Appeal No. UKEAT/0085/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDINGS,7 ROLLS BUILDING, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 27 August 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MS ANNE HARRISON — APPELLANT

ARYMA LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES BROMIGE (of Counsel) Instructed by: Excello Law 5 Chancery Lane London WC2A 1LG
For the Respondent	MR RAD KOHANZAD (of Counsel) Instructed by: Peninsula Business Services Ltd The Peninsula Victoria Place 2 Cheetham Hill Road Manchester M4 4 FB

SUMMARY

PRACTICE AND PROCEDURE – Admissibility of evidence

Following her resignation, the Claimant presented a claim form. The Respondent had written her a letter in August 2016 proposing that her employment be terminated on the basis of a settlement agreement. Her case was that this was a reaction to the news that she was pregnant, that there had been a history of various detrimental treatment for pregnancy or maternity-related reasons, and that the writing of that letter to her had led, in due course, to her decision to resign. It was her case, at least, that she had been constructively dismissed, and that she had been both unfairly dismissed and discriminated against contrary to sections 18 and 39 **Equality Act 2010**.

The Respondent defended the claims on their merits. It also asserted that section 111A **Employment Rights Act 1996** meant that the Claimant could not rely on the August 2016 letter in relation to any of her claims. It also asserted that she had in any event waived her right to rely on that letter as having caused her to resign, and it raised time points in relation to her discrimination claims.

At a case management Preliminary Hearing (PH) a Judge directed a further PH to consider the Respondent's application for strike -out /deposit orders, the "applicability" of section 111A and time points. The Claimant then tabled amended particulars of claim, which included her case in response to the Respondent's reliance on section 111A. This included that the August 2016 letter was not a genuine attempt to negotiate, so (it was argued) the section was not engaged at all, that section 111A(3) applied, and that the writing of the letter was "improper behaviour."

The Judge who heard the further PH stated in his decision that it was agreed that section 111A was "applicable", and held that it precluded reliance on the August 2016 letter in respect of the

unfair dismissal claim, but not the discrimination claims. The Claimant appealed the decision in relation to section 111A on the basis that the Judge had failed to engage with the issues in relation to section 111A(3) and (4), or, if he had, to explain his reasons in relation to them.

The appeal was allowed. In this particular case the amended particulars set out the factual basis for a claim of constructive automatically unfair dismissal, including the express assertion that the tabling of the August 2016 letter was an act of pregnancy or maternity discrimination, the assertion that section111A(3) applied, and the assertion that the writing of the letter amounted also to "improper behaviour". That provided the basis for assertions that both sections 111A(3) and (4) applied. The former assertion was also made in counsel's written skeleton argument for the second PH. While neither the pleadings nor that skeleton expressly referred to section 99 **ERA** 1996 or regulation 20 MAPLE Regulations 1999, that was a pure labelling exercise.

It appeared that the Claimant's counsel at the second PH has also not raised in *oral* argument that there were issues under either sub-section (3) or (4) of section 111A. In those circumstances it appears that the Judge understood that what he was told was agreed in respect of section 111A had disposed of the section 111A aspect entirely; and he did not give any consideration to how matters stood in relation to sub-sections (3) or (4).

However, in circumstances where there had been a reactive amendment to the particulars of claim, in response to the Respondent's assertion that section 111A applied, which expressly raised section 111A(3) and implicitly section 111A(4), in which no further case management prior to that PH had occurred, and no draft or agreed list of issues had subsequently been drawn up or tabled, and in which the Claimant's reliance on these provisions was not expressly abandoned, it was incumbent on the Judge at the second PH to seek to clarify with the representatives the issues arising under section 111A(3) and(4) and then to address them.

HIS HONOUR JUDGE AUERBACH

Introduction and Background

1. This matter is proceeding in the Cardiff Employment Tribunal ("ET"), and I will refer to the parties as they are in the ET as Claimant and Respondent. This is the Claimant's appeal. This appeal arises from a Decision at a Preliminary Hearing relating to the impact in this case of Section 111A **Employment Rights Act 1996** ("ERA"). That section appears in the part of that Act concerned with the right to claim unfair dismissal. More specifically, it follows Section 111, which gives a person, who believes they have been unfairly dismissed contrary to that part, the right to present their complaint to an ET.

2. It is, therefore, convenient to set out the text of Section 111A at the outset:

> **"111A Confidentiality of negotiations before termination of employment**
>
> **(1). Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under Section 111.**
>
> **(2). In subsection (1) "pre-termination negotiations" means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.**
>
> **(3). Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in or made under this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.**
>
> **(4). In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.**
>
> **(5). Subsection (1) does not affect the admissibility, on any question as to costs or expenses of evidence relation to an offer made on the basis that the right to refer to it on any such question is reserved".**

3. On 29 September 2017 the Claimant's solicitors, on her behalf, presented a claim form. That identified that she had been employed by the Respondent as a master craftsperson from 2002 until 2 July 2017. In box 8.1, concerning the type and details of claim, the boxes: "I was

unfairly dismissed, including constructive dismissal", and "I was discriminated against on the grounds of pregnancy or maternity, and sex" were ticked.

4. Attached to the claim form were particulars of claim. In the form that they were originally attached they began: "I am making a claim of constructive dismissal against Aryman Limited on the grounds of discrimination relating to pregnancy and maternity, and sexual discrimination". They went on to set out the Claimant's case that she had been left with no choice but to resign in light of the Respondent's behaviour to her since informing Mr Howard Sansome that she was pregnant, and that this behaviour was a fundamental breach of contract, and that she had been treated less favourably on the grounds of protected characteristics.

5. The unamended particulars went on to refer to the tabling by the managing director, Mr Sansome, of a letter dated 15 August 2016, from which, the particulars asserted, it was clear that he intended to bring the working relationship to an end. They went on to assert that this letter represented the last straw after a series of incidents over the previous few years related to her status as a pregnant woman and working mother, this being her third pregnancy. Further on the particulars asserted: "He has treated me unfairly as a result of my decision to start a family".

6. Over several pages the particulars gave more of the Claimant's side of the story as to the pregnancy-related treatment to which she said she had previously been subjected in her employment, and as to her case that this had happened again in relation to the third pregnancy, in particular by the Respondent's conduct in tabling the 15 August 2016 letter.

7. A response was entered defending the claims on their merits. It had attached to it grounds of resistance which asserted that the letter of 15 August 2016 could not be relied upon

to support the Claimant's case that the Respondent was in fundamental breach of contract, because it was rendered inadmissible by Section 111A of the **1996 Act**. Insofar as she was bringing a claim under the **Equality Act 2010** the response asserted that she could not rely on it for that purpose either, as she had failed to establish any improper behaviour. Other issues were raised, including as to whether the Claimant could seek to rely on alleged breaches of the implied term, or matters contributing to an alleged breach, in respect of a period when she had continued to work on; and as to whether she could rely on the 15 August 2016 letter when she had not, in fact, resigned until many months later. Time points were also asserted.

8. There was a Preliminary Case Management Hearing on 4 January 2018 before Employment Judge ("EJ") Whitcombe. Both parties were represented. The Judge wrote in the minute, under the heading, "Claims and issues":

> **"The claimant has brought claims for unfair (constructive) dismissal and direct discrimination because of her sex, pregnancy or maternity".**

The minute also indicated that it was now accepted that the Claimant could not rely on matters said to have taken place prior to the sending of the 15 August 2016 letter. The Judge wrote:

> **"The constructive dismissal complaint is, therefore effectively based on a single act or event rather than a "final straw" among many distinct allegations".**

The Judge continued that the discrimination claims would benefit from further particularisation, which was addressed in the Orders made.

9. The Judge directed a Preliminary Hearing to consider three matters. Firstly, whether there should be an Order for a deposit or strike out in respect of, "The unfair constructive dismissal complaint". This was having regard to the lapse of time between the 15 August 2016 letter and the date of resignation. Secondly, time limit issues in relation to the discrimination claims and thirdly, what was described as: "The applicability of Section 111A **ERA 1996** to the discussions on 15 August 2016". The Judge went on to say that the Section 111A point was

difficult to manage. Essentially, that was because the section could potentially apply to an unfair dismissal complaint, but not to a discrimination complaint. So, if both were live at the final hearing the Tribunal might, therefore, be entitled to have regard to it for the purposes of one complaint, but be obliged to disregard it for the purposes of the other.

10. The Judge directed that there be a further PH to consider all of these matters. In the specific orders made there was an Order for the Claimant to send to the Respondent:

> **"Concise further details of the discrimination claims, stating the date of each relevant act or omission, the person responsible and the gist of the allegation".**

I observe that there was no direction for the Respondent to further particularise its response.

11. Following that hearing, the Claimant tabled amended particulars of claim. These included a statement of her position in response to the Respondent's reliance upon Section 111A. The amended particulars referred to the Respondent purportedly relying on that section and stated that it was not admitted that it could do so, including the statement:

> **"I shall seek to rely on the provisions of Section 101A(3)".**

The amended particulars also gave more information about the Claimant's case in relation to the tabling of that letter, in the summary section, where it indicated her case was that:

> **"To state that the only way forward is basically for me to leave (settlement) seems incredibly harsh and unfair".**

Further on she alleged in the amended particulars that the purported issues of performance or conduct raised by that letter were petty, pedantic, and trivial, and that:

> **"…Such conduct does not in my view entitle the Respondent to rely on the provisions of Section 111A of the Employment Rights Act 1998, which is intended to afford protection as to (only) those discussions pre-termination, which are genuinely focused upon a desire to achieve settlement through negotiation rather than dictation".**

These amended particulars went on:

> **"Furthermore, this improper behaviour also amounts to direct sex and/or pregnancy discrimination within the meaning of Sections 4, 13, 18, 23, 24, 25 (5) and (8) of the Equality Act 2010, which I consider also amounted to a fundamental breach of the implied terms of**

> **mutual trust and confidence and was a manifest repudiatory breach of my Contract of Employment entitling me to resign my position with the Respondent".**

12. In relation to remedies the amended particulars indicated that the Claimant was seeking compensation for financial loss, injury to feelings, constructive unfair dismissal, an uplift for failure to comply with the ACAS Code of Practice on disciplinary and grievance procedures, interest and a declaration that she had been discriminated against on the grounds of sex and pregnancy.

The Employment Tribunal's Decision

13. Following the tabling of those particulars there was no further case management hearing or any case management orders prior to the hearing on 13 April 2018 that had been ordered to take place at the 4 January hearing. That hearing was before EJ S J Williams. The Claimant was represented by counsel and the Respondent by a consultant. The Judgment is in three points recorded as follows;

> **"1. As a condition of continuing to pursue her claim of dismissal the claimant is ordered to pay a deposit of £200**
>
> **2. in the absence of a successful constructive dismissal claim it is not just and equitable for the tribunal to consider the claimant's earlier discrimination complaints because of their late presentation;**
>
> **3. section 111A of the Employment Rights Act 1996 applies to the pre-termination negotiation between the parties evidenced by and following the respondent's letter of 15 August 2016, but the section is of no relevance to a claim of discrimination."**

14. There were written reasons which began by identifying that the Claimant complained of:

> **"Constructive unfair dismissal and discrimination on the protective grounds of sex, pregnancy or maternity".**

They reproduced the three points identified at the earlier case management Preliminary Hearing, which were for consideration at the present hearing, the third point being:

> **"the applicability of Section 111A of the Employment Rights Act 1996 to the discussions on 15 August 2016".**

A They referred to the Tribunal having heard evidence from the Claimant, and Mr Sansome of the Respondent, and having a bundle of documents, and there being written and oral submissions.

B 15. The Tribunal's findings of fact included the following at paragraphs seven, eight, and nine:

> **"7. The Respondent presented the claimant with a letter (B1) dated 15 August 2016 entitled "Confidential settlement proposal" in which it expressed concerns about the claimant's performance and conduct, saying "at this point we believe it is no longer possible to resolve this … because… you become highly defensive and sometimes accusatory ". The letter referred to the possibility of the claimant raising a formal grievance, before continuing, "however we consider that, in these circumstances, one option is to offer you a settlement agreement to bring our employment relationship to an end amicably", and proposing a meeting the following day. That meeting did not take place. The claimant thought this letter was connected with her pregnancy because it came out of the clue shortly after she had announced her pregnancy.**
>
> **8. The parties are agreed that the letter of 15 August contained pre-termination negotiations covered by section 111A of the Employment Rights Act 1996.**
>
> **9. The Claimant took sick leave for one week, following which the parties met on 26 August. At that meeting, and in subsequent correspondence, negotiations continued, proposals and counter -proposals were made but no agreement was reached."**

C

D

16. After the findings of fact there was a section headed, "Discussion and conclusions" which began in paragraphs 18 and 19 as follows:

E

> **"18. I deal firstly with the claim of constructive dismissal. The modern principles underlying such a claim derive from the case of Western Excavating Ltd v Sharp [1978] 1 QB 761 CA. The first principle is that there must be found to be a fundamental breach of the contract of employment by the respondent. On 4 January Employment Judge Whitcombe recorded that the claimant accepted that she had waived any breach of contract earlier dismissal was based on the allegation that that letter itself amounted to such a breach. Today, after being allowed some time for reflection, Ms Ahari confirmed that the claimant's complaint about that letter is that it evidence pregnancy discrimination. It is not said to amount to a breach of contract in any other way.**
>
> **19. The claimant resigned with effect from 2 July 2017. Ms Ahari relies on section 39 of the Equality Act to argue (subsection 2(c)) that the respondent must not discriminate against the claimant by dismissing her and, further (subsection 7(b)), that dismissal includes the termination of the employment by the claimant in circumstances such that she was entitled, because of the respondent's conduct, to resign without notice. If the claimant establishes that she was entitled to resign because of respondent's discriminatory conduct – that is to say that she was constructively dismissed – then her claim presented on 29 September 2017 is in time."**

F

G

17. The Judge went on to say that he considered that there was a strong likelihood that, because of the gap in time between the tabling of the August 2016 letter and the resignation, and because it could be said that the Claimant expected the Respondent in the interim to keep

H

her job open for her, she had lost the right to rely on that letter in support of her constructive dismissal claim. For that reason, the Judge was minded to make a deposit order in respect of that claim. The Judge also considered that it would not be just and equitable to extend time if the Claimant could not establish a discriminatory dismissal for the purposes of her **Equality Act** claim. The Judge said no more in the Reasons about Section 111A.

The Appeal

18. The Claimant, as I have said, specifically seeks to appeal against the Decision in relation to Section 111A. In the Notice of Appeal the principal basis of this appeal is identified in ground one, namely that the Judge erred by failing to consider whether factors were present under Section 111A(3) and/or (4). In particular, it asserts that there was no concession that those provisions did not or could not apply in this case, as opposed to an acceptance that the letter was evidence of pre-termination negotiations as defined in Section 111A(2), as such. The Notice of Appeal also argues that the Judge had ignored or not addressed the fact that, since the Claimant was arguing that she had been constructively unfairly dismissed because of her pregnancy, she was effectively claiming that she had been automatically unfairly dismissed contrary to Section 99 of the **Employment Rights Act 1996** and the associated Regulations, which would cause Section 111A(3) to apply. The Judge, it is argued, also failed to address the Claimant's case that the writing of the letter amounted to improper behaviour, such that Section 111A(4) would apply.

19. Alternatively, ground two contends the Judge had not sufficiently explained his Decision on these points so as to comply with Rule 62 of the ET's rules of procedure and/or the principles in the **Meek** line of authorities.

20. When the Notice of Appeal was considered on paper Soole J wrote:

> **"In the context of the claim of automatic unfair dismissal in the apparent absence of any stated reasons for the Judgment in respect of Section 111A Employments Rights Act 1996, I consider the grounds of appeal to be reasonably arguable".**

21. An Answer was then entered in the usual way. This argued that there had effectively been a concession that Section 111A operated so as to exclude the letter from evidence in relation to the unfair dismissal claim. That concession having been made, and no argument having been advanced that Section 111A(3) or (4) might nevertheless apply, the Tribunal was not obliged to say any more about Section 111A.

22. It was suggested in the Answer that the EAT might seek the representatives' and/or Judge's notes to clarify these points, but in the event that was not pursued further and that did not happen. The Answer also asserted that the Judge did not confuse the possibility of a Section 99 **Employment Rights Act** claim with the possibility of an **Equality Act** claim under Sections 18 and 39 of that Act, but proceeded correctly on the basis that no Section 99 claim had been asserted, even if one could have been.

The Law

23. I have already set out the text of Section 111A itself. I note also that ACAS, around the time when this section was introduced, produced a Code of Practice on Settlement Agreements, (ACAS Code 4). As the Code itself explains, it having been issued under Section 199 of the **Trade Union and Labour Relations Consolidation Act 1992**, a failure to follow the Code does not in itself give rise to freestanding liability, but ETs should take it into account where they consider it to be relevant to any issue in the case.

24. In a section headed, "Improper behaviour" the Code suggests that this concept may be broader than behaviour that would amount to "unambiguous impropriety" for the purposes of the without-prejudice rule, and, whilst accepting that what amounts to "improper behaviour" must be for an ET to decide on the facts and in the circumstances of each case, it goes on at paragraph 18 to provide some non-exhaustive examples of "improper behaviour", including, at (d), discrimination by reference to any of the listed protected characteristics, which include sex, pregnancy, and maternity.

25. I was referred to **Faithorn Farrell Timms LLP v Bailey** [2016] IRLR 839. This establishes a number of points about Section 111A, including that its provisions are distinct from, and additional to, the concept of without-prejudice privilege; that where there are mixed claims Section 111A will apply to a claim of unfair dismissal, unless it is one of automatic unfair dismissal, but not to the other claims, so that the Tribunal may have regard to evidence excluded by Section 111A in relation to the unfair dismissal claim for the purpose of determining the other claims; that where the section renders evidence inadmissible the parties cannot waive that rule and consent to the evidence being admitted; and that, as the Code envisages, improper behaviour is potentially wider than the concept of unambiguous impropriety for the purposes of the without-prejudice rule.

26. There are two other authorities I am aware of where the EAT has previously considered Section 111A. They are **Basra v BJSS Ltd** [2017] UKEAT/0090/17/DA, but on a point that is not relevant to this appeal, and **Graham v Agilitas IT Solutions Limited** [2017] UKEAT/0212/17/DA, also largely on points that are not relevant to this appeal. However, I note that in that case the EAT considered that a 111A(4) point should be considered by the ET

on remission, because of its substantial overlap with another point that was to be remitted to do with the scope of the without prejudice privilege, and any waiver or not thereof in that case.

The Arguments

27. I had the benefit of written skeleton arguments from the two representatives who have appeared before me: Mr Bromige for the Claimant, and Mr Kohanzad for the Respondent. It is fair to point out that neither of them appeared at either of the two PHs before the ET. In their written skeletons they traversed much the same ground as in the Notice of Appeal and the Answer. But Mr Bromige also highlighted that, in her skeleton argument for the April 2018 PH, the Claimant's then counsel had, at paragraph 21, included the assertion that Section 111A could only be relied upon in respect of a complaint of ordinary unfair dismissal, and not one of unfair dismissal for a reason that is automatically unfair, "such as the employee's pregnancy or trade union membership".

28. In the course of argument before me this morning both counsel agreed that the outcome of this appeal could be significant, even though in any event a claim of constructive discriminatory dismissal is going forward, in relation to which Section 111A will not prevent the August 2016 letter being put in evidence. That is partly because even if – and there was a dispute about this – the correct view is that there is a live claim of automatic unfair dismissal pursuant to Section 99 of the **1996 Act**, which would substantially overlap with the Section 18 and 39 **Equality Act** claim, the legal scope of those two claims is not precisely identical; and, perhaps more importantly, because if there is a live claim of the former type in which the Claimant succeeds, she will be entitled, in addition to other compensation, to a basic award.

29. It was also agreed during the course of discussion this morning, rightly in my view, what the fair inference was, as to what had occurred at the 13 April 2018 hearing, in terms of what concession had or had not been made by the Claimant's then counsel. That is to say, the only fair and sensible inference to draw from the content of the Judgment and Reasons was that something had been said, which was at least intended to convey to the Judge that the Claimant's counsel was no longer maintaining the argument that the letter did not represent an attempt to bring about a termination on agreed terms, as referred to in Section 111A(1) and (2).

30. However, it must also be inferred that there was, at that hearing, no discussion at all of the Claimant's position, or indeed that of the Respondent, in relation to the applicability or not of Section 111A(3) and/or (4). Mr Kohanzad sensibly accepted that, if there *had* been something said proactively by the Claimant's counsel orally, say to the effect that arguments based on 111A(3) and/or (4) were no longer being pursued, or that it was now agreed or accepted by the Claimant, that either or both of those provisions were not engaged, the Judge would surely have recorded that. So, it must therefore be inferred that, whatever may have been intended by the Claimant's counsel, the Judge, not having had 111A(3) or (4) proactively raised with him in oral submissions, and not having applied his mind to them, *assumed* that what he was being told about Section 111A disposed entirely of the 111A issue. Mr Bromige sensibly accepted that, reading the Judgment and Reasons as a whole, the Judge clearly did believe that the Section 111A issue had been wholly disposed of by what he had been told; but nevertheless this came about without the Judge having considered section 111A(3) or (4) at all.

31. That being agreed during the course of submissions before me, the difference between counsel resolved down to whether the Judge nevertheless *should* have considered and addressed Section 111A(3) and/or (4). Mr Bromige said he should, for one or more of three reasons.

32. First, it was signposted in the amended particulars of claim and/or in counsel's written submission for that hearing, that points on these two provisions *were* being raised; and those points had not expressly been withdrawn or abandoned. Secondly, the proper construction of Section 111A was that it did not apply at all when either subsection (3) or (4) or indeed both of them were engaged, so that necessarily those provisions had to be worked through, if not in every case, certainly in a case where they were potentially or arguably in play. Thirdly, Section 203 **Employment Rights Act 1996** meant that, once either or both of these sub-sections were engaged, a party could not agree to waive their application. He said this was a further instance of a point about section 203 discussed in **Bailey**, although there the point concerned a purported agreement by the parties, to admit something into evidence notwithstanding that Section 111A provided that it could not be admitted.

33. Mr Kohanzad disagreed with all three points.

34. I note two preliminary points about the architecture of Section 111A. Firstly, each of subsections (3) and (4) operates independently of the other. There may be some cases where one applies but not the other, either way around, but there may also be cases where both are engaged. Where either applies Section 111A as a whole will not apply. Secondly, there is a potentially important difference in their mechanisms. Section 111A(3) applies wherever a claimant puts their case a certain way, regardless of whether that case proves ultimately to be well founded. The application of Section 111A(3), therefore, depends on a proper consideration simply of how the case is being put. Section 111A(4), however, requires the Tribunal to form an opinion – effectively to make a finding – that something has been said or been done which amounts to improper behaviour; and, if it is of that opinion, to go on to consider to what extent it is just and equitable for that to affect the application of Section 111A.

35. In this case, therefore, it is important to consider how the Claimant's case was being put in the run up to the April 2018 hearing. This is complicated by the fact that the claim form was amended after the case management PH, but received no further case management or other consideration prior to the April 2018 PH.

36. However, what I think at least is clear, and Mr Kohanzad accepted this up to a point, is that the original claim form did assert a constructive unfair dismissal claim as well as claims of discrimination during employment and a constructive discriminatory dismissal claim. Further, it did, in relation to the constructive unfair dismissal claim, assert a factual basis that would support a claim under Section 99 and the relevant associated provisions of the **Maternity and Parental Leave Etc Regulations 1999**, including stating in terms:

> **"He has treated me unfairly as a result of my decision to start a family".**

I say that Mr Kohanzad accepted this up to a point, because he accepted that all the elements of that claim in terms of the factual case were there, but he said it was still not stated that the Claimant was asserting automatic unfair dismissal pursuant to Section 99 and Regulation 20 of the 1999 Regulations. However, he conceded that, on an application to amend, that would be bound to have been granted as a mere relabelling exercise.

37. As at the 4 January 2018 PH, it was known that there was an invocation of Section 111A by the Respondent, because that had emerged from their grounds of resistance. What was not yet set out in any document on the Claimant's behalf was the Claimant's case in response to the Respondent asserting that Section 111A applied. If this was discussed at all at the 4 January 2018 hearing the minute does not record what the Claimant's case in relation to Section 111A was said to be. It does say that there was an issue "as to the applicability of Section 111A", but

does not give any indication of what that issue was (or whether that was discussed). The discussion about the practicalities of managing a hearing in which evidence is or may be inadmissible for the purposes of one claim, but admissible for the purposes of another claim, does not materially advance the reader's understanding at this point of what the substantive issue as to the applicability of Section 111A is or may be, over and above that.

38. Further detail about that can only be acquired from the amended particulars of claim. These do, in terms, as I have recorded, invoke Section 111A(3). Even then, says Mr Kohanzad, the amended particulars do not, in terms, invoke Section 99. However, I observe that the invocation of Section 111A(3), coupled indeed with the existing words in the particulars: "He has treated me unfairly as a result of my decision to start a family", and the repeated assertions throughout the original and amended particulars of claim, that the 15 August 2016 letter was written in an attempt to move towards a parting of the ways because of the news of the Claimant's pregnancy, must convey to the reader that the Claimant is seeking to argue that she was automatically unfairly dismissed for pregnancy or maternity related reasons, and that that is the reason why she asserts that Section 111A(3) applies. There is no hint or suggestion of any other possible ground on which she might be saying in these amended particulars of claim that she was automatically unfairly dismissed for the purposes of Section 111A(3).

39. As I have said, the amended particulars of claim also describe the alleged conduct or motivation for the conduct of the Respondent in tabling the August 2016 letter as "improper behaviour". That said, there is no specific reference to Section 111A(4), but it is difficult to view the choice of that particular expression as merely coincidental.

40. Pausing there, it seems to me that, on a careful reading of the amended particulars of claim it ought to be clear to the reader, even though Section 99 and/or Regulation 20 of the 1999 Regulations have not been cited, that the Claimant is asserting a claim of automatically unfair dismissal, and asserting that for that reason Section 111A(3) is engaged, and Section 111A does not apply. That is in addition to her further argument, advanced at that point, that this letter was not evidence of pre-termination negotiations in the section 111A(2) sense, because it was a sham attempt to negotiate. There is also at least the basis here for the further assertion that Section 111A(4) applies, given the assertion that the conduct in tabling the letter was "improper behaviour".

41. The Judge at the PH in April 2018 did not have the benefit, however, of the amended particulars already having been subjected to any further consideration or analysis by the Tribunal at a further case management PH, nor of either of the parties having drafted or tabled, let alone sought to agree between the representatives, a draft list of issues which might have clarified and spelled out the issues as to the applicability of Section 111A that the Judge at the April 2018 PH needed to consider. Mr Kohanzad says that was the fault of the Claimant's solicitors and/or counsel who appeared at the April PH, who could, for example, have drawn up and tabled a draft list of issues for the Judge's consideration.

42. However, it seems to me at least potentially – and I will return to this – that in circumstances where further particulars had been tabled *following* the last case management PH, and where those particulars were to some degree inevitably *reactive* to the Respondent having asserted that it would rely on Section 111A, and in the absence of any list of issues, there was some obligation on the Judge proactively to clarify with the parties what the up to date position was in relation to what the Section 111A issues were, given that this was on the

agenda for the PH, and so that the Judge could then reach a reasoned Decision from a basis of clarity about the scope of those issues.

43. Further, the Claimant's counsel did, in her skeleton argument for that hearing, flag up at paragraph 21 that where there is a claim of automatically unfair dismissal, including by reason of pregnancy, Section 111A will not apply. However, as I have said, both counsel agreed before me, and I agree with them, that it must be inferred that, for whatever reason, this was not pursued by her proactively in oral submissions at that hearing. She did, however, make sure that the Judge had on board that the Claimant was not just claiming constructive *unfair* dismissal, but constructive *discriminatory* dismissal relying on Section 39(7)(b) of the **2010 Act**. That can be seen, in terms, from paragraph 19 of the Judge's Reasons. However, it appears that she did not, either in her skeleton for that hearing or orally, specifically raise the potential applicability of Section 111A(4).

44. However, although the skeleton argument makes the point that where there is a claim of automatically unfair dismissal, including on grounds of pregnancy, the effect of section 111A(3) is that Section 111A does not apply, as I have said, it must be inferred that the Judge did not have his attention drawn to this in oral submissions. Nor is there any sign that it was put to the Judge in oral submissions that it was the Claimant's case, in terms, that the constructive unfair dismissal claimed should be regarded as an automatically unfair dismissal within the scope of Section 99 **ERA** and Regulation 20 of the **1999 Regulations**.

45. Certainly, with respect to him, the Judge does not appear to have considered whether, if there was a claim of constructive discriminatory dismissal (because of pregnancy) and constructive unfair dismissal, the latter must be based on what is an automatically unfair

ground. The Reasons refer in paragraph 1 to claims of constructive unfair dismissal and discrimination on the protected grounds of sex, pregnancy or maternity, but do not expressly refer to constructive discriminatory dismissal. Nor do they do so anywhere else. Further, paragraph one of the Judgment is potentially ambiguous, since it refers to a claim of constructive dismissal, pure and simple, without referring to whether that is said to be unfair, discriminatory or both.

46. Mr Bromige submitted with some force that a further sign of the lack of clarity in the Judge's thinking, was that he had decided that Section 111A meant that the Claimant *could not rely* upon the 15 August 2016 letter for the purposes of her constructive unfair dismissal claim, but yet appeared separately to have considered that a deposit should be ordered in relation to it on the basis that she had waived her *ability to rely* on that very letter in the months that followed it having been written. This lack of clarity is compounded by the lack of clarity as to which of the claims the deposit order was intended to apply to.

47. I come back then to the three reasons, any of which would suffice for him to succeed in this appeal, why, according to Mr Bromige, the Judge was at fault in not proactively engaging with Section 111A(3) and/or (4) at all. (Alternatively, he contended, if the Judge *had* considered these provisions, he had failed to explain *how* he had done so, so that his Reasons did not comply with Rule 62 and/or **Meek** principles). To repeat, the first of these was that the Judge should have engaged with these matters because they were live issues and aspects of the Claimant's case that had not been abandoned or withdrawn, and there was a responsibility on the Judge to clarify the issues so that he could properly deal with them in a reasoned Decision.

48. Mr Kohanzad said that this was too great a burden to place upon the Judge where there was a represented Claimant, where her own pleadings, even as amended, were not a model of clarity, and where I must proceed on the inference that her representative had not proactively spelled out these points in oral submissions.

49. Mr Kohanzad suggested that even the reference in the written skeleton to the significance of an automatic unfair dismissal complaint was curiously unfocussed, in that it gave the examples of dismissal on grounds of pregnancy or trade union membership, the second of which was irrelevant, and failed to follow though by stating in terms that it was the Claimant's case that this dismissal was automatically unfair pursuant to Section 99 and/or Regulation 20. In all those circumstances, said Mr Kohanzad, the Judge could not be criticised in this general way for not having proactively teased out or appreciated the issue; and he could not be criticised for having acted on the understanding that what he was told about what was agreed in respect of Section 111A disposed of the issue of the applicability of that section.

50. I have considerable sympathy with that submission and with the position in which EJ Williams found himself, given that neither side had prepared even a draft list of issues, and that there had been no further clarification of the issues at any prior case management hearing as a result of the detailed points emerging only from amended particulars of claim that were tabled after the last and only previous case management hearing.

51. It is also not uncommon for a party to include a particular line of argument, or proposition, within their particulars of claim or grounds of resistance, which, though it is never in terms withdrawn, they do not in the event follow up or on or pursue, for example presenting no evidence or argument in relation to it at the full hearing. It is established that, even where

A the party is a litigant in person. it is not necessarily incumbent on the Judge, in such a situation, to pick the point up and proactively seek to clarify whether it is maintained.

B 52. However, in all the circumstances of this case, in view of the detailed amended particulars of claim having been tabled after the last hearing, and particularly in view of the fact that the Claimant's position on Section 111A was bound to be *reactive* to the Respondent having asserted that it relied on that section in its defence, and having regard, at least in relation to Section 111A(3), to the fact that the issue was signposted by the written skeleton argument, it seems to me that it was incumbent on the Judge proactively to seek clarification as to what the precise live issues were in relation to Section 111A that he had to decide.

C

D 53. I do not think the fact that he was told something, which may have been intended only to convey that it was now agreed or accepted that the contentious letter was evidence of pre-termination negotiations, as defined, and which must at best have been ambiguous as to where that left the arguments in relation to section 111A, is sufficient answer. I say this also having regard to the fact that it seems to me that, short of applying the legal labels expressly and in terms, the amended particulars of claim had set out a factual case and assertions that clearly signposted that the case was said to be in the territory of both Section 111A(3) and (4).

E

F

54. I turn to Mr Bromige's second line of argument, concerning the overall structure of Section 111A. He did not go quite so far as to suggest that even in a case where a respondent is relying on Section 111A, and a claimant has said nothing at all in her documents that might suggest that the case was in the territory to which 111A(3) and/or (4) could apply, the Judge would still have to raise and work through those sub-sections in order to check whether there might be some argument that they apply. However, this was not such a case because, as I have

G

H

said, there *was* material before the Judge which indicated that the factual case being asserted by the Claimant took the matter into the territory of both these subsections.

55. In another case the difference between the mechanism of Section 111A(3) and that of Section 111A(4) could be significant because, as I have noted, the former applies simply where according to the complainant's case the circumstances are such that a provision making the dismissal automatically unfair would be engaged. Arguably, therefore, where the complainant has asserted such a case, the Tribunal inescapably has to conclude that Section 111A(3) is engaged. Here, the Claimant had asserted such a factual case by the time of the April 2018 hearing. Even if Mr Kohanzad is right that, in order to actually pursue an automatically unfair dismissal claim under Section 99 and Regulation 20, she would have to have applied to amend to attach that legal label to her claims, he is also right to concede effectively that such an application to amend, if needed and made, would have been bound to be granted.

56. Section 111A(4) by contrast requires not just an assertion of some improper behaviour, but, certainly where there is dispute about that, a finding of fact about what behaviour occurred, a determination by the Tribunal as to whether, in its opinion, whatever behaviour did occur meets the legal concept of improper behaviour, and, if so, then a consideration by the Tribunal about the extent, if any, to which it is nevertheless just to permit reference to the pre-termination negotiations to be excluded.

57. If no case that there was improper behaviour has been advanced, sufficiently or at all, then I do not think the Judge needs to consider those issues. However, in the present case, it seems to me, the section 111A(3) and (4) arguments really go hand in hand, because the Claimant was saying that this letter was written as a reaction to the news that she was pregnant,

and that same factual proposition was said to be the foundation of her claim that there was a fundamental breach, her claim that this was an unfair constructive dismissal, including implicitly, if not explicitly, pursuant to Section 99 and Regulation 20, and her claim that this was improper behaviour. That is having regard, in particular, it must be noted, to the provisions of the Code, that include any act of discrimination among the examples of improper behaviour. All of these propositions really stand or fall together in this particular case.

58. In those circumstances, Mr Bromige's second line of argument does reinforce the conclusion that the Judge ought, in this particular case, to have proactively considered and raised how the issues stood in relation to Section 111A(3) and (4), before coming to his conclusions on section 111A, or at any rate that he should have explained what consideration he had given to those matters in order to produce a Rule 62, and/or **Meek** compliant decision.

59. This means that I do not have to determine Mr Bromige's third argument about the implications of Section 203 because, for the reasons I have already given, this appeal must succeed, and the matter must go back to the Tribunal for it to give further consideration to how the issues stand in relation to Section 111A(3) and (4). Whether or not legally sound, I am also doubtful that the factual foundation for this argument exists, given that it is not being asserted now that the Claimant's representative waived, or agreed not to pursue, the Section 111A(3) or (4) arguments, as opposed to simply not raising them proactively in oral submissions.

60. I have heard thoughtful argument from both Mr Bromige and Mr Kohanzad on whether Section 203 could apply so as to preclude the parties from agreeing to waive or not pursue the possible application of Section 111A(3) or (4). But since it is not necessary to my decision to

consider the point, I think it better to leave it to be determined, if it ever arises again, on some future occasion where it is necessary to do so.

61. Therefore, for all those reasons the appeal succeeds, and the matter is remitted to the Tribunal for fresh consideration of the section 111A issues. I should add that that will be on the basis that the Tribunal needs to consider how the issues stand in relation to both 111A(3) and (4). That is having regard to everything that I have said and because, by analogy with the scenario that arose in the **Graham** case, there would be a potential injustice were the Tribunal required only to look again at 111A(3) but not 111A(4), given that the two points really go hand in hand in this case, and will stand or fall together.