EMPLOYMENT TRIBUNALS

Claimant: Mr D MacFaden

Respondent: GCA Altium Capital Limited

HELD AT: Manchester **ON:** 18 December 2017
23 January 2018
(in Chambers)

BEFORE: Employment Judge Whittaker
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mrs C Ashiru, Counsel

JUDGMENT

The judgment of the Tribunal is that the respondent is not entitled to without prejudice privilege in connection with discussions between the claimant and the respondent on 19 January 2016 or subsequent discussions relating to or following the discussions on 19 January 2016.

REASONS

1. As a result of orders made in the London Central Employment Tribunal on 15 December 2016 by Employment Judge Goodman, preliminary issues were listed for consideration at a preliminary hearing. Those issues are identified at paragraph 10(1) of the Order of Employment Judge Goodman. They are:-

(a) Admissibility in evidence of the discussion 19 January 2016. The preliminary hearing was set to consider the following two questions:-

(i) Was there a dispute between the parties capable of settlement at the time of the discussion on 19 January 2016?

(ii) If yes, is privilege lost because of unambiguous impropriety?

2. Employment Judge Goodman considered that it would be prudent for the Preliminary Hearing to be listed for two days, but in fact it was listed in the Manchester Employment Tribunal for only one day. Various adjournments were granted in order to accommodate the health difficulties of the claimant. The case was initially heard for one day on 18 December 2017. The case then went part-heard and was re-listed for another full day on Thursday 4 January 2018. The evidence of the parties and their submissions were heard to a conclusion on 4 January 2018 but the case had to be then again re-listed for sufficient time on 23 January 2018 for the Tribunal to come to a judgment on the two issues identified above.

3. The claimant had been unable to attend the original Preliminary Hearing in London in December 2016 due to his ongoing health difficulties. In advance of the hearing on 18 December 2017 the claimant wrote to request that reasonable adjustments be made to the timetable of the Tribunal to accommodate the claimant's ongoing health issues. On the first day of hearing the Tribunal spoke with the parties by way of introduction and clarification for approximately ten minutes at 10.00am. The Tribunal then adjourned to read witness statements and relevant documents until 11.50am. The respondent's witness, Mr Knowles, then gave evidence from 11.50am until 1.10pm. The claimant was involved in cross examining Mr Knowles, with assistance and support from the Tribunal for one hour 20 minutes. The Tribunal then broke for lunch for one hour five minutes until 2.15pm. The Tribunal then continued to sit from 2.15pm until 3.50pm, a time of one hour 35 minutes. The claimant had requested that the sessions of the Tribunal did not greatly exceed 1½ hours and the Tribunal made that reasonable adjustment without any difficulty at the request of the claimant. Furthermore, at the beginning of the first day of hearing the Tribunal indicated very clearly to the claimant that if at any stage he wanted a break or a short adjournment that he should not hesitate to ask, and the claimant indicated very clearly that he understood that such a request could be made.

4. On 4 January 2018 the Tribunal began at 9.52am. Again there was a short discussion with the claimant about the timetabling of the hearing in December, and the claimant was again told by the Tribunal that the Tribunal would have no difficulty in making further adjustments, and again the claimant was asked specifically to let the Tribunal know if at any time he needed a break or an adjournment over and above the adjustments which the Tribunal would make. The claimant began giving his evidence and was cross examined at 10.05am. The tribunal took a break of 15 minutes at 11.15am. The evidence of the claimant resumed at 11.30am. The Tribunal broke for lunch at 12.40pm and resumed at 1.45pm, an arrangement which the claimant described as "perfect". The Tribunal resumed at 1.45pm. The Tribunal confirmed with the claimant that he was happy to continue. The claimant ended his evidence at 2.07pm. Submissions were then made both by the claimant and by counsel for the respondent. Those were concluded at 3.10pm when the matter was adjourned until 23 January 2018 for the Tribunal to come to a judgment on the issues which it was charged with deciding at the Preliminary Hearing.

Witnesses and Evidence

5. The respondent called one witness, Derek Knowles. He gave evidence on oath and by reference to a witness statement comprising seven pages and 21

paragraphs and which Mr Knowles signed and dated 2 March 2017. The claimant gave evidence on oath by reference to a witness statement dated 31 March 2017 comprising of 14 pages and 52 paragraphs. The claimant did not sign that statement but he was not requested or required to do so. The claimant confirmed on oath that the statement was true and accurate, as did Mr Knowles at the beginning of giving his evidence in respect of his own witness statement.

6. The Tribunal was presented with three bundles of documents but it almost exclusively worked from a bundle which was marked with tab B and comprised of 657 pages. The Tribunal in other bundles had the documents which were included in that numbered index but were marked with tabs A, B and C. Those documents were, as the Tribunal has just commented, included in the index. The respondent had also provided an extract bundle which they described as the proposed reading list. The Tribunal did not consider that bundle. Instead during the reading time the Tribunal paid attention to the content of the two witness statements and the documents in those witness statements which were referred to by Mr Knowles and by the claimant. At the conclusion of the evidence the claimant made reference to a written submission comprising 31 pages. The respondent referred to a skeleton argument which was marked by the Tribunal as "current" in order to differentiate it from a skeleton argument which had been prepared by the respondent and submitted in advance of the Preliminary Hearing.

Findings of Fact

7. The Tribunal made the following findings of Fact:

7.1 Derek Knowles had management responsibilities for the respondent company for almost seven years from December 2009 to October 2016 when Mr Knowles left the respondent company to take up a different job. The claimant has been employed by the respondent company as an analyst in the London based corporate finance team of the respondent company since 17 March 2011. The respondent company is an investment banking firm. The claimant continues to be employed with the respondent company but has been continuously absent from work since 16 September 2015, a period approaching 2½ years.

7.2 At paragraph 5 of his witness statement Mr Knowles set out a schedule of the absences of the claimant. This schedule was not disputed by the claimant. It showed that the claimant had a total of 13 separate periods of sickness absence from 14 April 2014 and then except for a short period when the claimant was able to return in September 2015, he had been continuously absent from work. The claimant was continuously absent from 10 October 2015.

7.3 There was no suggestion by the claimant that the respondent company had been anything but supportive of the claimant during the course of his periods of sickness absence. In October 2015 the terms of the policy of the health insurance of the respondent company were changed to include hospital based psychiatric care. This was at significant cost to the respondent company, but it was nevertheless a

cost which the respondent company was happy to incur in order to provide ongoing support, if necessary, to the claimant.

7.4 The respondent company also paid the claimant full pay beyond his contractual entitlement during his periods of absence, and continued to do so in the later months of 2015, as there was at that stage a hope/expectation that the claimant would very soon be able to return to work.

7.5 For the purposes of this Preliminary Hearing it is not necessary to list the detailed steps which were taken by the respondent company during the prolonged absence of the claimant in connection with ensuring that the claimant submitted sick notes and/or the steps which were taken to obtain appropriate medical advice. It is sufficient to note that the claimant began a phased return to full-time work on 29 June 2015 but unfortunately some 2½ months later the claimant again began a further period of prolonged sickness absence by the middle of September 2015. That process of phased return was supported by the claimant's treating psychiatrist in observations which were made in April 2015.

7.6 As the phased return had not been anywhere near as successful as everyone had hoped, a further medical report was then obtained on 11 November 2015. This report appeared in the bundle at pages 80/81. It was the report of a consultant psychiatrist. It confirmed that as a result of a change in the medication which was being supplied to the claimant, that he was "now making very good progress". The medical expert went on to confirm that the claimant would be fit to resume his duties within the next two weeks and that he should be able to "gradually resume full-time working capacity". There was some reservation expressed about the fact that the improvement in the condition of the claimant was associated with a change in medication, but the consultant went on to confirm that the progress of the claimant had "continued to be pleasing". The conclusion of the report was that the claimant should be able to render regular service to the company in the future. It was, therefore, anticipated that the claimant would be fit to return to work on or about 25 November 2015.

7.7 Unfortunately on 17 November 2015 the claimant indicated that he had picked up a cold/flu virus and that his psychiatrist had now suggested that his return to work should be postponed for another week. A copy of that email was at page 89. The tone of the email on the part of the claimant was clear and upbeat. It began with the words, "Ah, the best laid plans of mice and men". It was a friendly email. The claimant described the psychiatrist as "the shrink".

7.8 By 25 November 2015, the anticipated date of return, the claimant was still unfit to return to work as a result of what the claimant described (page 93) as "some sort of virus turned chest infection". Again the claimant jovially referred to his psychiatrist as "the shrink". The claimant expressed the hope that he would be able to return the following week but understandably said that that depended on his

continuing recovery “over the next few days”. There was at that stage, therefore, an anticipation on the part of the respondent that the claimant would be able to return to work in early December 2015.

7.9 However, on 6 December 2015 the claimant wrote to say that by now he had picked up a stomach bug and that he was himself very frustrated by the delay but that he was going to see his psychiatrist that week to see where things were. On 13 December 2015 the claimant indicated that “things are still in the process of resolving themselves”. Again the claimant said that he was going to see and rely upon the advice of his psychiatrist about his fitness to return to work. There was no date suggested in the claimant's email of 13 December 2015 (page 97).

7.10 There was ongoing concern on the part of the respondent that although the claimant was indicating in emails that he was unfit to return to work, he was not submitting sick notes to confirm that as certified by a relevant medical practitioner. Mr Knowles wrote to the claimant in a letter on 18 December 2015 (page 99) to confirm that there were numerous occasion on which medical certificates had not been produced by the claimant to cover his periods of absence. Mr Knowles pointed out that the external payroll provider to the respondent company was unable to process sick pay without the respondent company being able to send the necessary medical certificates to the payroll provider. Mr Knowles also pointed out that the claimant was in effect being overpaid because he was being paid money for which he had not been submitting the necessary medical certificates. The claimant was also advised that the company continued to pay the claimant in full, which was beyond his contractual entitlement. Mr Knowles commented in that letter, using the words “we reserve our position on this”. Mr Knowles was clearly frustrated and that is demonstrated by the tone of his letter of 18 December 2015. The claimant was told that he was not providing the certificates and as he was equally not attending work that he was in breach of the obligations of the respondent’s sickness policy. The claimant was then told by Mr Knowles that with effect from 1 January 2016 the claimant would be put on zero pay. Mr Knowles however ended the letter by saying that if the claimant wanted to discuss “any aspect of this letter please do not hesitate to contact me”.

7.11 The response of the claimant was in an email (page 100) on 24 December 2015. The claimant was still unfit to return to work, and this was now over a month from the time when the respondent had, on the basis of the medical evidence, expected the claimant to be able to return. The claimant confirmed that he had seen his psychiatrist the previous day, 23 December 2015. The claimant commented that things seemed to be getting back on track, and furthermore that the beneficial effects of the change of medication seemed to be continuing. However, the claimant indicated that the advice he had received from his consultant was that they should “play things conservatively” and that

the claimant was therefore going to see his psychiatrist again on 6 January 2016.

7.12 The claimant ended his email of 24 December 2015 by acknowledging that sick notes were missing and pointed out that he would see his GP to sort out that discrepancy. He pointed out that his consultant psychiatrist had kept his GP fully informed. The claimant was by now living back in Manchester for support during his continuing sickness absences. The claimant was, however, registered with a GP in London and this obviously created significant challenges for the claimant in obtaining the sick notes which were quite properly being requested by Mr Knowles. The claimant had no other reason to travel to and from London. The claimant did not, therefore, have the usual arrangement that one might expect between a patient and a GP where he could make a short trip to the relevant surgery and collect the necessary sickness documentation. That would have necessitated the claimant travelling specially from Manchester to London in circumstances where due to the current state of his mental health the claimant was being advised by his consultant that the effects of both his physical and mental health were such that he continued to be unfit to return to work.

7.13 The Tribunal has commented above that the letter which appeared at page 99 dated 18 December 2015, from which the Tribunal has quoted widely, was sent to the claimant on 18 December. However, the Tribunal was unable to make a finding of fact as to whether or not that letter was actually ever sent. Mr Knowles indicated that he could not be certain that it had been sent and all previous correspondence had been sent to the claimant by email. There was no evidence that the wording of that letter had ever been prepared and included in an email to the claimant, and neither was there any evidence that it had been sent by letter. Equally, in the emails which were received from the claimant at or about 18 December there was no comment made by the claimant about the receipt of that letter, and neither was there any indication from the claimant that he had received such a communication. He did not raise any queries about the letter despite its clear indication about ongoing threats to the financial circumstances of the claimant. On balance, therefore, the Tribunal finds that that letter was never sent to the claimant, either in the post or as an email, but that it nevertheless clearly indicated the state of mind of Mr Knowles as at 18 December 2015, and the general ongoing frustration of the company with regard to the absence of the claimant despite the clear indications which had been given on 11 November 2015 that the claimant would shortly be able to return to work.

7.14 Mr Knowles in his witness statement (paragraph 10) comments that the respondent company was by now “deeply frustrated”. The Tribunal finds that that was genuinely the position not only with Mr Knowles but also with other senior representatives of the respondent company.

7.15 The Tribunal accepted that quite understandably Mr Knowles had not dealt with the absences of the claimant, the issues relating to his pay

and the issues relating to the absence of medical certificates on his own and in isolation of other senior managers and representatives of the respondent company. As Mr Knowles said in his statement at paragraph 11, he remained in regular contact with his line manager, Sam Fuller, and with Phil Adams and Neil Myers. The frustration of the respondent company and the involvement of the senior management team is clear from the email sent by Mr Knowles to the claimant on 13 December 2015 (page 98) that he is copying in Sam Fuller and that there is an obvious sense of frustration on the part of the respondent company. Indeed Mr Knowles begins his email by saying "I do not want to sound like a broken record". Furthermore, there was clear evidence that the claimant himself had involved his line manager in correspondence which he had sent to the respondent company at the same time as he was sending correspondence to Mr Knowles. An example of such correspondence is at page 89 in an email dated 17 November 2015 when Mr Knowles first of all says that the claimant is going to be unable to return to work despite expectations to the contrary. That email is copied into his line manager, Sam Fuller. Equally the response of Mr Knowles to the claimant, again at page 89, is sent not only by Mr Knowles to the claimant but equally Mr Knowles copies in Mr Fuller.

7.16 It was very clear that by now there was frustration not only on the part of Mr Knowles but also on the part of the claimant's line manager, Mr Fuller. That is clear from the tone and content of emails exchanged between Mr Fuller and Mr Knowles on 17 November 2015. Those were included in the bundle at page 90.1 and 90.2. Indeed Mr Fuller, who held the position of Managing Director, was very clear in his views when he indicated on 17 November 2015 that the company "might still be getting these emails in five years' time", referring directly to the ongoing health issues of the claimant which were now directed more towards his physical than his mental health.

7.17 The involvement of Mr Fuller continued into late November as is clear in emails at pages 92 and 93. However, despite those frustrations the company continued to be largely sympathetic towards the circumstances of the claimant, and that was reflected in the tone and content of an informal email which was sent by Mr Fuller to the claimant (copying in Mr Knowles) on 6 December 2015 (page 95) when the claimant again indicated that due to a stomach bug that he was unable to return to work.

7.18 It is clear from emails at pages 102.1 on 18 December 2015 and then 6 January 2016 that by now the senior management of the company, Neil Myers and Phil Adams, were also very much shining the spotlight on the ongoing absences of the claimant and the difficulties that was causing, bearing in mind that the anticipated return of the claimant in November 2015 had evaporated. Neil Myers wrote to Mr Knowles on 18 December (page 102.1) in response to an email from Mr Knowles to Mr Myers, again on 18 December at 14:57 at page 102.2. Mr Myers, as a member of the senior management of the company, was telling Mr

Knowles that he, Mr Myers, even at his senior level, had "got the green light". Mr Knowles himself was at that time recovering from an operation, but in his email dated 18 December 2015 Mr Myers told Mr Knowles that there was agreement from the senior management of the company that Mr Knowles should contact the claimant after the "festive break" with a view to having a meeting face to face. Mr Myers indicates that that discussion should be a "without prejudice" chat. That email to Mr Knowles talks about the company making an "offer" to the claimant and in particular talks about extending the benefit of health cover in view of the claimant's ongoing sickness absence. The suggestion of the use of the words "without prejudice" was made by Mr Knowles in his email of 18 December at 14:57 (page 102.2). The Tribunal finds it of significance that it was Mr Knowles who first used those words "without prejudice" and that they were not words which were suggested to him by others. Furthermore in that email (page 102.2) Mr Knowles, against the background of his HR expertise, was indicating that the alternative to a "without prejudice" route and having a "sensible conversation" was that if agreement was not reached with the claimant on that basis, that the company would then "have to go down the by the book route" and invite the claimant to a disciplinary hearing. Mr Knowles was also indicating, as he had done in his draft letter of 18 December to which the Tribunal has already referred, that in the absence of the necessary medical evidence that the claimant could also still be put on zero pay during that disciplinary process if agreement cannot be reached with the claimant.

7.19 Understandably, no steps were taken to write to the claimant before the festive period, and that equally took into account the fact that Mr Knowles had medical challenges of his own at that stage. Mr Myers, however, wrote to Mr Knowles on 6 January 2016 (page 102.1) giving him a "nudge on this". He indicated to Mr Knowles that he thought that it would now be necessary to meet with the claimant "sooner rather than later". Again Mr Myers makes specific reference to the fact that the "plan" was for "an HR chat to become a 'without prejudice' chat".

7.20 Mr Knowles, however, had already written to the claimant the previous day, 5 January 2016 (page 102). Mr Knowles again made reference to the missing medical certificates and asked the claimant if he would "meet up", indicating that that could be in Manchester. Mr Knowles asked the claimant to let him know where and when suited the claimant. Mr Knowles confirmed to Mr Myers that he had already, in effect, beaten Mr Myers to it by writing to the claimant the previous day. In that email (page 102.1) Mr Knowles tells Mr Myers once again that if there was no response to that email of 5 January 2016 that he would have to issue a letter "giving a date and time of a formal meeting". In fact Mr Knowles went further to say that if that was necessary and if the claimant did not attend at such a formal meeting then the company would even perhaps go ahead and "deal with him" without his input. Mr Knowles recognised in that email that to take such a step would be harsh, but he also expressed his own view that "what can we do?".

7.21 This exchange of emails between Mr Myers and Mr Knowles clearly indicated a determination on the part of the respondent by early January 2016 to make some progress to draw the issues relating to the claimant to a conclusion one way or another. It is clear from the emails sent by Mr Knowles that he had in mind, as a result of his HR experience, two possibilities. One was what he believed would be a face to face "without prejudice" discussion with the claimant, and the alternative was that if either the meeting was declined by the claimant or alternatively if some agreement could not be reached between the respondent and the claimant about the way forward, that Mr Knowles was aware that the real alternative was formal disciplinary proceedings in view of the claimant's continued absence. The Tribunal refers again to the draft letter of 18 December 2015 in which Mr Knowles had also made clear the possibility that the claimant would not be in receipt of pay from the start of 2016, and that the company might even adopt the stance that the claimant had been "overpaid" and was reserving its position on this. Of course that letter was never sent in the opinion of the Tribunal, but nevertheless it reflects very clearly the forthright thinking of Mr Knowles as at 18 December 2015 (page 99).

7.22 At the conclusion of paragraph 11 of Mr Knowles' witness statement, in his final sentence, he says that the ongoing circumstances "inevitably led Altium to consider the possible commencement of a formal capability procedure". Mr Knowles also concludes that sentence by saying that this also raised the "possibility and likelihood of his dismissal". The Tribunal finds as a fact that that was a real possibility which was in the mind of Mr Knowles and which had been shared with Mr Myers in the emails to which the Tribunal has referred above on 18 December 2015 and 6 January 2016 (pages 102.1 and 102.2).

7.23 The response of the claimant to the invitation to "meet up" which had been sent by Mr Knowles to the claimant on 5 January 2016 was an email from the claimant dated 11 January 2016 (page 103). The email began with an exchange of the usual pleasantries between Mr Knowles and the claimant. The claimant alluded to the geographic difficulties which the claimant faced in obtaining and providing medical certificates to the respondent company. The claimant, however, expressed himself very clearly in positive terms about a "meet up" saying "yes absolutely to arranging a meet up".

7.24 The claimant ended that email of 11 January 2016 by referring to the ongoing effects of his medication and saying that as a result of understanding that his second medication "has some quite challenging side effects" he "was therefore wandering what the potential repercussions would be from an HR perspective of handing my notice in?".

7.25 Mr Knowles responded on 11 January asking the claimant to let him know what date and time worked for him and that "we can have a chat then" (105). In the opinion of the Tribunal it was also important to note that on 11 January Mr Knowles copied in both Mr Myers and Sam

Fuller into the email which he had received from the claimant on 11 January. The response of Mr Fuller was "thank goodness for that" as shown in an email on 11 January, which Mr Fuller sent to Mr Knowles but which he equally copied to Mr Myers and Mr Adams. This was continuing evidence of the involvement of four members of the management and senior management of the respondent company. Mr Knowles, copying in those three same members of the senior management team, wrote on 11 January, "It's not over till the fat lady belts one out, but we are tickling her ivories!!".

7.26 There is further evidence that the respondent company was thinking constructively about what terms of settlement it might reach with the claimant in an email dated 11 January sent by Mr Adams again to Mr Knowles, Mr Fuller and Mr Myers (110). He comments, "If we can extend his medical cover to help smooth things we should consider". Furthermore, in an email of 11 January (110.1) Mr Myers, again involving the other three members of the senior management team, comments that "at least this is a move in the right direction". He directs Mr Knowles to continue "as we planned to arrange the 'without prejudice' chat with him when he is up next week, and let's exit him painlessly if possible". Again Mr Myers indicates to Mr Knowles that extending medical cover was relatively inexpensive and practical and that that was something which Mr Knowles could use as part as discussions to seek an agreement with the claimant. Mr Knowles responded (111) that he would "keep that up his sleeve" but that he would "see where we get to".

7.27 The desire on the part of the respondent company to reach some conclusion with the claimant was again expressed in an email from Phil Adams to the other three members of the senior management team on 12 January (113), in which Mr Adams says, "when is he planning to resign? Can't we bring to a head?". This was in a response to an email which Mr Knowles had again sent to the three senior managers about the confusion relating to the payment of the claimant of pay beyond his contractual entitlement and the fact that the claimant had still not submitted sick notes.

7.28 There was clearly some significant misunderstanding on the part of the claimant's line manager, Sam Fuller, however, about what the claimant had asked for in connection with his possible resignation. In an email dated 12 January (114) Mr Fuller appeared by then to have anticipated that the claimant was actually going to hand in his notice, and that at that stage all the outstanding issues could be wrapped up. Mr Fuller was recognising (perhaps with slightly inappropriate language) that the company at that stage was hoping to reach an agreement with the claimant whereby his employment would come to an end.

7.29 The claimant and Mr Knowles eventually agreed to meet at Starbucks near the Town Hall in Manchester at 11.00am on Tuesday 19 January, and Mr Knowles informed the three other members of the management team of that in an email dated 14 January (128).

7.30 In advance of that meeting again Mr Fuller in an email (page 130) to the other three members of the management team expresses himself in language which clearly indicates that he is committed, on behalf of the company, to reaching an agreement with the claimant which would involve the termination of his employment. He goes to say that waiving a refund of the overpayment of sick pay and extending his sickness cover would "get my vote". Mr Myers equally in an email on 14 January (130) is asking Mr Knowles to check what the cost of extension of health cover would be for three/six months, and he goes on to suggest that "we take it from there".

7.31 In an email at page 131 (14 January) Mr Myers again involving all four members of the management team indicates that it is probably best for all of them to have ten minutes on the phone rather than "ping ponging our thoughts". This is further evidence of the continued involvement of all four members of the management team.

7.32 The claimant and Mr Knowles met as arranged in Manchester at Starbucks on 19 January. At the conclusion of paragraph 13 of his witness statement Mr Knowles says that at the beginning of the discussions with the claimant he stated that the meeting was to discuss what the next steps should be, and that Mr Knowles specifically stated to the claimant that he needed to have a "without prejudice" conversation with the claimant. He goes on to say that he asked the claimant to confirm that he understood what the implications of having such a discussion were, and the claimant confirmed that he was aware of what that meant. The respondent in evidence said that the claimant enlarged on that by saying that he had seen "without prejudice" as a phrase on corporate finance documentation during the course of his employment with the respondent company. Mr Knowles said that the claimant did not ask any questions or seek any clarification as to what the use of "without prejudice" meant. In contrast the claimant steadfastly denied in his own witness statement and in evidence that Mr Knowles had ever used the phrase "without prejudice".

7.33 During the course of giving his evidence under cross examination the claimant, for the very first time, indicated that what Mr Knowles had actually said to him was that the discussions between himself and Mr Knowles would just be between himself and Mr Knowles, and that that is what Mr Knowles had said to him. The claimant painted the picture of Mr Knowles indicating that the discussions were something which were private between himself and the claimant, and that it was in that way that Mr Knowles had expressed himself to the claimant about the format of the discussions which were taking place between the claimant and Mr Knowles.

7.34 The claimant was unable to provide any explanation to the Tribunal as to how for the first time, and on the second day of the hearing, that he had for the first time made this claim. Mr Knowles had given his evidence on the first day of hearing and had been excused attendance to the second day. The point which was being made now by the

claimant was not a point which had been put to Mr Knowles in cross examination by the claimant. It was not an interpretation of the explanation which Mr Knowles had allegedly offered which was previously put by the claimant to the respondent at all, and it was not something which he had included in any of the significant volumes of correspondence which had subsequently been exchanged between the claimant and the respondent, and the claimant and the respondent's representatives, and the claimant and the Tribunal. This comment was made by the claimant under cross examination at a time when he was being pressed by counsel for the respondent to accept that Mr Knowles had in fact quite clearly told the claimant that the discussions between them were to be conducted on a "without prejudice" basis. The Tribunal found it extremely troubling that the claimant only offered this explanation and suggestion for the very first time under cross examination.

7.35 The Tribunal finds as a fact that Mr Knowles did begin the discussions with the claimant by using the phrase "without prejudice" and checked with the claimant that he understood that, and questioned the claimant as to whether or not he understood the implication of the use of that phrase "without prejudice". The Tribunal accepts the evidence of Mr Knowles that the claimant indicated that he had no concerns or misunderstandings about the use of that phrase. The Tribunal rejects, by contrast, the evidence of the claimant which he introduced for the first time during being cross examined, that Mr Knowles had instead given him some personal reassurances that the content of the meeting would only ever be considered between Mr Knowles and the claimant. That was utterly inconsistent with the tone and content of the emails which had been exchanged prior to the meeting in Manchester between the four members of the management team of the respondent company. The Tribunal took careful note not only of the content of those emails, to which it has referred above, but also to the tone of those emails which were exchanged between the senior management team. The Tribunal has already alluded to the fact that the phrase "without prejudice" was used in those exchanges between the senior management team, and it was therefore, in the opinion of the Tribunal, clearly the intention of the management team to have those discussions on a "without prejudice" basis. Mr Knowles, from his HR experience, was aware of the protection that would give the company if the discussions were held on that basis, and the Tribunal finds that it was important for him to set out the structure of those discussions for the claimant at the outset of the meeting and to do so on the basis of the use of the phrase "without prejudice" and equally seeking an assurance from the claimant that he was aware of that and that he did not have any questions or uncertainty about what the use of that phrase meant.

7.36 In paragraph 8 of his witness statement the claimant says that Mr Knowles "made it clear to the claimant" that the respondent "wanted" to bring the claimant's employment to an end, and that Mr Knowles was under pressure from Mr Myers to achieve that result. In the opinion of

the Tribunal the emphasis by the claimant on the use of those words is important. By contrast, Mr Knowles in his witness statement at paragraph 14 indicated that whilst the termination of employment of the claimant was discussed, it was not on the basis that he was under pressure to achieve the termination of employment, and neither did he suggest that the respondent company "wanted" to bring employment to an end. Mr Knowles in his witness statement indicates that his evidence is that he made it clear that "termination of his employment was now a very real possibility". The Tribunal prefers the evidence of Mr Knowles to the evidence of the claimant on this point. There is nothing, in the opinion of the Tribunal, in the tone or content of the exchanges of emails between senior management to which the Tribunal has already referred in this Judgment, that Mr Knowles was under pressure to achieve termination of employment of the claimant. The Tribunal finds that Mr Knowles wanted to find an acceptable way forward which might include termination but that was only one possibility.

7.37 Mr Knowles had clearly and openly, in the opinion of the Tribunal, set out for the senior management team that two options were going to be on the table at the meeting with the claimant. The first was the possibility of reaching an agreement with him, and the second was then a requirement on the part of the company to follow its procedures. In the opinion of the Tribunal, the use of the words in his witness statement to which the Tribunal has just referred above indicate a tone on the part of the claimant that Mr Knowles was not fairly or reasonably representing to the claimant the two alternatives which he had arrived at that meeting to discuss with the claimant. The Tribunal finds that Mr Knowles genuinely arrived at and conducted himself during that meeting on the basis that there were two possibilities and two alternative routes. The first was that a settlement could be reached; and the alternative was to invoke the formal procedures of the respondent company. The Tribunal does not find, however, that Mr Knowles conducted himself at that meeting on the basis of anything other than making clear to the claimant that those were the two routes available. The Tribunal does not find that the management team had placed Mr Knowles in a position where he was required to do what he could at that meeting with the claimant to achieve termination of his employment. It was one of the possibilities. In the view of the Tribunal, the management team had understandably expressed a continuing frustration in their emails and that the situation could not go on forever. But equally, in the opinion of the Tribunal, Mr Knowles had quite clearly indicated to the management team that there were two possible ways forward and that the purpose of the meeting was to discuss with the claimant what those two routes were, and to then report back as to which of the two routes looked to be the most likely way forward.

7.38 The Tribunal therefore concludes that Mr Knowles did indeed make "it clear that termination of his employment was now a very real possibility". The Tribunal finds that Mr Knowles equally fairly and

responsibly explained to the claimant that there were "two ways to manage the next steps".

7.39 The claimant at paragraph 12.3 of his witness statement alleged that Mr Knowles said that if agreement could not be reached that the claimant would be put directly onto performance measures and "subsequently phased out". Mr Knowles denied that he had expressed himself in that way. The Tribunal prefers the evidence of Mr Knowles to the evidence of the claimant. Mr Knowles expressed himself to the Tribunal and in answer to questions put to him by the claimant in cross examination in a way which demonstrated that he understood very well that if a performance management/sickness management procedure had to be started that there was no obvious conclusion to that process whatsoever. Mr Knowles gave his evidence in a way which, without reference to any documents, comprehensively answered that question when it was put to him by the claimant. Mr Knowles indicated that he believed that there would be proper reasons for implementing the performance management process, but that the outcome was completely unknown. Mr Knowles was steadfast in denying his use of the phrase "phased out" and indeed he explained that if the process had begun that nobody could predict what the outcome was, as nobody knew when the claimant was, if at all, likely to return to work, and how successful any return to work might be. Mr Knowles persuaded the Tribunal that he understood that he would not be able to see into the future and that whilst he understood that as an alternative to settlement it was inevitable that a performance management process would begin, Mr Knowles was very well aware indeed of the obvious uncertainties of the outcome of that process. The Tribunal does not find, therefore, that Mr Knowles told the claimant that if a performance management process that he would be "subsequently phased out". The Tribunal in effect accepts what Mr Knowles said in his witness statement at paragraph 14 about this discussion.

7.40 In his witness statement, again at paragraph 14, Mr Knowles says that the alternative to performance management would be for the claimant to resign and to agree a Settlement Agreement which he would sort out immediately. Mr Knowles says that he went on to offer a contribution of £500 to the claimant's legal costs and that he went on, in accordance with the views which had been expressed to Mr Knowles in emails to him and between them by the senior management team, to say that the company would look constructively at extending his health cover until 1 September 2016. The words of Mr Knowles' witness statement at this point are important, because he says very clearly, and he asserted this very clearly in giving evidence, that one part of reaching a Settlement Agreement would be for the claimant to resign. The claimant in his own witness statement places a very different emphasis on what was said by Mr Knowles. At paragraph 12.1 the claimant says, and he repeated this very clearly in giving his evidence, that Mr Knowles had told him that he "had to" submit his resignation. This difference in language, which may not at first seem important, became important during the course of the hearing. The claimant explained that he had been told by

Mr Knowles very clearly that in order for the formal process of settlement to even begin, the claimant had to immediately submit his resignation following the discussions between himself and Mr Knowles. Mr Knowles, by contrast, was equally clear that he never gave any such suggestion or deadline to the claimant. Mr Knowles told the Tribunal that the resignation of the claimant was part and parcel of reaching an agreement, but that he never indicated to the claimant that before discussions could even begin and before any Settlement Agreement could be drafted and sent to him, that he had to submit his resignation. In effect the claimant was saying that he was required to resign before a Settlement Agreement would be sent to him for consideration; whereas Mr Knowles was saying that his resignation was simply part and parcel of the terms which were discussed and agreed with the claimant. Mr Knowles indicated that the claimant accepted the option of reaching a Settlement Agreement, but that the terms of that Settlement Agreement were obviously not reached at the discussion between the claimant and Mr Knowles. Mr Knowles understood that a settlement would need to be checked by a solicitor, and indeed offered a sensible contribution towards the claimant's legal costs. The Tribunal accepted that Mr Knowles understood the process of reaching a Settlement Agreement, and understood that that involved the claimant taking advice and that until such time as that advice had been taken and the claimant signed the agreement that nothing was certain or agreed at all other than in outline.

7.41 The Tribunal, therefore, preferred the evidence of Mr Knowles to the evidence of the claimant about this point. The Tribunal did not find that Mr Knowles demanded of the claimant his resignation or insisted upon it as a precursor to entering in to the detail of a Settlement Agreement. The Tribunal finds that the resignation of the claimant was simply one part of the overall terms of agreement which were proposed and discussed, in outline only, between Mr Knowles and the claimant at the meeting in Manchester.

7.42 At paragraph 12.2 of his witness statement the claimant says that he was told by Mr Knowles that if he did not accept the Settlement Agreement that the respondent would “seek” to claim back the wages that the claimant had been paid from October to December 2015. In the opinion of the Tribunal it is important to note the careful wording used by the claimant. The claimant in his statement says only that the respondent would “seek” to recover the monies. He does not say that they would. Mr Knowles addresses this point in paragraph 15 of his witness statement. Mr Knowles expanded upon this when he was giving evidence in answer to questions from the claimant. He explained that his stance during the course of the meeting was that this was one of the possibilities which would be considered by the respondent company if a settlement could not be reached. There was no doubt that the claimant had not provided the medical certificates which were required under the policies and procedures of the respondent company. The company had paid the claimant even though he had not supplied the medical certificates. In the opinion of the Tribunal the

company had been understanding to the claimant about the lack of medical certificates. They understood the geographic challenges but nevertheless the situation had gone on for a significant period of time and the company had paid monies to the claimant which, on the basis of the terms of his contract of employment, he was not strictly entitled to.

7.43 The Tribunal prefers the evidence of Mr Knowles to the evidence of the claimant on this point. Even the claimant uses the word "seek" to qualify the approach of Mr Knowles. In the opinion of the Tribunal the use of that word by the claimant demonstrates and supports the approach of Mr Knowles during the course of that meeting, which was that in the absence of an agreement there was an obvious possibility that the respondent would address the position of the overpayment of wages and the lack of medical certificates, and that one possibility was that the company would seek to recover those overpaid wages from the claimant. The Tribunal does not find that the claimant was told by Mr Knowles that this would happen and that it was inevitable. The Tribunal finds that Mr Knowles fairly and reasonably explained to the claimant that this was a possibility which was, as it were, the other side of the coin to a Settlement Agreement.

7.44 The Tribunal finds that at the conclusion of the discussion between Mr Knowles and the claimant on 19 January that the claimant had indicated that of the two options available that he preferred to explore a Settlement Agreement. As already indicated in this Judgment, the Tribunal found that Mr Knowles had mentioned that the resignation of the claimant was one part of reaching a Settlement Agreement but not that it was a prerequisite to that.

7.45 The Tribunal looked carefully at the email which was sent by the claimant to the other three members of the management team at 11.42am immediately after the meeting which had taken place between Mr Knowles and the claimant. This, in the opinion of the Tribunal, added considerable weight to the evidence of Mr Knowles, contrary to the evidence of the claimant, that he had never promised to the claimant that in effect the discussions between him and Mr Knowles would be only between the two of them. Within a very short period of time of the discussions concluding he is sharing the whole detail of that meeting with the other three members of the management team, and the Tribunal finds that that was always the intention of Mr Knowles. Mr Knowles explains that he had told the claimant that there was an easy and a hard way, and that the claimant had agreed to the easy exit, obviously referring to a Settlement Agreement. Mr Knowles goes on to say that the claimant would confirm his resignation with a termination date of Friday 12 February. In the evidence of Mr Knowles he explained that the resignation would then remove the challenges which the company had with its external payroll providers as once the company knew that the claimant was resigning and it knew how long it would be continuing then to pay the claimant, then the company could take a view that the payment of monies to the claimant by way of

wages and the lack of medical certificates could be seen as something in the past. Mr Knowles explained that to the management team in his email of 19 January (139). Mr Knowles goes on to confirm, as had been discussed between all the members of the senior management team, that the offer from the respondent company to the claimant would be to extend his medical cover to 1 September. Mr Knowles concludes that email by saying that the claimant "genuinely thanked me" and that he had equally genuinely thanked the company for the support which he had had.

7.46 Importantly Mr Knowles ends that email by saying to each of the members of the management team "any problems with this?". This is obviously in direct and obvious contradiction of the picture which the claimant sought to paint of Mr Knowles allegedly telling him that the discussions between himself and the claimant would be kept only between them. That email demonstrates that there was never any such intention on the part of Mr Knowles and that the evidence of the claimant to that effect is evidence which should be rejected by the Tribunal as not being an accurate description of what was said by Mr Knowles.

7.47 The Tribunal also took careful note of not only the content but also the tone of the letter which was sent by email on 19 January at 12.26pm by Mr Knowles to the claimant. It was marked "without prejudice". The letter goes on in its second sentence to say that the reason for inviting the claimant to submit his formal resignation was "so I can put you on the payroll for January 2016". This email is very shortly after the meeting between the claimant and the respondent. Mr Knowles makes no mention whatsoever of demanding the resignation of the claimant so that things can proceed. Mr Knowles is indicating to the claimant that the reason for requesting his resignation is relating to his entitlement to be paid. The claimant's evidence to the Tribunal is that this was a clear misrepresentation and indeed a serious misrepresentation on the part of Mr Knowles. However, in his response, which is only 14 minutes later at 12.40pm (page 142) the claimant makes no mention whatsoever of that serious misunderstanding and indeed describes the email sent to me by Mr Knowles at 12.26pm (page 141) as "perfect, thanks".

7.48 Referring again to the email at 12.26pm from Mr Knowles, Mr Knowles confirms that he has already drafted a compromise agreement outlining the discussions. Mr Knowles explained that he was easily able to do that because he was using a precedent which existed within the respondent company, and was obviously not drafting the agreement from scratch. That explained how, from Manchester, Mr Knowles was able to draft a Settlement Agreement so quickly after the discussions with the claimant. He does not attach it to that email but says that he will "get this to you ASAP". The Tribunal also finds it relevant to point out that Mr Knowles ends that email by saying, "do not hesitate to contact me if you need anything". As the Tribunal has already pointed, it took note of both the tone and content of the email which was then

sent by the claimant to Mr Knowles.The Tribunal notes, of course, that the first email sent by Mr Knowles to the claimant at 12.26pm was itself marked "without prejudice" by Mr Knowles, but the claimant took absolutely no issue with the use of that phrase when replying to Mr Knowles. The Tribunal finds that that was because the use of that phrase was consistent with the fact that it had been openly discussed by Mr Knowles with the claimant at the beginning of his discussions at the meeting in Manchester.

7.49 That same day at 12.40pm the claimant does, however, send an email which in the opinion of the Tribunal is important. First of all, by now, the claimant has amended the heading to the letter. He no longer replies to Mr Knowles by using the phrase "without prejudice" but he has changed the heading to "bits and pieces – off the record". It was put to the claimant that the use of this phrase was in effect a layman's translation of the phrase "without prejudice". The claimant was unwilling to accept that suggestion. The claimant explained, as previously referred to in this Judgment, that his use of the phrase was to reflect that Mr Knowles and the claimant had agreed that the discussions would in fact take place just between them and that Mr Knowles would not be involving members of the senior management team. The Tribunal has already in this Judgment rejected that as being an accurate description of what took place. Instead, the Tribunal believes that the use of the phrase "off the record" is indeed a recognised layman's translation of the phrase "without prejudice", and in the opinion of the Tribunal the use of that phrase by the claimant adds weight to the evidence of Mr Knowles, which the Tribunal has accepted, of the use by Mr Knowles of the phrase "without prejudice" and of that phrase being discussed at the outset of the discussions between Mr Knowles and the claimant on 19 January.

7.50 The tone of that email (page 144) is extremely pleasant. It does not in any way reflect the tone of the discussions which the claimant sought to persuade the Tribunal accurately reflected the tone of the meeting. In his evidence the claimant sought to persuade the Tribunal that Mr Knowles made a number of demands of him and indeed made a number of threats to him. The Tribunal has rejected that evidence but also takes into account the tone and content of this email from the claimant, which does not in any way complain about anything and certainly does not complain about being put under pressure or having improper threats or demands made of him by Mr Knowles. Indeed it does quite the opposite. The tone and content of that email, in the opinion of the Tribunal, is important and relevant. In particular, the claimant says that "and I of course remain happy with what we discussed this morning". In the opinion of the Tribunal, the use of that phrase does not accurately reflect the evidence which the Tribunal then received from the claimant. The claimant sought to persuade the Tribunal that Mr Knowles was threatening and demanding, even going to the stage of suggesting that if he was put on a performance improvement plan that he would then be "phased out". The tone of that email is not at all consistent with a suggestion on the part of the

claimant that that was the sort of tone and conduct which was demonstrated by Mr Knowles. The Tribunal believes that this email again is evidence which is important in persuading the Tribunal to prefer the evidence of Mr Knowles to the evidence of the claimant.

7.51 The claimant in that email (page 144) then includes a suggested text for his resignation, which is simple and to the point. Furthermore, the email goes on to say under the heading of "reflections" (145) to say, "Derek, I can only thank you again for your kindness and straightforwardness in what has been a very difficult time". There is no mention whatsoever of being made to feel uncomfortable or having had threats made against him which the claimant, even with the benefit of a short period of reflection, does not believe were appropriate. Indeed the email goes on to say that the claimant hopes is the not too distant future to "buy you a beer". He goes on equally to say that he owes a great deal of gratitude to the company as a whole for their support.

7.52 The claimant concludes that email by saying "I'll await the agreement from you". The claimant does not, for example, say in that email "I have now submitted my resignation to you and on that basis you are obliged to send me a Settlement Agreement". That is language which would have been consistent with the evidence of the claimant, evidence which the Tribunal has rejected. The evidence of Mr Knowles was that the resignation related to the ongoing ability of the claimant to be paid, and the evidence of the emails is consistent with that. The evidence of Mr Knowles was that the claimant and he had reached an outline agreement and that on that basis he would quickly be able to send him a draft Settlement Agreement for consideration and discussion with his advisers. Mr Knowles kept to that agreement as the Tribunal has already indicated.

7.53 Understandably in view of the length of absence of the claimant and the number of absences of the claimant from work due to illness, the claimant's adviser in connection with the terms of the Settlement Agreement raised with the claimant his ongoing entitlement to the benefits of the respondent's PHI policy. This was raised by the claimant in an email dated 28 January 2016 (page 208). The claimant began by making amusing comments about the way in which his lawyer was investigating the fine detail of the Settlement Agreement and the fact that the lawyers had (quite properly) raised with him (presumably) the impact of the termination of his employment on the ability of the claimant to continue to receive benefits under the terms of that PHI policy. The claimant was asking for the documents relating to that policy to be sent to him. The claimant indeed expressed the view that "hopefully this is the last thing she's going to ask for". It is clear in the opinion of the Tribunal that the claimant by using those words was expecting the Settlement Agreement to be very quickly finalised. Some five minutes later (208) Mr Knowles replies by confirming that it is only the private health insurance which will be extended to 1 June and that all other benefits, including PHI, would come to an end. Mr Knowles expressed the view that in his opinion the PHI policy was not relevant

on the basis that the only up-to-date medical evidence which the respondent company had (November 2015) was that the claimant was fit to return to work having recovered sufficiently well from his mental health difficulties. The subsequent emails from the claimant indicated that the reasons why he was unable to return to work related to "standard" physical ailments such as a stomach bug/cold/virus. There was no ongoing medical evidence to suggest that as a result of mental health difficulties that the claimant was then unfit to return to work. Obviously and understandably the respondent company did not seek any up-to-day medical evidence as they believed that they had reached an amicable agreement with the claimant on 19 January subject to approval of the exact terms of a written Agreement. Mr Knowles, therefore, offered the opinion that as far as he was concerned no insurer "would not pay out with the reports we have been provided with over the last 18 months or so". It is important at this stage to record, as the Tribunal has already done, that the claimant was in receipt of advice and support from a solicitor, and that it was the solicitor who had raised the relevance of PHI, not the claimant. The claimant was, therefore, obviously able to take that opinion as expressed by Mr Knowles to his solicitor for his/her observations/comment/support.

7.54 The claimant in his witness statement alleged that the tone and content of that email from Mr Knowles was obstructive and that Mr Knowles had sought to persuade the claimant that the PHI policy did not apply to him. The claimant sought to suggest that this was deliberately obstructive on the part of Mr Knowles. By contrast, however, the Tribunal finds that this was an understandable expression of opinion only on the part of Mr Knowles. In the view of the Tribunal Mr Knowles was expressing an understandable view which was that the payment by an insurance company of salary payment to the claimant on behalf of the respondent company under the terms of an insurance policy would not apply in circumstances where as recently as November 2015, but for minor physical ailments, the medical evidence of a consultant psychiatrist was extremely positive, and indeed the claimant had been expected to return to work on or about 24 November 2015. In the opinion of the Tribunal, therefore, it was understandable that Mr Knowles had, in any discussions with the claimant, indicated in his opinion that PHI was not a scheme which was relevant to the claimant. The Tribunal does not find or conclude that Mr Knowles was being in any way obstructive. Mr Knowles was only expressing a personal opinion based on his knowledge of the way in which PHI policies operated, and on the basis of the most recent medical evidence which the company was in possession of.

7.55 In his witness statement the claimant alleged that the application of PHI was discussed between himself and Mr Knowles. Mr Knowles denies any reference to any such discussion. Again the Tribunal prefers the evidence of Mr Knowles to the evidence of the claimant. There would be no need or point in Mr Knowles discussing with the claimant the application of a PHI policy if, as the Tribunal has found, outline terms of agreement for the voluntary termination of the employment of the

claimant had been reached. The terms and application of any such policy would then be completely irrelevant. They would only have been relevant if the employment of the claimant had continued and if the claimant had continued to be absent from work for any period of time which had, for example, perhaps prompted the implementation of the performance management/sickness absence policies and procedures of the respondent company. The Tribunal therefore finds that the first time that PHI was discussed was in the email which the claimant sent at page 208 on 28 January. The claimant is slightly disparaging about his legal advisers. He makes no reference in that letter to Mr Knowles having suggested at the meeting on 19 January that it did not apply to him, and questioning why he had said that in circumstances where his lawyer was now perhaps suggesting that it was relevant. The tone and content of that email from the claimant is almost suggesting that he cannot really understand why the lawyer is raising this, but that they are raising it and that it is something that needs to be sorted out in order that a Settlement Agreement can be signed. In the opinion of the Tribunal that is the only reasonable way in which the tone and content of that email from the claimant can be interpreted. The Tribunal does not find, therefore, that Mr Knowles was in any way obstructive about PHI or the application of PHI. He simply expressed an understandable opinion. In any event, there was further discussion by email between the claimant and Mr Knowles about this (210-221). Mr Knowles sent the documents to the claimant without any objection in an email dated 28 January at 12.35pm, less than 2½ hours after the issue was first raised by the claimant with Mr Knowles. Mr Knowles confirms his understanding of the relevance of a PHI in his email on 28 January at 11.07pm (page 221). Indeed the claimant himself explained to Mr Knowles that he understood how PHI worked in his own email at the bottom of page 221.

7.56 As the Tribunal has already confirmed, the claimant was sent a draft Settlement Agreement and the claimant confirmed in an email dated 21 January (172) that he had received the Settlement Agreement and that as far as he was concerned “all looks as discussed”. He confirmed that he had sent his formal resignation in the post “yesterday”. Again the claimant makes no reference of that being demanded of him by Mr Knowles as a prerequisite to getting a Settlement Agreement. Again the Tribunal took note of not only the content but also the tone of that letter from the claimant in which he makes no complaint whatsoever about the conduct of Mr Knowles or indeed the content of the Settlement Agreement, apart from saying that “all looks as discussed”. In an email (173) the claimant even goes on to say on 26 January that “it sounds as though all is in order”. This is a week after the claimant has had time to reflect on what was discussed on 19 January and some days after the claimant has had the opportunity once again to reflect on the terms of the Settlement Agreement. Despite that, the claimant makes no complaint of the content of the Settlement Agreement or the conduct of Mr Knowles, either during the meeting on 19 January or at any time after that up to and including 26 January.

7.57 The terms of the Settlement Agreement, which were clearly marked "without prejudice and subject to contract" appear at page 176 onwards, as does the heading "without prejudice and subject to contract".

7.58 By 29 January, as indicated in paragraph 18 of the witness statement of Mr Knowles, the Settlement Agreement was still not resolved. Mr Knowles then sent an email to the claimant, again marked "without prejudice", stating that the company now wished to have this matter resolved by 2 February or the offer would be withdrawn. That email appears at the bottom of page 278. However, the email does not just say that the "offer will be withdrawn" it also goes on to say that "we will simply act on your resignation". Importantly, however, the letter concludes by Mr Knowles telling the claimant, "Please ensure your lawyer is aware of this". The claimant responds approximately an hour and a half later at 9.07am (278). He only complains about the suggested deadline of 2 February to the extent that if that deadline had been known sooner then the whole process could have been accelerated. He does not complain about a deadline being imposed. He only complains about the fact that the deadline is being imposed at this stage and that it is a short period of time away. Not surprisingly, therefore, and quite reasonably the claimant asks for an extension to 5 February which Mr Knowles agrees to. In return the claimant thanks Mr Knowles for that extension in an email at 9.34am (279). He even goes on to then comment that "I'm as keen as you are to get this done and dusted". There is, therefore, no objection even at that stage to a deadline; only to a deadline not being suggested earlier.

7.59 But it is important in the opinion of the Tribunal that at that stage the claimant raises no objection whatsoever to the reference in the email from Mr Knowles to the effect that if the deadline is breached that the respondent will act on the resignation of the claimant. In the opinion of the Tribunal, to make that suggestion to the claimant was entirely inappropriate, something which Mr Knowles acknowledged during the course of questioning from the Tribunal. The only possible interpretation of the resignation of the claimant was that it was part and parcel of an overall agreement, and if that agreement was not reached then the respondent company would clearly never have been entitled to rely upon the resignation of the claimant. It was part and parcel of one agreement. It was not open to the respondent company to rely on part of that agreement but not then to rely on other parts. It was therefore a mistake on the part of Mr Knowles to make that comment. However, in that email he also advised the claimant very clearly to pass the letter to his lawyer. In his subsequent emails the claimant did not robustly object to what was being suggested by Mr Knowles. It is perhaps only as a result of passing that email to his legal advisers that the claimant subsequently objected. The Tribunal can, it believes, reasonably speculate that the advice of the legal adviser was in words which were similar to the words which have just been used by the Tribunal, namely that the resignation could not be taken by the respondent as being anything other than something to rely on as part

of an overall Settlement Agreement. However, the claimant had the benefit of ongoing legal advice about the tone and content of that email. He equally, as the Tribunal has already clearly indicated, had the benefit of ongoing and proper advice about the implications for the claimant of termination of his employment on his entitlement to benefits under PHI. Indeed, that picture was painted accurately for the claimant in an email (279) which Mr Knowles sent to the claimant.

7.60 This presumption on the part of the Tribunal is supported by the tone of the email sent by the claimant (284) to Mr Knowles. It confirms that since receipt of the email relating to his resignation and PHI, that he has "had a chance to speak with my lawyer". The claimant in that email confirms the position, which was that his resignation was only ever submitted as part and parcel of a Settlement Agreement. The claimant withdraws his resignation. Quite understandably at the foot of page 284 the claimant indicates that as a result of the advice which he has received from his lawyer that to sign the Settlement Agreement would significantly prejudice his entitlement to PHI, which would of course terminate on termination of employment. On the basis that the claimant continued to be unable to return to work, it is perhaps then not surprising that the terms of settlement which were agreed in outline between the claimant and Mr Knowles on 19 January were, with the benefit of legal advice and on the basis of the ongoing health challenges of the claimant, rejected.

The Law

8. The Tribunal was referred to a number of different relevant cases and they were provided to the Tribunal in a separate bundle. Those cases were:-

(a) Savings and Investment Bank Limited (in liquidation) -v- Fincken EWCA Civ 1630

(b) BNP Paribas -v- Mezzotero 2004 IRLR 508

(c) Benevst -v- Kingston University 2006 UKEAT 0393/05

(d) Barnetson -v- Framlington Group Limited and Another 2007 1W0R2443

(e) Woodward -v- Santander UK Plc UKEAT 0250/09

(f) AVB and Another UKEAT 0092/13

(g) Portnykh -v- Nomura International Limited 2014 IRLR 25

9. In most if not all of these cases there is a detailed and structured rehearsal of the principles relating to the protection offered by genuine "without prejudice" discussions. The most up to date recital of those principles appeared in Portnykh. In the summary of its judgment the EAT confirmed that "the concept that "without prejudice" negotiations are not admissible is an exception to the rule that admissions

against interest are admissible and the exception rests on the public policy of encouraging litigants to settle their differences, rather than litigate them to the finish". Secondly, in some circumstances the exception may rest on the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing issues ensues". That judgment goes on to say "for the exclusion to be effective there does not need to be extant litigation there only needs to be an extant dispute where the parties are conscious of the potential for litigation. If the employer announces an intention to dismiss the employee for misconduct and there are then discussions around the question of the alternative of the dismissal being for redundancy, no matter how amicable all that might be, it is beyond argument that it either demonstrates a present dispute or contains the potential for a further dispute".

10. That judgment continues by saying "the unambiguous impropriety" exception should not be applied too readily - no matter how important the admission might be for the potential litigation, unless it can be said to arise out of an abuse of the privileged occasion, such as where it is made to utter "a blackmailing threat or perjury" its significance alone cannot result in the admission being released from the cocoon of the "without prejudice" exclusion and into the glare of the forensic arena".

11. The first question therefore for the Tribunal to decide when answering the question whether or not the discussions on 19 January between Mr Knowles and the claimant were genuinely "without prejudice" was whether or not there was at the time of those discussions on 19 January "an extant dispute where the parties are conscious of the potential for litigation". The Tribunal was reminded that it was not necessary for both Mr Knowles on behalf of the respondent and the claimant to be aware of that dispute. That was made clear in paragraph 15 of the judgment in A and B (above) when at paragraph 15 it is made clear that "for the without prejudice to rule to apply, it was sufficient for just one of the parties to the negotiations to have been negotiating because they might reasonably have contemplated litigation if a compromise could not be reached". There was no suggestion made to the EAT that such a view was erroneous in law. The Tribunal therefore had to consider whether or not at the 19 January either party had either contemplated or might reasonably have contemplated litigation if agreement could not be reached between Mr Knowles and the claimant.

12. The Tribunal considered that there were potentially three ways/grounds on which at least the respondent might have considered that there was "potential for a future dispute" quoting from the judgment of Portnykh.

13. The first of these was the potential for a dispute between the claimant and the respondent company should the respondent company invoke its performance management/sickness absence procedures against the claimant and then if, ultimately, the respondent then took the decision to dismiss the claimant. However the judgment of the Tribunal is that there were no grounds as at the 19 January for the respondent to believe that there was an existing dispute on that basis with the claimant or indeed that there were any grounds for believing that there would be a dispute with the claimant even if the performance management procedures were invoked and even if the claimant was dismissed. It is most certainly not the case that every employee who is performance managed against sickness absence procedures

and then dismissed believes they have been treated unfairly and lodges a claim in an Employment Tribunal. If that were the case then the Employment Tribunal would be completely swamped by applications on behalf of dismissed employees. The evidence was that by November 2015 there was a very real expectation that but for minor subsequent physical ailments that in fact the claimant would return to work. The effect of those physical ailments continued for longer than was anticipated and then the inevitable break of the festive period intervened. The claimant was then unable to return to work but he was consulting with his psychiatrist on a regular basis and informing the employer of the ongoing discussions. There was no indication at that stage that the claimant would not shortly be able to return to work. There had been no indication since November 2015 that the mental health of the claimant was preventing him from returning. What was preventing him from returning were minor physical ailments which in some cases are often associated with Winter. There was no indication at all from the Consultant that the claimant had suffered any set backs in his mental health and that on that basis there was any reason for change to the upbeat assessment which had been provided in November 2015.

14. At page 105, on 11 January, only eight days before the meeting on 19 January the claimant has written in detail to Mr Knowles. He has provided a detailed explanation of the reason for the absence of his medical certificates which as the Tribunal has already explained related directly to his geographic location in Manchester and the geographic location of his GP in London. The claimant was however very confident in that email (105) that he would be able to finally provide the medical certificates and what's more he offered the alternative of providing medical certificates from his Consultant. Indeed he says "I am sure he could provide an updated report". Furthermore the claimant says in that email that "things seem to be finally getting back on track and not a moment too soon". The claimant goes on to express his frustration at not being able to return to work in November 2015 as clearly both he and his Consultant Psychiatrist had anticipated. In the view of the Tribunal there is nothing in that email which indicates that there is any disagreement between the claimant and the respondent about the ongoing reasons for his medical issues and neither is there any reason to believe that the claimant is not very soon firstly going to be able to provide the medical certificates which have been missing and perhaps more importantly that the claimant is beginning to overcome the short term medical issues which have prevented him returning to work. The mood of that email is in the opinion of the Tribunal upbeat. There was no evidence at all to suggest that there were going to be further long term absences on the part of the claimant. The respondent had never given any indication at all in November 2015, when it was informed that the claimant was on the verge of apparent and almost immediate return to work, that nevertheless the respondents were going to start a process of performance management on the basis of continued sickness absence. In the opinion of the Tribunal therefore there was no reason to believe that as at 11 January that the respondents were intending to go down that route either. The claimant was reporting progress in connection with his sickness absence and was providing what appeared to be satisfactory explanations for failing to provide sick notes. There was no objection or hint of objection or disagreement from the respondent to that email from the claimant.

15. There was an obvious and understandable sense of frustration on the part of the respondents that the claimant had not been able to return to work as anticipated

in November but equally it was abundantly clear to all that the reasons for that related to temporary physical ailments and did not relate to ongoing difficulties with the claimant's mental health or indeed with his change of medication. As at 19 January there was no reason to suspect that that was not as positive or even perhaps more positive than it had been in November 2015. All that was preventing the claimant returning were what could be anticipated to be temporary physical ailments.

16. As at 19 January therefore the Tribunal cannot accept that there was a dispute or that there was any reasonable contemplation of a dispute between the claimant and the respondent about his ongoing sickness absence. The tone of the email exchanges at page 105 clearly illustrates that. There was obviously a sense of frustration on the part of the respondents that the promised and anticipated return to work had not occurred and that the respondents either wanted the claimant to return to work or alternatively wanted some end to what appeared to be a very long and drawn out period of absence. However there was no up to date medical report as at January 2016 to indicate that there were going to be further long term absences or indeed to suggest that the claimant would not very soon be able to return to work after recovering from his short term physical ailments.

17. It would have been obvious to the respondents and in particular obvious to Mr Knowles that if the company had invoked the performance management/sickness absence procedures that that would have obviously involved a further detailed medical report. No one has any idea what that would have said. There is no evidence to suggest that the claimant and the respondent would not have been in agreement about the content of that report. Furthermore, if it had indicated that there had been a relapse in the anticipated recovery of the claimant from his mental illness and that that had indicated further prolonged periods of absence, then there is nothing to suggest that the claimant would not have accepted that and accepted that potential termination of his employment was the response of a fair and reasonable employer. In his evidence the claimant accepted that his absence was obviously having an impact on the London office where he had worked. The lengthy periods of absence described in the witness statement of Mr Knowles obviously indicate that the claimant's absence was inevitably going to have some knock on effect on his employer and on his work colleagues. There was nothing to suggest however that the claimant did not firstly understand that that was the case and secondly that he was anything other than sympathetic to the effect that that was having on the respondent's business.

18. Mr Knowles was very clear to point out during his evidence that he had never indicated to the claimant that if the performance management procedures were invoked that it was then inevitable that the claimant would be *"phased out"*. The Tribunal has found as a fact that this threat was not made. However the consequences of that finding of fact by the Tribunal appear to be, rather obviously, that the only steps which the respondent company would take if the claimant continued to be absent would be to start the performance management process without any conclusions or thoughts at all as to what the outcome might be. Obviously in any such proceedings termination is a possibility but there was no evidence to suggest as at 19 January that the respondents had the necessary up to date evidence to make any judgment at all about what the ultimate outcome of any

such performance management procedures might be. All that they could conclude and suggest during the meeting on 19 January, and the Tribunal found that that is all that they did suggest to the claimant through Mr Knowles was that if a settlement agreement could not be reached then the performance management procedures would commence without any indication, quite properly, as to what the outcome of those would be. However as the Tribunal has already commented it is not every employee who is involved in such procedures who believes that they are unfair. There is certainly no suggestion whatsoever that beginning such proceedings can immediately and obviously give rise to a dispute and the potential for litigation. The claimant had accepted the length of his absences and he had accepted that they inevitably had some impact on the respondent and his colleagues. There is no evidence to suggest that if the claimant had unfortunately had further lengthy periods of absence that he would not have continued to understand that situation and indeed, even if he had been dismissed there is no evidence to suggest that he would not have accepted that as the fair and reasonable decision of a reasonable employer.

19. The Tribunal therefore does not accept that the suggestion, or even threat, by an employer to start performance management procedures justifies a conclusion on the part of the employer that that was an "extant dispute" or indeed that starting those procedures reasonably gave rise to a conclusion on the part of the respondent that there was the potential for litigation. In the opinion of the Tribunal what the respondents hoped to achieve by the discussions which took place on 19 January was to avoid further delay and uncertainty for the respondents. Inevitably the delay in the return to work of the claimant was frustrating for them and that was shown very clearly in the emails to which the Tribunal has referred. They wanted the position to be clear. They wanted the claimant to either return to work or alternatively they wanted to explore the possibility of the claimant leaving by agreement. However if the claimant was unable to return and if they were unable to reach an agreement then in the view of the Tribunal that did not give rise to a dispute or even the reasonable possibility of a dispute. It simply meant that under the terms and policies of the respondent company that the claimant would begin to be performance managed against the background of his ongoing sickness absences. The respondents would need to get up to date medical evidence. Nobody has any idea what that would say. They certainly had no idea what it would say when the discussions took place on 19 January.

20. The conclusion of the Tribunal therefore is that at the time of the discussions with the claimant on 19 January that there was no extant dispute between the claimant and the respondent in consequence of the possible formal procedures of the company and that neither was there a set of circumstances which contained the potential for future dispute. In the opinion of the Tribunal the future was an unknown to both the claimant and the respondent other than that the respondent would, if the claimant continued to be absent, manage that ongoing absence in accordance with the policies and procedure of the respondent company. That set of circumstances does not in the opinion of the Tribunal amount to a dispute or give rise for a conclusion that there was a potential for future disputes between the claimant and the respondent.

21. In the opinion of the Tribunal the circumstances of the claimant in this matter were similar to those of the claimant in BNP Paribas (referred to above). In that case the Employment Appeal Tribunal indicated that in grievance procedures there is no obvious risk of litigation or dispute. A grievance may be upheld or alternatively dismissed for reasons which an employee finds acceptable, so that the parties never reach the stage in which they could properly be said to be in dispute. In the opinion of the Tribunal those words could be equally and properly used to the circumstances of the claimant. An employee involved in performance management duties/sickness absence, particularly whereas recently as November 2015 it was expected that the claimant's mental health issues had sufficiently improved to enable him to return to work, does not give rise to a set of circumstances where it could properly be said that the parties were "in dispute" or alternatively gave rise to circumstances where it could be reasonably anticipated by the respondents that by operation of their sickness management procedures that the claimant and the respondent would come to be in dispute.

22. There were two other potential areas of dispute which in the opinion of the Tribunal had to be considered in order to decide whether or not as at the 19 January there was an extant dispute or circumstances which could lead either of the parties to believe that there was a potential for litigation.

23. Both of these relate to the document at page 99, the letter from Mr Knowles to the claimant. The Tribunal has already found as a fact that that letter was not sent but it was clearly drafted by Mr Knowles and as the Tribunal has already indicated it would be sufficient to attract the protection of privilege if only one of the parties believed there was a dispute or the potential for a dispute. However, in the opinion of the Tribunal it is then important to look at the exchange of documentation between the parties which took place after that letter. The Tribunal considered carefully the tone and content of the email sent by the claimant to the respondents only eight days before the meeting on 19 January (page 103). This document is upbeat and positive. It suggests that "things seem to finally be getting back on track". Furthermore the claimant is confirming that he does not believe that he will have any difficulty at all in delivering the sick notes which have been quite properly requested over a lengthy period of time by Mr Knowles. The response of Mr Knowles (105) is simply to say that he is glad that things appear to be improving and that "fingers crossed that continues". He then goes on to invite the claimant again to provide him with dates and times which work for a meeting and he concludes that email by saying "we can have a chat then". There is no indication in that email that there is any dispute between the parties. As a result of what the claimant has said about obtaining sick notes there is no reason in the opinion of the Tribunal for Mr Knowles to believe that there is going to be any continuing difficulty on the part of the claimant in providing sick notes and therefore that issue will very soon be easily resolved, particularly bearing in mind that the claimant has now explained why he has been unable to obtain sick notes due to his geographic location. Furthermore the claimant sounds an upbeat tone about his health. He mentions nothing about any deterioration in his mental health to suggest that he will be unable to return. Indeed, he indicates that things are beginning to improve.

24. In the view of the Tribunal therefore there was nothing by the time that the parties met on 19 January to suggest that there was any ongoing reason for

believing that there was a dispute or the potential for a dispute between the claimant and the respondent either about any overpayment of wages or about the suggestion that as from the beginning of January that the claimant would not be paid because of missing medical certificates. The claimant was clearly indicating the reason why they were missing but was equally upbeat about how he would be able to resolve that and that he believed that he would be able to resolve that without any significant issue at all. In the opinion of the Tribunal therefore there was no reason for Mr Knowles to believe at the meeting on 19 January that medical certificates to justify the claimant's absence would not be forthcoming very quickly and that they would be supplied to his satisfaction. It would be entirely up to the respondents to decide whether they paid the claimant or not as from the beginning of January and of course it would be entirely up to the respondents to decide that in accordance with the terms of the contract of employment of the claimant and the relevant policies and procedure of the company. There was no reason to believe that the application of those terms of his contract or the relevant policies and procedures would result in a dispute disagreement between the claimant and the respondent. There was no reason to believe that the claimant did not understand the policies and procedure of the company in the same way that Mr Knowles did. There was no reason to believe that when the company was supplied with the relevant sick notes the company would then continue to be in dispute with the claimant. There was equally no reason to believe that there would be an ongoing dispute between the claimant and the respondent if, as suggested in the draft letter of 18 December, the respondent company decided not to pay the claimant. The whole issue revolved around the failure of the claimant to provide sick notes and the claimant had by 19 January explained that difficulty which in the opinion of the Tribunal was an understandable difficulty. However there was no reason on the part of the respondents to believe that the absences of the claimant were not directly and honestly as a result of ongoing health problems which meant that he was unfit for work. Indeed the claimant indicated that if the respondent wanted medical information from the claimant's Consultant that the claimant anticipated that that would be easily forthcoming. From November 2015 onwards the claimant had indicated that he continued to liaise, often weekly, with his Consultant with a view to the claimant being assessed on an ongoing basis about his suitability for returning to work.

25. The conclusion of the Tribunal is therefore that neither the suggestion of recovery of unpaid wages nor the suggestion of nil pay as from January 2016 onwards amounted to an extant dispute on the 19 January 2016 and neither did they in the opinion of the Tribunal give rise for reasonable contemplation of dispute/litigation between the parties.

26. In those circumstances the Tribunal is not satisfied that the content of the meeting on 19 January is entitled to attract without prejudice privilege on the basis that at the time of those discussions there was neither a dispute nor the obvious potential for a dispute between the claimant and the respondent.

27. The claimant had also raised the prospect of unambiguous impropriety on the part of Mr Knowles and he claimed that without prejudice/privilege should be lost by the respondent as a result of that. The Tribunal does not agree with those submissions of the claimant and they are, independently of the judgment set out above, dismissed. The claimant in his witness statement set out four reasons why

he believed that there had been unambiguous impropriety. He set out those reasons at paragraph 12.

28. The Tribunal has already made a finding of fact that Mr Knowles did not require the claimant to submit his resignation in the manner alleged and so that claim on the part of the claimant is dismissed.

29. The Tribunal has already found that the indication by Mr Knowles that the respondent would only "seek" to claim back wages did not amount to a threat and neither was it improper. The claimant was required to produce sick notes as part of the policies of the respondent company. He had failed to do so. There was in the opinion of the Tribunal therefore nothing wrong with Mr Knowles indicating, if he did, that the response of the respondent would be to "seek to claim back the wages". As the Tribunal has already indicated in its judgment it was not even suggested by the claimant that Mr Knowles said that that would inevitably be what happened. At best, it could only be suggested on the evidence of the claimant that that was a possibility which might be considered by the respondents. That in the opinion of the Tribunal does not amount to an unambiguous impropriety.

30. The claimant then went on to suggest that Mr Knowles had indicated that if performance management commenced that the claimant would then be "subsequently phased out". The Tribunal has found as a fact that Mr Knowles did not say that and on that basis that claim of unambiguous propriety is equally dismissed.

31. Finally the claimant alleged that the failure by Mr Knowles to apply the companies PHI insurance policy to the claimant equally amounted to an unambiguous impropriety. The Tribunal does not agree. Mr Knowles had his genuine reasons for believing that the policy did not apply. He held those reasons genuinely and honestly. In the opinion of the Tribunal they were reasonable opinions and views. As at 19 January the evidence still was that but for minor physical ailments that the claimant's mental health had improved to the extent that he should be able to return to work. There was no further medical evidence since November to suggest that that was not the case. On that basis there was no reason for Mr Knowles to consider the application of the PHI policy. It would obviously only apply to future payments. The evidence was that the claimant was fit to return to work in November. But for minor physical ailments that evidence had not changed. In the opinion of the Tribunal therefore any views expressed by Mr Knowles relating to the application of the PHI policy were reasonably and honestly held and could not in any circumstances amount to an ambiguous impropriety. Furthermore, the evidence was that when the application of the PHI policy was raised by the claimant's legal advisors Mr Knowles promptly supplied a copy of the documentation and did not obstruct the enquiries of the claimant or his legal representative in any way whatsoever. That was then by the end of January 2016 and there was of course by then some concern that the claimant had still not returned to work. At that stage it may well be that the PHI policy became something which was of much greater significance for the claimant than it was in November 2015 or at the 19 January 2016 either. The Tribunal therefore rejects the fourth suggestion on the part of the claimant that there was unambiguous impropriety.

32. In addition to the four reasons set out at paragraph 12 of his witness statement as to why the Tribunal should find there was unambiguous impropriety (which the Tribunal has addressed individually above) the Tribunal also carefully considered paragraphs E10 to E14 inclusive at pages 23-27 of his 31 page document headed "written submission by claimant" dated 10 December 2017.

33. At paragraph E10 the initial deadline of 2 February 2016 (page 246) was suggested to the claimant by Mr Knowles in an email dated 29 January at 7.38am. The claimant responded approximately 1½ hours later in an email of his own which appeared at page 251. The view of the Tribunal is that the claimant does not object to a timetable but only objects to the imposition of such a short timetable. Indeed the only reason he objects to the timetable suggested by Mr Knowles is that the claimant is, on 29 January, unable to contact his lawyer. It is for that reason and that reason only that the claimant indicates that the proposed dealing is unreasonable. The claimant asks for this to be extended to close of play on Friday 5 February. Mr Knowles replies to that email within 23 minutes. The claimant's email is timed at 9.23am (page 282). The response of Mr Knowles is at 9.29am (page 285). Mr Knowles openly acknowledges the frustration and he importantly goes on to say to the claimant that "you know me, this is not a deliberate attempt to get under anyone's skin". He goes on to immediately acknowledge and agree to the extension which had been requested by the claimant. The Tribunal does not, as a fact, find therefore that there was any undue pressure placed on the claimant by Mr Knowles. The Tribunal finds that it was perfectly reasonable for Mr Knowles to impose some form of deadline for closure if agreement was to be reached between the claimant and the respondent. The claimant asked for an extension. He explained that this was because he was unable to contact his lawyer. Within 23 minutes Mr Knowles agreed to that extension (contrast pages 251 at 9.06am and page 285 at 9.29am). The Tribunal therefore rejects the argument presented by the claimant at paragraph E10 as amounting to unambiguous impropriety on the part of the respondent.

34. The claimant then at paragraph E11 indicates that it was unambiguous impropriety on the part of the respondent to ask for the claimant's resignation before offering a settlement agreement. The Tribunal has found as a fact that the respondent did not behave in the way alleged by the claimant and that on that basis that argument on the part of the claimant is rejected.

35. At paragraph E12 the claimant alleges that undue pressure was placed on the claimant by indicating, as Mr Knowles did in his email at page 246 on 29 January at 7.38am, that the respondent would "simply act on your resignation" if the compromise agreement was not resolved by Tuesday 2 February 2016. However, the Tribunal has already explained in this judgment why it does not believe that that amounted to undue pressure on the part of Mr Knowles. It was reasonable for Mr Knowles to impose a deadline. Within 23 minutes Mr Knowles has agreed to a request by the claimant for an extension. The claimant did not indicate that there was undue pressure being placed upon him. The only reason for an extension was, in the words of the claimant, because the claimant was unable to contact his lawyer on that day. Mr Knowles was perfectly happy to very quickly agree to that extension, and the claimant did not ask for any further extension or raise any other complaint about the deadline which was imposed. The Tribunal rejects therefore any suggestion that the email at page 246 from Mr Knowles on 29 January at 7.38am amounts to unambiguous impropriety as alleged by the claimant.

36. The claimant then at paragraph E13 alleges that there was fault on the part of the respondent in not following through on the formal capability process. The Tribunal rejects this as a ground for concluding that there was unambiguous impropriety. What is clear to the Tribunal is that the reason why the respondent did not follow through with the capability procedure is because they recognised that when the claimant was unable to return to work, despite everyone eagerly anticipating that that would be the case in November 2015, the claimant then had the benefit of the respondent company's PHI policy. It would therefore have been a significant error on the part of the respondent company to have followed through with the formal capability procedures of the respondent, possibly leading to dismissal, in circumstances where ultimately the insurance company agreed that the terms of the PHI policy applied to the claimant. Indeed to have followed through with those procedures would almost inevitably have led to a very substantial claim for damages for breach of contract by the claimant against the respondent company on the basis of advice which was given by the claimant's legal advisers. It was the possible application of that policy to the circumstances of the claimant when he was unable to return to work in late January/early February that led the claimant's advisers to indicate to the claimant that rather than accepting the terms of the Settlement Agreement that he should require the respondent company to make an application for benefits under the terms of the PHI policy on behalf of the claimant. The submissions made by the claimant therefore in paragraph E13 are rejected.

37. Finally at paragraph E14 the claimant alleges that the respondent, possibly, intended to deliberately use the meeting of 19 January to make threats against the claimant. The respondent rejects the submissions made by the claimant under the seven paragraphs of E14. The Tribunal has found that the meeting of 19 January was a perfectly proper meeting conducted properly and fairly by Mr Knowles. The Tribunal has rejected the allegations made by the claimant of impropriety during the course of that meeting on the part of Mr Knowles. The meeting was not, as suggested by the claimant, arranged because the claimant had asked a question about the potential consequences of submitting his notice. The meeting had been organised by the respondent as a result of ongoing frustrations with the continuing absence of the claimant from work despite his anticipated return in November 2015. As the Tribunal has already indicated in this judgment, that is clear in the opinion of the Tribunal from the tone and content of emails exchanged between the four senior members of the management of the respondent company prior to the meeting on 19 January. The Tribunal rejects any impropriety in connection with the arrangements for that meeting as alleged by the claimant at paragraph E14 of his Written Submissions. The Tribunal finds that the genuine and reasonable intentions of the respondent in calling that meeting were indeed to catch up with the claimant bearing in mind he continued to be absent from work despite what they had been told in November 2015 about his imminent return, but at the same time the respondent wanted to explore with the claimant the possibility of reaching an agreement for the termination of his employment, or alternatively to indicate that the respondent company would begin a formal process under its policies and procedures as a consequence of the continued absence of the claimant from work.

38. The submissions of the claimant, therefore, made at paragraphs E10 to E14 are rejected for the reasons which have been explained above.

39. The conclusions of the Tribunal, therefore, are that at the time of the meeting on 19 January and up to and including the emails exchanged between the claimant and the respondent on 29 January at pages 346 and 282, that there were no "differences between the parties" which they were "able to litigate about". The Tribunal does not find that there was any potential or any basis for litigation between the claimant and the respondent as a result of the circumstances between 19 January and 29 January 2016 which would have given rise to the potential for or could have been the basis for litigation between the parties if agreement had not been reached. The respondent company wanted to know in which of two separate directions the circumstances relating to the ongoing absence of the claimant was to go. The respondent clearly preferred to reach a Settlement Agreement if possible, but at the same time they recognised on the basis of the information known to them at that time that if agreement could not reached that the company could invoke and rely upon its formal policies and procedures relating to sickness absence. In the opinion of the Tribunal, those alternatives do not give rise to "differences" between the parties and do not justify a conclusion that in that relevant time period there was the potential for or the basis for litigation between the parties if agreement could not be reached.

40. In the circumstances therefore the Tribunal rejects any suggestion of unambiguous impropriety on the part of the respondents and that would not have prevented the respondents enjoying the benefits of without prejudice privilege. The Tribunal has equally concluded in this judgment that the respondent company is not entitled to the benefits of "without prejudice" protection in respect of the discussions which took place between the claimant and the respondent on 19 January.

Employment Judge Whittaker

20th February 2017