



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Barker

**Respondent:** Sanders Senior Living Limited

**Heard on papers only**

**On:** 5 March 2021

**Before:** Employment Judge M Butler (sitting alone)

## JUDGMENT

The Employment Tribunal Judge gave judgment as follows:

1. The Claimant did not waive privilege in his letter to the Tribunal dated 30 November 2020;
2. the Claimant's letter to the Respondent dated 19 August 2020 is not privileged;
3. the conversations between the Claimant and the Respondent on 26, 27 and 28 August 2020 are not privileged.

## REASONS

### Introduction

1. This was an application by the Respondent to the Tribunal to the effect that the Claimant's solicitors had waived privilege in an email to the Tribunal on 2 December 2020. If I find that privilege was waived, the Respondent argues that a without prejudice subject to contract and save as to costs letter sent to its solicitors was also subject to that waiver.
2. At a Preliminary Hearing before me on 13 January 2021, the parties requested that the Respondent's application be dealt with on the papers after they had an opportunity to produce written submissions. Upon receipt of their submissions, I noted that not all of the correspondence seemed to have been included within the small bundle produced for the hearing so a further order for disclosure was made and complied with by the parties as appropriate.
3. In the light of the correspondence before me and my judgment in this case, I confirm that I shall not be involved in the final hearing in this matter.

4. In reaching my decision on the privilege issue in this case, I have considered the submissions of the parties and the case law referred to therein.

5. I have also had the benefit of reviewing correspondence that may well not be before the Tribunal hearing the case. However, I would say that much of the correspondence does not appear to be unusual in its content in considering the cut and thrust of employment litigation. Each party in a dispute will pursue its own agenda in much of the correspondence which is exchanged. I take no issue with that although I do wonder whether the Respondent's application served any real purpose other than to use up judicial time and additional time and expense of the parties. It would have been more usual, in my view, to leave matters such as this to the final hearing but the Respondent clearly had an agenda in making the application but one that is based on a misinterpretation of correspondence from the Claimant, notably the letter to the Tribunal of 2 December 2020. I consider this further below.

6. It is necessary for me to consider all of the correspondence and discussions prefaced by the words "without prejudice". I first consider the Claimant's without prejudice letter to the Respondent of 19 August 2020. It is headed "without prejudice" and states that the Claimant has received confidential information which he considered made his position untenable and suggested that "the best way forward for all concerned would be to agree a settlement agreement". At this point, there was no dispute between the parties. The letter was a suggestion and does not imply that any kind of legal proceedings are being contemplated. As such, the letter cannot be privileged (**Sang Kook Sub v Mace (UK) Limited** [2016] EWC civ 4).

7. In relation to the conversations between the Claimant and Ms Friend of the Respondent, the Respondent does not seek to argue that those conversations fall within section 111A of the Employment Rights Act 1996 (ERA). In any event, it is arguable that there was still no dispute between the parties, even though the Claimant had been dismissed when some of the conversations took place; and, in view of the Claimant's claim that he was automatically unfairly dismissed, I consider the conversations fall within section 111A(iii) ERA.

8. There was then further without prejudice correspondence sent by the Claimant to the Respondent on 30 November 2020. This made reference to the Respondent's inclusion in its response of a reference to the without prejudice letter sent by the Claimant personally to the Respondent. This was justified by the Respondent's solicitors in an email sent to the Claimant's solicitors on 19 November 2020 and the Claimant's solicitors wrote to the Tribunal about the matter on 2 December 2020.

9. The wording of the Claimant's solicitor's letter is critical in determining this issue. It states at the beginning of the second paragraph, "the Claimant does not have any issue with the without prejudice correspondence being included. However, the Claimant does take issue with the Respondent's assertion that:

"It will be necessary for the Tribunal to undertake all the events that occurred in August 2020", only to then be extremely selective in terms of the without prejudice correspondence reference in the grounds of resistance."

10. I note that in its email to the Tribunal on 27 January 2021, the Respondent justified the reference to without prejudice correspondence in the response by saying, “as the Respondent believed the Claimant had raised the whistleblowing allegations in bad faith it referred to the WP matters in the ET3”. Herein lies the reason for refusing the Respondent’s application. The Claimant’s email of 2 December 2020 is, in my view, conditional. It states there is no objection to without prejudice correspondence being included but it goes on to suggest the Respondent is being selective in relation to what without prejudice correspondence should be included. That does not amount to a clear waiver of privileged documents. The Respondent’s submission is “this is clear and unequivocal on C’s part as being a waiver of WP up till 2 December 2020, without making it clear that privilege following August 2020 was to be retained”. I do not agree with that submission in the light of the wording of the Claimant’s email of 2 December 2020 and in the context of these proceedings. Thus I do not conclude it can be said that the parties have agreed to put without prejudice communications before a Tribunal (**Somatra Limited v Sinclair Roche and Temperley** [2000] EWCA civ 229).

11. These are the reasons for my judgment above.

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Employment Judge M Butler

Date 12 March 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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