



EMPLOYMENT TRIBUNALS

Claimant: Mr C Jones

Respondent: Simpson Millar LLP

HELD at Leeds by CVP

ON: 12 June 2024

Reserved Decision

26 August 2024

BEFORE: Employment Judge Shulman

REPRESENTATION:

Claimant: Mr A Gloag Counsel

Respondent: Mr P Gilroy KC

RESERVED JUDGMENT

1. Documents 49 to 74 and 77 to 85 in the bundle are privileged within the “without prejudice” rule.
2. Documents 49 to 74 and 77 to 85 are inadmissible in these proceedings within the meaning of section 111A Employment Rights Act 1996.

REASONS

1. **Claim**

- 1.1. Unfair dismissal

2. **Issue**

The issue in this case relates to:

- 2.1. Whether the documents at pages 49 to 85 in the hearing bundle (Bundle) relating to certain communications between the claimant and the respondent should be ruled inadmissible on the grounds that they were “without prejudice” and/or protected.

3. **The Law**

The Tribunal has to have regard to the following provisions of the law:

3.1. Without prejudice

- 3.1.1. The purpose of the without prejudice rule is to encourage parties to settle disputes without resort to litigation. The principle is that where there is a dispute between the parties any written or oral communications between them which compromise genuine efforts to resolve their disputes will not generally be admitted in evidence at a subsequent hearing of the claim.
- 3.1.2. In considering whether without prejudice privilege applies the Tribunal must consider the purpose of the relevant communications.
- 3.1.3. The protection of the without prejudice rule only arises if and when the parties are in dispute with one another. This means that the parties must be conscious of at least the potential for litigation, even if neither intends it as an outcome.
- 3.1.4. The absence of the words “without prejudice” will not be fatal if the negotiations meet the principle. For example, in **Hawkes v Brewin Dolphin Securities Limited** ET case number 2305111/05 (Hawkes) an employment tribunal accepted that a conversation described as off the record was clearly conducted on a without prejudice basis, despite the fact that the specific words “without prejudice” had not been used.

3.2. Section 111A Employment Rights Act 1996 (section 111A) provides:

“111A Confidentiality of negotiations before termination of employment

(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”

3.2.1. For section 111A to apply there is no need for a dispute to be in existence, but the claimant must regard himself as unfairly dismissed. However the Tribunal must consider whether anything said or done was improper or connected with improper behaviour,

the test of inadmissibility being whether the Tribunal considers such conduct as just.

4. **Facts**

The Tribunal, having carefully reviewed all the evidence (both oral and documentary) before it, finds the following facts (proved on the balance of probabilities):

- 4.1. The Tribunal will make findings of fact in relation to pages 49 to 85 in the Bundle and where appropriate will consider what it regards as other evidence relevant to the issue. The Tribunal will make those findings in respect of each and every one of documents 49-85 and when it comes to determining the issue the Tribunal will in so far as it is able make generic findings having regard to those facts which the Tribunal now finds.
- 4.2. By way of introduction the respondent is a law firm. The claimant is a solicitor and at all material times was technology director. In or about December 2022 the future of the claimant's role with the respondent required examination. It is not necessary for the purposes of this hearing to consider why.
- 4.3. Document 49. Mr Gregory Cox, Chief Executive Officer of the respondent and a solicitor, arranged to meet the claimant on 16 January 2023 to discuss matters and he prepared notes for the meeting which are document 49. It is not necessary to recite those notes in their entirety, but they did rehearse bringing in Ms Helen Sutton, the Director of People, to the meeting to discuss what the notes described as practicalities. These included six months' notice and "something" for bringing the claimant's employment to an end. Ms Sutton told the Employment Tribunal that the claimant should revert to the respondent with a proposal.
- 4.4. Documents 50 to 51. The claimant did revert to the respondent, on 17 January 2023, with a proposal headed "without prejudice". As far as it went the claimant accepted six months' notice but said he needed to look for some form of compensatory payment and suggested a payment equivalent to 12 months' pay. The claimant accepts in his statement that the settlement proposals are "capable of being protected".
- 4.5. Document 52 is a document headed "without prejudice and subject to contract" dated 31 January 2023. Between 17 January 2023 and 31 January 2023 there were oral and written communications between the claimant and Ms Sutton but they did not generate anything for the Tribunal to consider in the Bundle until document 52. Document 52 is clearly a document for negotiation attaching a draft settlement agreement and a proposal, directing the claimant to take independent legal advice on the settlement provisions. In his witness statement the claimant accepts that "it can be treated as being protected".
- 4.6. Document 53 is a mere acknowledgement headed "without prejudice" which the claimant acknowledges and promises a response shortly.
- 4.7. Documents 54 to 55 are a summary of a telephone call on 2 February 2023 between Mr Cox and the claimant. In this call there was a discussion about alternative roles. The claimant said he did not have proposals. The claimant accepted that he had to make a decision,

presumably, on document 52. The Tribunal finds that this call did comprise operational matters but at the end the claimant accepted he had a difficult decision to make and that he to call it and that he would sleep on it.

- 4.8. Document 56 is an email from the claimant to Mr Cox on 2 February 2023. It is informative, but recognises the respondent's right to make a decision. The Tribunal finds that this decision is about the claimant's future and is a follow on from documents 54 and 55.
- 4.9. Document 57 is an acknowledgment by Mr Cox to the claimant in respect of document 56.
- 4.10. Document 58 is an acknowledgement by the claimant to Mr Cox of document 57.
- 4.11. Document 59 is a follow up by Mr Cox to the claimant in respect of document 58. Documents 57, 58 and 59 are all dated 2 February 2023.
- 4.12. Documents 60. Mr Cox politely pushes the claimant for something to review on 6 February 2023.
- 4.13. Documents 61 and 62. On the same day the claimant responds. The claimant makes reference to displacing him. The majority of this email is about the business and the claimant's contribution. The Tribunal finds that the claimant is putting proposals for him to stay in the business.
- 4.14. Document 63 is a historical attachment to documents 61 and 62.
- 4.15. Documents 64, 65, 66 and 67 appear to be historical attachments to document 61 and 62.
- 4.16. Document 68. Still on 6 February 2023 the claimant sends an email marked "without prejudice" to Ms Sutton. It makes reference to consulting a solicitor. The claimant says that he is seeking advice on the general position and proposal. The claimant complains about the proposed contribution to his legal costs by the respondent. He says that the discussion which he is going to have with a solicitor is free. The claimant says he will be in touch the next day.
- 4.17. Document 69. Without prejudice Ms Sutton acknowledges 68.
- 4.18. Document 70. Without prejudice the claimant rejects the offer previously made by Ms Sutton on behalf of the respondent. This is done on 6 February 2023.
- 4.19. Document 71. This document has the words "without prejudice" on twice. Ms Sutton asks the claimant whether he is intending to make a counter proposal on 7 February 2023.
- 4.20. Document 72. Without prejudice the claimant tells Ms Sutton that he is not intending to make a counter proposal on 7 February 2023.
- 4.21. Document 73. On the same day Mr Cox had a call with the claimant. Mr Cox reiterated that he wanted the claimant to work with Ms Sutton to agree terms for an exit. The claimant told Mr Cox that he the claimant was not going to make any proposals and that it was for the respondent to make them. The Tribunal finds that the claimant was still in negotiations

but was looking to the respondent to make further proposals. Mr Cox asked the claimant to speak to Ms Sutton.

- 4.22. Document 74. This is an aide memoire prepared by Ms Sutton for a meeting on 16 February 2023 with the claimant. That is nine days after the telephone call between the claimant and Mr Cox. Document 74 is headed “without prejudice”. Ms Sutton talked at this meeting about the claimant’s entitlement to six months’ notice, a good lump sum of money, a good reference and a positive exit. The alternative would be termination and the claimant would not get any money other than his six months’ notice. The respondent might be able to achieve an additional four months to that already offered. The Tribunal finds that putting an alternative to a settlement (in this case termination) is standard without prejudice and negotiation practice. Naturally any employee would be unhappy with such an approach but the Tribunal finds that the claimant was not only a very senior member of the respondent organisation, but was himself a solicitor, who, the Tribunal finds, is well familiar with the without prejudice and termination processes.
- 4.23. Document 75. On 21 February 2023, five days after the meeting with Ms Sutton, in the light of recent conversations with Ms Sutton, Mr Cox effectively stood the claimant down from the senior management team meetings.
- 4.24. Document 76. On the same date the claimant wrote to Mr Cox a letter of protest at being excluded from senior management team meetings.
- 4.25. Document 77. On 23 February 2023 Ms Sutton contacted the claimant in relation to the process.
- 4.26. Document 78. On the same day the claimant replied to Ms Sutton.
- 4.27. Document 79 to 80. On 24 February 2023 Ms Sutton sent a short email to the claimant attaching a “letter” to him. This letter was expressed to be “without prejudice” and also headed “protected conversation and subject to contract.” It mentioned the possibility of termination and also engagement on a consultancy. Ms Sutton asked for confirmation of constructive engagement to reach agreement and that discussions would be without prejudice and protected. Failing these discussions she said “we” will continue the previous discussion, likely to result in termination and Ms Sutton set a deadline of 3 March 2023.
- 4.28. Document 81. This followed documents 79 and 80 and was dated 24 February 2023. This was on the same day as an email from Ms Sutton to the claimant which accentuated the privileged nature of the conversations regarding the claimant’s future.
- 4.29. Document 82. Also on the same day the claimant wrote to Ms Sutton. Here the claimant took issue with the privileged nature of a meeting which the claimant said took place on 16 February 2023 with Mr Cox. There was in fact a meeting with Mr Cox on 16 January 2023. The email was in assertive tone but agreed to enter into without prejudice discussions around a consultancy.
- 4.30. Document 83. By email on 27 February 2023 from Ms Sutton to the claimant, because of a difference in recollections and deadline issues the

respondent withdrew. The Tribunal finds that this withdrawal was from the consultancy discussions.

- 4.31. Document 84. More or less a month had passed on the documents in the bundle before on 28 March 2023 the claimant wrote to Mr Cox and Ms Sutton without prejudice, in which the claimant said he was willing to discuss proposals. The claimant had by that time been given six months of notice of termination on 23 March 2023.
- 4.32. Document 85. On 28 March 2023 Mr Cox replied to the claimant without prejudice agreeing to explore a resolution but that document (85) was the last of the documents the Tribunal has been asked to consider. It follows that the Tribunal has not been asked to consider any further documentation.

5. **Determination of the Issue (after listening to the factual and legal submissions made by and on behalf of the respective parties):**

- 5.1. The Tribunal has carefully considered each of the documents numbered 49 to 85 in the bundle. With the exception of two documents, 75 and 76, the Tribunal is satisfied that the other documents, 49 to 74 and 77 to 85 (the privileged documents) are indeed privileged. It is clear that the privileged documents are part of a negotiating process, albeit an unsuccessful one, designed to settle a dispute between the parties without resort to litigation.
- 5.2. The Tribunal finds that there was a dispute between the parties. For the most part the claimant wanted to stay and the respondent wanted the claimant to go on terms. There was a dispute as to the terms. The Tribunal finds that the parties were conscious of the potential for litigation, even if neither intended it as an outcome.
- 5.3. The privileged documents the Tribunal finds comprised genuine efforts to resolve the dispute throughout and, therefore, should not be admitted in evidence at a subsequent hearing of the claim. The purpose of the privileged documents was to reach some form of agreement between the parties.
- 5.4. The absence of the words “without prejudice” is not fatal to the fact that these are otherwise the privileged documents. For example, even if Mr Cox did not use those words on 16 January 2023 (see **Hawkes**) there is a stream of words throughout the privileged documents which were clear that what happened on 16 January 2023 was a significant part of the negotiating process. This of course excludes documents 75 and 76. It is obvious to the Tribunal that all the privileged documents form part of a process aimed at settlement.
- 5.5. With regard to documents 75 and 76 the Tribunal finds that these are not privileged. Document 75 is the result of a strategic decision made by the respondent that, because of the very nature of the negotiations and possible termination, it would be inappropriate for the claimant to continue sitting on the senior management team meetings. Document 76 follows document 75 in an attempt by the claimant to deal with it.
- 5.6. All the documents 49 to 74 and 77 to 85 are indeed privileged and the Tribunal finds that they do fall within the without prejudice rule.

- 5.7. So far as section 111A is concerned it is not strictly necessary to make a ruling as to its effect, but it would be tidy to do so. The negotiations comprising the privileged documents are pre-termination negotiations within the meaning of section 111A(2). This is a case of unfair dismissal and, therefore, section 111A applies. As to whether anything said or done was improper or was connected within improper behaviour the view of the Tribunal is that there was no such conduct on the part of the respondent. The issue of impropriety in this case relates to whether in negotiations the respondent overstepped the mark by using “threats” designed to coerce the claimant into a position which he found unacceptable. Firstly, the claimant did not accept any terms which he did not want to do. Secondly, the sort of behaviour the respondent indulged in in this case was at worst a tactic design to encourage a settlement and nothing more. Thirdly, the claimant was not in the usual position of most unaccompanied or unrepresented parties. He is a solicitor and has had professional experience in these types of negotiations.
- 5.8. In all the circumstances the privileged documents are inadmissible in these proceedings within the meaning of section 111A in common with the fact that they are without prejudice.

Employment Judge Shulman

Date: 29 August 2024

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