limiting its reach as well as stated in* ***Unilever PLC v the Proctor and Gamble Company [2000] 1 1WLR 2436,*** *where Robert Walker LJ said at page 2445:*

> *"The rule also rests on the express or implied agreement of the parties themselves that communications in the course of their negotiation should not be admissible in evidence."*

27. *It is pertinent to observe that whatever the form that negotiations may take, genuine negotiations with a view to settlement are protective on disclosure whether or not the "without prejudice" stamp has been implied expressly to the negotiations. Lord Griffiths in* ***Rush and Thompkins at 1299*** *said:*

> *"The … rule applies to exclude all negotiations generally aimed at settlement whether oral or in writing from being given in evidence … however the application of the rule is not dependent upon the use of the phrase "without prejudice" and it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of these negotiations will, as a general rule, not be admissible at the trial" …*

30. *Decisions on the subject of whether correspondence and communications are genuinely sent as part of an on-going dispute are often fact sensitive (see* ***Passmore*** *third edition on privilege at 10-068). It is a concept that is often difficult to grasp. Privilege is available even though litigation may not follow until sometime after the protected exchanges and the question of how approximate must unsuccessful negotiations in a dispute leading to litigation be to the start of the litigation in order to attract that without prejudice rule is rife with judicial difficulty. Auld LJ said in* ***Barnetson v Framlington Group Limited and Another [2007] 1WLR 2443 at 32:***

> *"… the Courts are driven back … to the public policy interest behind the rule, of encouraging parties to settle their disputes*

without resort to litigation or without continuing it until the needless and bitter end. If the privilege were confined to settlement communications once litigation had been threatened or shortly before it has begun, there will have been an incentive on both sides to escalate their dispute with threats with litigation and/or to move quickly to it before they could safely start talking sensibly to each other … the critical question for the Court in such cases is fair to draw the line between serving that interest and wrongly preventing one or other party to litigation when it comes from putting his case at its best. It is undoubtedly a highly case sensitive question, or to put it another way, the dividing line may not also be clear".

31. *There is a number of recognised exceptions to the "without prejudice" rule which all served the underlining purpose of the rule, namely, to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement.*

…

33. *…. However for the purpose of this case, one aspect of exceptions to the rule is relevant. In* ***Unilever's case*** *a principle issue raised in the appeal was to the application of the general rule of evidence on "without prejudice" communications to proceedings peculiar to patent law and some other fields of intellectual property law. Walker LJ adumbrated various occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule did not prevent the admission into evidence of what one or both of the parties said or wrote. Amongst the most important instances that he had set out was the following at page 792 (4):*

> *"(4) apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous and propriety" "the expression used by Hoffman LJ in* ***Foster v Friedland [1992] CA transcript 1052)****".*

34 ***Foskett at 19-46*** *declares that there is "a clear trend in the authorities reflecting the desirability of restricting" the occasions when the defence can be raised to "clear cases of unambiguous and propriety". The Author adds at 19-55:*

> *"The Court will doubtless have to adopt a pragmatic approach, balancing the primary consideration of ensuring protection for parties involved in true settlement negotiations against the need to ensure that the privilege afforded by the rule is not abused.*

35 *A much discussed authority in the instance appeal was* ***B N P Paribas v Mezzotero [2004] IRLR 508 …*** *the EAT held that there was no*

dispute behind the parties at the time of a meeting between the parties at the time of a meeting between them that the employer had wished to conduct on a without prejudice basis and to which the employee had seemingly agreed, such that the without prejudice privilege did not apply to protect what they discussed on that occasion. The mere raising of a grievance as to discrimination by the employee did not put the parties "in dispute". Cox J also indicated, in ***Obiter Dicta,*** *that lest she was in error about that, she accepted the employees submission that the employer's conduct in the context of legitimate discrimination complaint amounted to unambiguous impropriety "and as an exception to the without prejudice rule within the abuse principle".*

36 This case has been subjected to some critical analysis (eg ***Passmore at 10-134-10-136)*** *with the suggestion that there has been some rowing back from the decision in later rulings which have arguably confined it to cases of blatant abuse."*

3.2 In ***Savings and Investment Bank Limited (in liquidation) v Fincken [2003] EWCA Civ 1630,*** Rix LJ said the without prejudice rule is all about encouraging parties "to speak frankly" to one another in aid of reaching a settlement: and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances (para 57). As stated in ***Fincken*** at paragraphs 57-63, it was clear that "unambiguous impropriety is not to be interpreted widely but is to be reserved for behaviour that shows a serious abuse of the privilege indeed. As stated in ***Portnykh v Numera International Limited [2004] IRLR 251*** it is made clear that the unambiguous impropriety exception means far more than one party being disadvantaged forensically by the exclusion of evidence. HH Judge Hand QC stated in ***Portnykh*** - "it is obvious that the operation of the exclusion is likely to cause a forensic disadvantage to one party or another, but the public policy is supporting the exclusionary rule is predicated on that disadvantage being overridden by the need to create the most beneficial circumstances so as to encourage and facilitate the settlement of disputes and avoid litigation. For the exclusion to be effective there does not need to be extant litigation there only needs to be an extant dispute where the parties are conscious of the potential for litigation. Further the unambiguous impropriety exception should not be applied too readily – no matter how important the admission might be for the potential litigation, unless it can be said to arise out of an abuse of the privileged occasion, such as where it was made to utter "a blackmailing threat of perjury" its significance alone cannot result in the admission being released from the cocoon of the "without prejudice exclusion" and into the glare of the forensic arena."

3.3 In ***Faithorn Farrell Timms LLP v Bailey [UKEAT/0025/16]*** *HH Judge Eady approved and followed the authorities referred to previously; but, interestingly, also stated at paragraphs 35 of her judgment:*

*"In the employment context, there has been some suggestion that this refusal to permit abuse of the without prejudice rule might extend to allegedly discriminatory remarks made during the course of such discussions (see per Cox J Obiter****,*** *in* ***BNP Paribas ….*** *In a subsequent ruling of the EAT (HHJ Richardson presiding), in* ***Woodward v Santander (UK) PLC [2010] IRL 834*** *however, it was held that this would only be the case where there*

was blatant discrimination"

3.4 In a recent decision in the case of ***Graham v Agilitas IT Solutions Limited (UKEAT/0212/17)***, Simler P stated:-

> *"15 As far as the without prejudice rule is concerned, in **Framlington Group Limited and Another v Barnetson [2007] EWCA Civ 502** the Court of Appeal considered the without prejudice rule in the context of a wrongful dismissal claim, and Auld LJ dealt with its scope, the policy justifications for the rule and the exemptions to it (at paragraphs 22 to 35). The Court of Appeal made clear that a dispute may engage the without prejudice principle even if litigation is not yet begun. The critical consideration is whether in the course of negotiations the parties contemplate or might reasonably have contemplated litigation if they could not agree. This is a fact sensitive question.*
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> *16 The privilege can be waived but there must be agreement on both sides in the relevant negotiations on waiver which must be unequivocal by reference to words of conduct used. There are limited exceptions to the without prejudice rule, discussed in **Unilever PLC v Proctor and Gamble Company [2001] 1 AER 783**, referred to by the Employment Judge and these include where the exclusion of the evidence would act as a cloak for unambiguous impropriety, for example, threatened behaviour or violence perjury or blackmail."*

4.1 The claimant frankly accepted, in the course of his evidence, that from in or about August 2017, following the issue of his first claim (case reference 4135/17), he was seeking, through the Labour Relations Agency, pursuant to their statutory conciliation procedures provided for in Articles 21-22 of the Industrial Tribunals (Northern Ireland) Order 1996, to engage the respondent in negotiations to resolve his dispute, as set out in the said claim form with the respondent. The claimant further, fairly and frankly accepted, in the circumstances, from the issue of the first claim there that was such an "extant dispute" between the parties. He also accepted that he was aware that any such negotiations conducted through the Labour Relations Agency, under the said conciliation procedures, were confidential; albeit he suggested that the concept of confidentiality was not explained to him as fully as set out in the LRA document, produced at this hearing, "Conciliation Explained". In the circumstances, even if this is correct, which I find unlikely, given the experienced LRA representatives involved in this matter, I did not consider it necessary to further consider this issue, of confidentiality in light of his evidence to the tribunal, as referred to above. This has to be contrasted with the fact situation in ***McKinstry,*** where the Court of Appeal were not satisfied there was an "extant" dispute at the relevant time. Further, unlike in the present proceedings, the disputed negotiations, in ***McKinstry,*** were part of an internal procedure and not part of the Labour Relations Agency conciliation procedures, and took place prior to the issuing of tribunal proceedings by the claimant against the respondent.

4.2 It was apparent from the documents contained in the bundle, produced at this hearing, as referred to previously, that the Labour Relations Agency, pursuant to its conciliation procedures, from on or about 6 September 2017, entered into a series of emails with the respondent's representative in an attempt to resolve the dispute

between the parties, initially in relation to the claimant's first claim (case reference 4135/17) and subsequently in relation to the dispute arising in his second claim (case reference 1733/18). It is not necessary, in light of my decision in this matter, to set out the detailed contents of this chain of emails, which I am satisfied, in the circumstances, were negotiations, as part of the said conciliation procedure, to resolve the disputes between the parties; albeit these were ultimately unsuccessful. I am further satisfied that these negotiations were genuine attempts to resolve, by means of the conciliation procedures, issues in dispute between the parties, the subject matter of the tribunal proceedings and therefore were "without prejudice" communications, as referred to in the said case law. In an email sent by the claimant directly to the respondent on 19 March 2018, which forms part of the said negotiations between the claimant and the respondent's representative, I found it significant that the claimant had, himself, headed the email "without prejudice email". This confirmed, in my judgment, he was at all times fully aware this series of correspondence, relating to the said negotiations, was confidential and all were without prejudice communications between the parties.

4.3 There was no evidence that any issue of waiver of the said privilege arose. I further do not accept that any issue raised by the claimant, as part of his objection to the application, about time limits sought to be imposed as part of the negotiations gives rise to any issue of unambiguous impropriety, as defined in the case law, as referred to previously. Further, as the claimant accepted in evidence that it was he who initiated and was anxious to continue the negotiations to resolve the disputed issues between the parties, the fact those negotiations related, inter alia, to issues about termination of employment does not give rise to unambiguous impropriety, as suggested by the claimant in his submissions. Further, it emphasises the rationale, as set out in the said case law, that anything stated by parties, during the course of such negotiations should not be admitted in evidence at the substantive hearing. Anything said in such negotiations, in my judgement, is not therefore relevant to the merits of the present proceedings and should be therefore excluded from the evidence at the substantive hearing.

5.1 In light of the foregoing, I therefore make an Order that, at page 8 of the claimant's witness statement, the sentences **FROM**, "at this stage …. **TO** …. me back" must be struck out/redacted, on the grounds that the matters set out in the said sentences refer to "without prejudice negotiations", which are not admissible in evidence at the substantive hearing.

6.1 At a Pre-Hearing Review, an Employment Judge, pursuant to the Rules of Procedure, can issue Orders, which would normally be made at a Case Management Discussion.

6.2 On 23 August 2018, I made a Witness Order against JM for the purposes of the substantive hearing. On 30 August 2018, the respondent's representative, on the application of JM, sought to revoke/set aside the said Witness Order. The claimant, following discussion, at this hearing, with a representative of the Labour Relations Agency, confirmed that he did not wish the said Witness Order revoked/set aside. In light of the foregoing, and following discussion at this Pre-Hearing Review, I decided it was not appropriate in the circumstances for me, at this hearing, to revoke/set aside the said Witness Order, on foot of the application of JM. Of course, JM, if she considered it appropriate and necessary, will be able to renew her application at the substantive hearing and it would be a matter for the tribunal at

the substantive hearing what further or other Order, if any, it should make in the circumstances upon such an application.

Employment Judge:

Date and place of hearing: **31 August 2018, Belfast.**

Date decision recorded in register and issued to parties: