Case Number: 1601593/2019

EMPLOYMENT TRIBUNALS

Claimant: **Ms T Salkeld**

Respondent: **Creditsafe Business Solutions Ltd**

Heard at: **Cardiff** **On: 7 January 2020**

Before: **Employment Judge S Davies**

Representation:
Claimant: **Mr A Griffiths, counsel**
Respondent: **Ms C Urquhart, counsel**

PRELIMINARY HEARING
RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that all evidence of discussions between the parties on 18, 19, 21 and 25 February 2019 is admissible in evidence under section 111A (1) and (4) Employment Rights Act 1996 (ERA).

REASONS

Issues

1. There was an issue between the parties as to the scope of this preliminary hearing. I determined, for the reasons given at the hearing, that the scope would include consideration of whether pre-termination negotiations had taken place on four occasions:

    a. 18 February 2019 between the Claimant, Melanie Price and Alison Thomas;
    b. 19 February 2019 between the Claimant and Ms Thomas;
    c. 21 February 2019 between the Claimant and Ms Thomas; and

d. 25 February 2019 between the Claimant, Mark Griffiths and Ms Thomas

2. In this judgment I refer to 'pre-termination negotiations', as this is the terminology used in section 111A. In evidence and submissions the parties used the term 'protected conversation'; this term is used interchangeably with pre-termination negotiations.

Claims

3. The Claimant claims constructive unfair dismissal, unauthorised deductions from wages and breach of contract.

Hearing

4. The hearing did not commence until 11am as there was another hearing listed at 10am which I had to deal with first. After determining the scope of the preliminary hearing and reading the witness statements, evidence started at around 12pm. As submissions did not conclude until almost 4pm, it was necessary to reserve my judgment.

5. Directions were made for the final hearing which was listed for three days on 15, 16 and 17 June 2020.

Application

6. The Respondent made an application on 19 December 2019 to amend the grounds of resistance. With agreement of counsel for the parties, I determined that the issue of amendment should be revisited after this judgment was promulgated, as the outcome could affect the extent of and whether the amendment was sought.

Witnesses

7. I heard live evidence from the Claimant and from Ms Thomas, HR Manager UK & Ireland, on behalf the Respondent.

Submissions and Bundles

8. The parties produced an agreed bundle of documents, 53 pages in length. References in this judgment to page numbers in the bundle are in square brackets.

9. The Respondent produced an authorities bundle.

10. I am grateful to both counsel for their helpful written submissions which were supplemented by oral submissions. I do not repeat the written submissions in this judgment but they are incorporated by reference. As necessary I refer to oral submissions below.

Credibility/reliability

11. This case is largely determined by whose evidence is preferred. The impression I gained from listening to evidence was that, the Claimant was clear and consistent and had a good recall of events. Ms Thomas's evidence was less clear e.g. she could not recall what words she had used at the first meeting (AT paragraph 14). Overall, I found that the Claimant's evidence was credible and consistent with contemporaneous documents. Unless specified to the contrary, where it conflicts with that of Ms Thomas, I prefer the Claimant's account.

12. There was a tension between Ms Thomas asserting that the Claimant was not given a deadline at the 25 February meeting and the agreed fact that only 10 minutes after leaving the first meeting, the Claimant was asked to return for a second meeting. If there was no deadline, there seems no logic in requiring that she return for a second meeting almost straight away. The evidence on this point lacks plausibility.

13. I placed limited weight on Ms Thomas' file note of discussions with the Claimant in February and March 2019 [31-32]. This was not a document that was shown to or agreed with the Claimant. The file note is a one-sided record and notably omits a lengthy conversation on 19 February 2019. Without the transcript produced by the Claimant, the gap between entries on 18 and 20 February in the file note gives the impression that there was no contact between the Claimant and Ms Thomas for two days. This diminishes the reliability of the file note as a contemporaneous record of events. Unless specified to the contrary, where the file note conflicts with the Claimants' evidence, I prefer the Claimant's account.

Facts

14. The Claimant was employed by the Respondent from 1 November 2016 until her dismissal on 9 May 2019. The Respondent asserts that the dismissal was for redundancy; the genuineness of which the Claimant disputes.

15. The Claimant was based at the Respondent's Caerphilly office as Manager of the Premier Accounts Renewals Team, a position she commenced on 1 April 2018.

16. The Claimant and Ms Thomas were friendly with each other, having worked together previously at another organisation before working together at the Respondent. Whilst working for the Respondent, they met regularly about once a week for lunch. Their friendship was such that they discussed personal matters, not related to work, with each other.

17. The Claimant confided in Ms Thomas that she was unsure about her long-term future with the Respondent. The Claimant had concerns about the prevailing management style within the business. The Claimant did not indicate to Ms Thomas a firm intention to leave the business at a specified point in time. Due to her personal circumstances, as a single parent, the Claimant needed to give careful consideration to her options.

18. Ms Thomas informed Mr Robertson, UK CEO, that the Claimant was not happy in her role and was considering leaving. Mr Robertson then asked the Claimant's line manager, Melanie Price, and Ms Thomas to discuss with the Claimant her team performance and his concerns about it.

19. The Claimant's performance had not been called into question by the Respondent prior to the meeting on 18 February 2019. The Claimant had been awarded manager of the month in September 2018 and awarded a pay rise in January 2019.

Discussion 1 - 18 February 2019

20. A meeting took place on 18 February 2019 at the instigation of Ms Price. It was conducted in a booth in Calon, the Respondent's on-site restaurant. The Claimant was not given advance notice as to the fact that the meeting was going to be held or its purpose. When the Claimant and Ms Price arrived in Calon, they were joined by Ms Thomas. The Claimant had not been informed in advance that Ms Thomas was attending the meeting. Ms Thomas explained that the meeting was held in Calon, as she felt this would afford the Claimant privacy, compared to holding it in her office, where the Claimant's team would be able to see that a meeting was ongoing.

21. At the start of the meeting, Ms Thomas checked with the Claimant whether she was happy to have the meeting in the restaurant. The Claimant said she was unaware as to the purpose of the meeting, so could not say whether she felt comfortable about it or not. There was no mention of the meeting being off the record or a protected conversation at this point. The meeting proceeded, with Ms Price outlining issues of concern with regard to the Claimant's performance and feedback from her team. The meeting lasted for around 40 minutes; Ms Price concluded by saying words to the effect, that despite the Claimant's personal circumstances, the management team had decided that it was not right for the business or for the Claimant to offer her another position. The Claimant understood that she was being dismissed and asked during the meeting whether she was being sacked.

22. Ms Thomas swiftly interjected to make the suggestion of settlement agreement. The meeting ended soon after the offer was made and it was

suggested that the Claimant go home to consider the offer. Ms Thomas only decided to hold a pre-termination negotiation right at the end of the meeting, after Ms Price had been going through performance issues for around 35 minutes.

23. I think it likely that Ms Thomas did say she wanted to hold a without prejudice discussion but Ms Thomas concedes she did not push the Claimant as much as she would with other individuals on whether she understood the concept of protected conversations / without prejudice; she felt that this was not necessary. I find that there was no agreement by the Claimant to hold a pre-termination negotiation. Ms Thomas did not check that the Claimant understood that she intended the offer to be off the record/confidential.

24. I find that the Claimant was informed by Ms Price that the Respondent wished to let her go (C paragraph 8). This is in part supported by the evidence of Ms Thomas who confirms that Ms Price mentioned leaving the company (AT paragraph 13). It is also repeated by the Claimant, during the conversation between her and Ms Thomas the following day [36]. Finally, Mr Griffiths' file note regarding his first meeting with the Claimant on 25 February 2019 indicates that the Claimant told him that she had been sacked [41]. The Claimant has been consistent in this assertion throughout her evidence and the contemporaneous documents. The Claimant's view that she had been sacked is illustrated by an email sent the same day by her to Ms Thomas [35] in which she says, "can I ask you to for the reasons for my immediate dismissal, so I can take this with me to the solicitor?"

25. Ms Thomas replied by email the same day [34] asserting that the Claimant's employment was ongoing and offering the opportunity of alternative employment and inviting the Claimant to contact her to discuss further. Ms Thomas included a breakdown of the level of settlement on offer in the email which increased slightly from the figure mentioned in the meeting. The email was not marked 'without prejudice'.

Discussion 2 - 19 February 2019

26. The Claimant telephoned Ms Thomas the day after the meeting in Calon. The Claimant covertly recorded the telephone call and the transcript, which is agreed as accurate, is at [36-39].

27. There was a short initial discussion between the Claimant and Ms Thomas about settlement but this extends only to a discussion about the figures included in Ms Thomas's email of the previous day and tax treatment.

28. The conversation then turns to discussion of the possibility of the Claimant being retained in the business in another role.

29. The discussion is pleasant; Ms Thomas indicates that she feels torn between her HR position and giving the Claimant advice about making the best choice for her. Ms Thomas says the Claimant should have a think about her options. At one point Ms Thomas refers to speaking with the Claimant 'friend to friend' [38].

30. This conversation is not recorded in the Respondent's file note [31].

Discussion 3 - 21 February 2019

31. Ms Thomas phoned the Claimant in the morning of 21 February 2019 to arrange a meeting later that day to discuss an alternative role. They agreed to meet at a coffee shop, which turned out to be closed, so the meeting took place in the grounds of Tredegar House.

32. During the meeting Ms Thomas talked about an alternative CRM role and gave details of pay, which was significantly lower than the Claimant's current salary. The Claimant described her misgivings about the way she felt she was treated during the meeting on 18 February 2019 but also indicated she could not be without a job.

33. Ms Thomas concedes that she cannot recall explaining to the Claimant that the conversation was a continuation of the protected conversation/without prejudice discussion. There was no change in the settlement offer previously suggested and as such I find that the focus of the discussion was on the CRM role, rather than settlement.

34. The Claimant and Ms Thomas left on good terms with the Claimant being given time to consider the alternative role.

22 February 2019

35. On 22 February 2019, Ms Thomas called the Claimant to see if she had come to a decision about the CRM role. There is a dispute as to whether Ms Thomas said to the Claimant that she was "having pressure from above" to go back with a decision. There is also a dispute as to whether the Claimant accepted the alternative CRM role during this telephone call; Ms Thomas asserts that she did (AT paragraph 25) whereas the Claimant asserts that she wanted to speak to Mark Griffiths to get more detail about the CRM role.

36. On balance I prefer the evidence of the Claimant. I consider it likely that Ms Thomas was being pressurised by management to resolve the

situation one way or the other and said so during the call. That there was management pressure is borne out by the events of the next day.

37. I also prefer the Claimant's account, in that she did not accept the CRM role but wanted to discuss it further with Mr Griffiths. This was consistent with her voicing her misgivings about continuing to work within the organisation following the meeting on 18 February 2019, being assured by Ms Thomas that she could have time to think about the option and consideration of the financial impact of the accepting the CRM role at reduced salary in light of her personal circumstances.

38. Mr Griffiths did not contact the Claimant during the afternoon of Friday, 22 February 2019; so she agreed with Ms Thomas to come in to work the following Monday to speak with him then.

Meeting with Mr Griffiths - 25 February 2019

39. There were two discussions held on 25 February 2019. The Respondent does not assert that the first discussion held between the Claimant and Mr Griffiths is inadmissible under s 111A ERA.

40. The Claimant attended the Respondent's offices to meet with Mr Griffiths at 8am. The Claimant had had a good working relationship with Mr Griffiths previously, and she was open with him about her unhappiness about the way she been treated. The Claimant explained to Mr Griffiths that she wanted to understand more about the CRM role, so she could make a decision about what to do. Mr Griffiths indicated his belief was that the Claimant had already agreed to take the role. When the Claimant explained that she had not, he indicated that Ms Thomas had told him that the Claimant had accepted it. Mr Griffiths then left the meeting; he came back after 10 minutes saying he could not find Ms Thomas and went on to explain the CRM role.

41. I accept the Claimant's account of this meeting with Mr Griffiths. I did not hear evidence from Mr Griffiths and no one else was present at the meeting. The file note created by Ms Thomas in the presence of Mr Griffiths [41] does not fully reflect the Claimant's evidence, however, I place limited weight on that document in the absence of evidence from Mr Griffiths.

42. The Claimant's evidence accords with the file note in that it is agreed that Mr Griffiths suggested the Claimant go home to think about her decision with regard to the CRM role.

43. Only 10 minutes after the Claimant had left the office to go home, she received separate telephone calls from both Ms Thomas and Mr Griffiths

asking that she come back to the office. After the Claimant put fuel in her car, she drove back to the office and met them in Calon.

Discussion 4 - 25 February 2019

44. A second meeting, between the Claimant, Mr Griffiths and Ms Thomas, was held on an open table in Calon. The Claimant was waiting in the restaurant when Mr Griffiths and Ms Thomas arrived.

45. I accept the Claimant's account of this meeting and I find that Mr Griffiths said words to the effect "look at you, you're not in the right state of mind to manage a team, you look like you're going to burst into tears". The offer of the CRM role was withdrawn and the Claimant was presented with the options of resignation or settlement agreement.

46. The Claimant asserts that she was told she needed to give her decision as soon as possible and that if she had not responded by midday, that would be taken as a resignation. Ms Thomas disputes this and asserted that no specific deadline was placed on the Claimant.

47. I find that the Claimant was required to give an answer by midday on 25 February 2019. Ms Thomas was unable to explain why it was necessary to call the Claimant back to the office within 10 minutes of her leaving, if there was no time pressure with regard to making a decision. Ms Thomas's own file note indicates that she told the Claimant that decision was required "it was made clear that the situation couldn't continue and that we needed a decision as soon as possible" [32]

48. I find the Claimant was given the option of resignation or accepting a settlement agreement and that time pressure was placed upon her during this meeting. This is consistent with the Claimant's correspondence with the Respondent on that day. The Claimant sent a text to Ms Thomas confirming that she would not resign and followed this up with an email [43] sent at 11:52. Ms Thomas created a draft email on 25 February 2019, sent to Mr Robertson at 12:28, which was intended for the Claimant but was not in fact sent to her [43]. In the draft Ms Thomas concludes "as you are aware the situation cannot continue indefinitely". The Claimant sent a further email on 25 February [46] at 17:02 in which she indicated again that she will not resign.

Law

Section 111A ERA

Confidentiality of negotiations before termination of employment

(1)Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111.

This is subject to subsections (3) to (5).

(2) In subsection (1) " pre-termination negotiations " means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

(3)Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.

(4)In relation to anything said or done which in the Tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the Tribunal considers just.

(5)Subsection (1) does not affect the admissibility, on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved.

49. I was referred to the EAT decisions in **Faithorn Farrell Timms LLP v Bailey 2016 ICR 1054** and **Graham v Agilitas IT Solutions Ltd (2017).**

50. HHJ Simler (President) refers, in paragraph 18 and 19 of **Agilitas,** to HHJ Eady QC's decision in **Faithorn** regarding the scope of section 111A (paragraphs 36 – 48), summarising as follows

> "What is clear is that section 111A runs in parallel with the without prejudice rule ... The section was introduced to allow greater flexibility in the use of confidential discussions as a means of bringing an employment relationship to an end. Unlike under the common law principle under section 111A there is no requirement for a pre-existing dispute between the parties and where section 111A(1) applies the evidence of pre-termination discussions is

> inadmissible only in ordinary unfair dismissal proceedings. The principle covers both the fact of the discussions and their content. Finally, whereas the without prejudice rule can be waived by agreement on both sides, no such waiver is possible under section 111A."

51. With regard to what amounts to "improper behaviour" (section 111A(4)), HHJ Eady QC addresses this at paragraph 48 in **Faithorn**:

> "Parliament chose to use the phrase "improper behaviour", not "unambiguous impropriety", thus allowing a potentially broader approach to the behaviour in issue and a greater degree of flexibility for the ET (arguably reflective of the broader categories of exceptions allowed by common law to prevent abuse of the without prejudice principle). Certainly I give respect to the approach adopted by ACAS and the examples of improper behaviour it has given at paragraph 18 of the Code. The flexibility that I consider has been permitted to the ET in approaching section 111A(4) is further reflected in the two stage task in which it is thereby required to engage. First, it must consider whether there was improper behaviour by either party during the settlement negotiations (a matter for the ET to determine on the particular facts of the case, having due regard to the non-exhaustive list of examples at paragraph 18 of the ACAS Code). If so, it is then up to the ET, at the second stage, to decide the extent to which confidentiality should be preserved in respect of those negotiations."

52. The Respondent relies upon **Agilitas,** paragraphs 24 to 26 and HHJ Simler's determination that meetings in that case were inadmissible under section 111A, because the possibility of termination of the contract by settlement agreement remained in the background throughout, despite discussions about another role. The Claimant asserts that we can distinguish **Agilitas** on the facts, as the company in that case made it clear from the outset of discussions that they were being held on a 'without prejudice' basis (paragraph 23).

53. In accordance with section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992, I take into account the ACAS Code of Practice on Settlement Agreements.

> **"Reaching a Settlement Agreement**
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> …
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> 12. Parties should be given a reasonable period of time to consider the proposed settlement agreement. What constitutes a reasonable period

of time will depend on the circumstances of the case.

As a general rule, a minimum period of 10 calendar days should be allowed to consider the proposed formal written terms of a settlement agreement and to receive independent advice, unless the parties agree otherwise.

13. The parties may find it helpful to discuss proposals face to face and any such meeting should be at an agreed time and place. Whilst not a legal requirement, employers should allow employees to be accompanied at the meeting by a work colleague, trade union official or trade union representative. Allowing the individual to be accompanied is good practice and may help to progress settlement discussions.

Improper Behaviour

…

17. What constitutes improper behaviour is ultimately for a Tribunal to decide on the facts and circumstances of each case. Improper behaviour will, however, include (but not be limited to) behaviour that would be regarded as 'unambiguous impropriety' under the 'without prejudice' principle.

18. The following list provides some examples of improper behaviour. The list is not exhaustive:

…

(e) Putting undue pressure on a party. For instance:

Not giving the reasonable time for consideration set out in paragraph 12 of this Code.

(ii) An employer saying before any form of disciplinary process has begun that if a settlement proposal is rejected then the employee will be dismissed."

54. I also note ACAS guidance to settlement agreements of December 2018, states:

"At the start of any such meeting it is good practice to make sure that those involved are aware that any discussions about the proposed settlement agreement are expected to be inadmissible in relevant legal proceedings" (page 13)

"The following list provides some examples of what, depending on the circumstances, usually would not be considered as "improper behaviour":

- setting out in a neutral manner the reasons that have led to the proposed settlement agreement;
- factually stating the likely alternatives if an agreement is not reached, including the possibility of disciplinary action which may lead to dismissal if relevant;
- factually stating that if an employee refuses settlement agreement and any subsequent disciplinary action results in dismissal that the employee may not be able to leave on the same terms as set out in the proposed settlement agreement;…" (Page 27)

Conclusions

55. The Claimant conceded that all 4 discussions were linked. I consider that the discussions were linked and all tainted by improper behaviour as detailed below.

56. I can distinguish **Agilitas** on the facts as submitted by the Claimant. Agilitas took a structured approach to commencing settlement discussions, with board approval, and the manager conducting discussions by outlining from the very outset that they were being held on a without prejudice basis, with options including termination, settlement or an alternative role.

57. The Respondent in this case failed to make it clear at the outset what the purpose of the meeting was, failed to obtain agreement to such discussions and failed to check the Claimant's understanding as to inadmissibility before commencing discussion.

Discussion 1 – 18 February 2019

58. There was no signposting to the Claimant as to the purpose or nature of the meeting prior to her attendance. The Claimant was not told that the discussion would be inadmissible in legal proceedings. The meeting did not take place at a time and place that was agreed by both parties. The Claimant was taken by surprise and could not give informed consent to

whether she was content for the meeting to continue, or that it could be held in a public place.

59. The part of the discussion led by Ms Price was not a pre-termination negotiation; it related to performance issues and she did not make any offer of settlement or flag at the outset that she intended to hold such a conversation. Whilst it is appropriate to neutrally state the reasons leading to a company wanting to hold a pre-termination negotiation, a lengthy disposition about alleged performance issues where none have been raised previously and outside of formal process, does not appear to be necessary or within the spirit of the ACAS guidance.

60. Again whilst it is appropriate to factually state likely alternatives to agreement, including disciplinary action, Ms Price went too far in telling the Claimant that her employment would be coming to an end. This was said before a settlement agreement was even raised as a possibility.

61. Ms Thomas suggested that because of the Claimant's experience as a manager, their friendship and the fact the Claimant confided in her that she was not happy at the Respondent, the Claimant understood that the content of the discussions were "off the record". The Claimant denies this and I am not convinced by this suggestion. The Claimant was taken by surprise and I do not think it likely that she would have inferred that it was a pre-termination negotiation or off the record discussion, without adequate or any explanation from the Respondent. It is quite possible that the Claimant did not absorb or hear the words 'without prejudice' as she was in shock.

62. In reaching my conclusions, I take into account that Ms Thomas confirmed her understanding of the difference between without prejudice discussions and pre-termination negotiations/protected conversations and is a HR professional with 25 years' experience.

63. I consider that there was improper behaviour by putting undue pressure on the Claimant. Despite having no previous action taken in respect of poor performance, the Claimant was extensively criticised in a public restaurant, told that her employment was over and offered a settlement agreement as an alternative at the very end of the meeting. This was not a discussion held on an informed basis with options open for mutual discussion between the parties; rather her departure was presented as a foregone conclusion with settlement included as an afterthought.

64. The part of the discussion led by Ms Thomas was tainted by improper behaviour; the Claimant had been placed under undue pressure by being told that her employment was at an end.

65. I consider it just that the entirety of conversation on 18 February 2019 is admissible in evidence for the unfair dismissal claim under s 111A(4). The Tribunal will be well aware of the fact that offers of settlement are made all the time by parties seeking to avoid litigation; I do not consider that they will be unduly influenced by having sight of the amount on offer. The Claimant is entitled to refer to the full content of the discussion as it appears relevant to her allegation that her dismissal was not genuinely for reason of redundancy and provides context to the events that follow.

Discussion 2 – 19 February 2019

66. This discussion contained the briefest of references to settlement. The character of the discussion was more akin to one between friends rather than one between the employer and employee.

67. There is discussion about another possible role. I do not think there is improper content in the discussion on 19 February 2019, but it is directly linked to the discussion the previous day where the Claimant was told her employment was over (the Claimant repeated what Ms Price had told her [36]). In my judgement, the improper behaviour cannot be cured by an email countering Ms Price's words and saying that employment is continuing.

68. As all conversations are linked, all are tainted by the original improper behaviour. I consider it just that all evidence of this discussion is admissible under s 111A(4) ERA.

Discussion 3 – 21 February 2019

69. This discussion was about the alternative CRM role. It was not a discussion held with a view to termination on agreed terms. In any event for the reasons given above I consider it just that all evidence of this discussion is admissible under s 111A(4) ERA.

Discussion 4 – 25 February 2019

70. As well as being linked to improper behaviour at the first discussion as detailed above, this discussion involved improper behaviour in itself; undue pressure was placed upon the Claimant to make up her mind about termination by resignation or settlement that same day.

71. The offer of alternative employment was withdrawn only minutes before the Claimant was presented with an ultimatum. She had only been provided with the briefest of written confirmation of any settlement offer in the email of 18 February 2019 from Ms Thomas; no wording of a settlement agreement been provided.

72. ACAS guidance suggests 10 working days to consider any settlement; the elapse of time in total had been only 7 days in total and in the absence of a formal written offer of settlement to consider.

73. In the circumstances, I consider it just that the entirety of the discussion is admissible evidence for unfair dismissal claim under s 111A(4) ERA.

Employment Judge S Davies
Dated: 17 January 2020

JUDGMENT SENT TO THE PARTIES ON 20 January 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS