Appeal No. UKEAT/0212/17/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 October 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

MR S GRAHAM — APPELLANT

AGILITAS IT SOLUTIONS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PAUL WILSON (of Counsel) Instructed by: SCE Solicitors Vicarage Chambers 9 Park Square East Leeds LS1 2LH
For the Respondent	MR TIM SHEPPARD (of Counsel) Instructed by: Geldards LLP Number One Pride Pace Pride Park Derby DE24 8QR

SUMMARY

PRACTICE AND PROCEDURE

The appeal concerns a challenge to a Preliminary Hearing Judgment holding that a number of discussions during meetings held on a without prejudice basis between the Appellant and the CEO of the Respondent prior to the termination of his employment were protected pursuant to section 111A(1) **Employment Rights Act 1996** and/or under the common law without prejudice rule.

The Tribunal correctly applied the relevant legal principles to the facts found and was entitled to reach the conclusions reached in relation to the relevant meetings, save in relation to two points.

Although squarely raised before it, the Tribunal did not consider whether there was a waiver of privilege by reason of the Respondent's conduct in relying on part of a conversation during a meeting on 12 August 2015 as a disciplinary allegation against the Appellant (ultimately leading to his dismissal) while at the same time contending that the meeting was covered by without prejudice privilege. The same point was not considered in the context of an argument that there was improper conduct by the Respondent within the meaning of section 111A(4) but the Tribunal could not be criticised in this respect because the argument was not advanced below. In circumstances where the same or very similar argument would be reconsidered by the Tribunal afresh in respect of the waiver point, the Appellant would exceptionally be permitted to raise this point as well.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

1. This appeal concerns the scope of the protection for without prejudice conversations available under section 111A of the **Employments Rights Act 1996** ("ERA") and the application of the common law without prejudice principle to the same conversations. By a Judgment at a Preliminary Hearing, with Reasons promulgated on 26 June 2017, Employment Judge Hutchinson ruled that passages in the Claimant's grounds of complaint relating to conversations on 12 August 2015, 18 August 2015, 11 September 2015, 5 January 2016, 19 January 2016 and 2 February 2016, collectively referred to as "the relevant meetings", should be deleted and the claim form resubmitted without reference to those conversations on the basis that these were pre-termination negotiations and evidence about them was inadmissible pursuant to section 111A(1) in proceedings for unfair dismissal, and more generally because they were covered by the without prejudice privilege rule and, therefore, inadmissible at common law.

2. The Claimant who appeals that decision challenges it as in error of law on six grounds; two directed at the decision pursuant to section 111A, and the remaining grounds directed to the decision under common law. I refer to the parties as they were before the Tribunal for ease of reference. Mr Paul Wilson of counsel appears for the Claimant but did not appear below. Mr Tim Sheppard of counsel appears for the Respondent, who resists this appeal on all grounds and did appear below. I am grateful to both of them for their assistance.

Factual Background

3. The case is proceeding in the Nottingham Employment Tribunal. The Claimant was employed as a Sales Director for the Respondent from November 2013 until his summary

dismissal on 9 August 2016. He was also a shareholder in the Respondent. On 12 August 2015 the Claimant met with the Respondent's Chief Executive Officer, Mr Shaun Lynn. That meeting followed an instruction from the Respondent's Executive Board at which Mr Lynn had been instructed to hold without prejudice conversations with the Claimant because of concerns about his performance and his sales. There is no dispute that during the course of the subsequent meeting between the Claimant and Mr Lynn, a number of options were discussed about the Claimant's ongoing employment or its termination, including performance improvement and dismissal. A series of meetings followed in the course of the following 10 months that are the subject of the impugned Judgment and this appeal.

4. By letter dated 21 June 2016 the Claimant was suspended from duty pending an investigation into allegations of gross misconduct. The allegations raised against the Claimant were set out in a letter dated 12 July 2016. I do not have a copy of that letter, but the Respondent's grounds of resistance make clear that among the allegations of disciplinary misconduct were allegations that the Claimant spoke to colleagues (including other Directors and the Financial Controller of the Respondent) about his perception that there was a conspiracy to remove him from the business. He informed them that he had a case for constructive dismissal and could damage the Respondent, and that there would be a financial impact for the business and them as shareholders.

5. Significantly the Respondent relied, as one of the disciplinary allegations amounting to gross misconduct, on words spoken to Mr Shaun Lynn by the Claimant during the course of one of the relevant meetings (on 12 August 2015) similar to those used in relation to other shareholders and Directors.

6. The Respondent contends that the disciplinary allegations led to concern by the Respondent about a possible breakdown in the trust and confidence necessary to maintain an employment relationship with the Claimant. Ultimately those allegations were found proven and the Respondent concluded that the conduct amounted to gross misconduct or, alternatively, that there had been an irretrievable breakdown in the necessary mutual relationship of trust and confidence.

7. The Claimant was dismissed and brought claims of ordinary unfair dismissal, wrongful dismissal and claims based on unlawful deduction from wages. It is his case that the dismissal was predetermined and the Board wished to dismiss him irrespective of the issues raised in the letter and throughout the disciplinary process because the Board wished to take over his shares. He contends that the dismissal was in part a response to the fact that he had raised a grievance refusing to accept a change in his role from Sales Director to Business Development Director which involved a significant reduction in salary.

8. The Claimant and Shaun Lynn both gave evidence at the Preliminary Hearing before Employment Judge Hutchinson. The Employment Judge made clear that he preferred the evidence of Mr Lynn where there was conflict and identified a number of matters that led to the conclusion that the evidence of the Claimant was in broad terms less reliable than that of Mr Lynn. The Employment Judge made findings of fact in light of the evidence he heard including, so far as relevant to this appeal, that there were issues with the Claimant's performance in his role as Sales Director and in relation to the Respondent's sales figures which were behind target or budget.

9. Before the meeting on 12 August 2015 the Respondent's Board met and instructed Mr Lynn to hold without prejudice discussions with the Claimant. The Employment Judge found that all of the relevant meetings were held on an agreed without prejudice basis. Specifically, in relation to the meeting on 12 August 2015, the Employment Judge found that Mr Lynn outlined the Board's concerns to the Claimant and identified three options: first, that things could carry on as they were with matters being dealt with as a capability issue through the disciplinary process; secondly, the Claimant could leave the Respondent under a settlement agreement; thirdly, the Claimant could undertake a different role within the business. The Employment Judge was satisfied that the Claimant was upset during the course of that meeting and that he threatened the business as he subsequently admitted in the course of the disciplinary investigation. At paragraph 18 the Employment Judge found that the Claimant used the following words:

> **"Yes I do recall saying that. I said I thought I had a case for constructive dismissal. It was said throughout the conversation. It wasn't threats on 12 August 2015. I allow the procedure under SL's whole stands was constructive ie unfair dismissal."**

That last sentence does not fully make sense but the gist is clear. The Employment Judge fairly inferred from that statement that the Claimant had in mind proceedings of his own at that time.

10. As far as the remaining meetings are concerned, the Employment Judge made the following findings of fact at paragraphs 20 to 25.

> **"20. The second meeting was held on 18 August 2015. This was at the behest of the Claimant and they discussed again the 3 options that had been previously offered. Again, there was a discussion about him leaving the business and keeping his shares. At the end of the meeting the Claimant informed Mr Lynn that he wanted to stay and change his role to a business development role. This needed to be discussed by the board.**
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> **21. Mr Lynn called the next meeting on 11 September 2015. They again discussed the change of his role to Business Development Director. They discussed changes to the role and that his salary package would be very different to that of a Sales Director. No agreement had been reached at that time and so all options including termination were available to the Respondent's [sic].**
>
> **22. Thereafter work was undertaken to agree a job description, a salary package and performance objective for the new role. In the meantime he remained on his Sales Director package. A further meeting then took place on 5 January 2016 so that Mr Lynn could obtain**

an update as to the Claimant's thoughts on his new role, job description, targets and salary. I am satisfied that at this meeting they again discussed the new role and how this would change the financial package that he enjoyed with the company. At the meeting the Claimant agreed to produce a job specification and Mr Lynn sent to him a template following the meeting. I am satisfied that this was a continuation of the previous 3 meetings.

23. On 19 January 2016 there was a further meeting. They were still in discussions on the way forward. A number of the Claimant's responsibilities had been transferred in October 2015 and Mr Lynn understood that the Claimant had spent November and December focussing on the business development role. They discussed the terms of the Claimant's contract and again the subject of the salary and package were discussed. I am satisfied that they did not discuss any other option at this time. This was simply a follow up meeting with Mr Lynn anxious to move the matter forward.

24. On 2 February 2016 Mr Lynn and Mr Graham had their final meeting that is in dispute. The purpose of the meeting was to discuss where they were with the progress of the job specification. Mr Lynn said that they were now 2 months away from the new financial year and they had spent 5 months discussing the job role and specification and asked him to complete it by their meeting which was scheduled for 15/16 February as a new job role and financial package would have to be in place by 1 April 2016.

25. Mr Lynn believed that there was then an agreement between them as to his position and all subsequent meetings were then held on an open basis."

11. Having set out the provisions of section 111A of the **ERA** and the guidance he derived from the authorities, the Employment Judge reached a number of conclusions dealing both with section 111A and the without prejudice rule. First he concluded that as at 12 August 2015 there was a dispute between the Claimant and the Respondent. The Claimant himself referred to possible litigation and the options identified by Mr Lynn included the immediate termination of his employment. The next meeting on 8 August was a continuation meeting; termination of the Claimant's contract remained a live issue between the parties. Before each of the relevant meetings Mr Lynn made clear that they were without prejudice. Further and separately, each of the relevant meetings was held in contemplation of the possible termination of the Claimant's employment on terms agreed between the parties.

12. The Employment Judge rejected the allegation that Mr Lynn's behaviour was improper, finding that he did not use threatening words or demeanour and nor did he behave in a manner that led to the Claimant feeling that he had no choice but to consider the alternative role offered. The Employment Judge was satisfied that there were issues concerning the Claimant's

performance prior to the first meeting on 12 August 2015 and that the purpose of that meeting and the discussions in all of the relevant meetings until 2 February 2016 was to seek to resolve those issues (see paragraph 32.5).

13. In the circumstances, the Employment Judge concluded that the conversations during the relevant meetings were protected both under section 111A and at common law and, therefore, not admissible both so far as unfair dismissal proceedings are concerned and so far as the proceedings as a whole are concerned.

The Applicable Law

14. There is no dispute between the parties about the principles of law that apply in this case.

15. As far as the without prejudice rule is concerned, in **Framlington Group Ltd and Another v Barnetson** [2007] EWCA Civ 502 the Court of Appeal considered the without prejudice rule in the context of a wrongful dismissal claim, and Auld LJ dealt with its scope, the policy justifications for the rule and the exceptions to it (at paragraphs 22 to 35). The Court of Appeal made clear that a dispute may engage the without prejudice principle even if litigation has not yet begun. The critical consideration is whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree. This is a fact sensitive question.

16. The privilege can be waived but there must be agreement on both sides in the relevant negotiations on waiver which must be unequivocal by reference to words or conduct used. There are limited exceptions to the without prejudice rule, discussed in **Unilever plc v Procter**

& Gamble Co [2001] 1 All ER 783, referred to by the Employment Judge and these include where the exclusion of the evidence would act as a cloak for unambiguous impropriety, for example, threatening behaviour or violence, perjury or blackmail.

17. As far as section 111A is concerned, the section provides as follows:

> **"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."**

18. Those provisions were considered by the EAT in **Faithorn Farrell Timms LLP v Bailey** [2016] IRLR 839 by HHJ Eady QC. After her clear and helpful summary of the scope of the without prejudice rule and its policy justifications, she dealt with the scope of section 111A at paragraphs 36 to 48. It is unnecessary for the purposes of this appeal to set out those paragraphs in full. The parties accept as correct the propositions she set out there, and I agree with them.

19. What is clear is that section 111A runs in parallel with the without prejudice rule which continues to apply where there is a dispute between the parties and their written or oral communications amount to a genuine effort to resolve the dispute. The section was introduced

to allow greater flexibility in the use of confidential discussions as a means of bringing an employment relationship to an end. Unlike under the common law principle under section 111A there is no requirement for a pre-existing dispute between the parties and where section 111A(1) applies the evidence of pre-termination discussions is inadmissible only in ordinary unfair dismissal proceedings. The principle covers both the fact of the discussions and their content. Finally, whereas the without prejudice rule can be waived by agreement on both sides, no such waiver is possible under section 111A.

The Appeal

20. As indicated, grounds one and two challenge the Tribunal's conclusion pursuant to section 111A.

21. By the first ground of appeal Mr Wilson contends that the Employment Tribunal failed to consider whether the discussions in the relevant meetings fulfilled the strict requirements of the statutory test and were held with a view to employment being terminated on terms to be agreed. He contends that the Tribunal's approach was confused and that the separate tests applicable to the two parallel concepts were conflated. The result was that there was no proper consideration in the Tribunal's findings and conclusions of the statutory requirements in section 111A(1) **ERA**.

22. I disagree. Although it is true that the section of the concluding paragraph 32 of the Judgment dealing with section 111A starts with the sentence "*As at 12 August 2015 there was a dispute*", the mere fact that reference was made to a dispute and is not required in the context of section 111A does not mean that the Employment Judge was not engaged in applying the statutory test in section 111A. The finding that there was a dispute is relevant to the issues the

ET had to determine in deciding whether section 111A applied, notwithstanding that a dispute is not a necessary condition for the application of that section because in determining whether there were discussions amounting to pre-termination negotiations as defined by the **ERA**, the fact that there was an existing dispute was an obviously relevant factor. It meant that there was a rational reason to hold discussions about a mutually acceptable termination of the Claimant's employment. That this finding is also relevant to the assessment of whether there was a dispute for the purposes of the without prejudice rule does not mean that the two tests were conflated by the Employment Judge.

23. Moreover, it seems to me the Employment Judge made findings of fact about the relevant meetings that are important. He found that the Respondent was dissatisfied with the Claimant's performance and with the sales that the Respondent company was achieving. That was directly relevant to the Claimant's role as the Respondent's Sales Director. The Board instructed Mr Lynn to hold 'without prejudice' discussions with the Claimant as a consequence. That the 'without prejudice' discussions were contemplated by the Board and the Respondent as a whole indicated immediately the potential for litigation concerning the Claimant's future employment. All of that occurred before the meeting on 12 August 2015. At the meeting itself, Mr Lynn made clear that the meeting was itself to be held without prejudice, again signifying the Respondent's view and immediately putting the Claimant on notice of the possibility of his employment being terminated. Moreover, Mr Lynn presented the Claimant with the three options, one of which was leaving employment under a settlement agreement.

24. The Employment Judge went on to find in terms that each of the first four meetings formed part of a continuation of the previous meeting and discussions. All options, including termination, remained on the table up to and including 11 September 2015. Although by 5

January 2016 and in the two meetings that followed, it appears that the discussions centred on the new role that the Claimant was being offered without express discussions about the other options, those meetings proceeded against the background of termination remaining an option throughout, as the Employment Judge found.

25. It is implicit in the Tribunal's findings about the way in which the discussions started and developed that throughout the period of the relevant meetings, if agreement could not be reached about an alternative role, the option of termination would be pursued whether under an agreed settlement or as a consequence of a disciplinary process. All of those findings resulted in a conclusion (expressed by the Judge at paragraph 32.3) not only that Mr Lynn made clear at the commencement of all the relevant meetings that they were without prejudice but also that Mr Lynn made clear that all the relevant meetings were "*held in contemplation, as one possible option, of the termination of his employment and it being terminated on terms agreed between them*".

26. Thus, even if the content of the discussions after 11 September focused on the change of role and did not expressly address terms for bringing the Claimant's employment to an end, that was plainly the context for those discussions and there was a finding that remained an option known to the parties and that the conversations were held on that basis. For those reasons ground one fails.

27. Ground two raises a point not argued below and, for reasons that will become clear, I prefer to deal with ground two after I have dealt with ground six.

28. Even if the Claimant can attack the Employment Judge's decision under section 111A in any respect, unless he can also successfully challenge the alternative basis on which the Judge concluded that the content of the relevant meetings was inadmissible under common law, the ruling must stand.

29. I turn, therefore, to address the arguments raised by the Claimant in relation to the common law principle. The first point made is that the Employment Judge failed to consider whether there was a dispute before the meeting on 12 August 2015 and did not explore whether any dispute about the Claimant's performance and ongoing employment had reached the point before 12 August of the parties contemplating litigation or being in a situation where they might reasonably have contemplated litigation if agreement could not be reached. Mr Wilson accepts that there need only be a dispute giving rise to a reasonable contemplation of litigation if agreement cannot be reached.

30. It seems to me that where an employer takes the view that performance concerns about an employee should result in disciplinary action and possible dismissal and there are then instructions given to hold a without prejudice meeting, it is beyond argument that the situation demonstrates a present dispute or at least the potential for a future dispute that might be litigated if agreement cannot be reached. Mr Wilson accepts that might well have been in the Respondent's mind and reasonably contemplated by the Respondent, but the mere fact that the Respondent was contemplating litigation is insufficient. Mr Wilson submits that from the Claimant's perspective, litigation was simply not in his reasonable contemplation before that meeting.

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31. I do not accept the logic or reality of that submission. The Claimant was called to a meeting with the Chief Executive Officer to talk about his future on a without prejudice basis. It is inevitable that he must at least have contemplated the possibility of litigation flowing from that. Moreover, within moments of the meeting commencing he was presented with options that included the termination of his employment and he responded in the course of that meeting about having a claim for constructive dismissal. I fail to see how it can be said to be an error of law for the Tribunal to conclude on the basis of those facts that the discussion during the course of the meeting on the 12 August 2015 was covered by the without prejudice principle. The fact that there was no extant dispute immediately before the 12 August meeting does not entail that there was no potential dispute and it seems to me to be obvious that there was the existence of a potential dispute immediately before that meeting in the circumstances I have described. Ground three accordingly fails.

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32. Ground four, which Mr Wilson describes as not his best point, argues that there was a failure by the Employment Judge to consider whether there was an agreement that the without prejudice rule should apply. I am afraid I fail to understand this argument. Not only was there no such failure by the Employment Judge, but he expressly found as a fact that the relevant meetings were held on an "*agreed without prejudice basis*" (see paragraph 15). That finding may not be one with which the Claimant agrees, and was plainly made on the basis of Mr Lynn's evidence in preference to the evidence given by the Claimant, but it is a finding of fact based on evidence and was amply open to the Employment Judge. It is not arguably in error of law and this ground accordingly, fails.

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33. Ground five contends that the Employment Judge was overly focused in his findings that the relevant meetings were protected by the without prejudice rule on the label attached to

those meetings that they were to be 'without prejudice'. Mr Wilson contends that although the use of that term may indicate that the without prejudice rule is engaged, it is not determinative. It is a factor in reaching such a conclusion but here the Employment Judge, in effect, treated the label as determinative.

34. Whilst I fully accept that the use of the term 'without prejudice' is relevant but not determinative as Mr Wilson submits, I do not accept his argument that this was the basis for the Employment Judge's conclusion. It is clear that the Judge had regard not only to the fact that the meetings were held on an agreed without prejudice basis, which in itself is more than simply the application of a label, but he had regard to other significant matters, most of which I have already referred to. First, he had regard to the existence of a dispute and to the fact that the Claimant was presented with options that included his dismissal. He had regard to the fact that the parties contemplated, as early as the 12 August 2015, potential litigation. The Respondent plainly contemplated the possibility of litigation and instructed Mr Lynn to hold without prejudice discussions. For his part the Claimant also contemplated possible litigation when he raised constructive dismissal during the course of the 12 August meeting. Moreover, the Employment Judge found as a fact that the parties were engaged in discussions expressly to avoid the Claimant's dismissal by moving him to an alternative role. The fact that this was by reference to a move to an alternative role does not alter that point. The parties were, on the Employment Judge's findings, in negotiations genuinely directed at resolving a dispute between them without resorting to litigation. It is implicit, if not explicit, in his findings that they were aware throughout the period of ongoing meetings (that were a continuation of each other) that if agreement could not be reached litigation might well follow.

35. In the circumstances, once again, there was an ample basis in the evidence and in the Employment Judge's findings for concluding that the relevant meetings were conducted on a without prejudice basis and no error of law under this ground is made out.

36. Finally, I turn to ground six. This ground challenges the holding at paragraph 32.9 that the Employment Judge was not satisfied that the parties waived the right to rely upon the without prejudice rule. The Employment Judge, having reached that conclusion, gave no explanation and provided no reasons for how and on what basis he arrived at it.

37. There is no doubt that to the extent that there was conflict between the parties about the evidence and the discussions that were held, the Employment Judge plainly preferred the evidence of Mr Lynn who made clear that at no stage did he say anything to waive privilege in the discussions in the relevant meetings. However, there is nothing in the Employment Judge's findings to indicate what he made of the argument advanced by the Claimant on waiver by reference to the Respondent's conduct.

38. It is common ground that the Claimant contended before the Employment Judge that both parties waived the right to rely upon the without prejudice rule by their conduct in the discussions that were the subject matter of both the disciplinary and grievance proceedings. The Claimant maintained that matters which arose during the relevant meetings formed the basis of the disciplinary case against him. The most obvious of these were the words spoken by the Claimant in the meeting on 12 August 2015 and relied on as demonstrating an irretrievable breakdown in trust and confidence between the parties.

39. Mr Sheppard fairly accepts that embedded in the first disciplinary allegation charged, is an allegation that the Claimant used words to the effect (in the conversation with Shaun Lynn) that he had a strong case of constructive dismissal and if pursued against the Respondent, it might be unable to continue due to the financial impact of the potential claim and would affect the future of other Directors. Mr Sheppard also accepts (correctly) that it is not open to the Respondent to cherry pick parts of a discussion in one meeting on 12 August, identifying matters spoken by Mr Lynn as without prejudice for example, but waiving privilege or suggesting that matters spoken by the Claimant in the self-same meeting were not subject to the same without prejudice rule.

40. There is nothing in the Employment Judge's findings or in the reasoning and conclusions that explains how he approached the question whether the Respondent's reliance on what was said during the meeting of 12 August as part of its disciplinary case against the Claimant amounted to a waiver by conduct by the Respondent of privilege in that meeting. The privilege was the Respondent's to waive. Although Mr Lynn said repeatedly (and the Tribunal accepted) that he himself never said anything to waive that privilege, the fact remains that the Claimant was relying on the Respondent's conduct in waiving privilege by relying on those matters as a disciplinary allegation. It being common ground that the point was squarely before the Tribunal, I can find no explanation as to how it was treated by the Employment Judge. His statement that he was not satisfied that the parties waived the right to rely on the without prejudice rule is unsupported by any reasoning or explanation that would cover this point. In those circumstances this ground of appeal is made out and the point must be remitted for consideration; ground six therefore succeeds. I will hear the parties as to how that should be dealt with in a moment.

41. Ground two raises a linked point and seeks to challenge the Tribunal's conclusion that there was nothing said or done in the course of any of the meetings that is improper or connected with improper behaviour within the meaning of section 111A(4) **ERA** so that subsection (1) should not apply.

42. It is common ground that the Claimant relied on this point so far as the allegations about the behaviour of Mr Lynn are concerned. The Claimant asserted that Mr Lynn had used threatening words and demeanour during the course of the relevant meetings which led the Claimant to feel that he had no choice but to accept an alternative role. It was his case that the conversations were all an attempt to move him into a different role or to pressurise and bully him into resigning. Those contentions were expressly considered by the Employment Judge and rejected at paragraph 32.4. The Judge rejected the Claimant's description of Mr Lynn's conduct and the words he had used.

43. The Tribunal did not, however, address the further argument now advanced by Mr Wilson on the Claimant's behalf unsurprisingly because it was not an argument pursued below. The argument is that the disciplinary allegations which led to the Claimant's dismissal arose out of and are explained by the discussions the Claimant had with Shaun Lynn during the 12 August meeting described above. Mr Wilson submits that it is improper for the Respondent to seek to shield itself behind section 111A(1) in relation to part of the discussion in that meeting but at the same time to rely on other parts of the meeting by way of disciplinary allegation.

44. Because the point was not run below, Mr Wilson accepts that he must persuade me to exercise my discretion to allow the new point to be argued notwithstanding that. He submits that in circumstances where the matter will have to be investigated and findings made in any

event in the context of ground six, that there are exceptional circumstances justifying the exercise of discretion in favour of the Claimant to permit him to argue this point before the Tribunal.

45. Mr Sheppard refers me to **Secretary of State for Health v Rance** [2007] IRLR 665 setting out the principles to be applied when considering whether to permit new points to be argued on appeal. Mr Sheppard accepts that there is discretion to allow this, but contends the discretion should be exercised only in exceptional circumstances and certainly not where fresh issues would have to be investigated. He points to the fact that although the material necessary to reach a conclusion about this point may be available to the Appeal Tribunal, what is required is an evaluation and an assessment of the material by the specialist first instance tribunal, and, therefore, the discretion should not be exercised. The point could have been taken below but was not. The fact that there was an omission in that regard is not sufficient to justify the exercise of discretion.

46. I have not found this point easy, and accept the force of the points made by Mr Sheppard. It seems to me, however, that what tips the balance in favour of the exercise of discretion to allow this new point of law to be argued is the fact that ground six has been allowed. In the absence of ground six and but for my conclusion that the question of waiver must be remitted, I would not have exercised my discretion in favour of the Claimant here. However, the question whether by its conduct the Respondent waived privilege in the discussions held on 12 August by including as a disciplinary allegation what the Claimant said in the course of that meeting will have to be evaluated and assessed by the Tribunal afresh. The matter will have to be investigated and findings made in any event (absent agreement between the parties about the facts). These are the facts directly engaged by ground two because the

improper conduct relied on is the same conduct of the Respondent in relying on the discussion by way of disciplinary allegation while at the same time seeking to shield other parts of the same discussion under section 111A(1) **ERA**. It seems to me that the Claimant has raised an arguable case on this point and there would be a glaring injustice if the Claimant were not permitted to run this point in relation to section 111A **ERA** when it is being dealt with and considered afresh in relation to the question of waiver at common law. In those exceptional circumstances I consider that the point should be permitted to be argued before the Employment Tribunal on remission.

Conclusion

47. For all those reasons the appeal must be allowed in relation to grounds two and six and the matter will have to be remitted for findings to be made about the discussions on 12 August 2015 and the extent to which those discussions form the basis of one or more disciplinary allegations that led to the Claimant's dismissal. It is common ground that it should be remitted to the same Employment Tribunal which will need to evaluate the evidence to decide whether the Respondent, by its conduct, waived privilege in respect of the 12 August 2015 meeting and/or whether its reliance on part of the discussions by way of disciplinary allegations amounts to improper behaviour or conduct within the meaning of section 111A(4) **ERA**. To that extent only the appeal is allowed.