EMPLOYMENT TRIBUNALS

Claimant: **Ms J Carr**
Respondent: **Patmore Co-operative Limited**

Before: **EMPLOYMENT JUDGE CORRIGAN**
Sitting alone

Representation
Claimant: Mr A Young, FRU Representative
Respondent: Mr M Islam-Choudhury, Counsel

Heard by CVP (Ashford) **On: 5-6 November 2020**

JUDGMENT ON PRELIMINARY ISSUE

This was a remote hearing which was not objected to by the parties. The form of remote hearing was V – Video (CVP). A face to face hearing was not held because it was not practicable. I was referred to email communications in the unredacted hearing bundle at pp 66-69, 73-74 and pp78-79, the unredacted witness statements and the parties' written submissions.

1. The contested material was inadmissible by virtue of s111A Employment Rights Act 1996.

REASONS

1. This matter was listed as a CVP hearing due to the Covid-19 pandemic.

2. At the outset of the substantive hearing I had to determine a preliminary issue in relation to the admissibility of certain communications between the parties in email correspondence on pp66-69 of the unredacted bundle, and references back to the correspondence in pp 73-74 and 78-79. I have set out my decision here separate to my substantive decision as I decided the material was not admissible.

3. The issue related to whether the third paragraph from the bottom of page 66 and the emails on page 68-69 was inadmissible applying s111A Employment Rights Act 1996.

4. S 111A states as follows:

> **"(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…."**

5. The Claimant's representative contended that the material was inadmissible. The Respondent contended the material was admissible. The Respondent's representative referred to The ACAS Statutory Code of Practice 4 (29 July 2013) – "Settlement Agreements (under section 111A of the Employment Rights Act 1996". In his skeleton argument he stated:

> **"Para 3** makes plain that "settlement agreements" are "*legally binding contracts which can be used to end the employment on agreed terms***". Para 6** goes on to state:
>
> *Section 111A of the ERA 1996 provides that offers to end the employment relationship on agreed terms (i.e. under a settlement agreement) can be made on a confidential basis which means that they cannot be used as evidence in an unfair dismissal claim to an employment tribunal*."
>
> **…**Therefore, it is clear from the above that the purpose of the legislation is to enable parties to
>
> agree terms to end employment by way of a settlement agreement without the risk of antecedent negotiations being

admissible in evidence for an unfair dismissal claim. In other words, it is to facilitate agreed terminations, not dismissals and not resignations.

It is contended that if a party has already unilaterally decided to end the employment, either through dismissal or resignation (as the case may be) then any subsequent negotiation is outside of the scope of **section 111A(2),** as the discussions or offer are not with a view to ending employment on agreed terms as the employment will end by either resignation or dismissal**."**

6. I found the communications in question occurred before termination. Termination is the date the employment ends. It clearly had not done so at the relevant time.

7. The Claimant stating her intention to leave at some stage when she had found a new job was not a termination. Nor was it unequivocal, though I am not sure that makes a difference, as even if one side did give definitive notice of termination on a future date, discussions could still lead to a settlement agreement or agreement of terms of departure after the day notice was given but before the termination and fall within the definition.

8. In her email at p66 the Claimant acknowledged it was not the best time for the Respondent for her to be thinking of leaving and she was offering to fix a date and work together to recruit and train a replacement. She was suggesting a benefit to the employer and a benefit to herself and seeing if a compromise could be reached so she left on a date agreed between the parties before finding another job. These were the proposed "terms of departure".

9. She still referred to a potential compromise on p68. There, she explained her preferred date to leave and acknowledged it would put the organization in a difficulty. She proposed she give notice and extend her employment beyond that preferred date to cover the year end/audit and to help with recruiting and training her replacement in return for an extra financial payment in her final pay. Here the proposed terms of departure were the date of termination and the additional fee. She was suggesting she was not going to give notice and leave on that later date without the additional work and pay. The proposed additional work related to her departure and the facilitation of her replacement. The proposal was unconventional I agree, but it fits within the definition in s 111A (2).

10. The two communications on pp 66 and 68 flow together, one was an expansion on the first and together formed an offer about the terms on which she proposed to leave her employment. These were inadmissible by virtue of s111A (2). Page 69 essentially repeated the proposal and the later pages referred back to these proposals. In the substantive hearing I did not take these communications into account and I used the redacted bundle.

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Employment Judge Corrigan

Date: 08 July 2021

Judgment sent to the parties and entered in the Register on

for the Tribunal Office