

2. Judge Roper ordered that statements be exchanged for this preliminary hearing and also draft full length witness statements prepared for the final hearing. The purposes of those full length witness statements was to enable the tribunal to come to a view on whether there was possibility that either the claim or response had little reasonable prospect of success. It was not long into the reading of the documents and hearing the evidence I reached the view that there was not going to be time to deal with the second issue in a three hour hearing. Neither party objected and I have therefore focussed only on the first issue - whether the conversation between Ms Olivia Frings and the Claimant on 7th August 2019 was protected by without prejudice legal privilege. It was accepted at the commencement that S111A had no application in the circumstances of this case.
3. It was accepted that S111A Employment Rights Act 1998 had no application in the present circumstances.
4. I was provided with a substantial amount of documents including a hearing bundle of documents in two parts, the case management order of 27th August 2020, witness statements and other supporting documents including a management of change policy document from the respondent, skeleton arguments, several authorities and witness statements. I heard evidence from the Claimant and Ms Frings both of whom were cross examined. Although an oral decision was given, as the parties are listed for a final hearing to determine issues of unfair dismissal and disability discrimination, at the suggestion of Counsel, I have provided written reasons for the convenience of the panel conducting the final hearing.
5. I make relevant findings of fact on the basis of the testimony and documentary evidence. Where there is a dispute I reach my findings on the balance of probabilities having regard to the testimony and the contemporaneous documents and the conduct of the parties at the relevant time.

Findings of Fact

6. I restrict my findings of fact to the meeting on 7th August and the interaction between the claimant and Ms Frings and the circumstances leading up to that meeting although the conduct of Ms Frings subsequently relating to redundancy dismissal are relevant.
7. Ms Frings is the Director of HR for the respondent. The claimant was employed from 27th November 2017 as School Business Manager with duties

including assisting the Finance Team. She moved to the new role of Payroll and Pensions Lead with effect from June 2018.

8. In November 2019 the respondent had commenced a restructure. The claimant was job matched into the position of Payroll and Pensions manager (rather than Payroll & Pensions Lead) confirmed in a letter of 16th January 2019. A letter dated 28th January 2019 confirmed her new position as Payroll & Pensions Manager as a written variation of contract with effect from 1st April 2019 with a salary review on 1st April 2020. The claimant's former role of Payroll and Pension lead being subsequently deleted. There was no mention of trial period or an extension of a trial period when the Claimant was 'slotted' into the Payroll & Pension Manager role. There was no reference to the Management of Change policy applying to her new appointment.

9. The claimant underwent major surgery in late February 2019 and had a recovery period until May 2019. In May 2019 she also had a minor car accident which delayed her return to work.

10. In June 2019 she was diagnosed with a further condition which required major surgery. The surgery was scheduled for 6th August 2019. The claimant had an OH report in July 2019 stating she could return to work. She did not in fact return to work. A return to work plan from September 2019 had been agreed between the claimant and Ms Frings.

11. The surgery on 6th August 2019 was cancelled at the last minute by the hospital. At this point the relevant facts regarding the meeting on 7th August began.

12. The claimant received a Whats App message from Ms Frings requesting that she attend a brief meeting on 7th August 2019 described as a "in touch day". The claimant willingly agreed. She had as far as she was concerned a good relationship with Ms Frings. The claimant had no indication that Ms Frings wanted to discuss redundancy or capability.

13. What happens next is the core of the dispute in these proceedings. I have not made findings of fact on any reference to the respondent's Goosewell site. The claimant's version of the meeting on 7th August 2019 was as follows.

- Ms Frings started the meeting by stating it's not good news I am afraid, and said that the claimant was being made redundant.
- As the claimant's surgery had been delayed, Ms Frings said could not cope with the claimant being off sick and longer and she needed to move forward.
- There was no discussion on the claimant's performance/capability in the payroll and pension manager role.

- Ms Frings wanted to advertise the position of Payroll & Pensions manager role immediately. She wanted to move things forward.
- The claimant wanted to know if there was any way she could stay and was informed by Ms Frings that there was an admin role at £10k p.a. less than her current position as payroll and pension manager.
- If C accepted the role, she would not be able to inform the newly incumbent payroll and pension manager that she, the claimant had held the job previously as that would make it awkward for the new manager in that role.
- The claimant was so distressed that another colleague came into the room to comfort her. The meeting with Ms Frings then resumed .
- Towards the end of the meeting Ms Frings made the claimant two offers - to enter into Without Prejudice discussions and agree a settlement agreement at a later date; or be subject to a capability procedure.
- As she said this, Ms Frings was tapping a sealed envelope on the desk without stating what was in it. The claimant believed Ms Frings to be referring to the capability route.
- the claimant found this intimidating although she did not know what was in the envelope. The claimant saw it as a threat.
- The claimant was in a state of shock and distress.
- When Ms Frings suggested a WP discussion the claimant believed it was a reference to a WP meeting in the future.
- The claimant perceived that she had two choices – she would be subject to a capability procedure or enter into a settlement agreement.

14. Ms Frings disputes the claimant's version of events. She claims that the meeting on 7th August was a merely a warning of the claimant being at risk of redundancy. Towards the end of the meeting Ms Frings had suggested a without prejudice meeting, she made references to the conversation being 'off the record' and understood that the claimant had agreed to participate when the claimant had nodded her head.

15. I refer to page 98 of the bundle and Ms Frings' note of the meeting; a note which she had written up sometime after the meeting. In the note Ms Frings referred to a conversation with the claimant being "off the record". Ms Frings did not actually record what was said during the 'off the record' part of the meeting. That was set out in her draft witness statement for the final hearing at paragraphs 26-34, the relevant parts of which are :

- That she had stated that the claimant was at risk of redundancy;
- She was concerned the claimant was not the best fit for the Payroll & Pensions Manager role and therefore there could be no role open for her on her return to work following her surgery and recovery.

- All of the options available to her were discussed on a without prejudice, confidential and off the record conversation;
- One option was a settlement agreement;
- Another option was a role at another site although there was no vacancy there currently;
- A further option was an administrator role for which Ms Frings provided a job description.

16. I preferred the claimant's version of events for the reasons stated below.

17. A further meeting was arranged for 8th August 2019. The claimant did not attend. On 10th August 2019 Ms Frings sent a letter of invitation dated 7th August 2019 to the claimant requesting her to attend a meeting to formally discuss what had been discussed on August 7th. The letter stated that Ms Frings wanted to discuss the claimant's "*recent sickness absence, medical suspension and capability for the payroll and pension manager role*". The claimant did not attend the meeting on 30th August 2019.

18. On 30th August 2019 Ms Frings emailed the claimant to express her regret that the claimant had not attended the meeting that day. She stated in the covering email "*Unfortunately I cannot delay the formal process in respect to your redundancy.*" although in fact the meeting on 30th August, as set out in the letter of invitation of 7th August (sent on 10th August), was to discuss the claimant's recent sickness absence, medical suspension and capability for her role *not* redundancy.

19. The dismissal letter attached to Ms Frings email of 30th August 2019 was the letter which would have been given to the claimant had she attended the 30th August meeting - dismissing her for redundancy despite the stated reasons being Ms Frings' doubts that the claimant had the ability to undertake the new role (the Payroll & Pensions Manager role) on a permanent basis and the role had been allocated to the claimant for a trial period which had been extended further. None of that had been discussed or notified to the Claimant in the meeting of 7th August 2019. The process conducted by Ms Frings was confused and confusing.

Submissions

20. I heard oral submissions and was also provided with written submissions and authorities by counsel, for which I thank Counsel. Authorities referred with copies supplied were:- **Faithorn Farrel Timms LLP v Bailey [2016] IRLR 839; Framlington Group Ltd and another v Barnetson [2007] EWCA Civ 502; BNP Paribas v Mezzoterro [2004] IRLR 508 and Dr V Portnykh UKEAT/0448/13/LA.**

The law

21. The without prejudice legal privilege is a general rule of the law of evidence which is that all of the evidence relevant to an issue in proceedings is admissible and may be ordered to be disclosed. The without prejudice legal privilege rule is an exception to that general rule; it prevents either party to negotiations *genuinely aimed at resolving a dispute* between them from giving evidence of those negotiations.

22. The privilege is founded on the public policy that litigants should be encouraged to settle their differences rather than pursue them through the courts to the bitter end; and on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court at trial as admissions on the question of liability.

23. There are certain principles to be met in the application of without prejudice legal privilege:-

(1) there must be a dispute between the parties although litigation need not necessarily have begun. It is the content of the negotiation which is critical to determining whether WP privilege applies not the imminence or fact of litigation commencing.

(2) The negotiation does not have to be prefaced with the words or the label – Without prejudice - it will apply if there is a genuine attempt to settle and it will not apply if there is not a genuine attempt to settle. Merely attaching the label of without prejudice does not give protection if there is no dispute and no genuine attempt to settle a dispute.

There are of course nuances arising out of these basic principles of WP privilege as illustrated in the various authorities referred to above, ie each case is fact sensitive.

Conclusions

24. I found the claimant to be a straightforward and credible witness.

25. I found Ms Frings' credibility to be seriously undermined in relation to her version of events of 7th August 2019 by her inflexible adherence to her line of evidence that the claimant's position of Payroll & Pension Manager was subject to a trial period under the Management of Change Policy (the Policy) despite no evidence that the claimant had been informed of that in the letters which had confirmed her appointment to the Payroll & Pensions Manager role, and the variation of contract from her role as Payroll & Pension Lead to the Payroll & Pensions Manager post commencing 1st April 2019. Ms Frings, who had 25 years HR experience, insisted that she had acted appropriately in dismissing the

claimant allegedly in accordance with the Policy on the basis that the claimant was on a trial period of four weeks in the Payroll & Pension Manager role - although that was never brought to the claimant's attention. I find Ms Frings has retrospectively applied Section 8.6 Suitable Alternative Employment of the Policy to the facts of claimant's situation and her insistence that it applied and justified the claimant's dismissal, was a misinterpretation /misapplication of the Policy under Section 8.6.

25. I preferred the claimant's version of events as being nearer to the truth.

26. Turning to the question of the without prejudice legal privilege protection claimed by the respondent as attaching to the discussion between Ms Frings and the claimant on 7th August 2019, the claimant was, as counsel put it, blindsided by Ms Frings' conduct of the meeting. She had expected a keeping "in touch day", a friendly, congenial meeting; instead Ms Frings commenced the hearing with a reference to redundancy dismissal; she talked about alternative employment and a vacancy at a lower grade and substantial lower pay. The claimant's reaction of shock and distress was understandable.

27. The claimant had no knowledge of any dispute between herself and the respondent and there was no evidence of any dispute. There was no dispute.

28. The claimant was already vulnerable, anxiously awaiting major life changing surgery which had been cancelled the day before the meeting. She was shocked and greatly distressed by what Ms Frings was saying. She was in floods of tears and needed comforting by another member of staff. She had not intended to enter into a without prejudice meeting. She had nodded her head but believed that the discussion would be at a later date. In fact the claimant and Ms Frings did arrange another meeting the following day (although they did not because the claimant was unwell).

29. Given the state of emotional distress the claimant was in as a result of Ms Frings' conduct of the meeting, it was incumbent on Ms Frings to ensure that the claimant was capable of giving informed consent to entering into a discussion about dismissal and alternative roles before she continued with any without prejudice discussions. The urgency to plough on with the meeting supports the claimant's evidence that Ms Frings had stated she could no longer cope with the claimant's sickness absence. Her conduct of the meeting was basically uncaring and unkind. In the circumstances there was no equality of arms. The claimant was not in a position to negotiate and she entered into no negotiations – she asked a question whether there was any way she could stay. The response was not encouraging. It effectively ended there.

30. The claimant did not give consent to a without prejudice conversation and nothing said by the claimant could be construed as negotiation. The case of **Portnykh** has no material relevance in these circumstances.

31. I find that the entirety of the meeting on 7th August 2019 has no WP legal privilege protection.

Employment Judge Richardson
Date: 28 January 2021

Judgment sent to Parties: 1 February 2021

ON BEHALF OF THE TRIBUNAL OFFICE