Appeal No. UKEAT/0025/16/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 20 May 2016
Judgment handed down on 28 June 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

FAITHORN FARRELL TIMMS LLP — APPELLANT

MRS S BAILEY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL AND CROSS-APPEAL

APPEARANCES

For the Appellant	MR RICHARD REES (Representative) Peninsula Business Services The Peninsula Victoria Place Manchester M4 4FB
For the Respondent	MR CHRISTOPHER MILSOM (of Counsel) Instructed by: Mulberry's Employment Solicitors 95 Ditchling Road Brighton BN1 4ST

SUMMARY

PRACTICE AND PROCEDURE - Admissibility of evidence

Admissibility of evidence - common law "without prejudice" privilege - section 111A ***Employment Rights Act 1996*** *("ERA")*

In proceedings before the ET, the Claimant had complained of constructive unfair dismissal and indirect sex discrimination arising, in part, from the Respondent's conduct towards her during a period of discussions she had initiated for the agreed termination of her employment. Her grievance and ET1 had referred to the parties' discussions in this regard on an open basis. In responding to the grievance and in its ET3, the Respondent had not objected but had itself also referred to the material in question. Subsequently, in preparing for the Full Merits Hearing of the Claimant's claims, the Respondent objected to her reliance on what it said was privileged material, alternatively material rendered inadmissible by virtue of section 111A **ERA**. On the basis of written submissions, the ET had ruled that the material in question was generally admissible, subject to redaction of specific references to any offer. It had not, however, gone on to deal with the Claimant's contentions that (i) the Respondent could not rely on without prejudice privilege or section 111A given its unambiguous impropriety/improper behaviour, and (ii) in any event, the parties had waived privilege. On the Respondent's appeal and the Claimant's cross-appeal. *Held*: Allowing both the appeal and the cross-appeal in part:

(1) In respect of without prejudice privilege.

Rejecting the Respondent's contention that the ET had erred in its approach to the principle of admissibility of without prejudice negotiations (applicable to the parties' communications post-dating 7 January 2015, at least so far as the Claimant's claim of discrimination was concerned); it had correctly applied the relevant principles and reached a permissible case management decision and the appeal was rejected on this point.

If wrong on this, the ET had failed to deal with the points raised by the Claimant as to whether the Respondent was genuinely negotiating in an effort to resolve the dispute and/or whether there was unambiguous impropriety and the cross-appeal would therefore have succeeded on this point.

In any event, the cross-appeal would have succeeded on the other question raised by the Claimant (also not addressed by the ET), that was whether the Respondent had waived without prejudice privilege. That issue was to be resolved in the Claimant's favour: the Respondent had implicitly waived privilege by relying on the material in issue in its ET3 (although not merely by permitting it to be referenced in the grievance); following **Brunel University v Vaseghi** [2007] IRLR 592 CA.

(2) On the application of section 111A **ERA**.

On this question, the ET had wrongly elided the approach to section 111A with that of without prejudice privilege. Section 111A had to be read on its own terms, which did not import the case law underpinning common law without prejudice privilege. The appeal would be allowed on this point.

The cross-appeal would also be allowed in part on the question of the application of section 111A; specifically as to whether there was improper behaviour. Remission of this matter to the ET would also enable it to consider the broader question as to whether section 111A was properly engaged in respect of the communications in issue in this case.

The cross-appeal was, however, dismissed so far as "waiver" of section 111A confidentiality was concerned: section 111A, construed on its own terms, allowed for no possibility of waiver.

HER HONOUR JUDGE EADY QC

Introduction

1. This Judgment is concerned with issues of admissibility of evidence in Employment Tribunal proceedings; specifically, with "without prejudice" privilege under common law and with the inadmissibility conferred by section 111A **Employment Rights Act 1996** ("ERA"). It may be the first appellate Judgment on the latter.

2. I refer to the parties as the Claimant and Respondent, as below. This is the hearing of the Respondent's appeal and the Claimant's cross-appeal against a Judgment of Employment Judge Baron sitting at the London (South) Employment Tribunal ("the ET"), sent out on 15 December 2015. That Judgment - reached on the basis of written submissions - concerns the admissibility of certain documents; a dispute having arisen between the parties in preparing for a Full Merits Hearing (postponed pending determination of the appeal).

3. The Respondent appeals against the ET's Orders on two main bases: (1) the ET erred in its approach to the ambit of section 111A **ERA**; and/or (2) it erred in its approach to the principle of admissibility in respect of without prejudice negotiations. The appeal was permitted to proceed by His Honour Judge Hand QC. The Claimant has raised a cross-appeal, which I permitted to proceed, which also raises two questions: (1) whether privilege had been "waived"; alternatively (2) whether there had been impropriety such that it would be inequitable for the privilege to remain. On the first, the parties agree this is an issue I should determine on the material before me (a course permitted, if agreed: **Jafri v Lincoln College** [2015] QB 781 CA, per Underhill LJ at paragraph 47). On the second, it is common ground, further findings of fact are needed such as to require remission to the ET.

The Background

4. Given the interlocutory nature of the ET's decision, there have been no findings of fact; this summary is provided solely by way of context. Save to the extent that the parties are agreed that I should express a view on the material before me relevant to the question of waiver (which I therefore set out in some detail), nothing I say should be taken to represent a factual finding on a matter in dispute between the parties.

5. The Respondent is a surveyors' firm (employing some 80 people), which employed the Claimant as an office secretary from 16 March 2009 until her resignation (she says, constructive dismissal) on 26 February 2015. She had worked on a part-time basis but an issue arose in respect of that arrangement towards the end of 2014. It is the Claimant's case, it was made clear that part-time working was no longer an option and, in those circumstances, on 10 December 2014, she initiated discussions about a settlement agreement. Whatever the initial intention, however, it is common ground that, by 7 January 2015, the parties might properly have been described as in dispute. It was on this date that the Claimant's solicitors wrote to the Respondent, by a letter marked "Without Prejudice - Subject to Contract"; albeit that the vast majority of that letter simply set out the Claimant's position in general terms, the discussions regarding a severance agreement were only referenced (and an offer made) towards the end. The Respondent's reply (of 13 January; not marked "without prejudice") similarly set out its position, with only passing reference to the severance discussions. This was followed by a further "without prejudice" letter from the Claimant's solicitors of 19 January, giving her perspective on events with some referencing of the settlement agreement talks. The Respondent then replied (not marked "without prejudice") on 29 January 2015.

6. During the latter part of January 2015, the Claimant raised an internal grievance, sending the Respondent her documentation in respect of this on 26 January, by means of a letter that started by discussing the logistical arrangements for the hearing, but continued:

> **"I raise the additional grievances now in open correspondence also to be dealt with (previously sent under cover of Dawson Hart's letter dated 7.1.2015"**

7. Dawson Hart were the Claimant's solicitors. Her grievance letter made clear she was openly relying on the matters set out in their letter of 7 January, treating the content (which she copied in, up to the final part which referred to the settlement discussions and her offer at that time) as no longer "without prejudice". She also relied on her solicitors' letter of 19 January, again openly copying it in, this time including references to settlement discussions. Just prior to the first grievance hearing (on 3 February 2015), the Claimant submitted further material, again referencing the settlement discussions on an open basis and attaching the Respondent's letter of 29 January, as well as an extract from the ACAS Code on Settlement Agreements and earlier party-party correspondence.

8. The Claimant's grievances were not upheld. No issue of admissibility is raised in respect of the grievance report, sent to the Claimant on 27 February 2015 (the day after she resigned), which attached minutes of the grievance hearings and various documents, including an email of 22 December 2014, in which the Claimant provided her solicitors' details. The Respondent did not suggest the Claimant was wrong to refer to the party-party correspondence on an open basis; on the contrary, the report also referred to it. The report acknowledged it was part of the Claimant's grievance that "*there is an underlying strategy to bully her out of her role to avoid a financial settlement*" and further referenced her email, initiating settlement discussions, of 10 December; her email of 22 December; and the content

of the letters of 7, 26 and 29 January 2015. The hearing minutes also referred to that correspondence as well as to the letters of 13 and 19 January 2015.

9. On 13 February 2015, solicitors acting for the Respondent wrote, referring to the previous settlement discussions. Their letter was marked "Without Prejudice". The Claimant - then acting in person - responded, observing:

> **"… I do not regard your letter as privileged under the "without prejudice" rules. … just labelling a communication "wp" does not make it so … it is the content that is relevant. Your letter does not make a genuine attempt at settlement as the offer you refer to does currently not exist. In addition, your letter is not concessionary but makes unsubstantiated threats and ultimatums. I therefore may rely on your letter as yet more evidence of your client's threatening and bullying behaviour."**

10. The Claimant initiated ET proceedings on 6 May 2015, claiming constructive unfair dismissal and sex discrimination. In her particulars, she referred to initiating settlement agreement discussions on 10 December 2014, after it was made clear part-time working was no longer an option and she felt she had no choice but to resign. She relied on her treatment thereafter as evincing bullying and discrimination; referencing the party-party letters cited above as well as various of the Respondent's internal communications (disclosed after a subject access request under the **Data Protection Act 1998**); as Mr Milsom observes, some 11 paragraphs of the particulars of complaint address communications relating to "the exit strategy". The Claimant complained that the Respondent's conduct at this time, along with the delay in responding to her grievance, breached the implied obligation not to undermine trust and confidence and amounted to sex discrimination, causing her to resign on 26 February 2015.

11. By its response (apparently lodged in June 2015), the Respondent denied the claims although did not then object to her open references to the various documents referred to above, but also cited the same material in support of its own case. Specifically, it referred to

the Claimant having initiated settlement discussions and notified the Respondent of her solicitors' details and it referenced the internal documents relied on by the Claimant and various of the party-party letters that followed. It did not suggest these were the subject of without prejudice privilege or otherwise inadmissible; indeed, in the Respondent's reference to its solicitors' letter of 13 February 2015 (relied on in relation to what was said to be the Claimant's aggressive conduct and unacceptable social media comments), this was not said to be "without prejudice", although the response continued: "*Without prejudice discussions continued to take place during this period.*"

12. Case management directions were given and the matter listed for hearing in February 2016. During the interlocutory stages, an issue arose as to the admissibility of the documentation referred to above; apparently, this was first raised at a Preliminary Hearing on 14 October 2015, although at that stage the Respondent was relying on litigation privilege. The parties were permitted to lodge written submissions on admissibility and on this basis the ET reached the decision in issue before me.

The ET Decision

13. The ET concluded the documents in issue were neither rendered wholly inadmissible by virtue of section 111A **ERA** nor by the common law without prejudice principle. Its reasoning in respect of section 111A **ERA** is explained as follows:

> **"5. … I … comment on the ambit of section 111A. There are two points. The first is that by virtue of subsection (1) it only applies to cases of unfair dismissal, whether constructive or actual. It does not apply to claims under other heads of jurisdiction and there is another claim in these proceedings. Secondly, although there is as yet no appellate authority on the provision, in my view it is restricted to the details of any offers made or discussions held, and not to the simple fact of there having been such offers or discussions. The Tribunal is often made aware that there has been correspondence on a without prejudice basis, and I see no objection to that. Further, the explanatory notes issued in conjunction with the legislation refer to the provision as applying 'to the offer itself and also the content of any negotiations about the offer'. …"**

14. The ET then gave its ruling on each of the documents in issue. It is common ground it did not address the issues raised by the cross-appeal, albeit these were raised in the Claimant's written submissions.

Submissions

The Appeal - The Respondent's Case

15. Generally, the ET wrongly adopted an unduly restrictive view as to the ambit of section 111A **ERA** and (absent authority or reasoning) the without prejudice principle.

16. Specifically, in respect of section 111A, the ET had:

(1) Failed to appreciate that it was required to undertake a division exercise; the existence of the discrimination claim did not - as the ET's reasoning suggested - mean that the evidence in question was admissible for all purposes. In the absence of authority, reference to Hansard made this clear (reference to Hansard being permissible to clear up confusion: **Pepper (Inspector of Taxes) v Hart** [1992] UKHL 3; **Harding v Wealands** [2006] UKHL 32): Parliamentary intent was that an ET would continue to disregard such material for the purposes of an unfair dismissal claim. That said, the correspondence in issue in this case was relied on to support the Claimant's unfair dismissal case (not the discrimination claim) and, therefore, no division was necessary: they were simply inadmissible.

(2) Wrongly taken section 111A(2) to be restricted to the offer rather than the entirety of pre-termination discussions, allowing pre-termination documents to be admitted subject only to redaction of references to the offer: if section 111A was not applicable to the whole such document, there was a question as to what it was intended to achieve. There was, further, no reason why it should not apply to

discussions *about* the pre-termination negotiations (the internal emails): section 111A referred to "discussions held", it did not say "discussions held between the parties". Following the literal wording, that must mean internal discussions were covered.

17. As for the application of the common law without prejudice principle, the ET erred in holding only part of the material required redaction; limiting confidentiality to the detail of the settlement offer but nothing more. Whilst merely using the label "without prejudice" was insufficient to attract the privilege, it was equally unnecessary that the document set out the offer; the privilege could extend to correspondence setting out a party's position as part of the negotiations even if it was not itself an offer (**South Shropshire District Council v Amos** [1987] 1 All ER 340); the whole of the correspondence was inadmissible, not simply the details of the offer.

The Appeal - The Claimant's Case

18. As for the scope of without prejudice privilege: the general rule was all relevant evidence should be admissible, there was no reason to extend the exemption further than required; **Barnetson v Framlington Group Ltd** [2007] 1 WLR 2443 CA. To rule otherwise would give rise to issues under the **European Convention of Human Rights**, in particular as to Article 10 freedom of expression (**Prudential Assurance Company Ltd v Prudential Insurance Company of America** [2002] EWHC 2809 (Ch)) and, arguably to Article 6 fair hearing rights (particularly in discrimination cases where domestic courts had a duty to ensure access to permit the enforcement of EU rights; **Meister v Speech Design Carrier Systems GmbH** [2012] ICR 1006 CEJ). The privilege could only attach to genuine attempts to settle, not positioning in an attempt to impose (**BE v DE** [2014] EWHC 2318 (Fam)).

Moreover, the privilege did not cloak the existence of without prejudice negotiations: it applied to the content, not the fact of negotiations (**Independent Research Services Ltd v Catterall** [1993] ICR 1 EAT). The protection of confidentiality could and should properly be achieved by partial redaction of evidence if that was all that was necessary to meet the public policy objective.

19. Section 111A **ERA** extended without prejudice privilege in limited circumstances in the employment sphere to cases where there was no dispute. There was no reason to think that Parliament intended to extend the privilege any further, i.e. to discussions that were other than a genuine attempt at settlement.

20. Here, the label of without prejudice had been misused. Only the Claimant had proposed any offer; there was no genuine attempt to resolve matters on the part of the Respondent. The ET (best placed to make the assessment) was entitled to rule that only specific references to that offer should be redacted as inadmissible. As for the approach to section 111A, the ET's decision had to be seen in the light of the Respondent's argument at that stage (*viz*, evidence rendered inadmissible by section 111A was also inadmissible in the discrimination claim); not the Respondent's position now. The ET had effectively left it to the Full Merits Hearing to resolve admissibility in respect of the two claims; that was an appropriate course, not least as the Claimant contended her resignation was due to prior acts of discrimination. There was no confusion requiring reference to Hansard.

21. As for the suggestion that section 111A must be read as extending to the Respondent's internal "discussions", that could not be right: (i) it would extend legal advice privilege to non-lawyer communications and there was no indication Parliament had intended

that; (ii) it would be introducing an entirely new form of privilege, rather than simply extending the without prejudice principle to cases where there was no actual dispute; (iii) the provision applied only to "discussions" not to a party's internal monologue.

Cross-Appeal - The Claimant's Case

22. In any event, this was academic; the Respondent had waived privilege. Waiver was to be determined objectively; the underlying principle was fairness (**Brennan v Sunderland City Council** [2009] ICR 479 EAT): a party could not partially waive privilege (**Paragon Finance plc v Freshfields** [1999] 1 WLR 1183 CA). Given the underlying nature of the privilege (implied contract, coupled with public policy) waiver required the consent of both parties, but when one side elected to use the material, the other could either affirm the contract (assert privilege) or accept that as bringing the agreement to an end (**Somatra Ltd v Sinclair Roche & Temperley** [2000] 1 WLR 2453 CA, paragraph 38). Given the implied contract basis of the principle, waiver was to be judged objectively. Once a party had deployed without prejudice material on a partial basis, however, it was open to the other party to put in the whole document in question (**Somatra**, paragraph 30). Here, the Claimant had expressly referred to these documents on an open basis and the Respondent had never objected but had, itself, also openly referred to this evidence, both in the grievance and in its ET3. Tested objectively, that was clearly an agreement to waive privilege (see **Brunel University v Vaseghi** [2007] IRLR 592 CA).

23. As for the Respondent's argument, that non-admissibility under section 111A **ERA** could not be waived, that would be to a significant change to the without prejudice rule, which Parliament could not have intended.

24. Alternatively, the case needed to be remitted to determine the question of unambiguous impropriety (without prejudice) or improper behaviour (section 111A). This was raised below but not addressed by the ET. Much of the content of the documentation in issue was an abuse of privilege; the Respondent used without prejudice discussions to threaten the Claimant. Privilege should not be used to provide a cloak in these circumstances (**BNP Paribas v Mezzotero** [2004] IRLR 508 EAT; **Re Daintrey** [1893] 2 QB 116).

The Cross-Appeal - The Respondent's Case

25. Waiver of without prejudice privilege had to be bilateral and clearly communicated: it was not enough for one party to seek to open up the privileged communications; it had to be consensual (**Brunel University v Vaseghi**). Moreover, mere reference to without prejudice material was insufficient; there must be reference to the content, and reliance upon it (**Howes v Hinckley & Bosworth Borough Council** [2008] UKEAT/0213/08). Here the Respondent had not expressly or impliedly waived without prejudice privilege. Most of the documents in issue had already been in the Claimant's possession; that did not permit her to rely on them in the ET proceedings. The Respondent's internal documents had been disclosed pursuant to a subject access request: it had no choice; disclosure in such circumstances should not be confused with waiver.

26. In any event, waiver did not apply to section 111A **ERA**: the inadmissibility attaching to evidence in an unfair dismissal case by virtue of that provision could not be waived. Section 111A provided for specific exceptions but did not refer to the possibility of waiver. In oral argument, Mr Rees resiled from the generality of that submission, conceding that parties must be able to expressly agree to refer to evidence of pre-termination negotiations in

an unfair dismissal case; he contended, however, that this agreement had to be express and not implicit if section 111A was to be avoided.

27. As for the second ground of cross-appeal - unambiguous impropriety or improper behaviour - the case law showed this had to meet a high hurdle (see **BNP Paribas v Mezzotero**). In responding to assertions made by the Claimant's solicitors, the Respondent had not acted improperly let alone demonstrated unambiguous impropriety. This required far more than was alleged by the cross-appeal; in **Brunel**, the examples given were of "a threat of violence or blackmail". And that was not any the less so in a discrimination case (see **Woodward v Sandtander UK plc** [2010] IRLR 834 EAT).

The Relevant Legal Principles (Addressing the Parties' Arguments on the Law)

28. Questions as to the admissibility of evidence are primarily a matter of case management for an ET; the EAT should not interfere unless there is an error of law or the conclusion reached is perverse, takes into account the irrelevant or fails to have regard to the relevant. In the present case, it is contended that the ET did, indeed, err in law in its approach to the question of admissibility. Considering whether or not it did requires some understanding of common law without prejudice privilege and the scope of section 111A **ERA**. With respect to the former, there is little dispute as to the principles that apply; as regards section 111A, however, the parties adopt very different positions.

(1) The "Without Prejudice Rule"

29. A useful summary of the basis of the without prejudice rule is provided in the judgment of Hoffmann LJ (as he then was) in **Muller v Linsley & Mortimer** [1996] PNLR 74:

> **"… the rule has two justifications. First, the public policy of encouraging parties to negotiate and settle their disputes out of court and, secondly, an implied agreement arising out of what is commonly understood to be the consequences of offering or agreeing to negotiate without prejudice. …"**

30. The principle provides that where there is a dispute between parties, any written or oral communications between them amounting to a genuine effort to resolve the dispute will not generally be admitted in evidence at a subsequent hearing of the claim. This enables parties to negotiate frankly without the risk that anything said in negotiations will be used against them in subsequent legal proceedings. Without prejudice privilege is, however, not invoked merely by the parties' description of negotiations as such: if there is no extant dispute, or no genuine efforts at resolving the dispute, the rule will not apply, regardless of the label used. Conversely, absence of the label "without prejudice" will not be fatal if the negotiations meet these criteria: the principle is one of substance, not form.

31. Given that without prejudice privilege renders inadmissible evidence that might otherwise have been considered probative of the issues to be determined in subsequent legal proceedings, the confidentiality thus bestowed should not be extended further than necessary to promote the general policy objective (**Barnetson v Framlington Group Ltd** [2007] 1 WLR 2443 CA). Where the line will fall may not always be easy to determine. As Mr Rees contends, it may include the broader discussions between the parties: the positioning, not solely the offer (**South Shropshire District Council v Amos** [1987] 1 All ER 340). If those broader discussions are, however, not properly to be described as part of such negotiations, then I do not read the decision in **Amos** as saying that they will still be covered. Mr Milsom seeks to draw upon the European Convention of Human Rights to argue against a broad approach to the privilege against admissibility. Whilst I agree that respect for Convention rights should underline the need to apply the without prejudice principle with restraint (see,

obiter, paragraph 27 **Prudential Assurance Company Ltd v Prudential Insurance Company of America** [2002] EWHC 2809 (Ch)), that seems to me to be reflected in the balance already struck under domestic law (**Barnetson**).

32. Without prejudice privilege can be waived, but that requires the agreement of both sides in those negotiations (both having an interest in the privilege). Waiver should be unequivocal - a genuine error in disclosure will not automatically suffice - but it may, in certain circumstances, be implied from the parties' conduct; **Brunel University v Vaseghi**, where the decision to hear evidence of settlement discussions in a grievance process chaired by an independent panel (reports of which were attached to the University's ET3), without making it clear privilege was to be retained, was held to be wholly inconsistent with the maintenance of that privilege. In **Vaseghi**, however, the Court of Appeal did not consider that, where an *internal* grievance meeting takes place in the usual way, there would be any question of waiver if the parties mentioned matters covered by without prejudice privilege, specifically:

> **"23. … We accept that later discussions between the same group of people as were privy to previous negotiations do not amount to a waiver of privilege in respect of the previous occasion … [and] that a privileged group or circle might well be extended to include others who had not been directly involved in the original discussions. … We also accept … that, where, as is usual, a grievance meeting consists of an internal (employer and employee) discussion about the grievance, the fact that previous 'without prejudice' negotiations are mentioned will not entail waiver of privilege in respect of those negotiations. …"**

33. There are, further, limited exceptions to the without prejudice rule, principally as identified by Walker LJ in **Unilever plc v Procter & Gamble Co** [2000] 1 WLR 2436 CA, at pages 2444 to 2445, namely: where there is an issue as to whether an agreement has actually been reached; where required to show an agreement should be set aside due to misrepresentation, fraud or undue influence; and where exclusion of the evidence would

otherwise act as a cloak for perjury, blackmail or other "unambiguous impropriety". The reasoning behind such exceptions being explained at page 2449B-C:

> **"… even in situations to which the without prejudice rule undoubtedly applies, the veil imposed by public policy may have to be pulled aside, even so as to disclose admissions, in cases where the protection afforded by the rule has been unequivocally abused."**

34. It is, as I understand the principle, due to the need to avoid abuse - or, to put it more neutrally, to avoid the Court or Tribunal being misled - that the fact of without prejudice negotiations might be admissible when the content is not (see, e.g., **IRS v Catterall** and, further, the discussion under section 111A, below).

35. In the employment context, there has been some suggestion that this refusal to permit abuse of the without prejudice rule might extend to allegedly discriminatory remarks made during the course of such discussions (see per Cox J, *obiter*, in **BNP Paribas v Mezzotero** [2004] IRLR 508 EAT). In a subsequent ruling of the EAT (HHJ Richardson presiding), in **Woodward v Santander UK plc** [2010] IRLR 834, however, it was held that this would only be the case where there was blatant discrimination.

*(2) Section 111A **Employment Rights Act 1996***

36. It is a requirement of without prejudice privilege that there is a dispute between the parties: they must be conscious, at least, of the potential for litigation, even if neither intends it as an outcome. In the employment context, that has not always proved easy to determine (see, for example, **BNP Paribas v Mezzotero**) and this threshold requirement has been removed in respect of unfair dismissal claims by the introduction of section 111A **ERA** (introduced, as from 29 July 2013, by section 14 of the **Enterprise and Regulatory Reform Act 2013**), which 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.**
>
> **(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."**

37. Under section 199 of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULR(C)A"), ACAS has produced its *Code of Practice (No 4) on Settlement Agreements*, in the Foreword to which the limitation (the requirement for a dispute) of the without prejudice principle is explained, with the observation that section 111A has:

> **"… therefore been introduced to allow greater flexibility in the use of confidential discussions as a means of ending the employment relationship. …"**

It continues:

> **"… Section 111A, which will run alongside the 'without prejudice' principle, provides that even where no employment dispute exist, the parties may still offer and discuss a settlement agreement in the knowledge that their conversations cannot be used in any subsequent unfair dismissal claim. …"**

38. By referring to complaints under section 111 **ERA**, section 111A(1) makes clear this provision is limited to complaints of unfair dismissal (whatever the particular form of the dismissal for section 95 purposes), save for the complaints of automatic unfair dismissal (section 111A(3)); it does not render such evidence inadmissible for the purposes of any other proceedings before the ET. It is common ground before me (and, I think, the correct way of

reading section 111A) that this does not mean that the existence of another claim (e.g. discrimination) would render admissible *for all purposes* evidence otherwise inadmissible in an unfair dismissal claim under section 111A; in such circumstances, the ET would allow the evidence to be admitted for one claim (e.g. discrimination) but still treat it as inadmissible for the other (the unfair dismissal claim). If the ET's reasoning in this case suggested otherwise (as to which, see below), that would have been wrong.

39. Where the parties differ is as to the scope of section 111A; specifically, does it apply only to evidence as to the *content* of any offers made or discussions held or does it extend to render inadmissible evidence of the *fact* of there having been such offers or discussions? The distinction will often be less than clear cut. Although it has been held that the existence of without prejudice negotiations (in contrast to the content of those negotiations) is not cloaked by the privilege (see, for instance, **IRS v Catterall**, per Knox J at page 7C-D) that will generally be because the ET might otherwise be misled. An example would be where there appears to be an unexplained delay in communications: if the explanation is that there were without prejudice discussions taking place, public policy would dictate that the explanation be provided whilst the protection against disclosure of any admission or other potentially prejudicial statement is maintained. That approach is consistent with the general protection against abuse of the privilege.

40. Section 111A starts with a general statement; by subsection (1) it is provided: "*Evidence of pre-termination negotiations is inadmissible*". Subsection (2) then defines "*pre-termination negotiations*" to mean: "*any offer made or discussions held*". What is rendered inadmissible is, thus, evidence of any offer made or discussions held with a view to terminating the employment on agreed terms and, on my reading of the section, that must

extend to the fact of the discussions, not simply to their content. Testing that construction of the provision seems to me to support that conclusion. If, for example, a Claimant relies on the existence of pre-termination negotiations in support of her claim of unfair dismissal, it is hard to see how that would not fall foul of section 111A: she would be relying on evidence of the discussions as supporting her claim that she had been unfairly dismissed, which would run counter to the purpose of the provision.

41. I have considered whether other circumstances - perhaps the unexplained gap in the chronology example, cited above - might give rise to the potential for abuse. Certainly, if the ET assumed there had been *no* communications between the parties, that might suggest it had been misled. That said, on that example, the only fact kept from the ET would concern the existence of confidential pre-termination discussions; something Parliament has decreed should not be admissible (for either party) on an unfair dismissal complaint (unless otherwise allowed by section 111A). If a party was deliberately seeking to mislead the ET in such a case, I did consider whether section 111A(4) might be relied on to protect against such apparent abuse, but do not think it can: section 111A(4) is worded in the past tense and, as I read it, refers back to the pre-termination negotiations addressed by sub-sections (1) and (2); it does not import the protections against potential abuse as found in the case law relating to common law without prejudice privilege. I think the answer lies in keeping firmly in mind what is relevant to an ET's determination of an unfair dismissal claim. Employers and employees do not have to stop communicating openly just because pre-termination discussions are taking place behind the scenes; a gap in their open communications may well be relevant to an unfair dismissal claim. In those circumstances, save for the specific exceptions Parliament has allowed, the ET would - and should - proceed on the assumption

that there were no communications relevant to its determination of the unfair dismissal complaint.

42. The second question as to the scope of section 111A arising on the appeal, asks whether the section renders inadmissible not simply the relevant discussions between employer and employee but also discussions within the employer, between (for example) different managers or a manager and a Human Resources adviser. Mr Milsom objects that this cannot be the case: it would be tantamount to extending legal professional privilege and that could not have been Parliament's intention. Even if viewed as a matter of without prejudice privilege, however, that is an over-simplification of the point: this is not a question of legal professional privilege; different public policy considerations arise. A corporate employer will be represented in without prejudice discussions by its officers and employees. Different individuals may be involved at different times and they will need to talk to each other about the discussions; there is no principled reason why the privilege would not extend to those internal conversations. As acknowledged in **Vaseghi** (see above), those within the privileged group or circle can discuss the negotiations amongst themselves without thereby waiving privilege.

43. In any event, at this stage, my focus is on the construction of section 111A, which renders inadmissible "*Evidence of … any offer made or discussions held, before the termination of the employment … with a view to it being terminated on terms agreed between the employer and the employee*". Even approaching this from the starting point that, generally, relevant evidence will be admissible, I am unable to see that the application of this provision is limited to the evidence of the negotiations from those who were directly involved. It will be fairly common place for a manager to have to report back to a Board,

higher management or HR on any such discussions; it would run counter to the purpose of section 111A if evidence of those reports was ruled to be admissible. Taking the wording of section 111A as the touchstone, the focus has to be on the subject matter of the evidence in question. If it is properly to be characterised as evidence of an offer or discussions held for the required purpose then (unless rendered admissible by any of the exemptions) it is inadmissible in any claim of unfair dismissal.

44. That leads me on to another point of contention between the parties, relating to the cross-appeal and the question of waiver of privilege. Whilst there is no dispute on the approach at common law, the parties take differing positions in respect of section 111A. At its highest, Mr Rees' argument did not permit any ability to waive inadmissibility conferred by section 111A. In oral submissions, however, he conceded that if both parties expressly consented to the admission of the evidence, section 111A must allow for this, albeit he did not accept that such consent could be implied. That caveat gives rise to a difficulty for Mr Rees' concession. Implicit consent is still consent; the parties have evinced an intention to waive the confidentiality otherwise attaching to their discussions. If parties can consent to the admission of evidence of pre-termination negotiations in an unfair dismissal case, notwithstanding section 111A, it must be open to an ET to find that consent implicit from their conduct even if not expressly stated. Having allowed that parties might expressly agree to the admission of evidence otherwise ruled inadmissible by section 111A, I cannot understand any logical or principled reason why that would not similarly be the case with an implicit agreement (as found in **Vaseghi**) and Mr Rees was unable to help on this point. That said, what is clear is that Mr Rees' concession does not extend to implicit consent; the question raised by the cross-appeal. That being so, I cannot avoid having to grapple with the

point of construction that arises, even if that means that I have to conclude that Mr Rees' concession was wrongly made.

45. Returning then to section 111A, I am unable to see how it can be read so as to permit agreement to the admission of evidence otherwise rendered inadmissible by this provision. Whilst counterintuitive, Parliament has apparently chosen not to allow for an exception where the parties so agree (although it has provided for other exceptions). This is apparent not just from the lack of any such exception within section 111A but also given the general injunction against contracting out, as provided by section 203 **ERA**:

> **"203.** ***Restrictions on contracting out***
>
> **(1) Any provision in an agreement … is void in so far as it purports -**
>
> **(a) to exclude or limit the operation of any provision of this Act, …"**

While section 111A is concerned with the admissibility of evidence rather than with what might be described as a substantive right (such as the right not to be unfairly dismissed), section 203 expressly applies to any provision of the **ERA**.

46. Mr Milsom seeks to answer the point by saying the mischief Parliament was seeking to address was the threshold requirement of a dispute before the without prejudice rule could bite. Whilst I would not disagree with that assessment (that much seems clear from the contextual background, described by ACAS in the citations given above), I am not persuaded I should assume that Parliament's intention was as limited as Mr Milsom suggests. Parliament could have imported the without prejudice rule into section 111A; it did not do so. It instead chose to create an express provision relating to the admissibility of evidence in quite specific circumstances. I consider I must look at section 111A on its own terms; not through the lens of common law without prejudice privilege.

47. That also informs my approach to section 111A(4). Whilst the explanatory notes state that this is "*intended to mirror the test of 'unambiguous impropriety' … established in case law as an exception to the common law principle of without prejudice*", those notes also anticipate the ACAS statutory Code of Practice, "*giving guidance as to what amounts to improper behaviour in this context*". Having regard to that Code of Practice (as I am bound to do, section 207 **TULR(C)A 1992**), I note that it states:

> **"17. What constitutes improper behaviour is ultimately for a tribunal to decide on the facts and circumstances of each case. Improper behaviour will, however, include (but not be limited to) behaviour that would be regarded as 'unambiguous impropriety' under the 'without prejudice' principle." (My emphasis)**

48. It seems to me this is, indeed, the correct way of approaching section 111A(4). Primarily, because Parliament chose to use the phrase "improper behaviour", not "unambiguous impropriety", thus allowing a potentially broader approach to the behaviour in issue and a greater degree of flexibility for the ET (arguably reflective of the broader categories of exceptions allowed by common law to prevent abuse of the without prejudice principle). Certainly I give respect to the approach adopted by ACAS and the examples of improper behaviour it has given at paragraph 18 of the Code. The flexibility that I consider has been permitted to the ET in approaching section 111A(4) is further reflected in the two-stage task in which it is thereby required to engage. First, it must consider whether there was improper behaviour by either party during the settlement negotiations (a matter for the ET to determine on the particular facts of the case, having due regard to the non-exhaustive list of examples at paragraph 18 of the ACAS Code). If so, it is then up to the ET, at the second stage, to decide the extent to which confidentiality should be preserved in respect of those negotiations.

Discussion and Conclusions

49. I now turn to the particular issues raised by the appeal and cross-appeal; first, considering how - if at all - common law without prejudice privilege might impact upon the evidence in issue, and then turning to the possible application of section 111A.

Without Prejudice Privilege

50. Common law without prejudice privilege can only apply to evidence of negotiations between parties where there is a dispute. It is common ground before me that this was the case by 7 January 2015. For the period prior to that, I have proceeded on the assumption there was no dispute, so issues of admissibility before that date can only be considered under section 111A, not as instances of without prejudice privilege. Mr Milsom argues that, even after 7 January, there was no genuine effort to resolve the dispute so far as the Respondent was concerned. This is a point that feeds into the Claimant's objection that the Respondent engaged in unambiguous impropriety during the discussions: it sought to abuse without prejudice privilege to cast aspersions on the Claimant, to threaten her with disciplinary sanction, to bully and discriminate against her; allegations that also form part of her substantive claims. As yet, the ET has not made any findings in these respects and it would be dangerous for me to attempt to do so merely upon a review of the documentary material before me. In the event, for the reasons set out below, it is unnecessary for me to consider these points under the without prejudice label, although similar issues arise in respect of section 111A which require further engagement.

51. What is apparent from the ET's reasoning is that it: (i) did not consider that the mere labelling of correspondence as without prejudice made it so; (ii) considered the bulk of the correspondence to be simply that: correspondence between the parties (or their respective

advisers), not evidence of negotiations seeking to resolve a dispute; (iii) did not think that mere references to the fact of such negotiations should be cloaked by the privilege. In my judgment that approach discloses no error of law. Mr Rees says that correspondence in which a party sets out its position can be part of without prejudice negotiations, even if not marked as such and even if making no reference to the detail of any offer. Whilst I would not disagree with that submission, it seems to me that this assessment is one for the ET. Here, the ET was entitled to consider whether it should permit the references to the fact of the negotiations to be admitted and was best placed to determine whether the broader content of the correspondence was properly to be characterised as evidencing without prejudice discussions. I am not persuaded the ET erred in its approach to these issues in so far as without prejudice privilege is concerned.

52. Even if I was wrong on this, I turn to the cross-appeal and the question whether the Respondent waived without prejudice privilege in this case in any event. The short answer is that, by failing to address this issue (raised below) the ET fell into error and the cross-appeal should be allowed. The parties are, however, agreed that I should myself consider the substantive question of waiver and I accordingly return to the events in issue.

53. The Claimant's case at its highest is put on the basis that the Respondent must be taken to have waived any privilege once she had expressly stated that she was now treating the material in question as "open" and, as such, referred to it in her grievance. She points out that the Respondent made no objection to this but, on the contrary, went on to address her grievance on this basis and itself made a number of references to that material in its grievance report (about which no issue has been raised as to admissibility).

54. There were plainly opportunities for the Respondent to object to the Claimant's open reliance on the material in issue which it failed to take. I also accept that difficulties might arise from the partial references to that material in the grievance report (to be admitted before the ET); it might be misleading not to admit the entirety of the material in those circumstances. That said, I do not consider that references to without prejudice material in the course of an internal grievance will ordinarily lead to the conclusion that the parties must be taken to have impliedly agreed to waive privilege (see **Vaseghi**).

55. The Claimant's case on waiver does not, however, stop there. She further points out that she continued to openly refer to the material in question in her ET complaint and, again, the Respondent did not object but itself also referred to that material in its response. In my judgment, it is this that demonstrates that the parties did indeed clearly agree any privilege should be waived. The Claimant had made her position clear: she was relying on the Respondent's conduct during the communications in issue as part of her case. It was (assuming I am wrong about the earlier point raised by the appeal) then still open to the Respondent to object and invoke without prejudice privilege; it did not do so. More than that, the Respondent itself expressly referenced and relied on the material that it now says should not be admitted; it unequivocally waived any without prejudice privilege formerly attaching to the parties' discussions from 7 January 2015.

Section 111A

56. I now turn to the points raised by section 111A **ERA**. The Respondent says this provision renders the material in question inadmissible for the purposes of the (constructive) unfair dismissal claim and that is true in respect of the evidence both pre and post-dating 7 January 2015. It is, of course, only by virtue of section 111A that discussions absent any

dispute can be rendered inadmissible in these circumstances. The subsequent existence of a dispute does not, however, mean that section 111A falls away; it remains applicable in any unfair dismissal claim before the ET.

57. The first point made by the Respondent is that the ET erred in failing to recognise that it needed to separate out questions of admissibility for the purposes of the different claims: allowing that evidence was admissible for the sex discrimination claim did not mean that it could be admitted for the purposes of the unfair dismissal claim. As I have said, I do not disagree with that analysis; that is, indeed, how section 111A operates. I do not, however, consider that the ET fell into the error suggested. The part of the ET's reasoning in issue was addressing a rather different point, arising from the fact that the Respondent's position below was founded upon the (now accepted to be) erroneous premise that section 111A inadmissibility for the purposes of the unfair dismissal claim extended to render the material in question inadmissible for the purposes of the discrimination claim. In addressing that argument, the ET stated (correctly):

> **"5. … the ambit of section 111A. … by virtue of subsection (1) it only applies to cases of unfair dismissal, whether constructive or actual. It does not apply to claims under other heads of jurisdiction and there is another claim in these proceedings. …"**

58. Answering a bad point taken below does not evince an error of law on the part of the ET.

59. As for the contention that, in any event, the correspondence in issue was being relied on to support the Claimant's unfair dismissal case (not the discrimination claim) and was, therefore, simply inadmissible; I disagree. It is apparent from the particulars attached to the ET1 that the Claimant relies on the material in question for both claims.

60. Separately, the Respondent objects that the ET wrongly elided section 111A with common law without prejudice and thus erred in restricting section 111A(2) to the detail of any offer rather than the entirety of pre-termination discussions, in allowing pre-termination documents to be admitted subject only to redaction of references to the offer, and in failing to allow that section 111A might apply to discussions *about* pre-termination negotiations (including the Respondent's internal emails).

61. As explained above, I accept that 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 of the case law that underpins without prejudice privilege. Adopting that approach, I agree with the Respondent that section 111A is not to be restricted to the content of the discussions in issue but extends to the fact of those discussions, even if this would not be the case under without prejudice privilege. I equally agree that section 111A need not be limited to the direct discussions between the main protagonists; it may extend to evidence of those discussions more widely (albeit that may also be true under common law without prejudice principles). Although the ET's reasoning does not demonstrate explicit engagement with these issues, I further think the Respondent is correct to infer that it approached its task under section 111A as if it were merely to read across from the common law principles applicable to without prejudice privilege. Mr Milsom urges me to take a more charitable approach and allow that the ET was really answering the point raised in respect of admissibility for the purposes of the discrimination claim and leaving the final decision to the Full Merits Hearing. That might be an entirely permissible course, but I am not persuaded I can infer that is what the ET intended here and, to the extent it was ruling that the material in question was admissible in respect of the unfair dismissal claim, I consider that amounted to an erroneous application of section 111A.

62. Mr Milsom's alternative reading of the ET's reasoning is that it was intending to state that the material in question was not properly to be characterised as evidence of pre-termination negotiations for the purposes of section 111A in any event. That is not an unreasonable point to make in relation to the documentation in this case; much of which consists of lengthy expositions of the parties' respective views on their relationship, with little reference to any negotiations. Allowing for Mr Rees' observation that negotiations can involve a degree of positioning, there remains a question as to whether all the material in issue in this case can properly be described as evidence of discussions held with a view to terminating the Claimant's employment on agreed terms. Although broadly worded, I do not read section 111A(2) as being open ended in this regard. Again, however, I consider this to be a question of assessment for the ET, which it has not yet grappled with. That may be because it intended the point to be left over to the Full Merits Hearing or because it considered it had answered the issues before it without needing to address this question. Either way, it has not yet been resolved.

63. There is a degree of overlap between this point and the second ground of the cross-appeal: the ET's failure to address the argument as to the applicability of section 111A(4). Not only does the Claimant contend that the Respondent was not engaged in any genuine attempt to achieve a termination agreement (its communications thus fell outwith section 111A), she says that its behaviour was "improper" for the purposes of section 111A(4); an issue the ET failed to address.

64. It is right that the ET did not address the section 111A(4) point and the cross-appeal should therefore be allowed on that basis. The parties are agreed that this will necessitate remission to the ET to determine and, in so doing, it seems to me that it will be well placed to

also answer the question whether the correspondence in issue - even if not "improper behaviour" - properly falls to be considered as "*Evidence of … any … discussions held … with a view to [the Claimant's employment] being terminated on terms agreed between the [parties]*".

65. Mr Milsom contends, however, this can be avoided: the Respondent waived privilege and that renders arguments as to admissibility academic. I disagree. Whilst the ET failed to address this question (also raised by the Claimant's submissions below) and whilst I had found the Respondent had implicitly waived without prejudice privilege, for the reasons given above, section 111A confidentiality cannot be waived; the cross-appeal in this regard must ultimately fail.

Outcome

66. For the reasons given, I:

(1) Dismiss the appeal in respect of the ET's approach to the principle of admissibility of without prejudice negotiations.

(2) (If wrong about (1)) would have allowed both grounds of cross-appeal in respect of the application of the without prejudice rule: (i) because the ET failed to deal with the points raised by the Claimant as to whether the Respondent was genuinely negotiating in an effort to resolve the dispute after 7 January 2015 and/or whether there was unambiguous impropriety; (ii) because the ET failed to address the waiver issue and in this case the Respondent had waived without prejudice privilege by relying on the material in issue in its ET3.

(3) Allow the appeal in respect of the approach to section 111A **ERA**.

(4) Also allow the cross-appeal on the question of the application of section 111A; specifically as to whether there was improper behaviour.

(5) Dismiss the cross-appeal in respect of "waiver" of section 111A confidentiality.

67. In the light of my Judgment, the parties are invited to send in their respective written submissions (if unable to agree) on the appropriate terms of my Order, on disposal and any other matters arising; such submissions to be exchanged lodged with the EAT within 14 days of this Judgment being handed down.