



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T Jordansen

**Respondent:** Check4Cancer Ltd

**HEARD AT:** BURY ST EDMUNDS ET **ON:** 5<sup>th</sup> May 2017

**BEFORE:** Employment Judge S Moore

## REPRESENTATION

**For the Claimant:** In person

**For the Respondent:** Ms R List (Solicitor)

# PRELIMINARY HEARING

## JUDGMENT

The negotiations marked 'without prejudice' that took place in a meeting on the 18<sup>th</sup> July 2016 and in subsequent written communications are inadmissible.

## REASONS

1. This is an application by the Respondent that the Claimant withdraws references to negotiations marked 'without prejudice' that took place in a meeting on the 18<sup>th</sup> July 2016 and in subsequent written communications. The references are contained in the Claimant's witness statement prepared for the substantive hearing of his claim of unfair dismissal. I am not concerned with the merits of that claim but only with the question of whether the evidence of those pre-termination negotiations is admissible. The Respondent says that the negotiations are not admissible because they were conducted 'without prejudice', being a genuine effort to resolve a dispute, alternatively because they fall within Section 111A of the Employment Rights Act 1996.
2. The facts relevant to this issue are as follows:-

- 2.1 On the 11<sup>th</sup> July 2016 there was a company meeting in London to look at the issues of costs reduction. After the meeting the Claimant had a further meeting with two of the company's Investor Directors who told him they did not believe they could raise more money for the company while the Claimant remained as Managing Director.
  - 2.2 On the 13<sup>th</sup> July 2016 the Claimant met with another of the Directors, Mr Wishart, on a more informal basis. Mr Wishart asked the Claimant if in circumstances where Mr Wishart was asked to run the company the Claimant would consider taking on a more sales based role.
  - 2.3 On the 18<sup>th</sup> July 2016 the Claimant met with Mr Wishart and another of the Directors. At that meeting the Claimant was handed a letter dated the 18<sup>th</sup> July that was marked "Without Prejudice". The Directors briefly took the Claimant through the offer contained in that letter which was stated to remain open for 10 days. The Claimant instructed Solicitors swiftly, who responded in writing on the 19<sup>th</sup> July 2016 asking for further information and querying whether it would be possible to comply with the 10-day deadline for responding to the offer. The Respondent's Solicitors responded by email on the 20<sup>th</sup> July 2017 stating that should the Claimant require some additional time to consider matters then the deadline for acceptance could be extended to a reasonable extent.
  - 2.4 On the 25<sup>th</sup> July 2016 a matter came to light which the Respondent says led to the Respondent investigating certain financial queries, and on the 26<sup>th</sup> July 2016 the Respondent withdrew the settlement agreement proposal i.e. the offer contained in the letter of 18<sup>th</sup> July 2016 and commenced disciplinary proceedings as a result of which the Claimant was dismissed.
3. Section 111A of the Employment Rights Act 1996 is headed 'Confidentiality of negotiations before termination of employment'. It provides that in a claim of ordinary unfair dismissal evidence of pre-termination negotiations is inadmissible, except that in relation to anything said or done which in the Tribunal's opinion was improper, or was connected with improper behaviour, negotiations are inadmissible only to the extent that the Tribunal considers just. Subsection 111A(2) defines pre-termination negotiations as 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.
  4. The letter and the meeting of the 18<sup>th</sup> July 2016 and subsequent related correspondence are plainly pre-termination negotiations within Subsection 111A(2). Accordingly, since this is a claim for ordinary, as opposed to automatic, unfair dismissal, the only reason why Section 111A might not apply to these negotiations would be if anything said or done by the Respondent regarding them was improper or connected with improper behaviour. I do not consider that anything improper occurred. The offer was articulated in detail by letter, but there is no requirement as a matter of law that an offer has to be articulated orally and in any event the Claimant was taken through the main parts of the letter in the meeting on the 18<sup>th</sup> July 2016.

Further, the Claimant was given reasonable time to respond to the offer and when the Claimant's Solicitors indicated that more time might be needed the Respondent indicated that more time could be given. It is true that the Respondent did not identify the negotiations as being conducted under the protection of section 111A, however again there is no requirement in the law to do so. Moreover, by labeling the letter of the 18<sup>th</sup> July 2016 as 'without prejudice' the Respondent clearly indicated that it did not expect the negotiations to be admissible in any subsequent proceedings. Accordingly I find that these pre-termination negotiations clearly fall within the scope of Section 111A.

5. I would add that even if Section 111A did not apply I would have come to the view that the 'without prejudice rule' applied to make the negotiations in question inadmissible in any event.
6. In this respect, the test is whether or not the nature of exchanges between the parties was such that by the date of the contested negotiations the parties could reasonably be expected to have been contemplating litigation. In this case by the 18<sup>th</sup> July 2016 the Directors of the company had made it clear to the Claimant that they intended to remove him as Managing Director, indeed that the Claimant understood this to be the case is evident from an email from him of the 13<sup>th</sup> July 2016 in which he stated, "having been told that I'm not needed or wanted as MD I have stopped taking any decisions. I can only see that whatever decision I may take will be used against me." The Claimant protested at the hearing that he was not at that time considering litigation because, since he thought he would be able to stay on with the company in some other capacity, he was not considering a legal response to the decision to remove him as Managing Director. However, in my view the objective facts of the matter, the tone of his email and the evidence of Mr Wishart that the Claimant was clearly upset when he saw him on 13<sup>th</sup> July 2016 lead to the inevitable conclusion that litigation must at that time have been within his reasonable contemplation. Accordingly I find in the alternative that the pre-negotiation communications in question are also subject to the 'without prejudice rule' and are inadmissible for that reason as well.
7. Having been informed of this decision at the hearing, the Respondent subsequently made an application for costs. I find that the Respondent is not entitled to its costs. It had not informed the Claimant prior to the hearing that it intended to rely on Section 111A of the Employment Rights Act 1996, referring only to the 'without prejudice rule'. I consider that it was not unreasonable of the Claimant to argue that the 'without prejudice rule' did not apply on the grounds that at the date of the relevant negotiations there was no dispute between the parties, and to contend that litigation was not within his reasonable contemplation.

# ORDERS

1. By 12<sup>th</sup> May 2017 the Claimant is to serve a redacted statement on the Respondent removing all reference to the negotiations marked 'without prejudice' that took place in a meeting on the 18<sup>th</sup> July 2016 and in subsequent written communications.
2. The matter will now be heard at a 2 day hearing at the Bury St Edmunds Employment Tribunal, 1<sup>st</sup> Floor, Triton House, St Andrews Street North, BURY ST EDMUNDS, IP33 1TR, on the 11<sup>th</sup> and 12<sup>th</sup> September 2017. The hearing will deal with both liability and, if appropriate, remedy.

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Employment Judge S Moore, Bury St Edmunds.  
Date: 17 May 2017

ORDER SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS