Case No:2418129/2018

EMPLOYMENT TRIBUNALS

Claimant: Mrs J Withers

Respondent: Knowsley Metropolitan Borough Council

Heard at: **Liverpool** **On:** **16 October 2019**

Before: **Employment Judge Benson**

Representation
Claimant: in person
Respondent: Mr T Kenward – Counsel

RESERVED JUDGMENT

The transcript of the telephone message of 23 March 2018 at page 55a of the bundle, the emails at page 402 and 403 and any reference to these discussions or any settlement discussions on 25 May 2018 are inadmissible in these proceedings under the without prejudice rule and section 111A Employment Rights Act 1996.

REASONS

Issues

1. The preliminary point to which this decision relates is whether evidence produced by the claimant in the form of a voicemail recording of discussion between the claimant's union representative and the respondent and the details of that discussion on 23 March 2018 and related emails and a further discussion on 25 May 2018 are admissible in evidence. The respondent contends that this evidence is inadmissible on the grounds that it privileged under the without prejudice rule and/or that they are Protected Conversations within section 111A of the Employment Rights Act 1996.
2. Within the claimant's submissions she only refers to the discussions in March and it would appear that she is no longer putting forward the argument in respect of the conversation on 25 May. I do however deal with both in case I am wrong as to her position.
3. The claimant alleges that the behaviour of the respondent in not providing the claimant with a reasonable time within which to consider the proposal which was put to her amounted to harassment and intimidation whilst she was unwell and was improper conduct and/or impropriety such that the content of those conversations should be admitted in evidence. She

further alleges in her written submissions that in respect of the without prejudice rule, there was no dispute at the stage the conversations took place.

4. I heard evidence from the claimant Mrs Withers and from three witnesses on behalf of the respondent. The respondent's evidence which is relevant to the admissibility issue is that of Mr Bernie Green who is the retired Assistant Executive Director.
5. In addition to the sets of statements and pleadings, I have been provided with two lever arch files of evidence. There is little documentary evidence on this specific issue but I have considered that which there is.
6. I have received written submissions from both the claimant and Mr Kenward, and also considered oral submissions from Mr Kenward.

Findings of Fact

7. The claimant was employed by the respondent from 2011 as a social worker.
8. The claimant suffers from the effects of stress and anxiety. The claimant was absent on sick leave from February 2018. Whilst on sick leave from the respondent she continued to work in her second role in a supermarket. When the respondent found out that she had been working elsewhere, a disciplinary investigation and procedure was instigated which ultimately led to the claimant being dismissed without notice on 25 September 2018.
9. On 20 March 2018, the claimant received a letter from the respondent suspending her whilst 'serious concerns' as to her conduct were investigated. The allegations were that: she (1) had worked for Tesco PLC whilst claiming sick pay from Knowsley MBC and (2) was in breach of the Council's Code of Conduct, Section 5.1, regarding other employment. The letter stated that: 'These are very serious allegations, which could constitute gross misconduct under the Council's Disciplinary Procedure, and, if proven, could lead to the termination of your employment with the Council' The claimant disputed that she was guilty of any misconduct.
10. Prior to the completion of the investigations into the alleged misconduct, on 21 March 2018, the claimant's trade union representative discussed with her the allegations which the respondent was making. He advised the claimant that the only alternative was for her to resign. There was a conflict in the evidence between the claimant and the respondent as to whether the initial settlement approach had come from the claimant, as suggested by Mr Green or from the respondent, as understood by the claimant. I find that on the balance of probabilities, the initial approach came from the claimant's trade union representative to Mr Green. It was not however made clear to the claimant that this was the trade union representative's proposal to avoid the disciplinary process and she understood that the approach had come from the respondent.
11. She was unwell at the time and was not in the best frame of mind to be making these decisions, however she engaged with her trade union representative and he put forward a proposal on her behalf in a discussion with Mr Green, sometime between 21 and 23 March.
12. The claimant's proposal was rejected but Mr Green made a counter proposal which was communicated to the claimant by her union representative on Friday 23 March 2018. That counterproposal was that the claimant would be permitted to resign and would be paid for the remainder of the calendar month. It was intended that the claimant would sign a Settlement Agreement. The claimant was given until the following Monday

26 March to confirm whether she wanted to accept the offer. Mr Green considered that the matter could not be allowed to drift on indefinitely and that it was in the interest of all parties that a speedy resolution be achieved.

13. The claimant did not seek an extension or ask for more time to consider the offer. I believe that this was not something which the trade union representative put forward as a possibility to her. In the claimant's state of mind at the time, she felt under pressure and unable to make such an important decision. As such she did not accept the proposal which was put to her. She emailed her trade union representative on 26 March 2018 at 1pm and this was forwarded to the respondent at 4.10pm that day. Mr Green then confirmed that the disciplinary investigation would resume. I consider that much of the pressure which the claimant felt was as a result of her trade union representative's communications and actions. In coming to this view, I have considered the transcript of the message left at page 55a of the bundle.
14. On 25 May 2018, before the disciplinary hearing which was due to take place on the 30 May, the claimant's trade union representative contacted the claimant and advised that the respondent was prepared to accept the claimant's original proposal if she still wished to resign. No time scale was put on the acceptance of this proposal. The claimant said that she was not willing to consider anything unless it was put to her in writing. It wasn't and the disciplinary hearing continued and the claimant was ultimately dismissed.

The Law

Without Prejudice Rule

15. The general rule is that without prejudice discussions, whether written or oral, which are made for the genuine purpose of compromising a dispute between the parties should not be admitted in evidence: Independent Research Services v Catherall [1993] ICR 1 EAT.
16. The underlying policy behind the principle that without prejudice negotiations are not admissible in litigation and the exception in cases of "unambiguous impropriety" are set out in Savings & Investment Bank v Fincken [2004] 1 WLR 667 CA.
17. There is no reason in principle why an employment tribunal should adopt a different attitude with regard to the admissibility of "without prejudice" material from the proper attitude to be adopted by a court:
18. There must be a dispute or potential dispute which is under settlement discussion and the aim of the negotiations must be to settle or resolve that dispute. What might amount to a dispute was considered in Portnykh v Nomura International plc EAT/0448/13. It is not necessary for any proceedings to be extant, nor for any specific complaint to have been raised, such as an explicit allegation of unfair dismissal, for there to be a potential dispute. It is important to consider the whole factual matrix when assessing whether there is a dispute.
19. There are few exceptions to the without prejudice rule. One of those exceptions is that the without prejudice communications should not be used as a cloak for 'inambiguous impropriety'. Once the respondent has demonstrated that the communications are without prejudice, the burden of showing that there has been unambiguous impropriety switches to the party alleging it.

20. This exception should only be applied in the clearest cases of abuse of a privileged occasion: Unilever plc v The Procter & Gamble Co [2000] 1 WLR 2436. An example might be where the privilege was being used as a cloak for blackmail or perjury. No matter how important the admission is to the potential litigation unless it can be said to arise out of an abuse of the occasion its significance alone cannot result in it losing the protection of the without prejudice privilege: Portnykh v Nomura International plc EAT/0448/13.

    Section 111A Employment Rights Act 1996

21. (1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111.
    This is subject to subsections (3) to (5).
    (2) In subsection (1) " pre-termination negotiations " means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.
    (3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.
    (4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.
    (5) Subsection (1) does not affect the admissibility, on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved.
22. Section 111A applies to unfair dismissal claims and not to any other forms of claims.
23. There is an exception to the protection where there has been improper behaviour or connected with improper behaviour with regard to anything said or done in relation to the settlement negotiations, to the extent that the Tribunal thinks just. The test is two stage one, in that if the Tribunal finds that there has been improper behaviour, then the Tribunal must go on to consider the extent to which confidentiality should be preserved.
24. I have also considered the ACAS Code of Practice and Guidance on Settlement Agreements.

Decision

Without Prejudice protection

25. The without prejudice rule is founded upon the public policy of encouraging litigants to settle their differences rather than litigate.
26. In order for the conversations and correspondence both in and around 23 March and 25 May to have the protection of the without prejudice rule, there must have been a dispute in existence. I have considered the case law to which I have been referred and the submissions of both Mr Kenward and the claimant. The decision of the EAT in Portnykh referred to above is clear in that I must look at the factual matrix surrounding the conversations and documents which are the subject of this application. At the time of the approach by the claimant's trade union representative to Mr Green, the

claimant had been suspended and notified that she was under investigation for serious concerns about her conduct, which could amount to gross misconduct and could lead to her dismissal. The claimant strenuously denied that she had committed any acts of misconduct. It was against this background the trade union representative approached the respondent to see if there was another way of resolving this matter, that being that the claimant be permitted to resign and receive certain (limited) payments.

27. In this situation where the claimant has been suspended and warned that she may be dismissed for serious allegations which she disputes, I consider that there is a dispute in existence. The claimant suggests that she considers that it was a misunderstanding that would be resolved, but I consider that the matter had gone further than simply a misunderstanding. In any event, there was at the very least a potential dispute as also referred to in the Portnykh decision. The correspondence and conversations in March and May 2018 were an attempt to resolve that dispute.
28. I go on to consider whether there was any unambiguous impropriety on the part of the respondent. As set out on the authorities, it is in only the clearest of cases of abuse that this exception would apply. The claimant relies upon the time pressure which was put upon her by the respondent in requiring her to make a decision upon the proposal by 26 March. She says that was both harassment and intimidation whilst she was unwell and put undue pressure upon her.
29. The initial proposal came from her trade union in March 2018. It is difficult for the claimant to sustain an argument that requiring her to make a decision on the counter proposal over the period of a weekend would amount to impropriety when the respondent had been approached in the first place. It would have been reasonable for Mr Green to assume that as the claimant had started this negotiation, she would have been in a position to consider any counter proposal fairly quickly. I do not consider that Mr Green's request to respond by 26 March meets the high hurdle required for conduct to amount to unambiguous impropriety even with any knowledge he had as to the claimant's mental state. It would of course have been open to the claimant to ask for more time to consider the proposal, but her union representative did not put this forward as a possibility. Any pressure felt by the claimant was in my view in part as a result of the actions of her union representative in giving her the impression that the original approach had come from the respondent and the message left on 23 March which did not make any suggestion that it might be possible to ask for more time.
30. I therefore conclude that the exception of unambiguous impropriety is not made out by the claimant and the transcript of the telephone message of 23 March 2018 at page 55a of the bundle, the emails at page 402 and 403 and any reference to these discussions are inadmissible under the without prejudice rule.

Section 111A Employment Rights Act 1996

31. In view of my findings above, I do not consider that the conduct of the respondent could be described as improper. Although the ACAS Code of Practice on Settlement Agreements refers to examples of what might amount to improper conduct and that includes not giving the employee a reasonable period of time to consider the proposal, what amounts to a reasonable time is a matter for the Tribunal to decide. In in a situation where

an approach from an employer to have a protected conversation comes without any warning, I consider that the 10 days period may well be a reasonable period. In the claimant's situation, as set out in my findings above, there was already a dispute ongoing and the respondent understood that the approach had come from the claimant. Against this background, I consider that giving the claimant over the weekend to consider the counterproposal was not unreasonable and did not amount to improper conduct. Again, for the reasons set out above, I do not consider that asking the claimant to give a decision by 26 March amounts to harassment or intimidation of the claimant.

32. The protection afforded to the respondent under s111A Employment Rights Act remains in place and therefore the transcript of the telephone message of 23 March 2018 at page 55a of the bundle, the emails at page 402 and 403 and any reference to these discussions are inadmissible under s111A.

25 May 2018 conversations

33. So far as I am aware, the claimant is no longer suggesting that the behaviour of the respondent in respect of the conversation on 25 May amounts to unambiguous impropriety or is protected under s111A of the Employment Rights Act 1996. She makes no reference to it in her submissions. She accepted in evidence that the respondent did not impose any time limit upon this offer. In fact, she refused to consider any further proposal unless it was put in writing. It is therefore unclear how she is seeking to make this argument, if indeed she is. In any event, I consider that there was no evidence presented to me which would support a finding of unambiguous impropriety or improper conduct. I therefore find that any reference to these discussions are inadmissible under the without prejudice rule and s111A Employment Rights Act 1996.

Employment Judge Benson

15 November 2019

Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

21 November 2019

FOR EMPLOYMENT TRIBUNALS