EMPLOYMENT TRIBUNALS

Claimant: Mr J Bagram

Respondent: Croner Group Limited

Heard at: Bristol (by video) **On:** 21 September 2020

Before: Employment Judge C H O'Rourke

Representation

Claimant: Mr J Heard - counsel
Respondent: Mr J Samson - counsel

RESERVED PRELIMINARY HEARING JUDGMENT

1. The Claimant's claim of constructive unfair dismissal will proceed to hearing, subject to payment of a deposit, amount to be determined. In this respect, the Claimant is ordered, by no later than fourteen days from the date this judgment is sent out, to make written representations in respect of the Respondent's application that such deposit be in the sum of £1000.

2. The claim of age discrimination is struck out, for want of jurisdiction.

3. The Respondent's application as to non-disclosure of privileged material is granted.

REASONS

Background and Issues

1. Following a telephone case management hearing before me, on 12 May 2020, this Open Preliminary Hearing was listed for hearing today, to determine the following preliminary matters:

    a. Whether, under Rule 37 of the Employment Tribunal's Rules of Procedure 2013 ('the Rules'), the Claimant's claim of constructive

unfair dismissal should be struck out as having no reasonable prospects of success; or, alternatively,

b. Whether, under Rule 39, the same claim should have a deposit order made in respect of it, as having little reasonable prospects of success;

c. Whether, under s.123 of the Equality Act 2010 ('EqA'), the Tribunal has jurisdiction to hear the Claimant's claim of age discrimination; and

d. Whether, under the common law and/or s.111A of the Employment Rights Act 1996 ('ERA'), the 'without prejudice' correspondence and/or the 'protected conversation' between the parties is admissible in evidence?

2. The Respondent also raised two further issues, as follows:

a. The non-compliance by the Claimant with the order made at the previous hearing as to disclosure of medical records. (I deal with this briefly by stating that it is clear, from those heavily-redacted documents that have been provided [162-165] that the Claimant has not complied with the Order, which required that all medical records held by the Claimant's GP, for the period 25 February to 19 July 2019, to include a list of conditions suffered by him, as at 25 February, be disclosed. No objection was raised to the terms of that Order, when made. Mr Heard indicated that he would seek instructions on this point, with the hope that full disclosure would be made, but, if not, it is clearly open to the Respondent to make the appropriate application.); and

b. Whether what the Respondent considered to be irrelevant material in the Claimant's pleadings (in relation to a former colleague of his) should be deleted from those pleadings? (Again, I deal briefly with this point. It appears that the Claimant had originally sought to conjoin his claim with that of a claim by the former colleague, but subsequently withdrew that application. It seems to be the case, from Mr Samson's knowledge of that other claim that it does not include a claim of discrimination, but simply a claim or claims relating to dismissal. Nor is the colleague the Claimant's comparator for his discrimination claim. It seems unlikely, therefore that by the nature of dismissal being usually personal to the individual dismissed that the colleague's circumstances are going to be relevant to that of the Claimant. In particular, the Respondent seeks to avoid what it considers will be unnecessary and disproportionate disclosure requests by the Claimant, in relation to that colleague's circumstances. However, as I had not heard full argument on this matter from the parties (Mr Heard only very recently having been appraised of this request of the Respondent) and full details of the colleague's claim being unavailable, I make no decision in this respect, pending any further applications from either party.)

The Law

3. I was referred to multiple authorities by both counsel, to which I shall refer below, in due course, as I consider relevant.

4. Section 111A ERA states:

'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.'

Submissions and Discussion

5. I read and heard submissions from both counsel and deal with the issues below, in the order I heard them.

6. Strike Out/Deposit Order in respect of the Constructive Unfair Dismissal Claim. The Claimant's amended particulars of claim asserted breach by the Respondent of the implied terms as to trust and confidence, cooperation and support and duty to redress grievances [68]. The acts or omissions leading to such alleged breaches included asserting performance concerns, setting unachievable targets, failing to either promote him, or offer him such opportunities, failing to put in place a promised training plan and which '*was on the grounds of his age and ongoing up until the termination of his employment.'* The Particulars went on to assert that the 'last straw' was the Respondent's failure to instruct an independent third party to conduct the investigation of his grievance, leading to his immediate resignation on 19 July 2019. The Claimant had previously resigned, on six months' notice, on 8 May 2019 [107-111] and

in his letter of resignation referred to other earlier matters, to include resentment against him by other managers, due to his salary and false accusations that he had spread malicious rumours about a colleague. He raised a grievance at the same time.

7. I summarise Mr Samson's submissions (as I consider relevant to my decision), as follows:

    a. When the Claimant resigned, on 8 May (all dates hereafter 2019), he was not acting promptly, in response to his alleged 'last straw' in early May (the advertising of a Business Development Manager (BDM) role in his area (the Claimant was a BDM) [65]), as he resigned on six months' notice and in any event, continued in employment for more than two months thereafter.

    b. The '*last* last straw' (the failure to appoint an independent grievance manager) is an inherently weak reason and in any event, the Respondent had been willing to consider such an appointment. The Claimant resigned, with immediate effect, on 19 July, but the Respondent had written to him, on 15 July [178], stating that they were '*happy to consider the possible appointment of* (an) *HR person (independent of Croner) to chair a grievance meeting with you if that would assist.'*, to which offer the Claimant did not respond.

    c. Instead, the Respondent asserts, the real reason the Claimant chose to advance his termination date, to 19 July, was because, on that date, he had been paid his salary and outstanding commission [142], which, Mr Samson states, was '*a calculated move'* on his part. He had written previously to the Respondent, on 21 June [174], requesting details of his entitlements in this respect, which he described as '*vital'*. Therefore, his reasons for resigning on 19 July are all to do with him, either his health concerns (as stated in his contemporaneous correspondence), or the receipt of his salary and outstanding commission and accordingly nothing to do with the Respondent.

    d. The Claimant cannot rely on earlier alleged acts or omissions of the Respondent, if the '*last* last straw' was, objectively viewed, entirely innocuous. In this case, it was such, as the Respondent was making active efforts to arrange a grievance hearing, but with which the Claimant was not co-operating [91, 98, 100 & 135] and had acceded to his request for an independent grievance manager, even though there was no contractual requirement to do so. The Claimant himself accepts this in his particulars, where he states that the Respondent '*continued to make efforts to arrange a grievance or welfare meeting 'as soon as possible''* [64] and other references in the same document [66]. There is therefore no 'link' to the earlier alleged breaches, which the Claimant had affirmed, by resigning only on lengthy notice. There is nothing else, after that date (8 May), until the alleged '*last* last straw'.

e. This claim is therefore fabricated and made in bad faith. Reliant on the case of **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA 4 All ER 238**, this Tribunal was entitled to conclude that this claim had no reasonable prospects of success, as there were no relevant issues of primary fact that required further determination at a final hearing. It should be noted that despite the Claimant having had the opportunity to give evidence, he has declined to do so.

8. I summarise Mr Heard's submissions as follows (to include responses from Mr Samson and counter-responses, in turn, from Mr Heard):

a. The claim has higher than little reasonable prospects of success.

b. If the age discrimination claim succeeds, then it is extremely likely that a Tribunal would find him also constructively unfairly dismissed. Given that this Tribunal is obliged to take such discrimination claim at its highest, it cannot be said that there are little reasonable prospects of success. The breaches of contract relied upon include discrimination.

c. The Claimant has set out a course of conduct between April 2018 to 19 July 2019, involving multiple allegations of breaches of implied terms, the facts of which the Respondent disputes. Accordingly, this claim is highly factually sensitive and claims of that nature should be reserved for a full hearing. This Tribunal should avoid the temptation to conduct a 'mini-trial'.

d. Any inconsistencies in the evidence can be dealt with at a final hearing and to strike out at this stage would be draconian. In **Kaur**, (76) tribunals are warned against such a step:

'It is well established that an employment tribunal ought to be very slow to strike out a claim in which there are disputed issues of fact: see, eg, Ezsias v North Glamorgan NHS Trust *[2007] EWCA Civ 330, [2007] 4 All ER 940, [2007] ICR 1126, and* Balls v Downham Market High School & College *(2010) UKEAT/0343/10, [2011] IRLR 217. However much a judge may suspect that the claimant will be unable to establish his or her version of the facts, it is necessary to bear in mind that the evidence may come out very differently at a hearing; the tribunal can always record its scepticism by making a deposit order.'*

(Mr Samson invited the Tribunal to read on to paragraph 77 of this judgment, for the full guidance.

'However there is no absolute rule against striking out a claim where there are factual issues—see, eg, Ahir v British Airways plc *[2017] EWCA Civ 1392. Whether it is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed'*).

e. The Respondent misidentifies the nature of this claim, as there are, in fact, two constructive unfair dismissal claims running in parallel. The circumstances of the earlier claim, resulting in the 8 May resignation, when added to the failure to appoint the independent grievance manager, indicate a cumulative breach and course of conduct. (Mr Samson countered that this was the first mention of two such causes of action, which he considered '*far-fetched and a spin'*. The resignation of 8 May was not pleaded as the termination event, either solely, or in the alternative. Mr Heard countered that Mr Samson was taking an '*extremely technical view'* and what was being advanced now was '*nothing inconsistent with the pleaded claim'*. Mr Samson's further response was that this was not a mere technical issue and that tribunals had to determine cases on their pleadings. As two separate specialist employment solicitors had been involved to date, in these pleadings, were any application now made to amend, he would seek the Respondent's full costs for this hearing.)

f. While Mr Samson asserts that nothing happened between 8 May and 19 July, to indicate an ongoing breach, that is not the case, as throughout that period, the Respondent had refused to involve an independent grievance manager, despite being aware of the Claimant's medical situation and attendant stress and only belatedly indicating that possibility, but which was 'too little, too late'.

g. The short period between 8 May and 19 July was not an affirmation of the contract.

h. There was no need for the Claimant to give evidence. (Mr Samson countered that the Claimant could have chosen to give evidence to support his pleaded case).

9. Conclusion. I have considered whether Rule 37 is engaged in this case and that therefore the claim of constructive unfair dismissal should be struck out, as having no reasonable prospects of success, but, on balance, find that it is not. Instead, however, I do find that Rule 39 is engaged and that accordingly the claim has little reasonable prospects of success, for the following reasons:

a. The Claimant is restricted to his pleaded case, which, in the absence of any application to amend, is that the 'final straw', prompting his resignation on 19 July, was the Respondent's failure to appoint an independent grievance manager.

b. In my view, he waived any previous breaches (up to an including 8 May), by, at that point, only resigning on six months' notice (**Quigly v University of St Andrews [2006] UKEAT 0025/05**).

c. For such previous breaches/acts or omissions to be part of a cumulative course of conduct, the 'final straw', while not needing to be such as to constitute a fundamental breach in its own right,

must, to establish a link to those breaches, be sufficiently serious itself, to contribute to whatever previous acts or omissions by the employer are relied on (**Waltham Forest London Borough Council v Omilaju [2005] EWCA ICR 481**). An entirely innocuous act by an employer cannot be a 'final straw', even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of trust and confidence. The test is an objective one. And while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test. I don't consider, in this case that the Claimant has a real prospect of proving (the burden being on him) that his alleged 'last straw' was anything but an innocuous act by the Respondent, for the following reasons:

i. There was no contractual entitlement to demand the appointment of an independent grievance manager. Nor does the ACAS Code require it. The Respondent is a large organisation, with several parts to its Group and can have been expected, therefore, to have sufficient managerial resources to provide a manager previously uninvolved with the Claimant, to satisfy him on this point (unlike, for example, in a small company, with only perhaps two or three managers, who might find it difficult to demonstrate independence of mind).

ii. Objectively, therefore, despite what the Claimant stated in his final resignation letter, as to his doubts that the Respondent could fairly conduct such a process, he had no reasonable basis upon which to make such an assertion.

iii. In any event, the Respondent complied with his request, even if belatedly, but the Claimant nonetheless resigned, having made no response to the offer made, indicating perhaps that in reality, he did not genuinely wish to embark on such a grievance procedure, with or without an independent chair, but was instead prompted to resign by receipt of his salary and commission.

d. I note the guidance in **Kaur**, but consider, in this case that there are factual issues in respect of which witness evidence will be required before a final determination can be reached, to include whether or not the Claimant in fact waived the pre-8 May breaches and the reasons for his resignation on 19 July. While he had the option to give evidence at this hearing, it is not a pre-requisite that he do so, to avoid a strike out order.

10. Deposit Order. I accordingly order that the Claimant pay a deposit (amount to be decided), to be permitted to continue with this claim. He has had professional legal advice throughout this matter, which advisors will no doubt inform him of the potential costs consequences of

maintaining this claim through to final hearing, but, for the avoidance of doubt, Rule 39(5) states:

> *'(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*
> *(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*
> *(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.*

11. Amount of Deposit. Rule 37(2) requires the Tribunal to make reasonable enquiries into the paying party's ability to pay the deposit, before deciding the appropriate amount. The Respondent has requested an order in the amount of £1000. Written representations, along with any supporting documentary evidence as to means, are required from the Claimant, within fourteen days of the date of issue of this Judgment, to be sent to the Tribunal and the Respondent, as to his ability, or otherwise, to pay such amount. The Tribunal will thereafter, having read any representations from the Respondent, make the final order.

12. Jurisdiction to hear Age Discrimination Claim. The Respondent contends that the Claimant's claim of direct age discrimination is out of time and that therefore the Tribunal does not have jurisdiction to hear it and that further, applying s.123 EqA, it would not be just and equitable to extend time.

13. I summarise Mr Samson's submissions on this issue, as follows:

    a. The key incident relied upon by the Claimant (and denied by the Respondent) occurred in November 2018, when he asked for feedback on an unsuccessful application for promotion (made in September), during which discussion he alleges that he was told that he was '*old school'*.

    b. This allegation was first raised six months later, in his 8 May resignation letter [109], in which he said '*… Dale told me I was unsuccessful as I was 'old school' and needed to get up to speed with the technical information requirements.'*

    c. The Claimant further asserts that the Respondent failed to provide him with a training plan, or training, to assist him in applying for future roles; that he was not considered for any future promotion opportunities, to include, specifically, the Team Leader role (from which the Claimant had previously resigned). The complaints as to promotion occurred in or around February [61] and therefore over nine months before he brought his claim. None of these allegations were raised in correspondence after 25 February [87, 88, 125, 134, 139, 140], except in his 19 July resignation letter. There was no ongoing course of conduct between those dates, during which time,

in any event, he was on sick leave. The issues he did raise, in relation to IT access, his anxiety etc., had nothing to do with age.

d. This is a weak foundation upon which to draw the inference of discrimination, for which the burden of proof rests with the Claimant.

e. The Claimant brought his discrimination claim on 16 November, a year after the initial incident and nor did he make any reference to such alleged discrimination in correspondence between 8 May and the termination of his employment.

f. Despite having the opportunity at this Hearing to give evidence as to reasons for such delay, the Claimant has failed to do so and one must query why not? There is nothing to justify such delay.

g. The most recent guidance on 'just and equitable' extensions is contained in **Thompson v Ark Schools [2019] UKEAT ICR 292**. In this claim, the Claimant has not properly pleaded conduct extending over a period of time; has provided no witness evidence; has had legal advice throughout; was clearly not lacking capacity during the relevant time, as he wrote coherent letters and was aware of all relevant facts.

h. There will be prejudice to the Respondent in defending against this claim, as the manager who allegedly made the comment in November 2018 has long left the Respondent's employment and is likely to require the serving of a witness order, if he is to attend the hearing.

i. The merits of the claim are weak.

14. I summarise Mr Heard's submissions as follows (again, incorporating Mr Samson's counter-submissions):

a. The earliest date for any stand-alone claim of discrimination to be in time is 2 July 2019. However, the Claimant's case is that the act of discrimination constituted conduct extending over a period.

b. The Tribunal is obliged to take the claim at its highest, as there is no application for strike out/deposit, in respect of it. (Mr Samson countered that prospects for the claim can be considered – **Lupetti v Wrens Old House Ltd [1984] UKEAT ICR 348**).

c. The last act of discrimination was his dismissal, which is within time and there are therefore no time issues in this case. (Mr Samson countered that discrimination was not pleaded for either date of resignation, or that any dismissal was discriminatory. The Tribunal is being asked to deduce this claim and the Respondent has not been asked to meet such a case. Despite listing the 'specific' acts of direct discrimination at paragraph 56 of the amended particulars of claim, no reference is made to the dismissal.)

15. Conclusion. I find that the claim of age discrimination is out of time and I decline to extend time, subject to s.123 EqA and therefore, the Tribunal not having jurisdiction to hear it, it is struck out. I do so for the following reasons:

    a. For the claim to be within time, the last act of discrimination must have occurred no earlier than 2 July 2019. The only incident that occurred after that date was the Claimant's resignation, on 19 July. In between those dates, there is no pleaded act of discrimination, or continuing act taking place. Any failure to provide a training plan or training, or to consider the Claimant for any future promotion opportunities cannot have been relevant, as the Claimant was on long-term sick leave, referring to his '*mental health* (being) *so troubled that I have experienced very dark thoughts*' [65], sufficient to prevent him attending even a grievance hearing and therefore he would clearly not have been expected to participate in or consider any training, or to be considered for promotion. The Team Leader opportunity arose in February and therefore that allegation falls outside this period. On his own pleadings, the only event arising between 2 and 19 July is his correspondence of 10 July [176], informing the Respondent of his health issues and continuing to complain that an independent grievance manager has not been appointed.

    b. His alleged constructive dismissal, on 19 July, is not pleaded as an act of detriment due to less favourable treatment on grounds of age. The Claimant has had the opportunity, following the case management hearing, to prepare and file an amended particulars of claim, with the benefit of legal advice, but did not include dismissal in the 'specific' acts of alleged discrimination listed. It is not for either the Tribunal or the Respondent to seek to infer a claim in this respect, but for the Claimant to set it out clearly, which he has not done. There is, therefore, no discriminatory act, or continuing act alleged, from 2 July onwards and accordingly, the claim is out of time.

    c. Of the acts that are pleaded, the most recent stems from February, when he was allegedly not considered for the Team Leader role and during which month (25 February), he went on the above-mentioned long-term sick leave, not, thereafter, returning to work. For the same reasons as set out above, I don't consider that there can have been any act of discrimination or continuing act, from that date. Accordingly, therefore, the claim is at least approximately four months out of time.

    d. Turning to the guidance in **Thompson v Ark Schools**, I consider the following principles:

        i. As referred to in the above decision, the case of **Robertson v Bexley Community Centre (trading as Leisure Link)[2003] IRLR434**, observed that:

"*25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.*'

ii. The question is a matter of fact and judgment, to be answered case by case, by this Tribunal.

iii. The length of the delay in this case is at least four months and based, as the claim is, on an alleged comment in November 2018, it is potentially of a year.

iv. The Claimant has advanced no reason for this delay, despite having had the opportunity to give evidence on this point.

v. There will, I consider, be some effect on the cogency of the evidence, bearing in mind that this matter is unlikely to come to hearing before mid-2021 and therefore almost two years after the alleged primary incident.

vi. The Claimant failed to act with any promptness, following the alleged comment, not even mentioning it until his first letter of resignation, on 8 May 2019, some six months later and thus rendering it unlikely that the alleged maker of the comment might even recall the incident.

vii. There is no evidence that the Claimant was unable, for medical reasons, to deal with the matter, as, firstly, he only first went sick approximately three months after the incident and, secondly, during that sick leave, engaged in lengthy and cogent correspondence, raising various issues, to include a grievance, thus indicating that he was capable of addressing this alleged of discrimination, were he so minded to do so. The medical notes he has provided do not indicate any condition that might have prevented him doing so, his stress being indicated to be '*work related'*.

viii. He appears to have had legal advice for much of the period and at least since 8 March 2019, when he informs his doctor that he has consulted a solicitor [162].

ix. Applying **Lupetti**, I consider the merits of this claim to be weak. It is based on what appears, even if true, to be a one-off, 'throw-away' remark, with no repetition or directly-attributable detriments and in respect of which the Claimant made no complaint, for six months. The Respondent denies the comment, or any related discrimination and it is difficult

to see, therefore, how the Claimant hopes to establish at least the inference of age discrimination, sufficient to shift the burden of proof to the Respondent.

x. Finally, considering the balance of prejudice to the parties, I find that while the Claimant will suffer the prejudice of being unable to pursue this claim, the balance falls in the Respondent's favour, for the following reasons:

1. They will not have to expend resources defending themselves against a weak claim.

2. The passage of time will affect the cogency of their evidence, particularly as the Claimant did not first raise this concern until some six months after the incident.

3. The manager concerned has long-since left their employment and they are likely to require to witness summons him.

16. Without Prejudice/s.111A ERA. The Claimant wishes to refer, in evidence, to correspondence in late March between the parties, headed '*without prejudice and subject to contract'* and a '*proposed meeting under s.111A ERA 1996'* [154-158], to which the Respondent objects, as it considers it privileged material.

17. I summarise Mr Samson's submissions as follows (I will refer to the authorities he relied upon, as I consider necessary, in my conclusions):

a. He relies on both the common law and s.111A.

b. The public interest in maintaining privilege is very great and not to be sacrificed save in truly exceptional and needy circumstances.

c. The crucial consideration is whether during negotiations the parties contemplated, or might reasonably have contemplated litigation. There is no requirement for hostility between the parties. By 25 February, there was a dispute, or nascent dispute between the parties, in relation to annual leave, the Claimant's performance, the fact he had been on sick leave for a month at that point and latterly, the accusation that he had set up a business in competition to the Respondent, which is why the Respondent sought to rely on the without prejudice rule. There can be no dispute that once the Respondent raised the competition point there was definitely an extant dispute.

d. There has been no 'unambiguous impropriety' in this case and the withholding of the correspondence will not result in a 'dishonest' case being presented.

e. Privilege applies both to the fact that discussions took place, as well as their content.

f. The Respondent's correspondence was clearly marked as privileged and the Claimant was presented with the option of leaving his employment under a settlement agreement. In his written response [156], the Claimant indicated his preparedness to consider such an offer, if the terms were right – '… *if the company is genuine about wanting to explore a sensible discussion about me leaving, I would suggest that you put something down in writing for me to consider in my own time. I do however say that I have a good package with a lot of money in the commission pipeline so an offer will need to take this into consideration.'* He is therefore 'talking money' and is effectively counter-offering to receive a sizeable written offer.

g. In considering s.111A(2), The meaning of 'pre-termination negotiations' is any offer made or discussion held before the termination of employment with a view to it being terminated on terms agreed between the employer and employee. None of the exceptions in that section apply.

h. s111A is designed to catch a wider range of discussions that those caught by the common law.

i. The whole point of the section is to provide a means for employers and employees to discuss settlement before any dispute has actually arisen, with the certainty that the offer and any discussions about it cannot be used as evidence against them in a subsequent unfair dismissal claim. It does not, therefore, cover discrimination claims.

18. I summarise Mr Heard's submissions, as follows:

a. The parties were not in dispute as at 22 March and therefore cannot rely on the without prejudice rule.

b. Further, or in the alternative, the correspondence was a consequence of age discrimination following the Respondent's desire for a '*younger and cheaper model'* than the Claimant, which constitutes unambiguous impropriety. Thus, at both common law and under the exception at s.111A(4), it is admissible. The relevant ACAS Code provides examples. (Mr Samson countered that this phrase was used by the Claimant, not the Respondent and cannot therefore be discriminatory.)

c. Section 111A does not apply to discrimination claims.

19. Conclusion. I find that the discussions between the parties as to possible settlement are privileged and therefore engage the 'without prejudice' rule/s.111A, for the following reasons:

a. The purpose of the 'without prejudice' rule is '*to encourage parties to speak frankly to one another in aid of reaching a settlement and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances.'* (**BNP Paribas v Mezzotero [2004] IRLR 508 UKEAT** and as considered in **Portnykh v Nomura International plc [2014] IRLR 251 UKEAT**). I don't consider that such circumstances exist in this case.

b. There does not have to be an actual dispute. Even a 'potential' dispute, which even though there is no extant litigation, renders the parties conscious of the potential for litigation (**Portnykh**), is sufficient to engage the Rule. There was clearly, in my view, at very least a potential dispute, with both parties conscious of the potential for litigation, for the following reasons:

    i. The Claimant considered (at least in his own mind) that he had been subjected to an act of age discrimination in November 2018 and which was restricting his promotion and career generally. Bearing in mind that he worked for a company that specialises in HR advice and he himself seems to have been involved in setting up a business offering such advice, it beggars belief that if he genuinely felt himself subject to such discrimination that he was not considering his legal position.

    ii. By that point, the Claimant had been on sick leave for a month and there was no indication that he was likely to return to work. Concerns had been raised about his performance and he was clearly unhappy to continue in the Respondent's employment. Had that situation continued, as it did, it would, almost inevitably (as in fact it did), lead to litigation. I am confident that such a potential outcome was in the 'reasonable contemplation' of both parties.

c. The face of the correspondence was clearly marked 'without prejudice' and proposed the termination of the Claimant's employment, by completion of a compromise agreement. The Claimant did not seek to step aside from such correspondence, but instead actively responded, seeking a concrete written offer of settlement and stressing, essentially, how expensive such settlement might be for the Respondent.

d. There was no conduct by the Respondent approaching anything like 'unambiguous impropriety'. The Respondent's letters were expressed in reasonable and polite terms and contained no threat of any kind. Nor was there any implication of discriminatory intent by the Respondent, with only the Claimant making the '*younger model'* allegation, on which the Respondent does not comment.

e. I don't consider that I need to deal in any detail with the s.111A point, but suffice to say, as stated above, the entire thrust of this section is to protect both employer and employee in respect of any

offer made or discussion held before the termination of employment, with a view to it being terminated on terms agreed between the employer and employee. This is precisely what occurred in this case.

20. Judgment. Judgment is therefore as follows:

    a. The Claimant's claim of constructive unfair dismissal will proceed to hearing, subject to payment of a deposit, amount to be determined.

    b. The claim of age discrimination is struck out, for want of jurisdiction.

    c. The Respondent's application as to non-disclosure of privileged material is granted.

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Employment Judge O'Rourke

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Date: 24 September 2020