Case Number: 3300789/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms Charlene Welford	**v**	Angela Jayne Drummond and Christopher Drummond t/a Papilio Cosmetic Suites

Heard at: Norwich **On:** 8 March 2022

Before: Employment Judge S Moore

Appearances
For the Claimant: Mr Esherwood, friend
For the Respondent: Mr Irons, solicitor

JUDGMENT ON PRELIMINARY ISSUES

In view of the Respondent's improper behaviour, it is just that evidence of pre-termination negotiations conducted between the Claimant and the Respondent on 12 October 2020 is admissible at the substantive hearing of the claim in so far as that evidence pertains to:

(i) The making and withdrawal of the Respondent's offer of settlement, and

(ii) FON and CD (incorrectly) telling the Claimant in the meeting of 12 October 2020 that the matter that was the subject of disciplinary proceedings had been reported to the NMC.

REASONS

Introduction

1. The Claimant (a Registered Nurse) was employed by the Respondent in its cosmetic surgery practice as an Aesthetic Nurse between 1 February 2017 and 21 October 2020 (the Respondent says the employment began on 1 April 2017 and ended on 27 October 2020, but nothing turns on the precise dates). She subsequently brought a claim of constructive unfair dismissal, maternity related discrimination and for notice pay by way of a breach of contract claim.

2. At a telephone Case Management Conference Judge Warren set down the following matter to be determined at an Open Preliminary Hearing:

   "Whether the existence and content of the discussions between the parties on 12 October 2020 should be admissible in evidence."

3. In this respect section 111A of the Employment Rights Act 1996 (ERA) provides:

   (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) 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.
   (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…

4. It is common ground that a meeting held on 12 October 2020 between the Claimant, Paul Esherwood (PE), (supporting the Claimant), Christopher Drummond (CD), Franchecika O'Neill (FON), HR Advisor, and Jack Brown (JB), notetaker, and a subsequent email sent from FON to the Claimant later the same day were pre-termination negotiations for the purposes of section 111A ERA. The issue before me is whether anything "improper" was said or done by the Respondent within the meaning of subsection 111A(4) and therefore whether it is just that those negotiations, or any part of them, remain inadmissible.

Facts

5. The Claimant commenced a period of maternity leave in August 2020. While on maternity leave, she received an email from an HR consultant (FON) informing her the Respondent was starting an investigation into her conduct.

6. On 28 September 2020 the Claimant attended an investigation meeting via Microsoft Teams. On 9 October 2020 she was asked to attend a disciplinary hearing on 14 October 2020.

7. Prior to the disciplinary hearing, the Claimant was asked to attend the Respondent's offices on 12 October 2020. FON states that this was to allow the Claimant to review evidence which she (FON) did not consider could be sent via post or email due to patient confidentiality. The Claimant was also invited to a "without prejudice" meeting/discussion scheduled immediately after the first meeting.

8. The Claimant stated she would attend and would bring a companion. FON responded that her companion to view the evidence needed to be a fellow employee or trade union representative but that she could bring any companion to the "without prejudice" meeting. The Claimant brought PE who was not a fellow employee or TU representative. At first PE was declined entry to the room, but he was allowed to accompany the Claimant when it was made clear he was not intending to look at the evidence.

9. In the event, the Claimant declined to view the evidence and PE suggested they proceed directly to the "without prejudice" meeting. The Claimant's position then (and remains) was that the evidence/case against her was fabricated by the Respondent and that there was no point in her looking at the evidence since it was apparent the Respondent no longer wanted her to work there.

10. The notes of the meeting record FON stating the Respondent was willing to offer the Claimant £2,000, as well as £350 for the Claimant to seek legal advice on the settlement agreement, and that she could have 7 days to consider it.

11. PE then asked FON if the Respondent had "reported" the alleged disciplinary matter to the NMC (Nursing and Midwifery Council), to which FON replied "Yes we have to by law due to [duty of care]". The words after that read "but if further evidence we…" but these have been crossed out.

12. It is also accepted by the Respondent that the Claimant also asked CD if the Respondent had reported to the matter to the NMC. In this respect CD statement states "I was also asked by Miss Welford whether the Respondent had reported the matter to their professional body, the Nursing and Midwifery Council, and I confirmed that at that point Papilio had done so".

13. PE then pointed out that the Claimant had herself paid the Respondent £5,000 when she moved to the business. At this point the notes record CD stating, "Jane would move to £5,000'. And he asks, "Would you do £5,000?"

14. PE then repeats the terms of the offer, and the notes record him stating the Claimant would "sign and accept".

15. Later that evening the Claimant received a one-line email from FON stating the offer had been withdrawn. There was no explanation or apology.

16. The Claimant was also sent an email/letter dated 12 October 2020 stating that the disciplinary hearing would now take place on 15 October 2020 at 11am.

17. On 13 October 2020 PE wrote to FON referring to the retraction of the offer to settle and stating that "it is clear to me your client is intent on making this issue as disruptive and upsetting for the Claimant as possible. Whilst yesterday's conversation was protected and not binding it is a clear demonstration of your client's character that the agreement we reached has been withdrawn without explanation. From the outset I have found your communication style oppressive and unnecessary…"

18. On 14 October 2020 FON sent an email to the Claimant stating that the Respondent wished to have a "without prejudice" conversation with her on 15 October at 12pm, and that "the reason for withdrawing from the previous conversation was because JD would like to speak with you directly."

19. PE informed FON the same day that the retraction of the offer had brought to an end any further discussion.

20. On 21 October 2020 the Claimant resigned.

21. On 27 October 2020 the Respondent's solicitors sent a proposed settlement agreement, reinstating the original offer of £5,000k, however the offer was not accepted.

Conclusions

22. The issue before me is whether anything "improper" was said or done by the Respondent within the meaning of subsection 111A(4) and therefore whether it is just that the pre-termination negotiations that took place on 12 October 2020, or any part of them, remain inadmissible.

23. The Claimant's case is put on the general basis that the Respondent's attitude towards her was wholly inappropriate and oppressive, given that she had recently given birth and was still breast-feeding her 5-week old baby (who was with her at the meeting). More particularly, the Claimant relies on two matters as constituting improper behaviour or being improper: first, the fact that the settlement offer made and agreed upon at the meeting of 12 October 2020 was withdrawn without explanation; secondly the fact she was told in that meeting the matter that was the subject of the disciplinary proceedings had been reported to the NMC when it had not been.

24. As regards the withdrawal of the offer, the evidence of FON and CD was that at the meeting on 12 October 2020 CD made it very clear that he

would need to discuss the matter with his wife, JD, before proceeding with the offer, so that, in effect the offer of £5,000 was subject to JD's approval. Both the Claimant and PE were adamant that no such proviso had been expressed, and that the clear understanding at the conclusion of the meeting was that the parties had reached an agreement.

25. I prefer the evidence of the Claimant and PE and do not accept that CD expressed any proviso at the meeting.

26. First, there is no record of CD making any such statement in the notes of the meeting. While I accept the notes are not a verbatim record, I would expect the statement that the offer being made was in fact conditional on JD's approval to have some mention in the notes. Secondly, the notes in fact record CD stating earlier in the meeting "JD would move to £5,000", which imply CD already knew JD's position on an offer of £5,000, not that he needed to find it out. Thirdly, if at the meeting, CD had stated the offer was subject to JD's approval, I would have expected FON's email later the same day to make some reference to that fact when withdrawing the offer.

27. As regards the reference to a report having been made to the NMC, it is accepted by the Respondent that at the meeting on 12 October 2022, both FON and CD told the Claimant that the Respondent had reported the matter to the NMC, FON adding that the Respondent was required to do so by law because of their duty of care. This was a matter of great concern to the Claimant: a referral to the NMC and subsequent investigation could have led to restrictions being placed upon her ability to practice whilst the investigation was carried out and could ultimately have led to her losing her right to practice as a nurse.

28. In fact, the Respondent had not reported the matter to the NMC (and that remained the position at the date of this hearing).

29. In evidence, FON first said that she understood JD *had* spoken to the NMC. She then said that JD had told her she was concerned about certain things the Claimant had done and *would* speak to the NMC to get guidance but as at 12 October 2020 she didn't actually know what conversation JD had had with the NMC.

30. In his statement (dated 22 February 2022), CD states that when the Claimant asked him whether the Respondent had reported the matter "I confirmed that at that point Papilio had done so". That evidence implies that his answer in the meeting on 12 October 2020 (that the matter had been reported to the NMC) was accurate at the time, and the position only changed subsequently (presumably by way of a retraction of the referral). However (as stated above) it is now accepted the Respondent never reported the matter. At today's hearing CD said that as at 12 October 2020 he believed the matter had been reported to the NMC. He then said he didn't know whether a "full reference" had been made, but at the time he assumed it had been.

31. In her evidence JD said she had phoned the NMC and spoken to someone in a clerical position to seek guidance on making a formal report to the NMC sometime at the end of August/beginning of September 2020, that she never gave the NMC the Claimant's name, that she couldn't remember the last time she had contact with the NMC prior to the meeting of 12 October 2020, and that no report had in fact been made.

32. It therefore follows that the unequivocal statements made to the Claimant at the meeting on 12 October 2020 that the matter had been reported to the NMC, with the explanation that the Respondent was legally required to do so because of its duty of care, were at worst a deliberate untruth and at best demonstrated a callous indifference for the truth in respect of a matter that was, as the Respondent would have known, of utmost concern to the Claimant.

33. Examples of what amounts to improper behaviour are given in the ACAS Code of Practice on Settlement Agreements, however the list (which includes bullying and intimidation) is not exhaustive and the matter is ultimately for the Tribunal to decide on the facts and circumstances of each case

34. In this case I consider that both the Respondent's withdrawal of their offer, without explanation and telling the Claimant in the meeting on 12 October 2020 that the Respondent had reported her to the NMC constituted improper behaviour.

35. I have found as a fact that the Respondent did not state at the meeting that their offer was conditional on the approval of JD and accepted the evidence of the Claimant and JE that a clear agreement had been reached at the end of the meeting. To have that offer withdrawn a matter of hours later without any explanation whatsoever can only have increased Claimant's stress, anxiety and sense of vulnerability. Mr Irons sought to rely on the fact that on 14 October 2020 the Respondent tried to reinstate negotiations, stating that the "the reason for withdrawing from the previous conversation was because JD would like to speak with you directly." However, what he failed to mention was that by that time the Respondent had already re-instigated the disciplinary process and invited the Claimant to another disciplinary meeting scheduled for 15 October 2020. In my view this sequence of events amounted, or was similar, to intimidation which, by causing the Claimant unwarranted distress undermined her ability to defend her own interests, whether in settlement negotiations or a disciplinary hearing.

36. As regards telling the Claimant that the Respondent had reported the matter to the NMC when it had not done, this was a clear act of intimidation. FON and CD must have known, given the potential consequences, that telling the Claimant the matter had been reported to the NMC would frighten her. However instead of telling her the truth (either that the matter had not been reported, or that they did not know whether the matter had been reported) they told her unequivocally it had been reported because the Respondent had been legally bound to do so. While

it is true, as Mr Irons submitted, that the Respondent did not threaten to report the matter to the NMC *if* the Claimant didn't agree to a proposed settlement, it nonetheless remains the case that the anxiety the Claimant felt on being told the matter had already been reported can only have increased her sense of vulnerability.

37. In the light of the above I consider it is just that evidence of the pre-termination negotiations conducted between the Claimant and the Respondent on 12 October 2020 is admissible at the substantive hearing in so far as that evidence pertains, first, to the making and withdrawal of the Respondent's offer of settlement and, secondly, to FON and CD telling the Claimant in the meeting of 12 October 2020 that the matter that was the subject of the disciplinary proceedings had been reported to the NMC.

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Employment Judge S Moore

Date: 9 March 2022

Sent to the parties on: 25 March 2022

For the Tribunal Office