EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110193/2019

5

Held in Glasgow on 16 December 2019

Employment Judge L Wiseman

10 **Mr GJZ Hunter**	**Claimant** **Represented by:** **Ms A Gordon -** **Solicitor**
15 **French Duncan Wealth Management Ltd**	**Respondent** **Represented by:** **Mr S Miller -** **Solicitor**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided evidence of the pre-termination negotiations will be admissible in the subsequent hearing to determine the complaint of unfair dismissal. The respondent's application in terms of section 111A Employment Rights Act is refused.

REASONS

25 1. The claimant presented a claim to the Employment Tribunal on the 16 August 2019 alleging he had been unfairly dismissed and was entitled to be paid notice pay.

2. The respondent entered a response admitting it had dismissed the claimant for reasons of gross misconduct but denying the dismissal was unfair. The
30 respondent noted the claimant intended to lead evidence of pre-termination negotiations and asserted he should not be permitted to do so in terms of section 111A of the Employment Rights Act.

3. The preliminary hearing today was to determine the admissibility of evidence of pre-termination negotiations under section 111A Employment Rights Act.

4. I heard evidence from Mr Graeme Finnie, Managing Partner, and I was referred to a jointly produced file of documents. I, on the basis of the evidence before me (which included an agreed Chronology/Statement of Facts) made the following material findings of fact.

Findings of fact

5. The claimant was employed by the respondent as Managing Director.

6. The claimant, following a second investigation meeting on Monday 15 April 2019, was invited by letter to attend a disciplinary hearing to be held on Tuesday 23 April. Mr Graeme Finnie, Managing Partner, handed the claimant a sheet of paper entitled Heads of Terms – Without Prejudice Proposal, Protected Conversation under section 111A of the Employment Rights Act 1996.

7. The following day (Tuesday 16 April) the claimant consulted a solicitor.

8. The claimant's solicitor, on Thursday 18 April, requested an extension of time until close of business on 24 April 2019, in which to consider the Settlement Agreement. (The Easter holidays meant the 19 and 22 April 2019 were not working days).

9. The respondent's Ms McCosh informed the claimant's solicitor, by email of the 18 April at 13.16, that they felt the claimant had "had sufficient time to seek initial advice on the matter" and she proposed to extend the deadline for acceptance to 09.30 on Tuesday 23 April and to postpone the disciplinary hearing until 12 noon.

10. The claimant's solicitor emailed the respondent on the 19 April at 14.34 rejecting the offered terms and putting forward a counter proposal. The respondent was not willing to meet the terms of the counter proposal.

11. On the 23 April, Mr Finnie informed the claimant that the deadline for acceptance of the original offer was extended from 09.30am until 12 noon.

12. The claimant's disciplinary hearing was held on Tuesday 23 April at 12.10pm. The respondent's Staff Partner, Mr Stephen Hughes, chaired the hearing.

13. The claimant was informed, following a three hour adjournment, that his suspension would continue and that his phone and IT access were restricted.

14. On the 24 April settlement discussions were re-entered with a deadline of 12pm on the 25 April.

5 15. On the 25 April the claimant's solicitor emailed the respondent's solicitor at 10.30am to confirm the claimant remained willing to negotiate a settlement, and put forward a revised counter proposal.

16. The respondent was not willing to meet the terms of the revised counter proposal.

10 17. The claimant was summarily dismissed by letter on the 25 April which confirmed the allegations against him were being upheld.

18. Mr Finnie confirmed that if the claimant's counter proposal had been acceptable, the respondent would have accepted it because their preference had been to resolve matters.

15 **Respondent's submissions**

19. Mr Miller noted the claimant intended to lead evidence of pre-termination negotiations and submitted he should not be permitted to do so. Evidence of pre-termination negotiations was inadmissible and Mr Miller referred to the terms of section 111A Employment Rights Act.

20 20. Mr Miller acknowledged improper behaviour could render inadmissible evidence admissible but submitted there had been no impropriety by the respondent in the conduct of the negotiations. Improper behaviour has to be established as a fact by evidence and what constitutes improper behaviour was ultimately for the tribunal to decide on the facts and circumstances of
25 each case. Mr Miller referred to the case of **Harrison v Aryma Ltd (UKEAT/0085/19)** where the EAT held, with regard to the issue of improper behaviour, that there had to be more than just an assertion by the employee and that the employment tribunal had to make findings about what behaviour

occurred, whether it met the legal test for "improper behaviour" and, if it did, to what extent the tribunal considered it fair to admit or not admit the evidence.

21. Mr Miller referred to the ACAS Code of Practice on Settlement Agreements which provided a list of examples of what may amount to improper behaviour which may dis-apply the rule regarding pre-termination negotiations. One example was (page 58, paragraph 18(e)) "putting undue pressure on a party. For instance not giving the reasonable time for consideration set out in paragraph 12 of this Code".

22. Paragraph 12 (page 57) states that *"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."*

23. Mr Miller summarised, in terms of the chronology, that the claimant was given heads of terms to consider on the 15 April; on the 16 April his representative requested an extension until the 24 April; the respondent agreed an extension until the 23 April; on the 19 April the claimant's representative made a counter-proposal; the respondent's representative agreed a further extension until noon on the 23 April; the disciplinary hearing took place on the 23 April at 12.10; on the 24 April the settlement discussions re-started prior to the outcome of the disciplinary hearing and on the 25 April the claimant's representative made a counter proposal which the respondent rejected. It was submitted the parties had not got to the stage of having a settlement agreement to consider and that discussions had foundered on the failure to agree heads of terms.

24. The respondent denied the claimant had been unduly pressurised in the negotiations which preceded his dismissal. The claimant was given reasonable time to consider the terms of the original offer and to participate in negotiations. Mr Miller submitted that what was "reasonable" depended on

the circumstances of the case and 10 calendar days was not mandatory. The Foreword to the Code used the word "should" rather than "must". In any event the negotiations had continued until the 25 April.

25. Mr Miller submitted the case could be distinguished from the **Lenlyn UK Ltd v Kular UKEAT/0108/16** case where the EAT found the respondent had behaved improperly. The employee had been given six days to consider a proposed settlement agreement. The EAT noted the employee was not given any option to extend the period. Further, the employee was told there was a report that established his gross negligence for the company's £1.9m loss, which misrepresented what the forensic account's report actually said.

26. Mr Miller, in conclusion, submitted the respondent's primary position was that parties did not get to the stage of discussing a settlement agreement. However, if they did, then 10 days were permitted for the negotiations. The reasonableness of the process was the issue and the respondent's position was that the claimant had reasonable time to consider the offer and made counter proposals.

27. Mr Miller confirmed that should the respondent be successful in their application, the statement of claim should be amended to delete paragraphs 10 and 12 and to delete paragraph 17 except for the words *"a letter summarily dismissing me was emailed to my solicitor on Thursday 15th April".*

Claimant's submissions

28. Ms Gordon confirmed the claimant's position was that the respondent had acted improperly in relation to the pre-termination negotiations between the parties. The claimant therefore sought to rely upon those discussions as evidence in support of his unfair dismissal claim. The respondent, having acted improperly, should not be permitted to rely on section 111A Employment Rights Act.

29. Ms Gordon submitted section 111A Employment Rights Act required the tribunal to look at whether a party (the respondent in this case) had behaved

improperly, and then go on to consider to what extent it would be just to apply section 111A in the circumstances.

30. The claimant's position was that the "improper behaviour" in this case related to the respondent's failure to comply with the ACAS Code of Practice on settlement agreements. Section 17 of the Code states that "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 be not limited to) behaviour that would be regarded as "unambiguous impropriety" under the without prejudice principle.

31. Ms Gordon referred to the facts of this case which were that the claimant had been given a letter inviting him to attend a disciplinary hearing on Tuesday 23 April; at the same meeting the claimant was handed an offer headed "Heads of Terms – Without Prejudice Proposal" by Mr Graeme Finnie. The claimant was given 3 days to consider that offer; the claimant sought legal advice the following days and attempts were made to negotiate an extension to the deadline for acceptance. The deadline was extended to the 23 April (a period of 8 days) and, no settlement having been agreed, the claimant attended the respondent's offices on the 23 April. Mr Finnie informed the claimant the deadline for acceptance of the offer had been extend from 9.30am to 12 noon. Ultimately the claimant's disciplinary hearing went ahead, the allegations against him were upheld and he was summarily dismissed.

32. Ms Gordon submitted two key issues emerged from those facts which amounted to improper behaviour: the first was the unreasonably short time limit for acceptance of the offer and the second was the unreasonable approach taken by the respondent in conducting those discussions, which was intended to place the claimant under undue pressure.

33. Ms Gordon referred to paragraph 12 of the Code which referred to the general rule being a minimum of 10 calendar days to consider the proposed formal written terms of a settlement agreement. The claimant had, on the 15 April, been given three days to consider the proposal. On the same day the claimant was suspended, given an invitation to a disciplinary hearing to consider

allegations of gross misconduct. The allegations were such that they could have serious repercussions for his long-term career and this put the claimant under a significant amount of pressure. The deadline not only fell short of the ACAS recommended period, but was also unreasonable given the seriousness of the allegations the claimant faced.

34. The respondent's representative did extend the deadline for acceptance to 8 days, however those days fell over the Easter holidays which meant two of the days were non working days. This had an impact on the claimant's ability to obtain legal advice and created additional pressure.

35. Ms Gordon submitted the respondent had breached paragraph 12 of the ACAS Code and had acted improperly in all of the circumstances.

36. The claimant's position, with regard to the second matter, was that he had been put under pressure by the respondent to accept the offer of settlement. The letter inviting him to attend a disciplinary hearing made reference to minutes which "are to follow" and to "further investigations". There was also reference to the respondent providing the claimant with any further material they gathered from their continuing investigations. It was submitted that expecting the claimant to prepare his case for a disciplinary hearing in 8 days' time, without the benefit of all the documents whilst at the same time considering an offer of settlement amounted to the type of undue pressure referred to at paragraph 18 of the ACAS Code.

37. Ms Gordon contrasted the approach of the respondent with the template letter in the ACAS guidance (page 103) which envisaged a gap between the settlement offer being considered and the next stage of the applicable process. The offer had, effectively, been presented to the claimant not as a means of resolving concerns, but as an ultimatum.

38. Ms Gordon submitted Mr Finnie's involvement in the process was, in itself, improper behaviour because this increased the pressure on the claimant to accept the respondent's offer. It also gave the claimant the impression that dismissal was a foregone conclusion.

39. Ms Gordon concluded her submission by inviting the tribunal to find the respondent had behaved improperly in the course of the pre-termination negotiations with the claimant. The respondent had imposed a deadline that was less than 10 days and, by Mr Finnie making an offer of settlement effectively in tandem with an invitation to a disciplinary hearing, the respondent put the claimant under pressure to accept the offer of settlement. In the circumstances it would not be just for the respondent to be permitted to rely on section 111A Employment Rights Act and therefore evidence of the pre-termination discussions between the parties should be admissible as evidence in the claimant's unfair dismissal claim.

Discussion and Decision

40. I firstly had regard to the terms of section 111A Employment Rights Act which deals with confidentiality of negotiations before termination of employment. The section provides as follows:

"(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.

(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."

41. I also had regard to the ACAS Code of Practice on Settlement Agreements (which was produced at pages 47 – 62 of the documents) and to the ACAS Guidance regarding Settlement Agreements (pages 63 – 128).

42. The respondent's position was that they were entitled to rely on the provisions of section 111A Employment Rights Act and accordingly evidence of the pre-termination negotiations was inadmissible in any subsequent hearing of the unfair dismissal claim.

43. The claimant sought to challenge that position because, it was said, the respondent had acted improperly by (i) failing to comply with the ACAS Code of Practice by giving an unreasonably short time to consider/accept the offer and (ii) adopting an unreasonable approach in conducting the discussions thereby putting the claimant under pressure. I examined each of these points.

44. The protection offered in section 111A Employment Rights Act will not apply where there is some improper behaviour in relation to the settlement agreement discussions of offer. The ACAS Code of Practice at paragraph 18 lists some examples of improper behaviour, which includes *"(e) putting undue pressure on a party. For instance, not giving the reasonable time for consideration set out in paragraph 12 of the Code".*

45. The ACAS Code of Practice, at paragraph 12 states that *"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."*

46. There was no dispute regarding the chronology in this case:

- on Monday 15 April 2019 Mr Finnie handed the claimant a document entitled "Heads of Terms" summarising an offer from the respondent proposing his agreed departure from the business with a deadline for responding by 3pm on the 18 April.

- The claimant sought legal advice and, on the 18 April, his representative sought an extension of time until the 24 April.

- The respondent agreed an extension until the 23 April.

- The claimant's representative made a counter proposal on the 19 April. This was rejected.
- The respondent agreed a further short extension until 12 noon on the 23 April.
- The disciplinary hearing took place at 12.10 on the 23 April.
- Settlement discussions restarted prior to the outcome of the disciplinary hearing.
- On the 25 April the claimant's representative put forward another counter proposal which was rejected by the respondent and
- The claimant was dismissed on the 25 April 2019.

47. Mr Miller, for the respondent, sought to argue that parties did not get to the stage of considering the proposed formal written terms of a settlement agreement. He submitted the respondent had put forward "Heads of Terms" for consideration by the claimant, who had responded with a counter proposal. The parties had not, it was submitted, reached the stage of agreeing heads of terms for a settlement agreement. And accordingly the time limit had not yet started.

48. Ms Gordon accepted the document entitled Heads of Terms – Without Prejudice Proposal (page 42) was not a settlement agreement in its final form, but submitted it was the heads of terms which would form the basis of the Agreement.

49. I had regard to the terms of section 111A(2) Employment Rights Act (set out above) where the term "pre termination negotiations" is defined as meaning any offer made or discussions held, before the termination of the employment in question, with a view to it being termination on terms agreed between the employer and the employee. I considered this definition captured the offer made by the respondent to the claimant, and the subsequent counter proposal. These were the negotiations entered into between the parties with

a view to terminating the claimant's employment on terms agreed between the respondent and the claimant.

50. I acknowledged the Heads of Terms document was not the formal written settlement agreement, but that was the document which opened the process of discussions to try to agree terms upon which the claimant's employment would terminate. There may be a period of negotiation during which both sides make proposals and counter proposals until an agreement is reached or both parties recognise that no agreement is possible. I considered that all of these elements of the negotiation leading, in some cases, to a settlement agreement, would be covered by the scope of section 111A Employment Rights Act.

51. I next had regard to the issue of the general rule that a minimum of 10 calendar days should be allowed to consider the proposed formal written terms of a settlement agreement and to receive independent advice. I could not accept Mr Miller's submission that the minimum period of 10 days should only start once the terms of the settlement agreement had been agreed. I could not accept this interpretation of paragraph 12 of the ACAS Code. The Code states that parties should be given a reasonable period of time to consider the "proposed" settlement agreement, and what constitutes a reasonable period of time will depend on the circumstances of the case. The paragraph then goes on to state the general rule being a minimum of 10 calendar days. I was satisfied, having regard to paragraph 12, that this general rule related to the process of considering the offer, negotiating and, where possible, reaching agreement.

52. Ms Gordon invited the tribunal to find the respondent had not complied with the general rule of allowing a minimum of 10 calendar days to consider the proposed written terms of the settlement agreement. The claimant had been given 3 days to consider the offer and his representative had had to ask for an extension until the 24 April. The respondent agreed to an extension until the 23 April. A total of 8 days.

53. I, in considering this matter, had regard to the fact there was no explanation by the respondent to explain why the time allowed to the claimant had been so short. The claimant was given the Heads of Terms letter on Monday 15 April, and had until Thursday 18 April to respond. Mr Finnie, who gave evidence at the hearing, offered nothing to explain why such a tight timescale had been imposed.

54. I acknowledged the respondent agreed to the request made by the claimant's representative to extend the time limit to the 23 April. This 5 day extension, however, included Good Friday, a weekend and Easter Monday. Accordingly, of the 5 days given in the extension, only the 23 April itself was a working day.

55. The respondent extended the deadline for a response from 9.30am on the 23 April until 12 noon on the 23 April. The respondent delayed the disciplinary hearing until 12.10 on the 23 April. The respondent, again, offered no explanation why a further meaningful extension could not have been offered to the claimant.

56. I, in addition to the above points, had regard to the fact the claimant consulted a lawyer the day after receiving the Heads of Terms document. He had time to consider the document, instruct his solicitor to seek an extension of time and to instruct his solicitor to put forward a counter proposal on the 19 April. The counter proposal was rejected the same day and no further proposals or counter proposals were put forward until after the disciplinary hearing had been heard.

57. I, having had regard to the above points, concluded that whilst on the face of it an extension from the 18 April to the 23 April appeared reasonable, it was not in fact so. I say that because of the five day extension allowed by the respondent, four of those days were non-working days. In reality the respondent allowed an extension from 9.30am on the 23 April until 12 noon on the 23 April. I considered the respondent compounded this by offering no explanation for the need to make time scales so short.

58. I, in conclusion, decided the respondent had behaved improperly by not giving a reasonable time for consideration as set out in paragraph 12 of the Code.

59. I next considered Ms Gordon's argument that the respondent had behaved improperly by putting undue pressure on the claimant to the accept the offer. Ms Gordon, in making that submission, pointed to the fact the claimant had, in the letter of suspension and invite to a disciplinary hearing, not been provided with all of the paperwork necessary to allow him to prepare for the disciplinary hearing. Furthermore, the letter confirmed investigations were ongoing and that he would be provided with any further paperwork in advance of the disciplinary hearing.

60. The claimant had been given this letter and then given the Heads of Terms letter by Mr Finnie. Ms Gordon invited the tribunal to contrast this approach with the approach set out in the Template Letter to Initiate Settlement Discussions, where there was a clear separation between the settlement discussions and subsequent disciplinary proceedings.

61. I acknowledged the Template Letter is optional and no criticism could be made of the respondent for not using this letter. I considered the issue of undue pressure related to the fact the respondent proceeded with the disciplinary hearing at 12.10 on the 23 April, and, following a three hour adjournment, the claimant was advised his suspension would continue and his phone/IT access were restricted. The following day settlement discussions re-started and the claimant was given until 12pm on the 25 April to give his response.

62. I noted the claimant, through his representative, made it clear to the respondent that he remained willing to negotiate a settlement, and he put forward a revised counter proposal. The respondent, also wished to settle this matter, but rejected the counter proposal and did not put anything further forward for the claimant to consider.

63. I acknowledged negotiations may run to the wire and ultimatums may be issued, but I considered that undue pressure was placed on the claimant when the process of the settlement discussions and the disciplinary hearing were conflated. The claimant was awaiting the outcome of the disciplinary

hearing when the settlement discussions were re-entered: I considered this to be undue pressure.

64. I, in conclusion, decided the respondent had behaved improperly by putting undue pressure on the claimant when it did not give the reasonable time for consideration set out in paragraph 12 of the Code, and when it placed the claimant in the position of re-entering discussions after the disciplinary hearing but before the outcome was announced. The effect of my decision is that the respondent is not entitled to the protection of section 111A Employment Rights Act. The pre-termination negotiations may be relied upon as evidence in the subsequent unfair dismissal hearing.

Employment Judge: Lucy Wiseman
Date of Judgement: 13 January 2020

Entered in Register,
Copied to Parties: 15 January 2020