Neutral Citation Number: [2024] EAT 149

Case No: EA-2021-001310-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 August 2024

Before:

HIS HONOUR JUDGE BARKLEM

- -

Between:

MR NIGEL MIDGLEY

Appellant

- and –

VOSSLOH COGIFER UK LIMITED

Respondent

- -
- -

Mr David Stephenson for **the Appellant**
No attendance or representation for the **Respondent**

Hearing Date: 6 August 2024

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JUDGMENT

SUMMARY

Practice and Procedure

An Employment Tribunal made an order for costs against an unsuccessful claimant. Although the respondent cited numerous instances of alleged impropriety on the part of the claimant in the course of the proceedings, the Employment Tribunal's decision to award costs was based upon a "costs warning letter" sent to him by the respondent's solicitor. That letter had been marked "Without Prejudice", but the copy provided to the Tribunal had had the first and last paragraphs redacted, removing all reference to the without prejudice nature of the letter.

The EAT held that the Tribunal had been drawn into an inadvertent error of law in relying on a letter which was plainly without prejudice, a status which had been concealed from it by the redaction. The costs order was quashed.

HIS HONOUR JUDGE BARKLEM:

1. This is an appeal from the decision of an employment tribunal comprising employment Judge Smith sitting with Mrs Brown and Mr Langman made on 3 September 2021, following a hearing on 19 August 2021 by which the claimant was ordered to pay the respondent's costs from 16 April 2021 limited to the sum of £10,000.

2. The order followed the claimant having been unsuccessful in his claim for unfair dismissal by reason of making protected disclosures and suffering a detriment under section 47B of the Employment Rights Act 1996. In this judgment I will refer to the parties as they were before the employment tribunal.

3. Following a preliminary hearing, this appeal was permitted to proceed to a full hearing by His Honour Judge Auerbach on a single ground, which is that the employment tribunal erred by relying on the 'without prejudice' costs letter dated 16 March 2021 in determining that the claimant pay the respondent's costs as set out above. The claimant's appeal against the substantive decision of the tribunal was dismissed by His Honour Judge Auerbach at a rule 3(10) hearing which took place on the same day.

4. Following that hearing, solicitors for the respondent wrote to the EAT in October of last year saying that they would not be attending today's hearing purely for reasons of commercial reality, the legal costs of preparing for and defending the appeal being bound to exceed the sum of £10,000 which is in issue. The respondent seeks to rely on written submissions prepared by junior counsel, Graham Anderson, dated 26 August 2022, which were prepared for the preliminary hearing and an email to the EAT from Mr Flanagan, solicitor acting for the respondent, dated 19 June 2023. A brief respondent's answer was also enclosed. I have had full regard to the material submitted.

5. The claimant has hitherto been acting as a litigant in person. However, a skeleton argument was served by Mr David Stephenson of counsel, who has also appeared for the claimant today under the Advocates' Scheme. I am grateful to him for the detailed and helpful analysis of the law and facts set out in his skeleton argument, as too is, no doubt, the claimant.

6. Mr Stephenson's oral submissions were succinct and to the point, giving me time to prepare and deliver this *ex-tempore* judgment within the allotted time for the hearing, a rare event. An inevitable consequence of the respondent's decision not to participate in this hearing other than by the submission of written materials, means that there has not been the conventional reply which I would otherwise have received from the opposing party.

7. The appeal centres on a letter which had been sent to the claimant by the solicitors acting for the respondent on 26 March 2021, some weeks before the trial and after, as the tribunal was to find, all necessary preparations had been done for the trial and the claimant was in possession of a copy of the bundle and all the evidence. The letter was sent by email. It begins:

> "Dear Mr Midgley,
>
> We are writing to you to make a without prejudice offer on the basis that you withdraw your claims and no costs application would be made against you".

The final two paragraphs read:

> "The purpose of this letter, however, is to offer you the opportunity to withdraw your case on the basis that we make no application for costs and provide for the same reference to always be given in the future. It is designed to be a clean break so that you can move on with your life and the respondent's staff and directors move on with theirs. The settlement would be in line with the attached COP 3 terms and you will notice that

> ACAS are copied in. If you wish to accept this offer, then you simply need to confirm to ACAS that you are happy to settle the claim based on the terms of the attached COP 3. We will leave this offer open until close of business, Wednesday, 31 March 2021 when it will be automatically withdrawn".

The letter was signed by Mr Flanagan, a partner in the Employment Department of Gosschalks LLP, Kingston upon Hull.

8. In between the opening and closing paragraphs which I have read out was a reasoned argument, the clear intention of which was to seek to point the claimant to the weaknesses in his case and the enormous potential costs consequences in the event that he lost and the respondent applied for costs. The letter urged in forthright terms that the claimant seek legal advice. It is notable that the letter was not headed: "Without prejudice save as to costs" as might have been expected.

9. Upon receipt of this letter, the claimant forwarded it to the employment tribunal, describing it as a: "Threatening letter", seeking advice and complaining that this was putting him under pressure. Upon learning that the claimant had forwarded the letter to the tribunal, Mr Flanagan wrote on 21 April:

> "It is clearly both inappropriate and unacceptable that the claimant opens up without prejudice correspondence to the Tribunal. We propose to address this issue and indeed the claimant's conduct generally throughout this matter at the forthcoming hearing".

10. I have been taken to the respondent's written submissions on costs which were prepared by Mr Nicholas Siddall, KC. In the bundle of documents that were before the tribunal, comprising the same Employment Judge and members who dealt with the substantive case, was a redacted form of the letter of 26 March. The redactions comprise the first paragraph and the penultimate and last paragraphs which I have set out in full above. The only reference to the letter in Mr Siddall's comprehensive written

submissions, which run to 50 paragraphs over 25 pages, is on the last page, paragraph 38(n), which gives as the last of: "Other examples of the claimant's unreasonable conduct", that he:

> "Failed at any stage to undertake a review of the merits of his case, let alone a critical one, especially in light of the repeated warnings from the Bench and the measured contents of the respondent's warning as to costs dated 26 March 2021".

There is no indication in that as to the "Without prejudice" label which the first paragraph of the letter bore.

11. The tribunal's ruling on the costs issue was comprehensive and studiously fair, ruling against most of the criticisms which the respondent had made, pointing out in particular the limited nature of the legal advice which had been sought by the claimant and his status as a litigant in person, with all the subjectivity which that gives rise to.

12. The following extracts from the tribunal's costs judgment are relevant. Paragraph 15.19:

> "On 26 March 2021 (68/69) the Claimant was sent by the Respondent's solicitors a costs warning letter…"

15.20:

> "The Tribunal had full regard to the costs letter."

15.24:

> "The letter did not expressly state that if the Claimant withdrew at that stage no application for costs would be made although the Tribunal considered reading the letter in its entirety that was the very clear implication."

15.25:

> "At the time the costs warning letter was written the case had been prepared for trial and the Claimant had a copy of the bundle and all the witness evidence."

13. Of course, stripped of the redactions, the letter did indeed expressly state that if the claimant withdrew, no application for costs would be made. From that it is hard to conclude other than that, whoever may have dealt with earlier correspondence, the judge and the members comprising this actual tribunal were unaware of the without prejudice nature of the document which becomes apparent only when unredacted.

14. At paragraph 15.26, the tribunal noted four further facts it felt necessary to record, which may be summarised as the respondent never having made either an application for a deposit or a strike out order and no employment Judge had ever warned the claimant that his case had no reasonable prospect of success. The fourth matter was that the respondent at no point made a financial offer which might have led the claimant to believe his claim had significant value.

15. At paragraphs 54 – 56 the tribunal said this:

> "54. Where the Tribunal has found the Claimant did act unreasonably is following the cost warning letter. By this stage he had the bundle and all the statements. He knew what was being said and had been warned by the Respondents of the potential weaknesses of his case.
>
> 55. The Tribunal is conscious that simply because the Claimant pressed on and was unsuccessful it did not follow the costs order should be made. Nor should the fact that the Claimant had an optimistic view of his chance of his success, when others may have taken a more pessimistic view. The Tribunal is mindful that there may be more than one reasonable conclusion to reach as to the prospects or otherwise of a claims success. The Tribunal has reminded itself that the Claimant was completely inexperienced and should not be judged by the standards of a legal professional. The Tribunal has factored all these matters into its conclusion.
>
> 56. Even having made all the above allowances following receipt of the costs letter the Claimant should have reflected upon matters."

Going on to paragraph 59:

> "It was therefore unreasonable three weeks after the costs warning, 16 April 2021 for the Claimant to continue to proceed on his original claim in the format that it was put before the Tribunal".

16. It is clear to me from the above that the letter of 26 March 2021 was front and centre to the tribunal's decision to make a limited order as to costs from a date based on the date of that letter. Given the rejection of the vast majority of the respondent's other arguments on costs, it seems to me clear that, had the letter not been before the tribunal, no award of costs would have been made. On that basis I now turn to the question of whether the letter ought properly to have been before the tribunal at all, which lies at the heart of this appeal.

17. There are two propositions advanced by the respondent in the submissions which I have had regard to. The first is that the claimant had waived privilege of the document, having forwarded it to the employment tribunal as mentioned above and in references made to the redacted documents in his written submissions. The problem with that submission is that there was no mention made in the written submissions by the respondent as to the ostensible 'without prejudice' nature of that document. The tribunal, having prepared a very full ruling, made no mention whatsoever of any discussion during the hearing of the document having begun with a paragraph headed: "Without prejudice" with the potential implications that that gave rise to. Particularly given the duty owed by a tribunal to a unrepresented litigant (see **Drysdale v Department of Transport (Maritime and Coastguard Agency)** [2014] IRLR 892, the Court of Appeal at paragraph 49) it seems inconceivable to me that, had the members of this tribunal been notified that the respondent was relying on a document in which the opening paragraph included the words: "We are writing to you to make a without prejudice offer on the basis

that you would withdraw your claim and no costs application would be made against you", the tribunal would have explained the nature of without prejudice privilege to the claimant and asked him to confirm his consent to waiver. This was bound to have been explained in the reasons.

18. Of course, because the necessary implication of the judgment as I have found it is that the tribunal was unaware of the redacted first paragraph and the later ones, there was no opportunity for it to consider and rule on arguments as to whether the removal of the first and the last two paragraphs was a proper act of severance or whether there had been a waiver of privilege.

19. In his email dated 19 June to the EAT, Mr Flanagan explains the redaction in this way:

> "The reason for the redaction was that the unredacted parts of the letter were separable from the redacted parts which, properly analysed, contain the admissions for the purpose of the without prejudice doctrine, whereas the unredacted sections did not".

The respondent notes by way of example the judgment of His Honour Judge Auerbach in **Meaker v Cyxtera Technology UK Ltd: [2023] EAT 17.**

20. Mr Stephenson makes the point, first, that as this was not argued before the tribunal, it is not open for the respondent to raise the matter for the first time on appeal, and second, that this is a letter which contained an offer made without prejudice, for the reasons set out in the main part of the letter. If the respondent was right, as Mr Flanagan contends, all one would have to do with a without prejudice letter of this nature is redact any reference to: "Without prejudice", making the concept devoid of meaning. He pointed out there was no reason why the letter could not have been expressed to have been without prejudice save as to costs.

21. There was only one purpose for writing the letter and that was to seek to persuade the claimant to abandon the claim, even at such a late stage. It was the respondent's choice to make this on a without prejudice basis and particularly with a litigant in person facing the forensic weight of a partner in a large law firm and Queen's Counsel against him, as the tribunal had pointed out, the point should have been expressly drawn to the attention of the claimant and for the tribunal then to have made any necessary rulings.

22. In the unusual circumstances of this case, I found it unnecessary to address the sometimes difficult legal principles surrounding the without prejudice doctrine. It may be that it could have been argued that the first and last two paragraphs could somehow have been validly severed, although I confess to difficulty in understanding how the argument would be run in this case, given the penultimate paragraph of the letter making clear the purpose of the letter, which was kept from the employment tribunal. The same applies regarding waiver.

23. Given the central importance of this letter to the tribunal's decision, it is inconceivable that it would intentionally have ignored the point in its ruling had it been alive to the issue. In the result, I would hold that, as the tribunal was apparently unaware of the without prejudice nature of the costs letter as originally sent and not warned as to potential issues as to waiver and/or severance, it was an inadvertent error of law on its part to have had regard to the unredacted part of the letter in reaching its decision. As Mr Stephenson puts it, the error vitiates that decision.

24. I therefore allow this appeal and I quash the costs order. Given the tribunal's almost total reliance on this document in its decision to the exclusion of almost all other submissions, this is not a case which should be remitted to the employment tribunal.

Although the respondent has made no comment as to disposal, its understandable reluctance to incur further costs in attending today's hearing suggests to me that it would not have pushed for such a remission had it been in attendance.