EMPLOYMENT TRIBUNALS

Claimant: Mrs D Lingard

Respondent: Leading Learners Multi Academy Trust

HELD AT: Manchester **ON:** 11 October 2017

BEFORE: Employment Judge Ross

REPRESENTATION:

Claimant: Mr M Palmer, Counsel
Respondent: Mr J Cook, Solicitor

JUDGMENT
ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. Paragraphs 47 to 48 of the claimant's claim form are admissible.

2. Paragraphs 51 to 52 and of the claim form are not admissible.

3. Paragraph 57 is admissible in part.

REASONS

1. The Preliminary Hearing was to determine the issue of admissibility identified by Employment Judge Holmes at a case management hearing held in Manchester on 22 June 2017. He noted the issue related to paragraphs 47 to 48, 51 to 52 and 57 of the claim form in which it was alleged that discussions were held which the claimant seeks to rely upon as being discussions which did not attract privilege and

which are not protected conversations within the meaning of Section 111A of the Employment Rights Act 1996.

2. Accordingly the issues for the Tribunal to decide were:-

   (i) Are these paragraphs of the claim form inadmissible by reason of the rule in relation to "without prejudice" communication?

   (ii) Are these paragraphs inadmissible because of section 111A of the Employment Rights Act 1996?

3. The Tribunal heard from Mrs Brown the respondent's Chief Executive Officer and Mrs Lingard the claimant.

Facts

4. The respondent is a multi academy trust comprising four primary schools including Tyldesley Primary School in Wigan. The claimant was employed by the respondent from 1 January 2002 until she resigned on 23 March 2017. The claimant became Head of School on 1 September 2016. It is not disputed that prior to becoming Head Teacher the claimant was Associate Head Teacher and part of the Senior Leadership Team.

5. The claimant brings claims to the Employment Tribunal of disability discrimination, breach of contract/unlawful deduction from wages and unfair (constructive) dismissal.

6. The claimant was absent from work from 7 November 2016 with high blood pressure and stress. On 15 November 2016 she participated in an occupational health assessment over the telephone. On 17 November 2016 she received a letter from Mrs Brown inviting her to attend a welfare meeting on 30 November 2016. The claimant was informed that the respondent's external HR consultant Ms N Yousaf would also be present at the meeting. She explained the claimant was entitled to bring her trade union representative as a companion to the meeting.

7. The claimant attended the welfare meeting. Mrs Brown, Ms Yousaf and Mr Atkins, the trade union representative, were already present in the meeting room when she arrived. There was no dispute that most of the meeting was spent discussing the claimant's health. I find there was a discussion about work related stressors.

8. There was no dispute that in April 2016 Jonathon Brown had been commissioned to carry out an external review of the school. It is not disputed that at the end of the review Mr Brown fed back to the Senior Leadership Team that the school was at best at the level of "requires improvement". At present, the school is "outstanding".

9. The claimant said she had never received a copy of the review. The respondent said that she had.

10. Both parties agreed there was no detailed discussion in the welfare meeting about the review. However both Mrs Brown and the claimant confirmed that the

claimant was asked by Mrs Brown if she was ready for the accountability that came with the role of Head Teacher.

11. It is not disputed that as the claimant was leaving the room Mrs Brown asked Mr Atkins, the trade union representative if he could come back into the meeting room when he had finished speaking with the claimant to discuss issues in relation to the Bradford schools. There was no dispute that these are other schools within the respondent's Academy Trust.

12. The claimant agrees that she spoke briefly with her trade union representative outside the meeting. The notes prepared by the claimant's union representative are disputed by the claimant.

13. There is no dispute that when Mr Atkins returned to discuss the Bradford schools Mrs Brown asked to speak to him on a "without prejudice basis". She told him she thought the claimant did not seem to accept responsibility for the poor performance issues that she suggested had just been raised. She said she discovered significant capability issues. She made an offer of settlement of £19,270.

14. This offer was sent to the trade union representative in writing following the meeting of the 30 November (see page 87 and 88). I find Mr Atkins sent the offer to the claimant the following day, 1 December, by email. Mr Atkins stated at the outset of the message "Yvonne has wasted no time letting you know what we thought yesterday-she wants you out". See p89a

15. The claimant responded promptly on 2 December, page 89b, where she stated "I was shocked to receive your email and digest its contents". She confirmed "to correct your email I was not considering leaving" and stated "You asked me whilst on the pavement outside after the meeting if I had any options and I replied sarcastically (in mutual recognition that should you fail to protect me or my employment under any unfair circumstances), leaving would remain my right to exercise at my discretion should I choose to. It is clearly not the option I would wish to choose to end my successful teaching career as Head of School at Tyldesley Primary School". She also asked Mr Atkins for details: "I need to be very clear how this situation came about".

16. The claimant stated in her evidence she did not speak to Mr Atkins until 7 December.In her statement she said: "later that day I sent an email to Max Atkins informing him that I did not wish to accept the respondent's offer. I also informed him that I wanted him to convey to Ms Brown that I did not consider there to be any legitimate grounds to commence performance management proceedings against me and that I was therefore prepared to defend myself against whatever allegations she chose to proceed with". I find this was 7 December 2016.

17. The Tribunal finds by this point, namely 7 December 2016 there is a dispute between the parties.

18. The claimant was not at any stage issued with a formal letter telling her that she was to be subject to capability/performance management. The Tribunal is not satisfied that there was any clear communication to the claimant in the welfare

meeting that there were any issues in relation to performance management likely to result in performance management or capability proceedings. The Tribunal finds there was some discussion around the issues raised in Mr Brown's report. The Tribunal is not satisfied that there was clear identification of any performance issue.

19. However by the time the claimant sent an email on 7 December 2016 informing Mr Atkins that she "did not consider there to be any legitimate grounds to commence performance management proceedings against me and that I was therefore prepared to defend myself against whatever allegation she chose to proceed with" there was clearly an area of potential dispute between the parties.

20. On 8 December 2016, the claimant received a further email from Mr Atkins forwarding to her a second offer from the respondent marked without prejudice increasing the offer to £30,000 page 89c. The leave date was stated 31 December 2016. The deadline for acceptance was 12 December.

21. The claimant lost confidence in Mr Atkins. She sent him an email on 8 December 89F "I am engaging the assistance of others. As a consequence, my instructions now are for you to cease acting for me".

22. On 9 December Mr Brown of Glaisyers solicitors contacted the respondent on the claimant's behalf. He said he would be taking detailed instructions and could not respond with the deadline given by the respondent. He also stated "I trust your client will not be so misguided as to commence any formal process against my client pending it receiving her response to its proposal". Page 90. I find this makes it clear that by this stage the claimant was aware that the respondent was considering commencing a formal process of capability proceedings against her although she had received nothing in writing.

23. On 15 December 2016 the claimant's solicitor received an email from Mr Whittaker of SAS Daniels identifying nine allegations of poor performance, page 91 to 93. The offer of £30,000 was restated but the termination date was different, being 19 December 2016. The deadline for acceptance was four days later on 19 December 2016.

24. Mr Brown responded on 16 December rejecting the offer and confirming "my client intends to submit a formal grievance in relation to the treatment she has suffered by your client in accordance with its grievance procedures." See page 94. In response Mr Whittaker of SAS Daniels stated: "we will deal with that as part of a capability - disciplinary process." See page 95.

25. It is not disputed that SAS Daniels are a law firm providing HR and legal advice to the respondent.

The Law

26. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013,Schedule 1 Rule 41 states "the Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the Courts". However, despite

this it is common ground that rules in relation to admissibility of "without prejudice" material applicable in the civil courts are adopted by the Employment Tribunal.

27. The general law of evidence is that all evidence relevant to an issue in proceedings is admissible and may be ordered to be disclosed. The without prejudice privilege is part of the law of evidence and is an exception to the general rule. This rule is grounded in public policy and prevents either party to negotiations genuinely aimed at resolving a dispute between them from giving evidence of those negotiations. Public policy is that litigants should be encouraged to settle their differences rather than pursuing them to the bitter end. The parties referred me to Unilever Plc -v- Procter and Gamble 2000 1W1LR2436 CA, Framlington Group Limited -v- Barnetson 2007 ICR 1439 CA, Portnykh -v- Nomura International Plc 2014 IRLR.

28. For the principle of “without prejudice” privilege to apply there must be a dispute between the parties although it is not necessary that litigation should have begun. It is necessary for me to look at the factual matrix and to determine whether there was dispute in existence. Portnykh -v- Nomura International Plc 2014.

29. In Barnetson -v- Framlington Group Limited 2007 ICR 1439 CA Lord Justice Auld stated "on that approach which I would commend, the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree".

30. He also referred to "the critical feature of proximity" which he stated was the "subject matter of the dispute rather than how long before the threat or start of litigation was aired in the negotiations between the parties"

Paragraphs 47 and 48 claim form.

31. I rely on my findings of fact that there was no dispute in existence between the parties at the occupational health meeting on 30 November 2016. There was a review by Mr Brown of which the claimant was aware which was critical of the school. The claimant was a member of the Senior Leadership Team and been recently appointed the Head Teacher of the school. However, at the time of the welfare meeting and immediately afterwards when Mrs Brown engaged in discussions with the trade union representative on 30 November I find there was no suggestion that the claimant was to be subject to formal capability proceedings. I am not satisfied that that stage that the parties to the employment relationship were "in dispute".

32. Accordingly I find paragraphs 47 and 48 of the claim form which relate to Mrs Brown's discussion with the claimant's trade union representative and the letters in relation to that meeting namely the letter to the trade union representative making the offer on 30 November, page 87 to 89, the email from the trade union representative to the claimant in relation to the offer at page 89A and the claimant's response page 89B are admissible. The reason is at that stage the parties were not in dispute and so the “without prejudice” privilege rule does not apply.

Paragraphs 51 to 52 of the claim form

33. These paragraphs deal with allegation ten (15 December 2016). Paragraph 51 mentions the claimant rejecting the respondent’s offer -and a further offer made by the respondent on 8 December. The allegation relates to an email from SAS on December 15 2016.

34. The Tribunal finds by this stage the parties are clearly in dispute. The Tribunal relies on its findings off fact that by 8 December 2016 the claimant is now aware that the respondent suggesting capability proceedings will be commenced. The Tribunal accepts the respondent's evidence that capability proceedings are not commenced when an employee is absent on sick leave but when an employee returns to work. The letter from the claimant’s solicitor of 9 December 2016 (p90) makes it clear that the claimant is aware of a "formal process" which may be commenced against her. Accordingly, the Tribunal finds that the fact of and any evidence relating to settlement discussions on and after 8 December 2016 are protected by the "without prejudice" rule. Therefore, the emails on 8 December at 89c-e are not admissible.

35. There is no doubt that the SAS Daniels letters at page 91 to 93 is not marked "without prejudice". However the Tribunal is satisfied that it is not the label the parties attach to a document which is significant although it is perhaps surprising a lawyer has not marked such a letter "without prejudice". It is the content which is important. The question is whether there is an attempt to compromise actual or pending litigation and whether from the circumstances the Tribunal can infer that the intention was in fact to be covered by the “without prejudice” doctrine. I find the reference to the nine capability issues within the letter and the reference to a settlement agreement satisfies me that there is clearly a dispute and a suggestion of how to settle the matter in the letter. Accordingly, even though the letter is not marked “without prejudice”, it is covered by the “without prejudice” privilege rule.

36. For these reasons paragraphs 51 and 52 are not admissible and neither are any documents directly relevant to that paragraph, in particular the letter dated 15 December.

Paragraph 57

37. Paragraph 57 of the claimant's claim form relates to the email dated 16 December 2016 from the claimant's representative and a reply from Mr Whittaker of SAS Daniels, see page 95. The Tribunal finds that by this stage there is very clearly a dispute between the parties. The letter from the claimant's representative rejects the offer of £30,000 and confirms the claimant's intention to submit a formal grievance.

38. The problem for the Tribunal is that Mrs Lingard's solicitor has included in the same letter where he rejects an offer of £30,000, a request in relation to a grievance.

39. I find the words: "Further to your email yesterday I am writing to inform you that your client's offer of £30,000 in return for my client's agreement to her employment being terminated on Monday 19 December is rejected” are words

clearly about negotiations made with a view to potentially settling an outstanding dispute between the parties. Accordingly despite the absence of the words “without prejudice” I find they clearly are intended to settle a dispute and are therefore protected by the “without prejudice” rule and are not admissible.

40. However the other part of the paragraph relates to different matter "I can also confirm my client intends to submit a formal grievance in relation to the treatment she has suffered by your client in accordance with its grievance procedures". The response from Mr Whittaker appears to relate to the indication that a grievance is going to be commenced because he states: "we will deal with that as part of capability disciplinary process". On an objective reading that cannot relate to the refusal to accept an offer of settlement.

41. Accordingly, the Tribunal finds that part of Mr Brown’s email at page 95 rejecting the offer is subject to the "without prejudice" rule and is not admissible. However the part signalling an intention to present a grievance is not protected by the without prejudice rule and is admissible. The Tribunal finds the reply by Mr Whittaker at p95 is not part of any effort attempting to settle a dispute, it is a response to the intention to submit a grievance and is also admissible.

42. The Tribunal directs that the reference to an offer of settlement in the pleadings at paragraph 57 is not admissible and neither is Mr Brown's letter of 16 December 2016 insofar as it relates to the offer of settlement. Therefore the words: “refused the respondent’s offer and” should be removed from paragraph 57 of the claim form and the words "Further to your email yesterday I am writing to inform you that your client's offer of £30,000 in return for my client's agreement to her employment being terminated on Monday 19 December is rejected” should be redacted in the email of Mr Brown’s solicitor of 16 December at p95 although the rest of the email is admissible.

43. The Tribunal turns to consider each of the paragraphs in relation to the Section 111A of the Employment Rights Act 1996 which provides that evidence for negotiations for termination of the claimant's employment is inadmissible in unfair dismissal proceedings except in certain circumstances.

44. . In considering this matter the Tribunal had regard to Faithorn Farrell Timms LLP -v- Bailey 2016 ICR 1054 together with the ACAS code of practice on settlement agreements (2013).

45. The Tribunal reminds itself that in accordance with Faithorn Farrell Timms LLP -v- Bailey, Section 111A has to be viewed independently of common law “without prejudice” principles. Its construction is to be informed by the language Parliament chose to use not the language that underpins “without prejudice” privilege.

46. The issue for the Tribunal are: does Section 111A apply? If yes, was anything said or done which in the Tribunal's opinion was improper or was connected with improper behaviour? If yes, does the Tribunal consider it just to determine the evidence of pre- termination negotiations is admissible.

47. The Tribunal turns to consider the first issue in relation to all of the contested paragraphs namely 47 to 48, 51 to 52 and 57.

48. The claimant does not just bring a claim for unfair constructive dismissal. She also brings a claim for disability discrimination. In these circumstances Section 111A does not apply because it relates to unfair dismissal claims only. See Section 111A(3). Accordingly that is the end of the matter.

49. However for the sake of completeness given there is also an unfair dismissal claim, the Tribunal has considered the next issue: was anything said or done which in the Tribunal's opinion was improper or was connected with improper behaviour? The Tribunal notes that in the guidance for settlement agreements “improper behaviour” is very widely defined. It suggests in the ACAS code : "the parties may find it helpful to discuss proposals face to face and any such meetings should be at an agreed time and place. Whilst not a legal requirement, employers should allow employees to be accompanied at the meeting by a work colleague, trade union official or trade union representative. Allowing the individual to be accompanied is good practice and may help progress settlement discussions".

50. There is no dispute that the offer of settlement was not made to the claimant. It was made by Mrs Brown to the trade union representative Mr Atkins. There is no dispute that it was not a meeting specially arranged to discuss the settlement proposal. Instead it followed a welfare meeting when Mr Atkins was called back, ostensibly to discuss work related matters concerning the respondent's other schools.

51. The claimant gave evidence that she had not given express instructions to her trade union official to discuss matters on her behalf in relation to any severance agreement.

52. The Tribunal finds that Mrs Brown knew that she was going to engage Mr Atkins in such a discussion because she informed the Tribunal that she could not offer large sums of money (the original offer was £19,000) without seeking permission from the Trustees. In these circumstances, the Tribunal finds given the wide definition of "improper behaviour” in the ACAS code and the facts above, the Tribunal finds that the conversation with Mr Atkins amounts to improper behaviour.

53. The Tribunal turns to the next issue: does the Tribunal consider it just to find the evidence of pre- termination negotiations is admissible. The Tribunal finds it is. The conditions for such a meeting suggested in the ACAS Code were not followed and I am satisfied that it is just to find this conversation is not protected and is admissible.

54. For these reasons, I find the conversation between Mr Atkins and Mrs Brown on 30 November 2016 was not a “protected conversation" and is admissible. Therefore paragraphs 47 and 48 of the claim form are admissible.

55. For the avoidance of doubt the Tribunal has not found there was any "unambiguous impropriety" which is a different test and requires very serious behaviour by the respondent.

56. Paragraphs 51 to 52. Once again the Tribunal relies on its finding that the claimant is bringing a claim for disability discrimination and so the protection of 111A cannot be invoked. However for completeness the Tribunal has considered whether s.111A is engaged in relation to the unfair dismissal claim.

57. The Tribunal notes the letter of 15 December is stated to be protected within the meaning of Section 111A ERA 1996. The Tribunal considers that stating a letter has the protection of 111A is of itself not sufficient. The Tribunal is required to consider whether it does in fact attract the protection of Section 111A ERA 1996.

58. Once again for the sake of completeness the Tribunal has considered whether there was anything said or done which in the Tribunal's opinion was improper or was connected with improper behaviour.

59. The Tribunal finds that in the ACAS settlement agreement it specifically states that "not giving the reasonable time for consideration set out in paragraph 12 of this code" can amount to improper behaviour. See paragraph 18 (e) of the ACAS code on settlement agreements. Paragraph 12 states "parties should be given a reasonable period of time to consider the proposed settlement agreement. What constitutes a reasonable period of time would depend on the circumstances of the case. As a general rule the minimum period of ten calendar days should be allowed to consider the proposed formal written terms of the settlement agreement and to receive independent advice unless the parties agree otherwise".

60. The Tribunal finds that the respondent made an offer on 8 December 2016 which required a response by 12 December 2016. The leave date in that letter was 31 December 2016. The respondent put another offer by letter of 15 December 2016. This offer was slightly different. The sum of money was the same but a different leave date of 19 December 2016 included. The response date was four days later on 19 December 2016. However, the Tribunal finds these were two offers which were almost the same-the only difference was the termination date. Therefore although the respondent did not give the claimant the suggested ten days to consider the offer of 15 December, the Tribunal is not satisfied that this amounts to improper behaviour because it was almost identical to an earlier offer. Accordingly this letter is protected and paragraphs 51 and 52 of the claim form are not admissible.

61. Paragraph 57 The Tribunal relies on its finding above that this claim contains a claim for discrimination and accordingly Section 111A is not engaged. However for completeness the Tribunal has considered whether s.111A is engaged in relation to the unfair dismissal claim.

62. Paragraph 57 of the claim form relates to the email from the claimant's representative of 16 December refusing the respondent's offer and indicating an intention on the part of the claimant to raise a grievance.

63. The Tribunal relies on its findings of fact. The Tribunal is satisfied that the rejection of the offer of settlement is part of a chain of communications which are

part of a protected conversation and is inadmissible. The Tribunal turns to the exceptions under Section 111A. The Tribunal is not satisfied that they are engaged. There is nothing improper in relation to the way that the claimant's solicitors objected to the offer.

64. The Tribunal finds that the second part of the email from the claimant's solicitor is simply a communication of the intention to lodge a grievance and is admissible as is the respondent's reply to that communication because they are not part of a protected conversation.

Employment Judge Ross

Date 20 October 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
26 October 2017

FOR THE TRIBUNAL OFFICE

[JE]