EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Miss S FILIPPI	v	WORKMAN FACILITIES MANAGEMENT LIMITED **First Respondent** ELLANDI MANAGEMENT LIMITED – ELLANDI – ELLANDI LLP **Second Respondent** ELLANDI MANAGEMENT LIMITED **Third Respondent** ELLANDI LLP **Fourth Respondent** ELLANDI **Fifth Respondent**

OPEN PRELIMINARY HEARING

Heard at: London South **On:** 1 April 2019

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: in person
For the Respondent: Mr D Widdowson solicitor

JUDGMENT on PRELIMINARY HEARING

1. The claimant's claims against the second, third, fourth and fifth respondents are struck out as they do not disclose any cause of action.

2. The references to settlement should be redacted from the claim.

REASONS

Preliminary

1. This Preliminary Hearing was fixed in order to address two issues, firstly whether the second to fifth respondents were competent respondents and secondly whether the claimant was entitled to refer to settlement discussions in her claim.

2. Mr Widdowson made oral submissions. The claimant was unrepresented at the hearing and did not put forward any substantive position, nonetheless the Tribunal considered each issue.

3. She claims unfair dismissal and breach of section 44 (c) of the Employment Rights Act 1996.

Findings

4. The Claimant was employed by the first respondent from 20 October 2015 until she was dismissed on 8 August 2018 as Centre Manager at The Priory Shopping Centre in Dartford, Kent.

5. The second to fifth respondents were the landlords of the shopping centre where the claimant was employed. The claimant was not employed by any of the second to fifth respondents.

6. Settlement discussions took place towards the end of her employment and are referred to at various points in a long narrative supporting the claim, more particularly at pages 17, 18, 34, 36, 38 and 39 of the bundle prepared for this hearing.

Legal Principles
Unfair dismissal

7. The general principle is that only employees are eligible to present a complaint of unfair dismissal (ERA 1996 s 94). This also applies to a claim under section 44.

8. An employee is defined for these purposes by ERA 1996 s 230 as someone who has entered into, or works under, a contract of employment.

9. In **Secretary of State for Education and Employment v Bearman** [1998] IRLR 431 EAT at paragraph 22, the Employment Appeal Tribunal gave practical guidance as to the approach to be adopted when seeking to identify which of two possible candidates is the proper employer. The starting point is to look at the written contractual arrangements and inquire whether they truly reflected the intention of the parties. If they did, the tribunal should then determine, on a proper construction of the documents, which of the two candidates was the employer of the employee at the commencement of his employment. Finally, it should ask whether that position changed subsequently and, if so, how and when.

Confidential discussions
10. The discussions that take place in order to reach a settlement agreement in relation to an existing employment dispute can be, and often are, undertaken on a ‘without prejudice’ basis. This means that any statements made during a ‘without prejudice’ meeting or discussion cannot be used in a court or tribunal as evidence. This ‘without prejudice’ confidentiality does not, however, apply where there is no existing dispute between the parties. Section 111A of the ERA 1996 has therefore been introduced to allow greater flexibility in the use of confidential discussions as a means of ending the employment relationship. Section 111A, which will run alongside the ‘without prejudice’ principle, provides that even where no employment dispute

exists, the parties may still offer and discuss a settlement agreement in the knowledge that their conversations cannot be used in any subsequent unfair dismissal claim

11. In the first appellate decision on this section, **Fairthorn Farrell Timms plc v Bailey** [2016] ICR 1054, Judge Eady gave the following guidance on the legislation and the Code of Practice:

(1) Section 111A is not simply a rehash of without prejudice law; it has to be applied on its own terms.

(2) Unlike without prejudice, its operation cannot be waived by the parties, even by mutual agreement; this is the case both under its own wording and (interestingly) under the ERA s 203 which bars contracting out of the Act.

(3) Section 111A only applies to a subsequent unfair dismissal claim, However, if another claim is brought in addition (eg for discrimination) that does *not* mean that the section no longer applies at all; instead, the tribunal must still exclude the evidence in the unfair dismissal action, even if it is admissible in the other action.

(4) The section applies to render inadmissible not just the *content* of the negotiations, but also their very *existence*. This is shown by sub-s (2) which defines 'pre-termination negotiations' as 'any offer made *or discussions held* '.

(5) Similarly, it applies not just to evidence of discussions between employer and employee but also to discussions *within the employer*, eg between line manager and HR adviser; this is important in larger organisations and is again justified on the wording of the section.

(6) In relation to the potentially important exception in sub-s (4) (improper remarks or behaviour) on which the Code gives guidance, the correct interpretation is that this is *not* the same as the 'unambiguous impropriety' exception to the without prejudice principle. Reference to para 17 of the Code shows that it was Parliament's intent to give more flexibility and a wider discretion to tribunals than under common law. If this question arises, the tribunal should apply a two-stage test:

(i) was there improper behaviour by either party during the settlement negotiations (in the light of the Code guidance in para 18)?

(ii) if so, to what extent should confidentiality be preserved in respect of those negotiations?

Decision

12. Although no documentary support was provided by either party, it is clear that the claimant was employed by the first respondent and can seek her remedy against them. She has no basis of claim against the second to fifth respondents.

13. Statute provides that the claimant cannot rely on the discussions which took place near the end of her employment.

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Employment Judge Truscott QC

Date 9 April 2019