EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Sue Burnell	v	Addison Motor Group T/a Benfield Motor Group

Heard at: **North Shields** **On: 10,11 September 2018**

Before: **Employment Judge O'Dempsey**

Appearances:

For the Claimant: **Mr M Hartnack (representative)**
For the Respondent: **Ms L Quiggley (counsel)**

JUDGMENT AND REASONS

JUDGMENT

1. **Section 111A Employment Rights Act 1996 applies to the following conversations which are inadmissible at the hearing on the merits of the claimant's claim for unfair dismissal.**
2. **The conversations identified in the reasons as conversations 4-9 are also covered by the principles relating to without prejudice communications.**

REASONS

1. By a complaint which was presented to the employment tribunal on 16 March 2018, the claimant complains that she was unfairly dismissed. She claims that she was constructively dismissed.

2. The respondent stated at paragraph 20 of the grounds of resistance "pursuant to common law and/or section 111A of the Employment Rights Act 1996, the contents of any without prejudice and/or protected conversations are inadmissible in the claimant's tribunal claim for unfair constructive dismissal." It is that matter which I have to make findings upon.

3. On 2 July 2018 there was a telephone preliminary hearing with employment Judge Garnon. This deals with the issue raised at paragraph 20 of the grounds of resistance and has led to the hearing before me. It sets out many of the principles of law relating to this area. It appears that the contentious matters relate to about eight meetings between Mr Waugh and the claimant on various dates. These appear to be the meetings at which inadmissible conversations are said to have taken place. Mr Waugh was the principal witness for the respondent. He is Lookers Plc general manager. I also heard from the claimant, Ms McCafferty, Ms Davison, and Mr Patton. I have not needed to refer to many aspects of the witnesses' evidence and I have confine my remarks to those aspects of their evidence that appear to me to be relevant to the issues before me.

4. As employment judge Garnon says in paragraph 14 of his notes of explanation: if the contents of the meeting are what is asserted by the claimant namely that there was a threat to dismiss if she did not resign, then there was no offer made. In particular there was no offer made of terms upon which the claimant could leave, it was simply an ultimatum: resign or be sacked. The case comes before me solely for the purposes of determining this preliminary point. My task is to determine what was said at these meetings and to determine their admissibility. Another judge will deal with the remainder of the case. It is for this reason that this judgment does not contain findings of fact on other aspects of the case, save those explored before me in the evidence.

5. It is useful to set out the relevant legal principles. It appeared that there was a large measure of agreement on these. I had written submissions from both parties, including an opening note from the claimant, and a written closing submission from both parties. I have borne these in mind.

6. I have approached the case by considering in relation to each conversation first whether it is inadmissible by reference to section 111A Employment Rights Act 1996 and if not whether it is a without prejudice conversation. The scope of section 111A is much broader than the concept of without prejudice. By the same token the exceptions to its protection for a respondent are triggered at a much lower level than exist for the common law concept of without prejudice communications.

Law

7. "Pre-termination negotiations" may be protected from admissibility in unfair dismissal proceedings unless there has been "improper behaviour" (section 111A(1), ERA 1996).

8. I must look at whether there is evidence of

a. Pre-termination negotiations; if the Respondent shows that there is such evidence and that it falls within the scope of the concept of "pre-termination negotiations", I next consider

b. Whether I consider that there was anything said or done which was

i. Improper; or

ii. Connected with improper behaviour. In those circumstances then the evidence of pre-termination negotiations is inadmissible only to the extent that I consider just (section 111A(4)).

9. Section 111A states:

"(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111.

This is subject to subsections (3) to (5).

(2) In subsection (1) "pre-termination negotiations" means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

(3)…

(4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.

(5) Subsection (1) does not affect the admissibility, on any question as to 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."

10. The term "pre-termination negotiations" does not mean what a non-lawyer might think it would mean. It is a term of art. It means either

a. any offer made before the termination of the employment with a view to the employment being terminated on terms agreed between the employer and employee, or

b. Any discussion held before the termination of the employment with a view to the employment being terminated on terms agreed between employer and employee.

11. So if there is an offer made by one party, which satisfies (a) above, that conversation will be inadmissible. If there is a discussion held in which one of the parties is aiming at the termination of the employment on agreed terms, it seems (perhaps counterintuitively) that this too is excluded.

12. As this is a measure which will restrict the rights of one party to any particular case to refer to relevant evidence which may be explicitly probative of the main issue in the case, it is a measure which restricts access to a fair hearing in the sense of Article 6 of the European Convention on Human Rights and Fundamental Freedoms. Whilst such a measure may be introduced by legislation, as it has been, it must be interpreted so as not illegitimately to restrict any party's right to a fair hearing in the determination of their civil rights and obligations. Therefore the section must be construed so as far as possible to give effect to the Article 6 rights of those appearing before the tribunals. I therefore interpret the concepts in section 111A narrowly applying section 3 of the Human Rights Act 1998.

13. This analysis requires me to consider the facts of the particular case in order to ascertain whether the material that is to be excluded has a disproportionate effect on the right of any party to the proceedings to access a fair hearing. If it does, then despite the lawful basis of section 111A, it cannot be construed so as to exclude (in a disproportionate way) evidence probative of a breach of a civil right or the existence of a civil obligation of one or other of the parties.

14. The requirement for the common law "without prejudice" rule that the parties be in dispute does not apply to the statutory inadmissibility rule.

15. If there were pre-termination negotiations, and no improper behaviour, the evidence is inadmissible, including the fact that pre-termination negotiations have taken place, not just the details of those negotiations (see **Faithorn Farrell Timms LLP v Bailey** [2016] IRLR 839). I would qualify that principle however to the extent that it cannot exclude evidence in a disproportionate way and I do not read the Faithorn judgment or any of the other cases as requiring a tribunal to exclude evidence in a disproportionate way so as to prevent a party receiving a fair determination of their civil rights and obligations. I have taken account of the Code of Practice issued under section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A"), by ACAS (Code of Practice (No 4) on Settlement Agreements) and in particular the guidance set out at paragraphs 17-20 of that document. I consider these paragraphs to be relevant and hence must take them into account (see section 207 TULR(C)A 1992). That guidance is of some assistance in determining when the section might be considered to exclude evidence in a disproportionate way. Provided the employer conducts themselves properly during the meeting and surrounding it, parliament has said that it will be proportionate to exclude the evidence.

Were the discussions without prejudice?

16. In order for the discussions to be protected by without prejudice status, there must be a dispute between parties. If there is, any written or oral communications between them amounting to a genuine effort to resolve the dispute will not generally be admitted. The aim behind the rule is important. It enables parties to negotiate frankly without the risk that anything said in negotiations will be used against them in subsequent legal proceedings.

17. The privilege is not invoked merely by the parties' description of negotiations as such, let alone one party's description. If there is no extant dispute, or no genuine efforts at resolving such a dispute, the rule will not apply, regardless of labels. I need to look at the substance, not the form of those discussions.

18. As it renders inadmissible evidence that might otherwise have been considered probative of the issues to be determined in subsequent legal proceedings, the exclusory effect bestowed should not be extended further than necessary to

promote the general policy objective (**Barnetson v Framlington Group Ltd** [2007] 1 WLR 2443 CA).

19. The broader discussions between the parties: the positioning, not solely the offer may be excluded (**South Shropshire District Council v Amos** [1987] 1 All ER 340), but if they are not properly described as part of such negotiations, this principle does not require them to be excluded. The without prejudice principle is to be applied with restraint (**Prudential Assurance Company Ltd v Prudential Insurance Company of America** [2002] EWHC 2809 (Ch)). The concept of unambiguous impropriety will permit otherwise inadmissible evidence to be admitted. The claimant would have to show that there had been such unambiguous impropriety (thus simply showing that during such an exchange there had been discrimination would not automatically amount to such impropriety). Each case needs to be assessed on its merits.

Findings of fact

20. With those principles in mind I make the following findings of fact. These are largely based on what the claimant has said about these meetings. There were many disagreements of fact between the parties which do not appear to me to be material to the issues that I have to determine. This includes whether the respondent's witnesses have not told the truth about certain matters, such as when notes were compiled. In so far as meetings are not rendered inadmissible by this judgment it will be open to the claimant to pursue these points of general credibility so far as they are relevant to the other issues in the case.

21. I have to determine what happened at certain conversations between the claimant and the respondent's management:

a. Conversation 1 (Claimant's witness statement, 4.7, 5.1-5.12): According to the Claimant this happened at about 4pm on 9 October 2018, with Mr Patton present, and everyone agrees that the phrase "without prejudice" was used at it. Everyone agrees that an offer was made at this meeting: that if the claimant would work until Friday 13 October, the respondent would pay her until the end of November (according to the claimant) or until 8 December (according to the respondent). The detail of the offer does not matter. It is sufficient that an offer was made in relation to the termination of the claimant's employment (and in particular the timing of that termination in consideration of a monetary offer by the respondent.

b. Conversation 2 (Claimant's witness statement 6.1-6.3): According to the claimant this happened on 10 October 2018 at around 4pm. Mr Waugh asked her whether she had made a decision. It is plainly a continuation of Conversation 1, and so was a discussion of the earlier offer, on anyone's account of it.

c. Conversation 3 (Claimant's witness statement, 7.7 to 7.9): According to the claimant this occurred on 11 October, again at about 4.50pm. During this conversation the claimant said that she would leave on the Friday "as he [Mr Waugh] had directed". This again is clearly a continuation of the discussions about the offer that had been made to her (on her own account of it).

d. Conversation 4 (Claimant's witness statement 7.10-9.2): According to the claimant this occurred on 12 October at about 10 am. At this meeting the claimant put forward an offer including a compromise agreement. The timing of this meeting is not important. It is clear that at that meeting there were discussions as to ending the claimant's employment by means of an agreed settlement.

e. Conversation 5 (Claimant's witness statement 9.3-9.7): The claimant describes a further conversation that day. The claimant says that "without prejudice" was mentioned again at this meeting. According to the claimant the conversation appears to have focused on what would happen if the claimant declined the offer that had been made and remained in employment. As such it appears to me, on the claimant's own account to be a conversation following and extending the discussion of termination of the claimant's employment in accordance with an agreement.

f. Conversation 6 (Claimant's witness statement 9.8-10.5): The claimant describes a further separate meeting on 12 October 2018, which started around 3pm. It is clear from the claimant's own account that this was a continuation of the discussion concerning her proposal for a compromise agreement. The respondent was rejecting it, and the claimant remembers that "without prejudice" was again mentioned.

g. Conversation 7(Claimant's witness statement 10.6-10.8): There was a further meeting at about 4.30 on 12 October. This was short, and it was plainly a continuation of the earlier conversations as a without prejudice letter was given to the claimant which contained details of the final offer being made to her.

h. Conversations 8 & 9 (Claimant's witness statement 10.9 -12.7): On 13 October there was another meeting. The claimant says that at this meeting the without prejudice letter was read out to her, and there was discussion of the wording of a letter of resignation which would be acceptable to the respondent. It is plain that this was a continuation of the discussions concerning the circumstances in which the claimant's employment would terminate by agreement (if one was reached). The claimant says that there was a further meeting on 13 October. She says that at this meeting Mr Waugh accepted her resignation letter, and gave a breakdown of the wages she was to receive. On her own account this was a discussion about termination of her employment by reference to the conclusion of an agreement that she would leave in return for certain monetary advantages on that day.

Conversation 1 (about 4pm on 9 October 2018)

22. The claimant deals with the events surrounding meetings that might be construed as "without prejudice" in her witness statement at around 4.7. She says that Mr Waugh asked her to come to his office and when she attended Mr Tony Patton was also in the office. At paragraph 5.3 she says that Mr Waugh started the meeting by talking about relationships and saying that relationships had broken down between her and some staff and also with him. She says that Mr Waugh said that he could see no way of fixing them. It was after this that he went on to ask whether they could have a "without prejudice" discussion.

23. The claimant was cross-examined on paragraph 5.3 of her witness statement. Although the claimant denies that Mr Waugh explained what "without

prejudice" meant, I do not accept her evidence is accurate in this respect. She did recall that he explained that he wanted to have a frank and off the record conversation with her and having given that explanation asked whether he could have a without prejudice conversation with her.

24. In her witness statement she goes on to say that she did not agree to a discussion because she did not know what Mr Waugh meant and because she was taken by surprise. I do not think that her recollection is accurate in this respect. There is no evidence in any of the meetings to the effect that she said she had been taken by surprise or did not understand what was going on.

25. I accept that she had believed that the action to be taken in relation to her over the the incident which occurred on 29 September had been concluded. However I do not consider that the behaviour upon which she seeks to rely constituted, for the purposes of this application, improper behaviour to which reference was made explicitly or implicitly in any of these conversations upon which I must rule. By the same token, to the extent that the claimant relies on conduct at other meetings, she cannot be prevented from relying on them to found a claim for constructive dismissal. Given the way the claimant presented her arguments in relation to this application, there is no basis for me to make a ruling that there was improper conduct at the meetings outwith Conversations 1-8. It remains open to the claimant therefore to rely on that other evidence.

26. At paragraph 5.8 of her witness statement the claimant says that Mr Waugh told her during this meeting "Georgia is off this week. Work til Friday this week (13 October), and I will pay you til the end of November, so long as you work til Friday.". This was the offer which was pursued through the remainder of the exchanges between the parties.

27. The claimant says that she was taken aback and said nothing. She says that Mr Waugh asked her whether she had anything to say she replied that she had not. According to her Mr Waugh then said "I'll leave it with you Sue." That was the end of the meeting.

28. It seems to me that even on the claimant's own account of this meeting it falls within section 111A, although not the concept of "without prejudice" as there was no dispute within the foreseeable future at this point. It was a perfectly ordinary employment situation which might resolve in any number of ways without there being a dispute. On what I have seen it was at that stage quite unlikely that it would have ended in litigation.

29. At paragraph 5.12 the claimant says that she has seen the handwritten notes of the meeting which Mr Patten has produced but she says that they are not an accurate account of the meeting held (page 275 a). In her witness statement she has not set out how she says those notes are inaccurate. It was not clear to me having heard her evidence how she said these notes were inaccurate. In any event, I do not

consider that those inaccuracies, even if established have any bearing on whether the meeting was protected under section 111A or was without prejudice. I should add that they do not show any improper behaviour or connection with improper behaviour (which had occurred at the relevant time).

Conversation 2 (10 October 2018 at around 4pm)

30. The claimant also gives evidence about a meeting on 10 October 2017 which she says was at around 4 o'clock in the afternoon. Mr Waugh asked her to come into his office and asked her "have you made a decision?". She said that she explained that she had not been given enough time to find work and that Christmas was coming soon. She says that nothing had been set up until that point about any disciplinary action being taken against her.

31. I find that this was a continuation of the discussion in conversation 1 and was for the same purpose. It was plainly a discussion where both parties were thinking about the appropriate type of termination. It is within the scope of s111A. It was not a without prejudice exchange for the same reasons as given for conversation 1.

Conversation 3 (11 October, at about 4.50pm)

32. On 11 October 2017 at about 4.50pm, the claimant had a conversation with Mr Waugh. During this conversation the claimant said that she would leave on the Friday “as he [Mr Waugh] had directed”. This again is clearly a continuation of the discussions about the offer that had been made to her (on her own account of it).

33. In fact he had not directed her to leave, but had put to her an offer that she should terminate her employment at that point rather than earlier in return for monetary consideration.

34. She said that they could go over the paperwork on the following day. According to the claimant Mr Waugh told her not to rush her decision.

Conversation 4 (12 October 2018, about 10 am)

35. The claimant says that on 12 October 2017 there were four meetings: at the first of these the claimant was allowed to be accompanied. As well as the claimant and her representative Mr Waugh attended the meeting. This was a short meeting of just over 10 minutes.

36. The claimant accepts in paragraph 8.2 of her witness statement that the expression "without prejudice" was mentioned. At that meeting the claimant says that Mr Waugh had told her that he could have that conversation with her because she was asking for a compromise agreement and he believed that they were already having a without prejudice conversation. However the claimant says that she still did not know

what a "without prejudice" discussion was. She said that Mr Waugh talks very quickly and appeared to rush the conversation. She says therefore that she did not get the chance to ask for an explanation as to what he meant in respect of some of the things that were mentioned in the discussion. There were no notes taken at the meeting at the time.

37. The claimant explained at paragraph 8.5 of her witness statement that she had said that she could not take any more pressure and was at the end of her rope. She said that she felt as though she was being forced out of the organisation. She explained that if she did decide to leave at the very least she would want an agreed reference in three months salary. The point that she “could not take any more pressure” was not put to Mr Waugh for his comment and I find that it was not said by the claimant. However it is very clear that the claimant on her own account attended that meeting intending to negotiate an agreement. She referred to her wishes as regards a compromise agreement.

38. The claimant says that Mr Waugh told her that he had never asked her to leave. This is something that she does not accept as being true. He also said that she had nobody else to blame but herself for the situation. I find it is likely that he did say this, but it does not amount to improper behaviour, and is plainly not unambiguous impropriety.

39. On day two of this hearing C 4 was handed in. This document consisted of notes done in preparation for the meeting on 12 October and represented the claimant's plan of what she was going to try to do on 12 October.

40. I do not accept that these notes were written a week after the event. They appear to me to be clearly notes of what the claimant planned to say. From these it is clear that the claimant was willing to leave but that she explained that she wanted a compromise agreement if the parties could agree on it as a condition of her going. It is clear that whoever had advised her on the nature of a compromise agreement had explained the mechanics of obtaining one. The claimant accepted that the idea of the meeting on 12 October was to enter into a compromise agreement if she could: she went there to negotiate an agreement and she accepted that that was her friend of mind at the time of the meeting.

41. It is clear from C 4 that the claimant was saying to the respondent that the respondent should "up your offer" and that this should be done "for a quick settlement". The claimants evidencing explanation of these phrases appear to me to be inconsistent. Her evidence was that she could not guarantee to leave at this stage but that she needed to stay because she had no job.

42. I think the reality of the situation in this meeting was that the claimant did want to leave and that she wanted to negotiate the best agreement that she could before leaving. I have no criticism of her for wishing to do so. She explained to me that she wanted to have the documents that were required for a compromise agreement

sorted out before the Friday that she did not want her last day to be taken up with dealing with that documentation or other matters relating to the agreement.

43. The claimant accepted in her evidence at several points that no one told her that she would definitely be dismissed for gross misconduct if she did not accept the offer that was being made. She accepted that she was told that if matters were proved against her then they might amount to gross misconduct in the sense that they would fall into the category of gross misconduct under the disciplinary procedure.

44. Again on the claimant's own evidence it seems to me that this meeting falls under section 111A. I also consider that this exchange does fall within the concept of without prejudice communication. A compromise agreement is an agreement which compromises legal claims between the parties. When the claimant was cross examined on the second day of the hearing about her notes made in preparation for this meeting she appeared to suggest that she had simply repeated what she had been told to say by a friend. The implication was that she did not understand what a compromise agreement was. I do not accept this implication. It seems to be clear that she understood she was putting forward an agreement to prevent future disputes. These preparation notes (C4) were disclosed to the respondent on the first day of the hearing when the respondent asked to see the original of a spiral note book, parts of which (C1-3) had been disclosed by the claimant. Overnight counsel for the respondent examined the notes and asked for C4 to be introduced in evidence at the start of day 2. I take the view that these notes show clearly that from this point onwards the claimant's state of mind was that of one who was seeking to negotiate an agreement by which her employment might terminate (if the terms were acceptable to her).

45. During this meeting the claimant says that she noticed that Mr Waugh had on his computer screen a letter accepting her resignation. She says, however, that she had not tendered her resignation at this time. This is not the case. She had made it clear that she was offering to resign even if she had not done so formally. There is nothing improper in Mr Waugh having a copy of a letter accepting her resignation in those circumstances. The claimant says that the meeting ended by Mr Waugh saying that he would check on what he could provide in respect of salary and reference for her.

46. This conversation was intended to be a without prejudice conversation. It was clearly, on the claimant's account, a discussion as to whether her employment could be terminated in return for an agreement and hence it is independently in the scope of s111A.

Conversation 5 (12 October 2018, about lunchtime)

47. The claimant says that "without prejudice" was mentioned again at this meeting, which she recalls occurring at around lunchtime. The claimant had asked for notes of the investigation meeting on 11 October but had been refused. Mr Waugh said

that he had told the claimant that she was being investigated. He also said he had not written this in his notes and would have to check with Mr Dixon's notes.

48. According to the claimant she was told that if she stayed she would be put down the disciplinary route for gross misconduct. She was told that she could be sacked. When she asked what she had done wrong and what was being investigated, Mr Waugh said, according to her, "the category is gross misconduct Sue". Again the claimant says that "without prejudice" was mentioned in this meeting, but no explanation was provided to her.

49. From the claimant's account it seems to me that this conversation was focusing on what would happen if the claimant did not accept the offer to leave on Friday with a payment, or chose to remain. The discussion was held with a view to the employment terminating, and was part of the negotiations surrounding it, and agreement that had been offered. It appears to me be within scope of s111A and to be a without prejudice conversation.

Conversation 6 (12 October about 3 pm)

50. There was then a third meeting at around 3pm. This was attended by the claimant Ms McCafferty, Danielle Davison and Mr Waugh. The claimant accepts that the phrase "without prejudice" was mentioned again. Mr Waugh explains that human resources would not do a compromise agreement and that she was to be taken down the disciplinary route. The claimant says that Mr Waugh said that he would have to get witness statements and that he explained the disciplinary process. When the claimant asked for a copy of the company handbook Mr Waugh said according to her that he did not know where she could access it from. It was eventually found on the intranet.

51. According to the claimant her companion Liz McCafferty did ask about the offer that the respondent was making. She asked whether that could be taken away from the claimant at any point. The meeting ended with Mr Waugh explaining that any offer would be final. She would be given the offer that night for consideration and her response would be needed on 13 October.

52. At first glance that this would be a very short period of time to consider, and might have placed undue pressure on the claim if it was the first time it had been mentioned. However it was not the first time. Given the fact that the claimant had indicated a desire to leave the employment of the respondent, the respondent appears to have been negotiating an agreement whereby the termination date was supposed to be the next day. The offer was a modest one which should have not caused the claimant any difficulty to consider and either accept or reject. The respondent was not telling her that she would be dismissed for sure, and had told the claimant that someone other than Mr Waugh would be making the disciplinary decision.

53. Unfortunately the point that the claimant makes in her witness statement, that Mr Waugh added that he would be commencing the disciplinary process as soon as possible if the claimant decided to refuse the offer and to stay, was not put to Mr Waugh so that he could comment on whether he said it or not. In those circumstances I find that he did not say that he would start disciplinary proceedings as soon as possible. However even if he did, I do not consider that this, viewed objectively, constitutes improper pressure. Mr Waugh had, I find, been clear that he was not pre-determining the outcome. I can see no basis for saying he did this either explicitly or by a “nod and a wink”, i.e. implication.

54. In those circumstances, barring any unambiguous impropriety I consider that the conversation is inadmissible due to the without prejudice rule. I also consider it would be excluded by section 111A unless the claimant can show impropriety relevant to that section.

Conversation 7 (12 October about 4.30)

55. There was a further short meeting at about 4.30 on 12 October. The claimant was given the first without prejudice letter dated 12 October which is at page 275J of the bundle. This contains the details of final offer. The letter was defective in that it did not mention her overtime payments and this omission was corrected. This is plainly without prejudice and or falls under section 111A. It is inadmissible unless relevant impropriety is shown.

Conversation 8. (13 October)

56. On Friday, 13 October 2017 there was a further meeting attended by Ms McCafferty Mr Waugh and the claimant. At this meeting Mr Waugh read out the claimant's resignation letter (page 275L). He said that he had never asked the claimant to leave and that he was happy for her to stay. If she did stay they would need to start the disciplinary process as there had been complaints made about her. He said he would need to obtain witness statements because the information he had was fairly vague. For some reason, the question of whether the resignation letter should be amended was raised by this McCafferty. According to the claimant Mr Waugh said that he would accept the letter as long as it was worded differently.

57. According to the claimant at this point Mr Waugh said, out of the blue, "without prejudice" and then said, "I am trying to comply with your wishes.". I do not think that this matters, although I am happy to accept that the claimant’s account is correct. The claimant says that there was a further meeting on 13 October. She says that at this meeting Mr Waugh accepted her resignation letter, and gave a breakdown of the wages she was to receive. What is clear on her own evidence is that these were further conversations seeking to reach a settlement and were the continuation of earlier without prejudice or section 111A conversations. If there is no relevant impropriety they are inadmissible.

Was there anything said or done which was improper, or was connected with improper behaviour?

58. In relation to each of these conversations which fall within the scope of section 111A I have to ask whether I think there was anything said or done which was improper or was connected with improper behaviour. I also have to ask whether there was unambiguous impropriety only in the cases where I find that there was impropriety. Under section 111A the test for admissibility where a discussion/negotiation is otherwise in scope is whether there is anything said or done which in my opinion was improper, or was connected with improper behaviour. If I find that there was such verbal or physical behaviour the evidence of the meeting is inadmissible only to the extent that I consider just.

Conversation 1

59. The Claimant's witness statement at paragraph 4.1. – 4.6 deals with a meeting which is not the subject of this application.

60. However it contains material which if it had been put to Mr Waugh might have constituted a context for what was said in conversation 1 as identified above. Mr Waugh was not given the opportunity to comment on whether he had shouted at the claimant, nor whether he had spoken in an abusive manner; nor the allegation that the claimant was not allowed to speak during that meeting. The claimant describes Conversation 1 at paragraphs 4.7 to 5.11 in her witness statement. There is nothing in that conversation which would constitute improper behaviour in my opinion.

61. Mr Waugh was not, I find, abusive towards the claimant. I find that he did not shout at the claimant at any of the meetings which are the subject of this application or at the earlier meeting. The claimant's account in her witness statement was that she had been shouted at for a period of 20 minutes. I find that she has not remembered this correctly.

62. At paragraph 4.5 of her witness statement the claimant refers to the themes of the meeting constituting this conversation. It is clear that these were her recollections of themes. I have no doubt that something like them was said at the meeting. However the manner in which these points were made was not put to Mr Waugh. During Conversation 1 Mr Waugh talked about relationships and said that relationships had broken down. This, by itself, does not seem to me to constitute improper behaviour. The reference to relationship breakdown, by itself, does not constitute either improper behaviour or a reference to any improper behaviour which was put to Mr Waugh for his comment.

63. When cross-examined about this meeting the claimant stated that she had felt insulted because reference was made to the way she interacted with other people in the workplace and specifically that Mr Waugh had accused her of being intimidating and causing an atmosphere everywhere including with Ms Davison. I think it is likely that Mr Waugh did ask questions at various meetings about her relationships with her colleagues. However the claimant cannot rely on the way in which Mr Waugh

spoke at this meeting which I conclude was not unusual or insulting. I should add that even if I had found that Mr Waugh had spoken to the claimant in strong terms about the relationship breakdown between her and her colleagues and even if he had said to her that she needed to fix her problems I do not consider that that would constitute improper behaviour in this context.

64. As a result conversation 1 in its entirety is inadmissible at the full hearing of this case because it was a protected conversation. I do not consider that this amounts of disproportionate exclusion of evidence such as would impede the claimant's right to a fair determination of her claim for unfair dismissal. I also find that there was no improper verbal or other behaviour at the meeting and nothing said or done was connected to improper behaviour. Neither side may adduce evidence of, or refer to the fact of, the conversation. The earlier conversation may be the subject of further evidence to the extent permitted by the tribunal hearing the case.

Conversation 2

65. The Claimant does not describe any behaviour by Mr Waugh or anyone else during this conversation which could be described as either improper speech or improper behaviour. On her account of it, the meeting was simply a short conversation in which Mr Waugh asked her if she had made up her mind, and she said no, explaining that she did not have enough time to find work and that Christmas was coming.

66. The conversation and the fact of the conversation is inadmissible.

Conversation 3

67. This was a conversation that the claimant deals with at paragraph 7.7 and following in her witness statement. Some of the material was not put to Mr Waugh for his comment. Thus it was not put to Mr Waugh that he was told by the claimant that she felt it was very clear to her that she was a hinderance and that it was not worth her while trying any more. However, even taking the claimant's evidence at its highest it does not appear to me that Mr Waugh's behaviour at the meeting was anywhere on the spectrum of behaviour that could be regarded as improper. On the contrary he appears, on the claimant's account, to have been behaving in a solicitous manner to her. Whilst Mr Waugh's behaviour may have confused the claimant as to whether he wanted her to leave, it cannot be described as improper, either verbally or by reference to any other improper behaviour.

68. The conversation and the fact of the conversation is inadmissible.

Conversation 4

69. The first meeting on 12 October 2018 was dealt with by the claimant in her witness statement at paragraphs 7.10 and following. The meeting was at about 10 am on 12 October. This was the first meeting at which Gillian McCafferty was present.

It was a short meeting according to the claimant's witness statement at paragraph 8.2. It is clear to me, from the contents of the claimant's exhibit "C4", her preparatory notes for this meeting, that her intention was to come to this meeting to negotiate a compromise agreement. She explained that she could not take any more pressure and that she felt as though she was being forced out. However nothing she describes in her witness statement at paragraphs 8.2-9.2 constitutes improper behaviour, and in my opinion none of it is referrable to improper behaviour whether in or out of the meeting. It was in any event a without prejudice discussion, and the respondent did not engage in any unambiguous impropriety.

70. The conversation and the fact of the conversation is inadmissible.

Conversation 5.

71. The claimant deals with this at paragraphs 9.3 and following of her witness statement. During this meeting the claimant referred back to an earlier investigation meeting. She was told she said in evidence that she would be taken down the disciplinary route if she stayed and could be sacked. She was told that the category of behaviour she was to be investigated for was "gross misconduct". She was told that she could be sacked for gross misconduct.

72. Gillian McCafferty's witness statement of 28 May 2018 deals with the conversations. She says that on Thursday, 12 October 2017 she attended a meeting as the friend of the claimant. At that meeting she says that Mr Waugh said that the matter needed to be sorted and the claimant in response asked what she was supposed to have done to lead to a disciplinary process being necessary. Mr Waugh then said that he wanted to do the claimant a favour as "discipline will be an awful process". This point was not put to Mr Waugh for his comment by the claimant and I find that Mr Waugh did not say these words. However, even if he did say them, they do not constitute improper behaviour and are not referrable to any improper behaviour which has yet been put to Mr Waugh for his comment. In those circumstances I do not find that it is likely that the words were referrable to any such improper conduct to any extent.

73. According to Ms McCafferty Mr Waugh said that the claimant was guilty of gross misconduct and could be sacked. I consider that Ms McCafferty was not recollecting this subtle detail correctly, and she appeared to shift from this position when giving evidence, no doubt in the light of recollecting more clearly what had happened. I think that it is more likely that Mr Waugh was consistent with his unchallenged evidence to the effect that he said that the conduct would fall under the category of gross misconduct. He did not say that the claimant had committed gross misconduct.

74. According to Ms McCafferty Mr Waugh asked the claimant what she wanted and she said that she wanted to keep her job but that if she was going to be sacked she would have no choice other than to leave. This, again, was not put to Mr Waugh so that he could comment on it. I find that it was not said by him.

75. The claimant then, according to Ms McCafferty, asked for three months' salary and a good reference. This evidence supports the view that by this stage in the proceedings, the parties were negotiating the termination of the employment. Hence the conversation falls within the scope of section 111A. There appears to have been no improper behaviour etc, and therefore this conversation (dealt with at paragraphs 9.3 to 9.7 of the claimant's witness statement) is inadmissible.

76. Ms McCafferty does not appear to recall a reference to "without prejudice" conversations in her original witness statement. However on 21 July 2018 she provided a further witness statement in which she said that she understood "without prejudice" as meaning nothing more than "confidential". She asserts that this is why she was surprised that Mr Patton was discussing the content of those meetings with staff who were not involved after the event. I find that Mr Patton did not breach confidentiality in the way alleged.

77. Ms McCafferty's witness statement does not deal with what she said Mr Patton was supposed to have done, but she gave evidence, which was not contained in her witness statement, and was not put to the respondent's witnesses, that on 9 October she had seen the claimant, Mr Waugh, and Mr Patton in Mr Waugh's office. Shortly after that she had overheard a conversation in the office between Mr Patton and another colleague.

78. The other colleague was the workshop controller. Mr Patton was saying "Peter's got Sue in. She'll be gone by the end of week. He's given her a few quid to go.". I find that Ms McCafferty is incorrect in her recollection of events. I find that this conversation did not occur.

79. I find it very surprising that evidence as significant as this was not included in the claimant's witness's witness statement. I also find it surprising that there was no reference to the claimant having heard about this conversation from anyone. As such I have to conclude that this conversation played no part in influencing the claimant. However even if I were to accept, which I do not, that Ms McCafferty has recalled this correctly, it does not show improper behaviour during any of the relevant conversations by the respondent. There was, on the evidence I have been shown, no reference to it in any of the conversations. I do not consider that a passing reference to the need to keep conversations confidential constitutes such a reference.

80. In any event I find that there was neither impropriety nor unambiguous impropriety of the relevant, or any, kind by the respondent. The conversation and the fact of the conversation is inadmissible.

Conversation 6

81. The claimant's account of this meeting is at paragraphs 9.8 and following of her witness statement. At this meeting Mr Waugh rejected the compromise

agreement suggestion put forward by the claimant. The claimant says that Mr Waugh explained that he had done many disciplinaries before. The claimant, very fairly, sets out in her witness statement what was said at that meeting, and it amounts to this. Mr Waugh said that if she stayed he could have to get witness statements together. There was a search for the disciplinary procedures. Mr Waugh corrected advice the claimant had been given about disciplinary procedures. Mr Waugh explained that there would be a further investigatory meeting, and he would need to obtain witness statements as what he had at that time was “hearsay”. It is in that context, fairly set out by the claimant, that Mr Waugh remarked, as I find he did, “I don’t want to chew on getting statements. I know the process. I’ve had to sack people in the past”. He explained that the offer that would be made to her would be a final offer, and that he would need to have an answer on 13 October.

82. The claimant alleges that Mr Waugh said this was because he was going to be working a half day that day. This was not put to Mr Waugh. However even if this was said by him I do not consider that it, or the other matters set out above constitute improper words or behaviour, and they are not referrable to any relevant extent to any such improper conduct.

83. Ms McCafferty recalled this meeting. The phrase "without prejudice" was mentioned again.

84. Nothing improper occurred during this meeting and nothing referrable to improper conduct occurred. Therefore no unambiguous impropriety took place. The conversation and the fact of the conversation is inadmissible.

Conversation 7

85. There was a further short meeting at the end of 12th October. No improper behaviour or words were alleged by the claimant in her evidence relating to this meeting which is contained in her witness statement at 10.6-8.

86. The conversation and the fact of the conversation is inadmissible.

Conversations 8 and 9

87. The claimant’s evidence about the meetings on Friday 13th, and that of Ms McCafferty does not disclose any improper behaviour or words (or anything referrable to the same). The claimant handed Mr Waugh her resignation letter. McCafferty remembers mentioning that if the resignation letter was worded differently might be that Mr Waugh might accept it. His response to this was odd according to her: He said "without prejudice".

88. It is very clear from this that Mr Waugh was very keen to ensure that the meetings he had with the claimant were “without prejudice”. It seems to me abundantly clear that all of the offers he made to the claimant were within the scope of

section 111A and none of this amounts to improper behaviour, whether verbal or other. The meetings on 13th were simply continuations of the without prejudice and or protected conversations.

Conclusion

89. In those circumstances all of the conversations are inadmissible under section 111A. All but conversations 1-3 are without prejudice discussions and hence inadmissible before the tribunal. Matters of evidence relating to admissibility remain matters for the tribunal hearing the merits of the case and so my ruling on without prejudice status cannot in any event bind the tribunal hearing the case. The same is not true in relation to section 111A.

90. I should say that in respect of timings I have preferred the evidence of the claimant to that of the respondent. I consider that the claimant and Mr Patton constructed their notes of the meetings after the event. This is no criticism of either of them. However both of them clearly did not remember the sequence of events with clarity. The claimant explained that she wrote C1-3 about a week after her employment had ended. Mr Patton wrote his account of the meetings shortly after, but they were short notes and clearly do not reflect the detail of the conversations. In the end it does not appear to me to be material when these notes were compiled.

91. When I looked at the extent to which the parties disagreed over the relevant matters in this application, namely the contents of and behaviour at the various meetings (regardless of the precise timing of when those meetings occurred) it struck me that there was in fact a considerable amount of agreement where matters were explored in cross examination with the witnesses. Whilst the parties differ over the interpretation to be placed on key passages, they do not differ on the principal relevant facts.

92. In particular Mr Waugh denied that there were any threats and denied in particular saying that if she did not resign then disciplinary action would follow and the claimant would be dismissed. What he did say, in his evidence, was that he had used words to the effect at some point in the discussion that if she did not resign then the disciplinary procedure would be followed and that the claimant could be sacked. I find that he did use words to this effect. However this is very different from saying that she would be sacked for certain. From the evidence which was tested before me by being put to the witnesses, there was no improper behaviour in or referred to at the meetings.

93. The parties need to understand clearly that my description of behaviour as “not improper” has no relevance to whether the behaviour which occurred at other meetings could have constituted a fundamental breach of contract. Behaviour may constitute a breach of contract, even a fundamental breach, and remain “proper” in this sense. Behaviour which does not constitute improper behaviour in this sense may also constitute a breach of the contract of employment and or a fact which may be taken into account in determining whether as a result of a course of conduct there has been

a breach of the implied term that an employer will not without good and proper cause undermine the relationship of trust and confidence.

94. However, during these meetings, in essence the claimant had a choice. She could stay and then the disciplinary procedure would be followed to its conclusion (whatever that might be), or she could agree to the resignation offer being made to her (or she could simply resign in a way that did not accept the offer). I do not accept that the respondent placed the claimant under any improper pressure in those circumstances during these meetings (or by acts or speech connected to other improper behaviour).

95. Even if there was pressure on her during these meetings, this came from her own belief that if a disciplinary investigation and process was concluded, it would result in her dismissal for gross misconduct. However that is not something for which the respondent can be held accountable (in this application), regardless of whether the respondent's behaviour outside these inadmissible meetings constitute a breach of contract in response to which the claimant resigned, and regardless of whether that resignation was in circumstances entitling her to resign without notice. Of course the Respondent is not entitled to refer to these meetings (or these findings) to indicate that there was another reason for the claimant leaving (namely that she had put herself under pressure by believing due to these meetings that she would be dismissed). Neither party may refer to the fact of or contents of these meetings.

96. The relevant passages of both parties' and their witnesses' witness statements should now be identified by the parties and it should be agreed that these passages should be excised from the witness statements. If the parties are unable to reach agreement on the matters to be excised, that disagreement should be brought back before me, by way of a telephone preliminary hearing. However it ought to be possible for both parties to agree what needs to be excised.

Finally, care should be taken by both sides to avoid any reference in any witness statement, or in giving evidence to any of these conversations or the events within them.

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Employment Judge O'Dempsey

Date 3 October 2018
JUDGMENT SENT TO THE PARTIES ON

3 October 2018

Miss K Featherstone
FOR THE TRIBUNAL