Appeal No. UKEAT/0090/17/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 November 2017
Judgment handed down on 19 December 2017

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

(SITTING ALONE)

MR B BASRA — APPELLANT

BJSS LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS KAREN MOSS (of Counsel) Instructed by: DPH Legal Davidson House Forbury Square Reading RG1 3EU
For the Respondent	MR EDWARD NUTTMAN (Solicitor) Ward Hadaway Solicitors 1A Tower Square Wellington Street Leeds LS1 4DL

SUMMARY

PRACTICE AND PROCEDURE - Admissibility of evidence

The Tribunal erred in excluding evidence pursuant to section 111A of the **1996 Act** in circumstances where the date of termination was itself in dispute.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. This appeal concerns the scope of the protection conferred by section 111A of the **Employment Rights Act 1996** ("the 1996 Act") in respect of pre-termination negotiations. Evidence of such negotiations is inadmissible in any proceedings on a complaint under section 111 of the **1996 Act**, that is to say claims of unfair dismissal. In the present case, the Employment Tribunal ("the Tribunal") was required to consider whether an email sent by the Claimant on 3 March 2016 amounted to a resignation by the Claimant. That was the Respondent's contention. The Claimant's contention was that the email was not a resignation at all and that his employment was in fact terminated by the Respondent on a later date, 15 March 2016. The email was written in response to a without prejudice offer made by the employer on 1 March 2016 to terminate the employment on certain terms. The Tribunal held that the email of 3 March 2016 was a resignation. However, in doing so, it expressly excluded any consideration of the prior offer letter on the grounds that it was not admissible as falling within section 111A of the **1996 Act**. The Tribunal took the course of excluding the offer notwithstanding the parties' agreed position that it should be taken into account. The question is whether the Tribunal erred in law in regarding the offer as inadmissible.

Factual Background

2. The Claimant was employed by the Respondent as a Technical Architect from 30 September 2013. The Claimant was, for much of that time, a highly regarded employee. However, during the early part of 2016, the Respondent began to have some concerns about his performance which arose out of complaints and comments from clients.

3. On 29 February 2016, the Claimant had a meeting with a Mr Michitson of the Respondent. There was a dispute as to the content of that meeting: The Claimant's evidence was that Mr Michitson told him that he should immediately resign and said, "I am an American and in the United Kingdom I understand that you don't give notice, what you have to do is resign"; Mr Michitson's account was that it was the Claimant who suggested resignation and that he had responded that if the Claimant wished to resign they could discuss it but that he should not rush into a decision.

4. The Tribunal preferred Mr Michitson's account and concluded that the Claimant was not under any pressure to resign and that no duress was applied by the Respondent for him to leave.

5. On 1 March 2016, the Respondent wrote to the Claimant inviting him to a disciplinary hearing. The letter summarised the issues that would be considered - these included the concerns raised by clients - and invited the Claimant to attend the hearing on 7 March 2016. The parties then produced the two documents which are central to this appeal:

a. The Respondent sent a second letter on 1 March 2016, which was marked "without prejudice subject to contract". That letter ("the WP offer"), informed the Claimant that a potential outcome of the disciplinary hearing could be the issuing of a formal warning or dismissal and spelt out the consequences of such findings for the Claimant and his career. The WP offer concluded with an offer of a financial settlement should the Claimant wish to leave the business on agreed terms rather than proceed through the disciplinary process. It was said that the offer was intended to provide the Claimant with the choice of an alternative option to the

disciplinary process and that there was no pressure at all from the business to accept it. The offer was in the following terms:

> **"The offer is 3 months' net salary in return for your employment ending immediately and you accepting and signing a settlement agreement with BJSS. Please let me have your response before 10AM on Monday 7 March 2016.**
>
> **Please be aware that if you do not accept the offer than the disciplinary hearing will take place but no decision has been made in respect of your employment. That fair process would simply run its course.**
>
> **This is a generous offer advanced in good faith and so it is not negotiable. It is an offer, subject to contract, that you can choose to accept or reject. For this reason, it will not be available after the start of the disciplinary hearing."**

b. On 3 March 2016 at 8:45 AM the Claimant responded to that offer by an email in the following terms ("the acceptance email"):

> **"I do not accept your version of events at this meeting or the [sic] agree to any of the statements that you have made.**
>
> **I accept bjss's 3 month notice offer subject to contract and without prejudice; today will be the last day at bjss.**
>
> **I will send you my final expense bill for which I expect prompt payment."**

6. It was contended by the Respondent before the Tribunal that the acceptance email amounted to a resignation or an agreed termination which brought his employment to an end immediately on 3 March 2016. The Claimant said that it did not have that effect; that his acceptance was entirely subject to contract; and that the employer's subsequent failure to pay the agreed sum meant that there was no agreement reached in respect of his termination.

7. The Claimant did not attend work the following day. On 7 March 2016 (the date scheduled for the disciplinary hearing), the Claimant sent an email to the Respondent with his final expenses, as he said he would do in the acceptance email.

8. On 8 March 2016, the Respondent chased the Claimant for a draft settlement agreement and gave him until 11 March 2016 to respond. On 10 March 2016, the Claimant obtained a fit note from his GP stating that he was suffering from "severe stress insomnia" and would remain

A unfit for three weeks. The Respondent emailed the Claimant about his expenses and reminded him that the settlement agreement needed to be completed that week.

B 9. On 11 March 2016 (by which time the Claimant had instructed solicitors), the Claimant's solicitors wrote to the Respondent to say that the Claimant was suffering from work-related stress and that he was not fit and able to attend the disciplinary hearing. That letter was not received by the Respondent until 15 March 2016 because the Claimant's solicitors had made an error in the Respondent's email address. The Claimant remained off work.

C

D 10. On 15 March 2016, the Respondent sent a letter to the Claimant in which it was said that it was the Claimant who had offered his resignation after learning of the client concerns, that he had been invited to a formal disciplinary hearing, that in order to avoid the hearing he had agreed that his employment would terminate immediately by mutual agreement, that in order to receive three months' pay he would enter into a settlement agreement with BJSS, and that the employment ended on 3 March 2016. The letter went on to say as follows:

E

> **"The disciplinary hearing was only stopped given the agreement that your employment end immediately. This has therefore taken effect by mutual agreement. For the avoidance of doubt, your employment ended on 3 March 2016."**

F

11. After some intervening legal correspondence, on 29 March 2016, the Claimant wrote to the Respondent stating that he had not resigned and that he expected to return to work when fit. The Respondent replied that day as follows:

G

> **"The current position is that your employment has ended. As per my email of 15 of March 2016 I believe that your employment ended by agreement on 3 March 2016 in order to avoid the disciplinary hearing (which did not then take place). I note that you emailed me confirming that this was your last day of work and subsequently forwarded me your outstanding expenses. However, even if I am wrong in that, your employment ended at the latest: on 15 March 2016 when you received my email categorically stating that your employment had ended; or on 17 March 2016 when our lawyer notified your lawyer that your employment had ended. In the circumstances you should not seek to attend work on 1 April 2016 but I do wish you a speedy recovery from any ill-health. If there was any misunderstanding then I am willing to work with you to try to satisfactorily resolve it. Please**

H

> **confirm that you want to work with BJSS and, if so, I will arrange a meeting with you to discuss …"**

12. The Claimant lodged his ET1 on 7 June 2016. In it, he had claimed that his employment ended on 3 March 2016 (although this was later amended to read 15 March 2016), and that he had been unfairly and wrongfully dismissed. He claimed compensation. The Claimant's particulars of claim did not mention either the WP offer or the acceptance email. It was denied that there had been any termination by mutual agreement. The Respondent's grounds of resistance denied that the Claimant had been dismissed and maintained that his employment had ended by mutual agreement. The grounds of resistance did mention the WP offer, which was said to have been "sent under section 111A of the **Employment Rights Act 1996**", and also mentions the acceptance email. It was contended that the acceptance email evidenced the Claimant's acceptance of the offer to terminate his employment immediately, such that there was no dismissal but termination by agreement. In the alternative, it was contended that the Respondent was entitled to believe that the employment terminated by agreement because of the acceptance email, such that it terminated fairly by reason of some other substantial reason or that it terminated by reason of conduct.

The Tribunal's Judgment

13. The matter came before Employment Judge Deol in the London Central Employment Tribunal on 22 September 2016. The Tribunal found that the Claimant had not been dismissed from his employment and his claims were dismissed.

14. The Tribunal set out the background to the matter as follows:

> **"1. The parties had agreed between themselves that the primary issue for the Tribunal to determine was whether the Claimant had been dismissed from employment or whether his employment had terminated by mutual agreement or for some other reason.**

> **2. <u>If the Claimant could establish that he had been dismissed the Tribunal would move on to the issue of whether that dismissal was fair, that is whether in the circumstances (including the size and administrative resources of the employer) the Respondent acted reasonably or unreasonably as treating it as a sufficient reason for dismissing the Claimant taking in account equity and the substantial merits of the case</u>. There would also normally be issues of procedural fairness to address in this case.**
>
> **3. The Respondent acknowledged that in the absence of a dismissal procedure, it would struggle to show that a dismissal (if one existed) was procedurally fair and that it would rely on arguments of Polkey, contribution and mitigation to limit any remedy that the Claimant sought to claim". (Emphasis added)**

15. It is clear from the underlined sentence that the Tribunal was treating the issue of dismissal as a preliminary issue before going on to consider the question of unfairness.

16. In relation to the without prejudice communications, the Tribunal said as follows:

> **"8. A significant part of the evidence that the parties wished to rely upon consisted of "without prejudice" communication. Both sides suggested that they waive the protection of that privilege so that the Tribunal could consider the full circumstances of the case. The Tribunal has, however, ignored the content of any conversations and the fact that they took place insofar as those conversations were protected by Section 111A of the Employment Rights Act 1996."**

17. It is clear from the absence of any qualification in this passage that the Tribunal had decided to exclude this material for all purposes and not just for the purposes of determining whether any dismissal (if there was one) was unfair. It is significant to note that the Tribunal's decision, which was based on an application of section 111A of the **1996 Act**, was taken without the benefit of hearing any submissions from the parties on that issue.

18. The Tribunal did not, therefore, make any reference to, or presumably take any account of, the WP letter. It did, however, refer to the acceptance email as follows:

> **"26. The disciplinary hearing did not however take place. That is because prior to that hearing the Claimant wrote to the Respondent on 3 March 2016 indicating that "I accept bjss's (sic) 3 month notice offer subject to contract and without prejudice; *today will be last day at bjss*". [Tribunal's emphasis] There was some reference by the parties to the exchange prior to this communication which has been disregarded for the reasons set out in paragraph 8 of this Judgment despite invitations from both parties to the contrary.**
>
> **27. The Claimant suggests that on a full reading of his e-mail his resignation should have been taken as "without prejudice" and "subject to contract", effectively that until terms for his departure had been agreed his resignation remained in abeyance. However in the same**

communication the Claimant indicated acceptance of an offer of 3 months' notice and indicated that he would submit his last expense bill.

28. The Claimant's behaviour after this date does not sit comfortably with that of an employee who considered himself still employed. He did not attend work the following day or the pre-arranged disciplinary hearing on 7 March 2016 and neither did he call in sick when first absent from work. He did not immediately object to the termination date of 3 March indicated in the draft settlement agreement sent to him on 10 and 15 March 2016 as one might expect from an employee who still believed he was employed. He received three communications from the Respondent inviting him to attend a meeting to discuss the issue of whether he remained in employment or not and did not take the opportunity to engage on the issue, or at least clarify that in his view he remained in employment.

29. It is not that the Claimant did nothing after 3 March 2016. His solicitor wrote to the Respondent over this period to record the Claimant's view that he remained employed and to inform the Respondent that he was sick. The first of these letters was sent to a wrong e-mail address but these letters were eventually received by the Respondent. The Claimant's solicitor sought to secure an improved settlement with the Respondent for the Claimant's departure from employment.

30. The Claimant accepted that he would have signed up to the deal of 3 months' pay but for advice from his solicitor that he come back and ask for more, because the offer was derogatory [sic]"

19. In a section entitled "The Law", the Tribunal set out a summary of the case law and the submissions in respect of the effective date of termination ("EDT") and whether or not resignation had been communicated in unambiguous terms. Towards the end of that section, the Tribunal said as follows:

> **"42. The Tribunal also had regard to the decision in *Faithorn Farrell Timms LLP v Bailey* UKEAT/0025/16 in which was confirmed that unlike the privilege which applies to "without prejudice" negotiations, the protection afforded by s.111A ERA 1996 cannot be waived. Similarly, the EAT clarified that the protection extends to not only the content of any protected conversation, but to the fact that the protected conversation took place."**

20. At paragraphs 45 and 46, the Tribunal identified the critical issue as being whether the Claimant had left his employment voluntarily, either through resignation or mutual agreement, or had been dismissed from employment. As to this issue the Tribunal held as follows:

> **"47. The focus of the Tribunal's attention was on an e-mail from the Claimant to the Respondent on 3 March 2016, the detail of which is set out at paragraph 24 of this Judgment and a copy of which is at page 127 of the bundle. Arguably the fact and content of this e-mail falls under the protection of Section 111A of the Employment Rights Act 1996. Neither party pursued this argument, preferring instead to focus on the interpretation of the wording within it. The preferred view, is that the e-mail was the result of the S111A conversations, rather than part of them, and that it would be completely artificial for the Tribunal to disregard it given the issues in dispute.**
>
> **…**
>
> **58. The Claimant's statement that his last day of employment with bjss was 3rd March 2016 was clear. It was not ambiguous and a reasonable listener would be very clear it was that day**

if asked the question - "when did the Claimant leave employment?" The Claimant was indicating that his employment was at an end because of the overall terms that he had agreed with the Respondent. The fact that he had yet to negotiate the terms of a settlement agreement or sign up to one or that he was not advised to wait until he had, does not affect transparency of the Claimant's statement. Neither was there any suggestion of "garden leave" - his last day was 3rd March 2016 and he was expecting a payment in lieu of his notice, until his solicitor advised him that he should try for a better offer.

59. It was suggested that the Respondent was being opportunistic in treating the Claimant as having left on 3 March 2016. If anything the Respondent did not jump on the opportunity of exploiting the Claimant's seemingly premature resignation at the first opportunity as many less scrupulous employers might have done. It offered to clarify the position with the Claimant and his legal representatives and left the original terms agreed upon on the table for the Claimant to accept for some time.

60. In contrast the Claimant took the opportunity to argue through his solicitors that his "last day at bjss" was not in fact his last day unless improved terms could be agreed for his departure. This was despite the fact that on 3 March 2016 he had accepted the terms put forward by the Respondent. The Claimant's argument that his resignation should be taken in the context of a continued negotiation may have improved had the Claimant suggested that he would agree to a termination date of 3 March 2016 in any settlement agreement that was to be agreed. It is important, however, that the Tribunal does not look at undisclosed intentions and instead focuses on that language used and circumstances in which they were used and it is quite clear here that the Claimant was saying that he left employment on 3 March 2016.

61. The Claimant argued that his resignation was "without prejudice" and subject to contract. His communication however had separated the two issues referring to his last day of employment at bjss as 3 March or "today" and separately suggesting that his acceptance of 3 months' notice was subject to contract and without prejudice. The argument that the Claimant used, first in the correspondence from his solicitor and again in these proceedings that he remained employed after this date was very much an afterthought rather than a serious consideration at the time the e-mail was drafted on 3rd March 2016.

62. The Tribunal has considered whether this was a mutual termination, conditional on a future event. The difficulty again arises that the language used by the Claimant is not ambiguous and does not open itself up to such an interpretation.

63. Put simply, the Claimant's communication was clear and the fact that he subsequently wished to ask for more money to leave, whether with the benefit of legal advice or not, does not allow him to revoke that resignation. Likewise the resignation does not just fall away because agreed settlement terms could not be reached. It would be precisely the same were an employee to be dismissed, and to then try and negotiate the terms of a settlement agreement. If that negotiation failed that dismissal would stand although the employee in that case may have an unfair dismissal case. There is no reason to treat these circumstances as any different.

64. It is normal to see employees in such situations remain in employment, that is not resign or agree to leave, until the terms of a settlement agreement have been concluded and agreed upon. There is little leverage left to an employee, such as the Claimant, who chooses to resign and then agree the terms of their departure.

65. This takes us back to the issue addressed at insert paragraph 47 above, that is whether the content of the Claimant's e-mail of 3 March 2016 should be disregarded under Section 111A ERA. Had the Claimant indicated that he was prepared to leave on financial terms to be agreed the answer may have been in the affirmative. That however was not the case here - the Claimant had said he was leaving on that day and Section 111A did not then extend to discussions about the terms of a settlement agreement, after he had left - it only covered the confidentiality of negotiations before the termination of employment. Those negotiations had concluded with the Claimant agreeing in his e-mail of 3 March 2016 to leave on the terms proposed by the Respondent, subject to finalizing the terms of the Settlement Agreement. The guidance in the ACAS Code of Practice on Settlement Agreements assumes that discussions about the content of a settlement agreement would take place before an employee resigns, which, unfortunately for the Claimant, was not the case here." (Tribunal's emphasis)

21. Accordingly, having concluded that there was no dismissal, the Tribunal made no findings as to the fairness or otherwise of the Respondent's treatment of the Claimant and his claim was dismissed.

The Law

22. Section 111A of the **1996 Act** provides as follows:

> ***"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."**

23. A complaint under section 111 is a complaint of unfair dismissal. Section 111(1) of the **1996 Act** provides as follows:

> ***"Complaints to employment tribunal***
>
> **(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer."**

24. Thus, the protection conferred by this provision extends only to proceedings in a complaint of unfair dismissal. Complaints of automatically unfair dismissal are not protected (section 111A(3)).

25. This provision (section 111A) was the subject of detailed consideration by HHJ Eady QC in **Faithorn Farrell Timms LLP v Bailey** [2016] IRLR 839 ("**Faithorn**"), where it was claimed that the tribunal had erred in applying common law principles applicable to without prejudice communications to the protected communications regime under section 111A. In that case, HHJ Eady QC held as follows:

> **"38. By referring to complaints under s.111 of the ERA, s.111A(1) makes clear this provision is limited to complaints of unfair dismissal (whatever the particular form of the dismissal for s.95 purposes), save for the complaints of automatic unfair dismissal (s.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 s.111A) that this does not mean that the existence of another claim (eg discrimination) would render admissible *for all purposes* evidence otherwise inadmissible in an unfair dismissal claim under s.111A; in such circumstances the ET would allow the evidence to be admitted for one claim (eg 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.**
>
> **…**
>
> **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 s.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 s.111A). If a party was deliberately seeking to mislead the ET in such a case, I did consider whether s.111A(4) might be relied on to protect against such apparent abuse, but do not think it can: s.111A(4) is worded in the past tense and, as I read it, refers back to the pre-termination negotiations addressed by subsections (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.**
>
> **…**
>
> **45. Returning then to s.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 s.111A but also given the general injunction against contracting out, as provided by s.203 of the 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 s.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), s.203 expressly applies to any provision of the ERA.**
>
> **…**
>
> **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 s.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 s.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 s.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. …'" (Original emphasis)**

26. Several principles emerge from this analysis:

a. First, unlike the position in relation to common law privilege in respect of without prejudice communications, the protection under this section cannot be waived by agreement between the parties;

b. Second, where the protection exists, it extends to both the fact and content of any pre-termination negotiations;

c. Third, that in a claim involving several causes of action including a claim of unfair dismissal, a tribunal may well have to exclude consideration of protected conversations for the purposes of that claim whilst taking them into account for the purposes of other claims.

The third principle might require a tribunal to treat the same evidence differently according to the claim to which it relates. This will not always be an easy task. However, it is the kind of analytical compartmentalisation that tribunals and courts often have to undertake.

The Grounds of Appeal and the Parties' Submissions

27. The Claimant, who was ably represented by Ms Karen Moss of counsel, raised three grounds of appeal:

a. Ground 1: The Tribunal erred in its interpretation of section 111A of the **1996 Act** and should not have excluded the WP offer from its consideration;

b. Ground 2: The Tribunal erred procedurally in not giving the parties an opportunity to make submissions on the section 111A issue before deciding that the WP offer was inadmissible; and

c. Ground 3: The Tribunal erred in concluding that the acceptance email amounted to an unambiguous resignation.

28. In relation to ground 1, Ms Moss submitted that where there is a preliminary question as to whether or not there was a resignation or dismissal, that question ought to be determined by reference to all the relevant circumstances. If there was a dismissal on 3 March 2016 then the Tribunal would have proceeded to consider the question of whether that dismissal was unfair. It is only at that stage, says Ms Moss, that the exclusion of evidence relating to pre-termination negotiations becomes relevant. It was further submitted that it was wholly artificial in the circumstances of this case, to draw a distinction between the WP offer and the acceptance email in considering whether the latter amounted to a resignation; it is only by considering both documents that the effect of the latter could be properly understood.

29. Ms Moss further submitted that the Tribunal failed to consider whether or not the exception under section 111A(4) applied in that there was conduct in this case which amounted to improper behaviour on the part of employer.

30. Mr Nuttman, for the Respondent, did not oppose the argument that the Tribunal ought to have considered the WP offer.

31. As to ground 2, Ms Moss' short submission was that it was a serious procedural error for the Tribunal to determine the issue of admissibility without regard to submissions from the parties. Mr Nuttman also did not oppose this ground of appeal.

32. As to ground 3, Ms Moss submitted that the Tribunal was wrong to conclude that the acceptance email constituted an unambiguous resignation. This was because the Tribunal had failed to take into account all the relevant circumstances, including the WP offer. It was further submitted that if the WP offer had been considered, it would have been clear to the Tribunal that the acceptance email was not a resignation, and that, in any case, the Tribunal's conclusion in relation to the acceptance email was perverse. The Claimant places particular emphasis on the use of the phrase "subject to contract", which appears in both the WP offer and the acceptance email. It is said that the Tribunal failed to take proper or any account of that phrase in reaching its conclusions, and that had it done so it could not have concluded that there was an agreement of any sort reached on 3 March 2016. In other words, the acceptance email was no more than the next stage in ongoing negotiations.

33. Ground 3 of the appeal was strongly opposed by Mr Nuttman. He submitted that the Tribunal did carefully analyse all the circumstances save for the WP offer and that it would have made no difference to the outcome even if the WP offer had been taken into account. Mr Nuttman emphasises that the Tribunal made a clear finding that there was a resignation on 3 March 2016; and that this was a finding in respect of the EDT, which is a statutory construct that cannot be altered retrospectively by agreement between the parties. Reliance was placed

on the fact that the acceptance email appears to be divided into two parts: one dealing with an acceptance of the monetary offer; and another ending his employment with immediate effect with the use of the words, "today will be the last day at BJSS". Mr Nuttman also says that, on any view, the Claimant's arguments fall far short of establishing that the Tribunal's judgment on this issue of fact was perverse.

Discussion

Ground 1: Error in the application of section 111A

34. The protection under section 111A of the **Act** applies to evidence of *pre-termination* negotiations. The chronological dividing line between what is, and what is not, admissible therefore lies on the point at which the contract is terminated. In many cases of unfair dismissal, there will not be a dispute about the effective date of termination and the Tribunal's analysis will be focused on whether that dismissal was unfair. In conducting that analysis, the Tribunal will not consider evidence of the fact or content of negotiations prior to that termination. However, where there is a dispute as to whether or not the contract was terminated on a particular date, the Tribunal would not be in a position to say what evidence should be excluded until that dispute is determined. In such cases, the Tribunal will need to make a finding as to the date of termination before it can properly apply the section.

35. In the present appeal, there was a clear dispute as to the date of termination (see paragraphs 45 and 46 of the Reasons). However, even before reaching a final conclusion on whether the contract terminated on 3 March 2016 (as the Respondent contended) or on 15 March 2016 (as the Claimant contended), the Tribunal chose to disregard without prejudice communications prior to the first of these dates (see paragraph 26 of the Reasons). In my judgment, the Tribunal erred in so doing.

A

36. The proper approach in such cases, in my judgment, is to determine, as a preliminary question, when the contract was terminated. In doing so, the Tribunal must consider all the evidence relevant to that issue. That might include, if relevant, evidence of any negotiations about termination. It is only if the Tribunal concludes that there was a termination on a particular date that it could proceed to consider whether that termination was by the employer (so as to render it a dismissal within the meaning of section 95 of **1996 Act**) and, if so, whether it was unfair. At that stage, (i.e. after determining the EDT) the Tribunal would exclude consideration of any pre-termination negotiations pursuant to section 111A of the **1996 Act**.

37. In the present case, the opposing contentions of the parties meant that two different EDTs were being proposed. The Tribunal's error was to disregard evidence of negotiations prior to the first of those dates even before deciding whether that date was the EDT. If the EDT was found to be the later date, then the acceptance email itself might fall within the category of material excluded by section 111A. Whether or not it did so would depend on whether its contents could be said to amount to evidence of negotiations. The Tribunal mooted this possibility at paragraph 47 of the Reasons. However, the Tribunal's decision to exclude the WP offer and focus on the acceptance email wrongly presupposes that the termination date was 3 March 2016.

38. The analysis thus far has focused on the situation where the EDT itself is in dispute. What if the parties are agreed on the EDT, but in dispute as to whether the termination was a dismissal (within the meaning of section 95 of the **1996 Act**) or a voluntary resignation? Could it be said that even in those circumstances, section 111A of the **1996 Act** should not apply such that evidence of pre-termination negotiations may be taken into account in order to determine the nature of the termination itself?

39. In my judgment, to take that approach would be to limit the scope of the section 111A protection to an unwarranted extent. Section 111A provides that evidence of pre-termination negotiations is inadmissible in "any proceedings on a complaint under section 111". The reference to "any proceedings" would include preliminary issues relating to a complaint of unfair dismissal, including the issue of whether or not there was a dismissal at all. In my judgment, section 111A of the **1996 Act** cannot be interpreted in a way that would permit the admission of evidence of pre-termination negotiations to determine that issue where the EDT is not in dispute. I say that for the following reasons:

a. The statutory wording is clear that the exclusion applies to "any proceedings" on a complaint of unfair dismissal. The exceptions to the exclusion are only those contained in subsections (3) to (5). Had Parliament intended for there to be a further exception where there is an issue as to whether there was a dismissal or resignation then it could have so provided;

b. That interpretation is more consistent with the purpose of the protection, which is to enable parties to discuss an agreed termination without such discussions being held against the employer in any subsequent claim of unfair dismissal. There is no difficulty if it is agreed that there was a dismissal. But what if an employee resigns and claims that he was constructively dismissed? The issue then would be whether the resignation was voluntary or proffered in circumstances where the employer's conduct was such that the employee was entitled to terminate his employment without notice (see section 95(1)(c) of the **1996 Act**). In those circumstances, it is consistent with the statutory purpose that the employee should not be able to rely on matters arising during negotiations as entitling him to resign (unless those matters involved improper behaviour, in which case the exception under section 111A(4) would apply);

c. Whilst this approach might result in having to treat an acceptance of an offer differently from the offer itself (where the acceptance brought the contract to an immediate end), I do not consider that that would create a nonsensical or artificial outcome as contended for by the Claimant. Tribunals will often have to consider material that has been redacted to remove without prejudice content. The fact that such redactions might give an incomplete picture of the remainder is not generally reason to consider the entirety of the document. The same applies, in my judgment, where a document that is admissible (in whole or in part) must be construed without reference to another inadmissible one to which it is a response;

d. There is no inconsistency between this approach and the different one where the EDT is in dispute. That is because the EDT needs to be known before section 111A can be applied at all.

40. Ground 1 therefore succeeds on the facts of this case because the parties were expressly relying upon two different dates of termination. Had that not been the case, and had the only issue been whether or not an undisputed termination on 3 March 2016 amounted to a resignation by the Claimant, a dismissal by the Respondent or an agreed termination, then the Tribunal would have been correct to exclude all evidence of negotiations prior to that date.

41. It is not necessary to consider whether the Tribunal also erred in failing to consider whether there was improper behaviour so as to limit the extent of the protection. The Tribunal erred in applying section 111A at all before even determining the date of termination. It does not assist the Claimant, on the facts of this case, to argue that that application was in itself flawed by reason of the failure to consider whether the exception under section 111A(4) applied. There had not been any submissions on the section 111A(1) issue let alone the more

fact-sensitive issue of whether there had been improper behaviour within the meaning of section 111A(4).

Ground 2: Proceeding without hearing submissions

42. The issue here is whether the Tribunal erred in law in proceeding to determine the section 111A issue without hearing any submissions on the point.

43. The point was clearly an important one; the Tribunal had itself identified that a "significant part of the evidence that the parties wished to rely upon consistent of "without prejudice" communication" (Reasons at paragraph 8), and both sides were in agreement that all the evidence that bore on the issue should be taken into account. In those circumstances, it does seem to me that the Tribunal failed to deal with the matter in accordance with the overriding objective. Whilst I was not taken to any authority on the point, it seems to me that to proceed as the Tribunal did, in circumstances where the parties had agreed on admissibility in relation to a critical issue, amounted to a failure to deal with the case fairly and justly or in a manner proportionate to the importance of the issue. It would have been proportionate to invite submissions from the parties before deciding the issue, given its importance.

Ground 3: Did the acceptance email amount to an unambiguous resignation?

44. Mr Nuttman submits that if the appeal is allowed under grounds 1 and 2 then there is no need to consider ground 3 as the matter would be remitted to the Tribunal to consider the additional evidence that it had failed to take into account. Whilst there is some force in that point, I consider that it is appropriate to address ground 3, not only because I heard detailed submissions on it from both parties, but also because, if the matter is remitted (as to which see below), the conclusions of this Court might inform the Tribunal's approach upon remission.

45. Ms Moss' first point under this ground was that it was an error of law to conclude that the acceptance email amounted to an unambiguous resignation without taking account of all the circumstances, including the WP offer. I was referred to a number of cases highlighting the importance of the surrounding circumstances in determining whether words used, whether orally or in a document, could be said to amount to a resignation. These included **J & J Stern v Simpson** [1983] IRLR 52 (where it was held that the words used must be viewed in the context of the facts); **Sovereign House Security Services Ltd v Savage** [1989] IRLR 115 (where it was held that the circumstances might lead to the conclusion that notwithstanding the use of unambiguous language, there was no real resignation); and **Willoughby v CF Capital plc** [2011] IRLR 985.

46. Of course, the reason that the Tribunal did not take the WP offer into account was because it had applied section 111A of the **1996 Act** to exclude it. For the reasons set out under ground 1, I find that the Tribunal was wrong to do so, but only because there was a prior issue to be determined, which was the date of termination. The Tribunal would not have erred, in my judgment, had the date of termination not been in dispute and the issue was whether the termination was the result of a resignation or a dismissal by the employer. That is the effect, in my judgment, of section 111A of the **1996 Act** properly applied. I do not consider that that effect is limited by the principles stated in the decisions in the preceding paragraph. If the proper application of the statutory provision requires certain evidence to be excluded, then the decisions reached in different circumstances (and prior to the enactment of section 111A) cannot override that.

47. The second point made under this ground is that, had the WP offer been considered, the Tribunal would have been bound to conclude that there was no resignation. This was because both offer and acceptance were expressly stated to be "subject to contract".

48. It is right that the use of the phrase "subject to contract" can prevent a contract from being formed: See **Confetti Records (A Firm) and Others v Warner Music UK Ltd** [2003] EWHC 1274 (Ch) at [65] and [66], where the use of the phrase was considered in the context of a non-property transaction. The Tribunal did consider the effect of those words (and the Claimant's use of the term "without prejudice") at paragraph 61 of the Reasons. However, it considered that the acceptance email had "separated the two issues referring to his last day of employment at bjss as 3 March or "today" and separately suggesting that his acceptance of 3 months' notice was subject to contract and without prejudice". Mr Nuttman also submitted that there was this separation. He relied upon the Claimant's use of a semi-colon between the acceptance of the financial offer and the statement that, "today will be the last day at bjss".

49. In my judgment, this separation between these two parts of the same sentence in the acceptance email was unfounded:

a. It is inappropriate to construe the use of a semi-colon, in the context of a short email sent on a mobile device, as having the disjunctive effect contended for;

b. The offer itself did not contain the separation contended for, as it refers to the payment of 3 months' salary in return for the immediate end of employment. Had the Tribunal taken that offer into account (as it would have done if it had not applied section 111A prematurely) then it might well have concluded that there was no proper basis for separating the acceptance into different parts, one subject to contract and one not;

c. The Tribunal, in any case, appears to have read far more into the reference to the "last day at bjss" than the facts warranted. It is notable that at paragraph 61, the Tribunal states that the Claimant had referred to his last day of "employment", whereas that word does not in fact appear in the acceptance email. The reference to the "last day" was arguably not wholly unambiguous. It could, as Ms Moss argued, just as easily have been a reference to his last day on the premises before going on garden leave (albeit the notion of garden leave was rejected by the Tribunal here), or his last day on the premises given the expectation pursuant to the agreement, subject to contract, that his employment would soon be coming to an end. Having the full context of the negotiations in mind might have led to the Tribunal reaching a different view about the effect of those words. Mr Nuttman contends that the reference to the last day cannot be anything but synonymous with the end of employment because of the terms of the offer, which referred to an immediate termination of employment. Of course, that is not something which the Tribunal had in mind because of its exclusion of the WP offer. In any event, Mr Nuttman's argument (like the Tribunal's conclusion) ignores or fails to give effect to the fact that the acceptance was expressly stated to be "subject to contract".

50. Mr Nuttman also submitted that the Tribunal here has made a finding of fact as to the EDT, which is a statutory construct that cannot be altered whether by agreement between the parties or otherwise. The difficulty with this point is that, as I have found under ground 1, the Tribunal erred in excluding the WP offer in determining what the EDT was. It is possible that the Tribunal would have come to a different conclusion, namely that the EDT was not 3 March 2016, if the full circumstances were taken into account.

51. Ground 3 therefore succeeds in that the Tribunal erred in concluding that the acceptance email (without reference to the WP offer) amounted to an unambiguous resignation.

Disposal

52. This appeal therefore succeeds. The next question is disposal. The parties were divided on this issue. Ms Moss contends that if ground 3 succeeds and the Tribunal had erred in concluding that there was unambiguous resignation on 3 March 2016, then the EAT is in a position to decide the issue of the fairness or otherwise of the dismissal itself. That is because nothing significant happened between 3 and 15 March that could amount to a termination, and that it was only by the letter from the Respondent dated 15 March 2016 that the contract was finally brought to an end. Ms Moss reminds me that there was a concession that if the termination was on 15 March 2016, the Respondent would "struggle to show that a dismissal (if one existed) was procedurally fair and that it would rely on arguments of Polkey, contribution and mitigation to limit any remedy" (Reasons at paragraph 3). In the alternative, Ms Moss submits that the matter should be remitted for consideration by a fresh Tribunal on the basis that the decision here was totally flawed.

53. Mr Nuttman submits that the matter must be remitted to the same Tribunal. He says that the decision was not totally flawed because there was only a failure to consider one letter and that the Judgment is otherwise complete. Mr Nuttman goes further and says that as the Tribunal has already heard the relevant evidence and had submissions (since the hearing), the matter could be remitted for determination on the papers. There would, he submits, be only one question for the Tribunal which is whether the WP offer makes any difference to its conclusions.

54. In my judgment, it would not be appropriate for the EAT to proceed to determine the matter. The EAT should only proceed to determine an issue where there is only one possible outcome that the Tribunal could have reached had it correctly directed itself in law: **Jafri v Lincoln College** [2014] ICR 920. In the present case, it cannot be said that there is only one possible outcome. If the WP letter were taken into account along with the other circumstances of the case, the Tribunal might conclude that there was no resignation on 3 March 2016 and/or that that was not the EDT, but there is no certainty that it would. Moreover, it is clear that the Tribunal took account of conduct subsequent to the acceptance email, which it considered was not consistent with the Claimant regarding himself as still employed. It is possible that the Tribunal might view that conduct in a different light if the full context of the negotiations were taken into account.

55. The matter must therefore be remitted. The question then is whether it should be remitted to the same Tribunal or to a freshly constituted one. I was reminded of the well-established principles summarised in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763:

a. Proportionality: Although, as Mr Nuttman says, there will only be one additional item of evidence to consider, the Tribunal would have to revisit many of its findings in the light of that evidence. That said, the Tribunal would in all likelihood still be able to deal with this matter in less time than a freshly constituted one.

b. Passage of time: It has been over a year since the Tribunal heard the evidence. However, I note that the Reasons were not promulgated until January 2017. Furthermore, the Tribunal has already had reason to reconsider the matter in May 2017 pursuant to the EAT's Order. As such, this matter is not as stale for this Tribunal as might appear from the date of hearing.

c. Bias or partiality: This is not relevant here.

d. Totally flawed decision: Ms Moss submits that this was a totally flawed decision as the entire case hinged on the meaning and effect of the acceptance email, and the Tribunal should have looked at that in context. Mr Nuttman's point, forcefully made, was that the Tribunal only missed one letter out and the majority of the decision was not affected. It is right to note that the WP offer was directly relevant to a proper understanding of the effect of the acceptance email, which was in the Tribunal's own words, "The focus of the Tribunal's attention …" (Reasons at paragraph 47). However, notwithstanding that focus, it cannot be said that the decision was totally flawed. The Tribunal missed out one part of the evidence which it now needs to reconsider. It seems to me that this is precisely the kind of thing that the Tribunal might have had to do had there been different causes of action in the claim, some (such as automatic unfair dismissal or discrimination) where the exclusion does not apply and another (ordinary unfair dismissal) where it does;

e. Second bite of the cherry: This is not the kind of case where the EAT could not have confidence that "with guidance, the tribunal, because there were matters which it had not, or had not yet, considered at the time it apparently reached a conclusion, would be prepared to look fully at such further matters, and thus be willing or enabled to come to a different conclusion".

f. Tribunal professionalism: There are no concerns in this regard.

56. Taking account of all of the above, it seems to me that this case should be remitted to the same Tribunal. The Tribunal will reconsider its conclusions as to the date of termination in the light of the WP offer and all the other circumstances of the case, and having regard to the

analysis in this Judgment. Having made a determination as to the date of termination, the Tribunal will proceed to consider the remaining issues in the case insofar as they remain live and after applying section 111A of the **1996 Act** to exclude evidence of pre-termination negotiations. I do not direct that this exercise of reconsideration be done on the papers.