EMPLOYMENT TRIBUNALS

BETWEEN

Mr K Gorman **AND** Cory Brothers Shipping Agency Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON PRE HEARING REVIEW

HELD AT Liverpool on 19 June 2018 and 26 July 2018 (in chambers)

EMPLOYMENT JUDGE Warren

Representation

For the Claimant: Mr J Crossfill, Counsel
For the Respondent: Mr S Forsyth, Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:-

1. **The respondent's application to exclude evidence of the content of a meeting on 26 October 2017 on the grounds that it was a protected conversation under section 111 of the Employment Rights Act 1996 is not well founded and is dismissed because of improper conduct on the part of the respondent.**

2. **The respondent's application to exclude evidence of the content of a meeting on the 26 October 2017 on the grounds that it was the subject of the "without prejudice" rule is not well founded and is dismissed.**

3. **The respondent's application to exclude evidence of the content of a meeting on 26 October 2017 on the grounds that it was the subject of**

the "without prejudice" rule by means of a contractual consent between the parties is not well founded and is dismissed.

REASONS

Background

1. By an ET1 presented to the Employment Tribunal on 9 February 2018, the claimant alleges that he was unfairly dismissed. The respondent denied the same.

2. The respondent challenges the admissibility of evidence of a conversation between the claimant and respondent's Group Chief Executive Officer, Mr Kidwell, and Mr McKellar, Group HR Director on 26 October 2017.

3. The claimant seeks to introduce this evidence on the basis that if there was a protected conversation it is admissible under the terms of section 111A (4) Employment Rights Act 1996 ("ERA"), the respondent being guilty of improper behaviour, and it would be just to include it in the evidence. The conversation was not in circumstances which led to either party being able to rely on the 'without prejudice' rule, and the claimant did not in fact agree to it being so.

4. The respondent asserts that this conversation is inadmissible by virtue of section 111A ERA as a 'protected conversation', or in the alternative as being covered by the 'without prejudice' principle, and finally, by agreement (contractually).

Evidence

5. The Tribunal heard evidence from the claimant in person, and Mr McKellar, Group HR Director, and Mr Kidwell, Group CEO, for the respondent. There was an agreed bundle of documents to which page references within this judgement refer. The evidential test 'the balance of probabilities' was applied. There was little factual issue between the parties, and that which existed could be related to memory failures from the passage of time. All of the witnesses were credible.

Facts

6. The claimant was employed by the respondent from 1 March 2006 until his summary dismissal on 1 December 2017. At the time of his dismissal he was the respondent's Managing Director. The respondent is described as an international logistics and maritime services provider.

7. The respondent's parent company has policies relating to employee share dealing.

8. The claimant brought his own breach of the policies to the attention of the respondent in January 2017. No disciplinary action was taken. He later, around mid-October 2017, referred two earlier breaches to the respondent's attention.

9. On the 25 October 2017 Mr Kidwell telephoned the claimant and asked him to attend a meeting with himself and Mr McKellar in London on 26 October 2017. No reason was given. A few hours later the claimant rang Mr Kidwell back to ask for the reason for the meeting. Mr Kidwell chose not to tell him. The claimant was not invited to be accompanied at the meeting.

10. In the meeting the claimant was advised that the Board considered the share dealing to be a serious issue. Mr Kidwell felt the claimant should look at leaving at the end of his notice period (6 months) as that would be 'best for all concerned', a comment he later reiterated in 'without prejudice' correspondence with the claimant (page 39).

11. The claimant cannot recall if he was then invited to take part in a protected conversation. The respondent witnesses agree that he was. The claimant had never heard of a protected conversation in any event, and did not know what one was. He was unaware, and not made aware, of the ACAS Code of Practice and Guidance.

12. Mr McKellar is an experienced HR professional who had practiced for 33 years. He confirmed in evidence that Mr Kidwell told the claimant that there was to be a 'pre termination discussion' as an alternative way of dealing with what had been described as 'issues considered serious by the Board', and that Mr Gorman agreed to engage. The claimant was then advised that the alternative was a disciplinary investigation, suspension and possible dismissal.

13. All parties agree that the claimant displayed shock at the news he had been given at the outset of the meeting. He had been totally unaware of the subject matter of the meeting, believing that the likely reason was to offer him support through the FCA's investigation.

14. There is no evidence that any party expressly indicated that the discussions would be "without prejudice".

15. The claimant was offered time to consider the proposal, and he asked for a week. The meeting was held on a Thursday. The claimant was given until

the Monday to respond, and invited not to work on the Friday, giving him a maximum of 2 working days to consider the proposal.

16. The respondent witnesses explained in their evidence that had the claimant agreed, a formal offer would then have been made, and the claimant given time to seek advice.

17. The claimant rejected the offer on the morning of Monday 30 October 2017. He was suspended pending disciplinary action on the 31 October 2017 and subsequently summarily dismissed.

Law

18. Without prejudice :-

The ‘without prejudice’ rule will apply where there is a dispute between the parties, there are communications amounting to a genuine effort to resolve the dispute, and the communications are not unambiguously improper (irrespective of whether the label is actually applied). *Faithorn Farrell Timms LLP v Bailey [2016] IRLR 839.*

Whether there is a dispute or not will depend on whether there is an actual or potential future dispute. Where the parties get to the stage of proffering and considering a compromise agreement it will very often be the case that there is an actual or potential dispute. *Portnykh v Nomura International Plc [2014] IRLR 251*

Framlington Group Limited v Barneston [2007] IRLR 598. The question is whether the parties contemplated or might reasonably have contemplated litigation if they could not agree.

19. Section 111A Employment Rights Act 1996

(1) Evidence of pre- termination negotiations is inadmissible in any proceedings on a complaint under section 111. This is subject to sections (3) to (5)
(2) In sub-section (1) “Pre-termination negotiations” means an offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.
(3) (Not relevant)
(4) In relation to anything said or done which in the tribunal’s opinion was improper, or was connected with improper behaviour,

subsection (1) applies only to the extent that the tribunal considers just.

Faithorn Farrell Timms LLP v Bailey [2016] IRLR 839:-

There are two questions to be answered:-

i) Was there any improper behaviour by any party in settlement discussions?
ii) If there was improper behaviour, the extent to which confidentiality in the negotiations should be preserved.

The employment tribunal is entitled to consider the ACAS Code of Practice and Guidance on Settlements in deciding if there has been improper behaviour.

20. Agreement

Avonwick Holdings Limited v Webinvest [2014] EWCA Civ 1436 the without prejudice rule also rests on the basis that parties are entitled to agree contractually that discussions shoul;d remain confidential. The parties can agree even if there is no dispute between them.

Submissions

21. On behalf of the respondent:-

In brief:-

21.1 The meeting on the 26 October was a pre-termination negotiation. There was no improper conduct on behalf of the respondent. In particular it was not improper to give the claimant four days to consider whether he wanted to enter into settlement discussions, and nor was it improper to suggest it would be 'the best way to go'

21.2 If improper conduct were to be find it would not be just to permit the claimant to adduce the evidence of the meeting, because there was no evidence that the respondent intended to act improperly, and the claimant did not enter into a settlement agreement, and so the evidence would not be probative.

21.3 The negotiations were covered by the without prejudice rule in any event. The claimant was advised on 26 October that there was a potentially serious issue. Mr Kidwell believed that if the claimant was dismissed, litigation would be likely

and on 30 October the claimant indicated in an email (page 51B), that he would not go quietly.
Litigation was actually contemplated by the parties.
There was no unambiguous propriety such as to negate the rule, and none is suggested by the claimant.

21.4 The claimant agreed to the conversation being a pre- termination discussion, which was by its nature confidential, and therefore the conversation was inadmissible as a matter of contract.

22. On behalf of the claimant.

In brief:-

22.1 The issue of improper conduct in section 111A ERA is left open in the ACAS Guide – it is a question of fact and degree. It does not however need to amount to unambiguous impropriety as in the "without prejudice" rule. Section 111A ERA only relates to claims of unfair dismissal. The tribunal is invited to look at the evidence in the round, not slice by slice.

22.2 The claimant was invited to the meeting by telephone without any warning (ACAS suggests this should be an invitation in writing). When he rang to ask what it was about he was deliberately not told. He was unable to prepare mentally or factually.
ACAS suggests it is good practice to offer the employee the chance to be accompanied. The fact that the claimant was a senior employee did not impact on the fact that there was inequality of position.

22.3 Everyone accepts that the claimant as shocked, the meeting however did not slow down. This was unreasonable.

22.4 The pressure placed on the claimant may well have been thoughtless – he was told the view of the Board. It was the CEO and head of HR for the Group conducting the meeting.
There was an absence of neutrality. The claimant was told what to do, the only sensible option 'the best thing to do' and the 'facts are clear'.

22.5 The claimant was placed under pressure of time by being given four days to think about a settlement. He was not given anything in writing. He was told that he would be suspended pending a disciplinary investigation if he did not agree.
Thoughtlessness can be improper behaviour.

22.6 The respondent's exposition on the law relating to 'without prejudice' is agreed by the claimant.
There is no authority in law which states that the action of an employer in saying 'let's have a without prejudice discussion' gives rise to a 'dispute'.

Commenting on the case law

22.7 *Framlington* – the parties had been squabbling for months, there was a clear dispute.

22.8 *Partnykh* – this was a redundancy following an intimation of dismissal, a clear ongoing dispute.

22.9 In summary – something happens and a without prejudice conversation flows from it. It is incongruous for an employer to instigate a dispute, and the instigation itself is asserted to be ‘without prejudice’. The ACAS guide agrees with this.

Contractual consent

23. It is impossible to contract out of Section 111A ERA and in *Autoclenz v Belcher [2011] UKSC 41* the comments relating to consent are obiter.

Conclusions

Section 111A ERA

24. There was, on the facts of this case, improper conduct by the respondent. I have taken account of the ACAS guidance and considered the evidence ‘in the round’. There is no case law yet on the parameters of improper conduct. The factors taken into account in deciding overall that the respondent behaved improperly are as follows:-

24.1 Mr Kidwell made no effort to write to the claimant to invite him to the meeting, and gave him gave less than 24 hours telephone notice.

24.2 He deliberately chose not to tell the claimant what the meeting was about when the claimant queried it in advance. He knew therefore at the outset that the claimant came into the meeting with no element of preparation.

24.3 He did not offer the claimant the chance to be accompanied.

24.4 He knew that the Board was taking it very seriously and expressed that view to the claimant, indicating it would be best for the company and claimant, for the claimant to accept a settlement package consisting of his contractual 6 month notice period.

24.5 He knew that at the time this conversation progressed, the claimant was in shock.

24.6 He did not offer the claimant a copy of the ACAS pre termination settlement guidelines, he did not check to establish that the claimant knew what a protected conversation was.

24.7 It is far from clear that he had read the guidelines himself, as he did not follow them.

24.8 Mr McKellar, a highly experienced HR Director, was unaware of what the claimant had been told before he entered the meeting, and was unaware before the meeting that the claimant was likely to leave the business. It had not crossed his mind to let the claimant know what it would be about, or suggest he should be accompanied, and he confirmed that the claimant was shocked. He agreed that the claimant asked for a week to consider what had been said, but was persuaded by Mr Kidwell, to reduce the time to 4 days over a weekend.

24.9 It should have been obvious to both Mr Kidwell and Mr McKellar, that having delivered a very harsh and potentially career ending message to the claimant, who had no idea that it was coming, after a lengthy and successful career in a very senior position, Mr Gorman would be in no position to have a protected conversation. Indeed it is clear he had no idea what such a conversation was.

25. The ACAS guidelines were not followed and they are there to ensure parity and fairness between the parties in such conversations. It is surprising that far from being followed they were deliberately flouted in some degree

26. In this case therefore I find that the respondent behaved improperly and that the conversation is, on the face of it, admissible in evidence.

27. It is then necessary to consider how much if any of the conversation should be included or excluded in the interests of justice.

28. This is a claim for unfair dismissal. It is true to say that the claimant refused the offer of settlement and chose to proceed with the disciplinary procedure. However it is unarguable that the start of the disciplinary process began within the meeting with the claimant being advised of the serious nature of his alleged misconduct and the process that would be followed if he did not agree settlement. It would therefore seem just to enable the claimant to refer to the entire conversation, as part of his allegation that he was treated unfairly from the outset.

29. The issue of the weight to be placed on such evidence will be entirely in the hands of the Tribunal which hears the case in due course and is not something which I intend to pre judge as I am unaware of the rest of the allegations if any, and the response to them.

<u>The ‘Without Prejudice’ Rule.</u>

30. There was no dispute at the time when the claimant attended the meeting, he was ambushed with news in that meeting from the respondent which later led to a dispute. The first real indication however came several days later in an email on 30 October 2017 in which he said that he 'would not go quietly'. This post-dated the conversation which the respondent asserts was 'without prejudice'.

31. The 'dispute' was created by the respondent. The respondent officers knew that they intended to raise issues which may lead to a dispute. The claimant was completely unaware until after the issues were raised. There cannot be said to be an existing dispute at the time that the respondent initiated a conversation to see whether there was scope for the claimant to leave voluntarily (which is the respondent's case).

32. In any event having attempted to create a dispute within the meeting it ill behoves the respondent to rely on the situation to argue that the rest of the meeting was subject to the 'without prejudice' rule, particularly when it was not specifically mentioned to be as such, to a shocked and ambushed claimant.

33. The dispute crystallised when the claimant said that he would not go quietly. At that stage both parties knew that there was a chance of litigation, and a dispute can truly be said to exist. That did not occur until some days after the meeting in issue.

34. In conclusion I do not find that the respondent behaved with unambiguous impropriety (a very different test to 'improper conduct'). I do however find that at the time of the meeting there was no dispute and therefore the 'without prejudice' rule is not engaged.

35. It follows that I do not find that the claimant consented to holding a 'without prejudice' discussion such as to form a contractual term. He was insufficiently informed to agree any such term at the time.

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Employment Judge Warren
31 July 2018

Judgment sent to Parties on

4 August 2018