EMPLOYMENT TRIBUNALS

Claimant: **Miss A Napier**

Respondents: **(R1) Churchills International Consulting Limited**
(R2) Peter Meagher

Heard at: **Nottingham** **On:** **Thursday 24 August 2017**

Before: **Employment Judge Britton (sitting alone)**

Representatives
Claimant: **Miss R Dickinson of Counsel**
Respondents: **Miss R Azib of Counsel**

JUDGMENT

1. The without prejudice negotiations in this case are all inadmissible both pursuant to the without prejudice rule at common law and Section 111(a) of the Employment Rights Act 1996 and therefore cannot be referred to or deployed at the forthcoming hearing .

2. Having so ruled this Judge excludes himself from presiding at that hearing.

3. Within 21 days of today the Claimant will file an amended claim deleting references to the without prejudice negotiations.

4. Following receipt, within 14 days the Respondent will accordingly serve an amended response.

REASONS

Introduction

1. At the case management telephone discussion heard by my colleague Regional Employment Judge Swann on 15 June 2017, it was directed that there be held this Preliminary Hearing to determine whether the two telephone conversations held between the Claimant and Gregory ("Greg") Cheshire, the Employment Consultant for the Respondents, and which took place on 6 January 2017 should be excluded or not. These conversations, or rather one of them, are referred to at paragraph 27 of the particulars to the ET1. The Respondent applies for exclusion submitting that :-

> 1.1 Those two conversations were clearly without prejudice with the aim of trying to achieve a settlement in a circumstance where there was clearly an extant dispute and are therefore excluded from consideration by the Tribunal at the hearing in due course under the without prejudice

principle.

1.2 That pursuant to Section 111A (1) of the Employment Rights Act 1996 (the ERA) they should also be excluded. S111A is headed "confidentiality of negotiations before termination of employment". It is basically a provision which renders pursuant to 111A (1) inadmissible " Evidence of *pre- termination negotiations .. held before the termination of the employment in question*". Now that provision for the purposes of the case that I am dealing with today would, if the provisions of it apply, render inadmissible those negotiations in relation to the Claimant's claim of constructive unfair dismissal pursuant to s95(1) (c) of the Employment Rights Act 1996 (the ERA) unless the Respondent behaved improperly. However, it is not in dispute that this exclusion provision does not apply to the provisions of the Equality Act 2010 (the EqA) and which are also engaged because the Claimant additionally claims as to the circumstances, including her departure from the employment, sex discrimination. Pursuant to s39 (2) (c) of the EqA this can include dismissal, and as to which the jurisprudence has long made clear that this can include discriminatory constructive dismissal.

2. So engaged before me at first blush is this: if the negotiations are protected by the without prejudice rule, thus of course rendering inadmissible their utilisation for the purposes of the EqA claim, does that mean that they are also excluded for the purposes of the Section 111A claim? I have been taken by both Counsel to the judgment of HHJ Judge Eady QC in **Faithorn Farrell Timms LLP v Bailey** [2016] ICR 1054 EAT. Having concluded that her judgment may be the first at appeal on the point, and then having taken herself to the provisions of Section 111A she has concluded essentially at paragraph 46:

> *"…Parliament could have imported the without prejudice rule into Section 111(a); it did not do so. It instead chose to create an express provision relating to the admissibility of evidence in quite specific circumstances. I consider I must look at Section 111A on its own terms; not through the lens of common law without prejudice privilege."*

3. And, albeit Per Curiam:

> *"By referring to complaints under section 111 of the 1996 Act, section 111A(1) makes clear this provision is limited to complaints of unfair dismissal save for complaints of automatic unfair dismissal; it does not render such evidence inadmissible for the purposes of any other proceedings before the Tribunal.*[1] *This does not mean that the existence of another claim (eg discrimination) would render admissible for all purposes evidence otherwise inadmissible in an unfair dismissal claim under Section 111A; in such circumstances the Tribunal would allow the evidence to be admitted for the one claim (eg discrimination) but still treat it as inadmissible for the other, (the unfair dismissal claim)."*

4. But of course if I hold that the discussions are inadmissible under the without prejudice rule, then s111A will surely apply unless I find that the respondents cannot rely on the exclusion in s111A (1) because of the application of ss(4):

> *" In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection 1(1)*

[1] Obviously if they are not inadmissible by way of without prejudice privilege.

applies only to the extent that the tribunal considers just.."

5. I will return to s111A in due course.

The facts in this case

6. The statements of the Claimant, and Greg Cheshire for the Respondents, I am invited to take as read for the purposes of the argument. This I have duly done. I have read the transcripts of the two discussions on the 6th January 2017 and heard the recording of the same made by Mr Cheshire .

7. It is clear that prior to the discussions on 6th January there was a dispute between the parties which could result in a Tribunal proceeding. In that context the Claimant had raised a grievance in relation to her complaints of sexual discrimination including harassment against the second Respondent. There is also evidence from the pleadings that the Claimant already may have been unhappy with the working relationship and dissatisfied with matters relating to shortfalls in bonuses. The Respondent was already at least suspicious that she was planning to leave and go into competition[2].

8. And in that context, as to which Ms Dickinson did not seek to dissuade me, the attempts to try and settle the matter by the Respondent and indeed the Claimant in the first of the telephone discussions on 6 January falls squarely within the without prejudice rule. They were even said to be without prejudice and the claimant didn't demure when Mr Cheshire made that plain and that it was all "off the record". She herself used that phrase at one stage during the discussion as well. Suffice it to say that the first discussion really centred around money. It seems to me the Claimant had already indicated what she had in mind if she was going to leave[3] and so Mr Cheshire opened up the bidding, so to speak, at £8,000 which is about 2 months' money. The Claimant made the valid point that as she did not consider herself to have resigned, and it seems to me from what I have read and heard that there was at least uncertainty in the mind of Mr Cheshire as to whether she had, that therefore in those circumstances as she had a 6 month notice clause why she should she leave for less, and that if necessary she would work her notice out: Thus meaning of course that the Respondent's[4] would have to put up with her or pay her off in lieu. The conversation otherwise centered around such things as the bonus structure and whether or not the Claimant really wanted to remain in the employment given that such a close working relationship with the second Respondent was coming to grief. That is my summary of that first discussion. There is nothing about it that is oppressive in terms of the conduct of it by Mr Cheshire; and the Claimant does not show any signs of being hostile to the fact that she had been talked to in this way. It is a civilised discussion as happens everyday of the week in the world of employment where parties are about seeing if they can settle the matter between them without recourse to litigation and which of course is an absolute fundamental of the desirability and thus importance in English jurisprudence of the sanctity of without prejudice discussions.

9. Mr Cheshire then went off and got instructions from Mr Meagher and came back into the second telephone discussion that day with a firmed up approach. He again made clear to the Claimant that this was a without prejudice discussion and that it was off the record. The Claimant did not disagree. Mr Cheshire made

[2] Para 6 of the Response particulars.
[3] At least £44k.
[4] The second respondent is the owner of the first.

plain that it was a situation where the "gloves were now off" and so he set out the likely scenario if the Claimant didn't want to take the £8,000 offer. Essentially it was that he had been instructed by the second Respondent, Mr Meagher, that there were concerns about the way the Claimant had been "engineering sales", in other words putting in early invoices for the purposes of artificially beefing up her bonus in the new year. That is a complicated subject. I am of course not venturing an opinion on the merits or otherwise of the assertion today. Second raised was that there were concerns that the Claimant had been giving discounts as to insurance cover to the customer as part of the sale of the Respondents' financial services. This would go to whether this was at the expense of the commission on the insurance sold which the first respondent would otherwise earn: so an issue of whether the Claimant in her desire to clinch the sale gave an unauthorised discount. Third raised by Mr Cheshire was that there was some evidence that the Claimant may have abused the company credit card. He could not give her any more detail about that at that stage. These issues are pleaded in the Response; indeed there is a counter claim. Details are provided. All of which is obviously to be the subject of findings of fact at the main hearing. So, at least so far, it cannot be said that the Respondent was deploying allegations it knew to be false, to in effect blackmail the Claimant into a settlement. But there is a fourth element.

10. When I started this case today, a fresh face so to speak and reading as I did the pleadings and the skeleton submissions, an immediate matter that did concern me was the reference that Mr Cheshire made to a referral of the Claimant to the FCA. That, of course, could be professionally career threatening for the Claimant. So in my mind was as to whether as that was never pleaded in the response[5], that was something which was said improperly and when I use the phrase improperly I have referred Counsel to the relevant extracts in the Oxford English dictionary, improper meaning:

> *"Not truly or strictly belonging to the thing under consideration; not in accordance with truth, fact, reason, or rule; abnormal, irregular, inaccurate, erroneous, wrong".*

11. But then I read the transcript again and of course I listened to the recording; and the relevant extracts are as follows. Thus page one of transcript two, main final paragraph for Mr Cheshire (G):

> *"..so that's you know, and also…**there may be**[6] some FCA non-compliance as well. So I am just putting that out there.*

He doesn't have any further evidence he can provide her with at that stage and makes it plain. The Claimant (A) then asks more on this topic at the bottom of page 2. She makes it plain that if they want to go down that route, then far from being intimidated she has her own ammunition, so to speak:

> *"and I haven't notified you of some of the other situations… that Peter [7]has been involved in his capacity as the Compliance Officer and …what that entails …in terms of the FCA and I have no issue whatsoever having heard that, in going directly to them now absolutely appalled that he is trying to raise all these issues… I will fully intend to go to the FCA*

[5] That there had been a referral.
[6] My emphasis as are the other highlighted words.
[7] R2.

…without a doubt now.

12. Later on they come back to the topic and she asks him:

" A. What is the basis for any concern vis FCA?

G right.. there was one that I didn't mention, well I did mention the non, the FCA, the FCA one is the non- compliance 10 client files incomplete and off site.

A. Err no that would be incorrect, they were being audited.

And at the end of the discussion she adds

"at the end of the day as I say I have withheld things …because of his capacity …as compliance officer erm and we need to report these to the FCA".

As to which Mr G concludes their discussion:

Right ok, Right well I mean, that's, that's everything I have to say, you know, and was informed to do either from the client, you know, from the company's perspective so you know, I've relayed that to you, you know where they stand now."

13. I gather C has not pursued matters with the FCA, if she has then it has yet to be pleaded and it was not before me. So what do I make of it? Is it bluff and counter bluff?

14. As to the conversations Mr Cheshire doesn't say she is being reported to the FCA, only that she might be, that he doesn't know much about it other that the reference to the ten files. The Claimant echoes back in a firm way that she is not frightened at all at the suggestion; I have already recited her retort. Finally the discussion between them is at all stages civilised and good tempered.

The law as to without prejudice

15. On both this and the s111A ERA issue I have been greatly assisted by the opening written submissions of both Counsel. This takes me to in particular Ms Azib's written submissions and the summarisation of the jurisprudence, albeit I have before me a bundle of authorities that encompasses all of them. They are encapsulated by Judge Richardson in ***Woodward v Santander UK Plc [2010] IRLR 834***. I use the head note because it accurately summarises what he rules.

"…The without prejudice rule is a rule of evidence which (subject to exceptions) makes inadmissible in any subsequent litigation evidence of communications made in negotiations entered into between parties with a view to settling litigation or a dispute of a legal nature. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence.

The policy underlying the rule is that parties should not be discouraged from settling their disputes by a fear that something said in the course of negotiations may be used to their prejudice in subsequent proceedings. There is an exception to that rule if the exclusion of what was communicated in without

prejudice negotiations would act as a cloak for perjury, blackmail or other "unambiguous impropriety". The requirement for any impropriety to be "unambiguous" must be strictly applied less the exception overtake the rule and render it of no value. The list of exceptions to the rule is not closed, but arguments seeking to establish a new exception should be scrutinised with care. Any new exception must be consistent with the overall policy behind the rule. A new exception should only be recognised if justice clearly demands it. In that regard ***Mezzotero*** *does not establish any new exception to the "without prejudice rule".* [8]

Conclusion as to admissibility applying the without prejudice rule

16. Thus the long established exclusion to the protection of without prejudice, *namely a cloak for perjury, blackmail or other unambiguous impropriety* places a very high threshold.

17. Given the facts in the scenario before me it comes no where near such a threshold. Accordingly these two telephone discussions are not admissible.

The s111A ERA exclusion issue

18. This is particularly explored by Ms Dickinson in her written submissions. She recites the section in full:

> **Confidentiality of negotiations before termination of employment**
>
> *(1) Evidence of pre-termination in negotiations is inadmissible in any proceedings on a complaint under Section 111*[9]*.*
>
> *This is subject to subsections 3 to 5.*
>
> *(2) In subsection (1) "pre-termination negotiations" means any offer made or discussions held, before*[10] *the termination of the employment in question, with a view to its being terminated on terms agreed between the employer and the employee.*
>
> *(3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in or made under this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed*[11]*.*
>
> *(4) In relation to anything said or done which is in the Tribunal's opinion was* ***improper****, or was connected with* ***improper behaviour***[12] *subsection (1) applies only to the extent that the Tribunal considers just.*

[8] The reference there is to be in BNP **Paribas v *Mezzotero (2004) IRLR 508 EAT*.** which was also before me and whether or not the without prejudice rule had to be expanded by way of further exception to the rule in discrimination cases. It was held that it did not and there is no higher authority that has ruled that it does.

[9] That of course includes complaints of unfair dismissal including constructive

[10] Taking the Claimant's case at the highest, she had not resigned from the employment at the date of the without prejudice discussions. She resigned with immediate effect on 15 January 2017

[11] Not engaged as no such claim is made ie whistle blowing

[12] The emphasis in bold is mine.

(5) Subsection (1) does not affect the admissibility, on any question as to the costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved."

19. So even though the discussions for the purposes of the discrimination based claims are inadmissible, nevertheless they could be admissible under this provision applying ***Faithorn Farrel***, that of course will only be the case if I find that the Respondents via Mr Gregory acted improperly. I so observe because otherwise this self-evidently was a pre-termination negotiation. The section itself does not define improper at ss(4) hence why I have applied the dictionary definition.

20. Thus using the definition was that which was under discussion particularly in the second conversation not true or strictly belonging to the thing under consideration? The answer to that is it was all strictly belonging to the thing under consideration because it was all about the alleged shortcomings that the Respondent was seeking to deploy in persuading the Claimant that her proposal that she have £44,000 to go was unrealistic. I do note that although Mr Cheshire started off by saying they weren't prepared to pay more than £8,000 he didn't actually completely close that off. As it is I realise for the purpose of where this case goes in future, that the Claimant's view coming out of that meeting, because of the various accusations that were being put to her, that she was at that stage not willing to negotiate. As to the respondents and what Mr Cheshire told the Claiamnt, it had only got to the stage where acting on his instructions he had put into the without prejudice arena the issues of concern which could result in the Claimant being suspended if she returned to work and because they had the potential to mean an investigation and a disciplinary process. He did not say "if you return to work, you will be disciplined and dismissed". He made plain that in relation to the instructions he had that these were all matters that he would need to further investigate; but he was making the point that prima facie it was serious; thus it was highly likely the Claimant would have to be suspended. I have already observed that the Respondent pleads substance to the allegations. So is it improper to raise these matters as part of the negotiation? Well the answer to that one would be what's the point of otherwise having this type of negotiation? Also Ms Azib makes the valid point that what if the Respondents had not told the Claimant that they had these concerns and thus lulled her into thinking all would be well if she came back to work, cynically knowing that as soon as the relevant time limit had gone by, ie the sex complaint, they would then in fact get rid of her banking on that they would get the constructive unfair dismissal claim struck out for lack of qualifying service.

21. That then brings me to the **ACAS Code of Practice 4 Settlement Agreements** (the CP) which I must have judicial regard to and which Ms Dickinson relies upon because she submits the approach of the respondents apropos these two discussions was bullying and intimidation. Thus she relies upon Paragraph 18a whereat the authors suggest "bullying and intimidation" will be improper behaviour".[13] In that context I note the deployment of the very phrase which I have quoted from interalia the judgment of Judge Richardson as to what is unambiguous impropriety.

22. In any event the relevant section of the CP is:

"17. What constitutes improper behaviour is ultimately for a Tribunal to decide on the facts and circumstances of each case. Improper behaviour

[13] See para 17 in particular of Ms Dickinson' written submissions.

will however include (but not be limited to) behaviour that would be regarded as "unambiguous impropriety" under the "without prejudice" principle.

18. The following list provides some examples of improper behaviour. This list is not exhaustive:-

(a) All forms of harassment, bullying and intimidation including through the use of offensive words or aggressive behaviour.

22.1 In this context, albeit not on point as to the actual scenario, I remind myself of the judgment of Mr Justice Underhill when he was the President of the EAT in relation to what is bullying and harassment, albeit in the context of s26 of the EqA in **Richmond Pharmacology Ltd v Dhaliwal**[14]. It depends on the context. It's not just the perception of the individual concerned. In this case, on the facts as I have found them to be, putting forward in the negotiation the likely stance of a Respondents if settlement cannot be achieved is not intimidation. If it was so, it would defeat the purpose of the protection to encourage settlement which is obviously the aim of the provision. There was no use of offensive words and there was no aggressive behaviour.

(b) Physical assault or threats or other criminal behaviour.

It simply doesn't engage.

(*c) All forms of victimisation.*

22.3 There is no suggestion at this stage that the holding of the negotiation discussions was itself victimisation pursuant, for example, to Section 27 of the EQA.

(*d) Discrimination because of age, sex, race, disability, sexual orientation, religion or belief, transgender, pregnancy and maternity and marriage or civil partnership.*

22.4 I query why the authors of the CP have put this in given the limited compass of s 111A (1).

(e) Putting undue pressure on a party. For instance:-

(i) Not giving the reasonable time for consideration set out in paragraph 12 of this Code.

22.5 It does not engage because this was a preliminary indication and no more than that by Mr Cheshire of what could happen, with the express caveat made by him that he would of course investigate matters.

(ii) An employer saying before any form of disciplinary process has begun then the employee <u>will</u> be dismissed.

22.6 I have already found that Mr Cheshire didn't say that.

[14] (2009) IRLR 336 EAT

> *(iii) An employee threatening to undermine another organisation's public reputation…*

22.7 That doesn't engage as the focus before me is upon the behaviour of the Respondents.

> *The examples set out in paragraph 18 above are not intended to prevent, for instance, a party setting out in a neutral manner the reasons that have led to the proposed settlement agreement or* ***factually stating the likely alternative if an agreement is not reached including the possibility of starting a disciplinary process if relevant).***

22.8 That which I have highlighted is what happened.

23. So applying the CP, the conduct of Mr Gregory and for that matter the Respondents, in particular Mr Meagher, in raising matters in the two discussions as he did was not improper.

Conclusion s111A

24. The Respondents conduct was not improper. Thus the two discussions between Mr Gregory and the Claimant on the 7th January are inadmissible.

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Employment Judge P Britton

Date 4 September 2017

JUDGMENT SENT TO THE PARTIES ON

19 September 2017

FOR THE TRIBUNAL OFFICE

Footnote (*5) These examples are not intended to be exhaustive