EMPLOYMENT TRIBUNALS

Claimant: Miss L Murray

Respondent: Hudson Administration Services Limited

WRITTEN REASONS

1. These are the written reasons for the judgment delivered orally at the preliminary hearing on 21 July 2021 and sent to the parties on 29 July 2021, pursuant to the respondent's request dated 12 August 2021.

The claim

2. The claimant's complaints are unfair dismissal, indirect sex discrimination, victimisation and a breach of the part time workers' regulations, as set out in the case management summary dated 9 April 2021. The claimant says these complaints arise from the respondent failing to provide equipment to make it possible for her to work from home during the Covid 19 pandemic and making her redundant. Part of the evidence the claimant seeks to rely on relates to a conversation on 10 June 2020 between herself and Mr John-Lee Thompson, the respondent's General Manager ("the Conversation"). The respondent says that the Conversation is not admissible in evidence.

3. It was agreed at the outset of the preliminary hearing on 21 July 2021 that the preliminary issues to be determined in this hearing were:

    3.1. Whether all or part of the Conversation was a protected conversation within the meaning of section 111A of the Employment Rights Act 1996 ("ERA").

    3.2. Whether, if the Conversation was a protected conversation, anything was said or done which, in the Tribunal's opinion, was improper or connected with improper behaviour; and, if so, to what extent section 111A(1) should apply.

    3.3. If section 111A does not apply, whether there was discussion of a discrimination complaint during the Conversation and, if there was no specific reference to matters or issues upon which the claimant needs to rely in evidence, whether it would be proportionate to rule the Conversation inadmissible in accordance with the overriding objective.

3.4. If section 111A ERA does not apply, whether there was an existing dispute between the parties, and/or whether, during the course of the Conversation, the Respondent engaged in unambiguous impropriety (i.e. whether the Conversation was 'without prejudice').

Evidence

4. The parties produced a joint file of documents for the hearing, containing 309 pages, of which I read only those pages to which I was directed. The claimant gave evidence on her own behalf from a written witness statement. The respondent called Mr John-Lee Thompson (General Manager) who also gave evidence from a written witness statement.

Submissions

5. Mr Nuttman for the respondent provided a written skeleton argument and a bundle of authorities, as well as making oral submissions. I have considered his submissions with care, but I do not rehearse them here in full. In essence it was submitted that:

5.1. All of the Conversation was a protected conversation within the meaning of section 111A ERA. The evidence clearly shows that Mr Thompson acted appropriately in relation to the conversation and that it falls within the definition. The claimant has not identified anything which would amount to improper behaviour. The conversation should not be before the final hearing.

5.2. There was no assertion made of discrimination during the conversation, no discussion of a discrimination complaint nor could any of the discussion form the basis for a discrimination complaint which could not be advanced anyway by the resulting selection for redundancy. The claimant's question about part time workers and challenge to the selection criteria were also raised at other stages of the process and she does not need to rely on the Conversation.

5.3. The fact of the Conversation itself cannot be evidence of discrimination against the claimant. Such conversations are encouraged as a matter of public policy. There is no prejudice to the claimant in not allowing the conversation to be admitted in evidence.

5.4. The normal without prejudice principle applies to the conversation. None of the exceptions are engaged. The respondent's wish to restructure, it's identification of the claimant being at risk, and the claimant's agreement to have an off the record discussion, is capable of amounting to a dispute. A dispute does not need to be a difference of opinion, merely an issue which is capable of being resolved. The order of the information is important, in that the circumstances giving rise to the dispute were explained to the claimant and the offer was then advanced. When the offer was advanced it was covered by the without prejudice principle. The collective effect of the decision to restructure, the identification of selection criteria and of the claimant as being likely to be most at risk gave rise to the dispute.

6. The claimant made oral submissions, which I have considered with equal care, but do not rehearse here in full. In essence she submitted that:

   6.1. Only part time workers were called and offered voluntary redundancy in the first instance. The Conversation is evidence of that and should be admissible.

   6.2. It was not explained to her that she would not be able to refer to the Conversation in subsequent legal proceedings and she was given other misleading information during the Conversation. It was not a negotiation and was premature and evidence that her selection was prejudged.

   6.3. She was placed under undue pressure and not given the time stated in the ACAS Code to consider the offer.

   6.4. The Conversation is vital to proving her claim and it would prejudice her to have it ruled inadmissible.

Facts

7. On the evidence before me, I made the following findings of fact on the balance of probabilities. However, I have not heard the evidence relating to the full case and these findings of fact were made only for the purpose of determining this issue of admissibility of evidence.

8. It was agreed that the respondent had produced proposed criteria and scored the claimant and her admin colleagues against that criteria prior to 10 June 2020 and prior to any consultation with the claimant or her colleagues. Mr Thompson explained and I accepted that this was so that the respondent would know who was likely to be selected and therefore with whom to have 'protected conversations'. The rationale for offering voluntary redundancy to employees who were most likely to be selected was to avoid causing undue stress and disruption to the workforce by having to go through a full redundancy selection process.

9. Mr Thompson telephoned the claimant on 10 June 2020 and told her he wanted to offer her the chance to have a protected conversation. He explained that meant the conversation would be "off the record, confidential". It was agreed that, while he told her it was a legal term, he did not explain its effect, i.e. that she would not be permitted to refer to the Conversation or its contents in future legal proceedings. He just told her, "it is what it is". The claimant says she interpreted 'off the record' as meaning 'off the record at work', rather than inadmissible in future litigation and it is clear from Mr Thompson's later emphasis on keeping it confidential from colleagues, that it was the work context which was his concern. I find that he did not make it clear to her initially that a "protected conversation" was something she might want or need to take legal advice about or that it went beyond requiring her to keep it confidential from her work colleagues.

10. Mr Thompson went on to explain that the company could operate with reduced hours and was therefore restructuring. He explained the selection criteria and how they would apply to her. He told the claimant that adjustments had been made to the

scoring to reflect her part time work. The claimant appeared to accept that there would be a knock on effect on her role from the decision to operate with reduced hours.

11. Mr Thompson was clear in his evidence that the offer he put to the claimant during the Conversation was not open to negotiation but was rather intended to be accepted or rejected. Mr Thompson told the claimant that she would be made redundant under the proposed criteria. While that could be interpreted as a threat to either accept voluntary redundancy on the terms being offered or be made redundant on worse terms, I accepted Mr Thompson's evidence that he did not mean that and the claimant would not have understood that. When the whole conversation is taken into account, including Mr Thompson's reassurances that the respondent would act in good faith and conduct a proper redundancy process, I find that he was not issuing an ultimatum. The claimant clearly had the choice of turning down the offer and taking her chances in the full redundancy process which was to come. Mr Thompson told the claimant he would consider alternatives and the follow-up letter included a reassurance that nothing had been prejudged.

12. Mr Thompson explained to the claimant during the Conversation that there were no current vacancies in the business. I accepted Mr Thompson's evidence that he was referring to the situation before engaging in consultation with the pool of employees at risk of redundancy. Such consultation might, of course, create a vacancy if another employee volunteered for redundancy, but that was not what he meant. While his reference to there being no vacancies and to someone else having accepted voluntary redundancy appear, with hindsight, to have been misleading, I accepted Mr Thompson's evidence that he believed that to be the case at the time and was not being disingenuous.

13. The claimant has not specifically alleged that the meeting itself was an act of discrimination or part of an act of discrimination. I find that there was no discussion of discrimination during the meeting, nor any comment or behaviour which could be said to amount to discrimination or an implication of discrimination. The only reference to the substance of the claimant's complaints was her question as to whether it was just part time workers who were being selected for redundancy, to which the respondent replied in the negative. I accepted that that question was raised elsewhere during the redundancy process and therefore elsewhere in the evidence relating to the claimant's claim.

14. It is not disputed that the respondent gave the claimant 7 days, rather than the 10 days recommended in the ACAS Code, to consider the offer and there was no explanation given for the shorter time period. I accepted the claimant's evidence that she felt pressured by Mr Thompson's phone call after 6 days to chase her response.

The Law

Without prejudice

15. The "without prejudice" rule is that written or oral communications, which are made for the purpose of a genuine attempt to compromise a dispute between the parties may generally not be admitted in evidence. Evidence of such communications is only admissible in the Employment Tribunal if it falls within one of the recognised

exceptions identified in the case law (Unilever plc v Procter & Gamble Co [2001] 1 All ER 783, Oceanbulk Shipping and
Trading SA v TMT Asia Ltd and Others [2010] 4 All ER 1011, Independent Research Services Ltd v Catterall [1993] ICR 1).

16. One such exception is where there has been 'unambiguous impropriety'. The test of unambiguous impropriety is narrower than that for improper behaviour. For 'without prejudice' protection to be withheld, a party must be shown to be abusing the privilege by, for example, blatantly discriminating against or threatening another party. In BNP Paribas v Mezzotero [2004] IRLR 508 an employee who raised concerns about her treatment following maternity leave was invited to a meeting, told the discussions would be without prejudice and then told it was not viable for her to return to work. The EAT held this was 'unambiguous impropriety'.

17. For the 'without prejudice' principle to apply to negotiations, the negotiations must be with a view to resolving an existing dispute. It is not necessary for there to be legal proceedings extant or for any specific complaint to have been raised but the parties must be conscious of at least the potential for litigation, even if neither side intends it as an outcome. In Mezzotero the EAT ruled that the employment judge had not erred in finding there was no existing dispute where the meeting was to discuss the claimant's grievance and the employer only raised termination of her employment once the meeting had commenced.

Protected conversations

18. While the 'without prejudice' principle requires an existing dispute, section 111A of the Employment Rights Act 1996 (ERA) has no such limitation. However, it only applies to evidence in a complaint of unfair dismissal, unlike the 'without prejudice' principle which can apply to evidence in any type of complaint. In Faithorn Farrell Timms LLP v Bailey UKEAT/0025/16 the EAT gave guidance on the application of section 111A ERA and its relation to the 'without prejudice' principle, including that, if there are multiple claims, including unfair dismissal, evidence of pre-termination negotiations may be inadmissible in relation to the unfair dismissal claim but admissible in relation to the other claims.

19. Section 111A ERA provides

(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.

20. The ACAS statutory Code of Practice on Settlement Agreements ("the ACAS Code") should be taken into account when considering relevant cases and the ACAS guidance 'Settlement Agreements: a guide' ("the ACAS Guide") provides further guidance.

21. Section 111A(4) requires two stages to decide whether the negotiation is admissible due to 'improper conduct' (according to Bailey): First, was there improper behaviour by either party during the settlement negotiations? Second, if so, to what extent should confidentiality be preserved in respect of the settlement negotiations? Where the tribunal finds that a party acted improperly, therefore the settlement negotiations as a whole do not become admissible. It is for the Tribunal to decide, at its discretion, whether it is just for any improper behaviour or anything said or done that is connected with improper behaviour to be admitted in evidence.

22. The ACAS Code contains a non-exhaustive list of types of 'improper behaviour' for the purposes of sub-section (4):
    - 22.1. Harassment, bullying and intimidation, including the use of offensive words or aggressive behaviour;
    - 22.2. Criminal behaviour, such as the threat of physical assault;
    - 22.3. Victimisation;
    - 22.4. Discrimination;
    - 22.5. Putting undue pressure on a party (for example, not giving an employee a reasonable period of time to consider an offer, threatening to dismiss before any disciplinary process has been commenced if the employee refuses to accept or threatening to undermine an organisation's public reputation if the organisation does not sign the agreement, paragraph 18). Factually stating in a neutral manner the reasons that have led to the proposed settlement agreement does not amount to improper behaviour (paragraph 19)

23. It is not necessary for an employer to follow any particular procedure before initiating a protected conversation. The ACAS Code makes recommendations for specific aspects of pre-termination discussions. An employee should be given a reasonable amount of time to consider an offer, for example, although a minimum of 10 calendar days should generally be allowed to consider the proposed formal written terms of a settlement agreement and to receive independent advice, unless the parties agree otherwise (paragraph 12). The non-binding ACAS Guide makes suggestions as to best practice, including that, at the start of the meeting, it is advisable to make sure that those involved are aware that any discussions about a proposed settlement agreement are expected to be inadmissible in relevant legal proceedings.

Overriding Objective

24. Rule 2 of the Employment Tribunal Rules of Procedure 2013 (Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013) ("the Rules") sets out the overriding objective of the Rules. It is to enable tribunals to deal with cases 'fairly and justly'. Dealing with a case fairly and justly includes, so far as practicable:

- Ensuring that the parties are on an equal footing;
- Dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- Avoiding unnecessary formality and seeking flexibility in the proceedings;
- Avoiding delay, so far as compatible with proper consideration of the issues, and
- Saving expense.

Determinations

Protected conversation

25. I find that the Conversation between the claimant and Mr John-Lee Thompson on 10 June 2020 was a protected conversation within the meaning of section 111A ERA. The claimant argued that she did not know that evidence of the Conversation would be inadmissible in subsequent legal proceedings because Mr Thompson did not properly explain to her what 'protected conversation' meant. I found that was indeed the case. Nevertheless, it is not a requirement of section 111A ERA that the employee understand the implications. There is no formal procedure required and the ACAS Guide is merely good practice. As it was, the claimant knew that the Conversation was 'off the record', i.e. confidential.

26. The claimant argued that the Conversation comprised an offer only, rather than a negotiation, because the respondent was not prepared to enter into discussion or compromise. I found on the facts that this was the case. However, section 111A(2) ERA is clear that 'pre-termination negotiations' means 'any offer made or discussions held'. In other words, an offer is sufficient. There do not need to be negotiations, discussion or compromise.

27. The claimant argued that the respondent did not give her the 10 days provided for in the ACAS Code to consider the offer. I find that the respondent offered her 7 days but chased her for a response after 6 days. However, the steps in the Code are recommendations only and there is no particular procedure required by law. I find that 6 days was reasonable in the circumstances for the claimant to consider what was, in fact, an outline offer, rather than the specific terms of a settlement agreement.

28. The Conversation was clearly a pre-termination negotiation between the employer and the employee with a view to terminating the employment relationship and is inadmissible in the claimant's unfair dismissal complaint, under section 111A(1) ERA.

Improper conduct

29. Nothing was said or done during the Conversation which, in my opinion, was improper or connected with improper behaviour. Neither of the procedural issues (the time given to consider the offer nor the lack of warning about inadmissibility) discussed above amount to improper behaviour in my view. Nor, in my view do any of Mr Thompson's comments or behaviour during the Conversation amount to improper conduct. On the contrary, Mr Thompson was careful to explain the offer, the circumstances and the implications for the claimant carefully and calmly. The

ACAS Code gives a non-exhaustive list of improper conduct and I do not consider that any of Mr Thompson's actions or words constituted bullying or intimidation or putting undue pressure on the claimant or any behaviour of that type. The ACAS Code gives an example relating to a disciplinary situation which, while not directly analogous, is helpful in my view. In that situation, according to the Code, setting out the reasons that have led to the proposed settlement agreement 'in a neutral manner' or 'factually stating' the possibility of starting a disciplinary process as a likely alternative if an agreement is not reached will not amount to improper behaviour (paragraph 19). The Guide adds that it is not improper behaviour to factually state that an employee may not be able to leave on the same beneficial terms as proposed in the settlement, if they refuse it and any subsequent disciplinary action results in their dismissal. Mr Thompson's explanation of the restructuring and the likely selection of the claimant under the proposed criteria in the subsequent redundancy process if she did not accept the offer was factual and neutral and in line with that described in the ACAS Code and the Guide. In the context of the Conversation and the explanations and reassurances he offered I find that his statement that the claimant 'would' be dismissed under the proposed criteria if she did not accept the offer was not improper.

30. I conclude that the Conversation was a protected conversation under section 111A ERA and is not admissible in relation to the claimant's unfair dismissal complaint.

Overriding Objective

31. The respondent submits that, if the Conversation is a protected conversation under section 111A ERA, it would be proportionate in this case to exclude the Conversation from the evidence in the whole claim. The respondent submits that the evidence of the Conversation adds nothing to the claimant's case but its inclusion will necessitate the holding of two separate hearings, one for the unfair dismissal claim and one for the discrimination and part time workers complaints (unless the Conversation was 'without prejudice' (for which, see below)).

32. The respondent agrees that, if a discrimination complaint was discussed during the Conversation or there was any specific reference made or issues discussed in the Conversation on which the claimant will need to rely in evidence in her discrimination claim, it would not be proportionate to rule the evidence of the Conversation inadmissible. However, if there was no such discussion or reference, or if the claimant raised the same issue elsewhere in the course of the redundancy process (and can therefore rely on that evidence instead) the respondent says it would be proportionate, and therefore in accordance with the Overriding Objective, to exclude the evidence of the Conversation.

33. Key to this consideration is obviously the question of whether a discrimination complaint was discussed during the Conversation, and whether the claimant will need to rely on the Conversation to substantiate her discrimination claim.

34. I find that there was no specific discussion of a discrimination complaint in the Conversation. Furthermore, it appears to me (although I have not seen all of the evidence related to the final hearing, nor the parties' witness statements) that much of what the claimant complains of in the Conversation may be repeated elsewhere (i.e. the choice and weighting of selection criteria, the scores she received, etc). It is true

that she may not need the evidence of the Conversation or from within the Conversation to prove her discrimination complaints. Nevertheless, that is not the only relevant factor in applying the
Overriding Objective, in my view. Relevance must also be a factor and the Conversation is undeniably relevant to the claimant's complaints of discrimination. That is a factor which weighs heavily in favour of the evidence being admissible. The fact that there is evidence of similar or identical discussions or facts available from other documents or at other times, does not detract from the relevance of this evidence.

35. Mr Nuttman referred to protected conversations being encouraged as a matter of public policy. I agree that protected conversations are encouraged, but the legislation is clear that evidence of them is only inadmissible in unfair dismissal claims. Parliament did not legislate to make that evidence inadmissible in discrimination claims.

36. Another factor I have taken into consideration is the fact that the claimant is unrepresented and that I have not seen all of the evidence. This gives me concern that she may be prejudiced if I prevent her being able to rely on evidence of the Conversation in her discrimination complaint. An unrepresented litigant may not fully appreciate the significance or nuance of the evidence available to them until the final hearing. I do not want to assume that the claimant can evaluate the significance of the evidence at this stage in the way that an experienced legal representative might be able to do. That would not be to 'put the parties on an equal footing'.

37. Furthermore, there is no good reason, as I see it, to exclude that evidence in the discrimination and part time worker claims. The Overriding Objective requires cases to be heard fairly and justly and that requires all the relevant evidence to be available, subject to specific exclusions where public policy requires (such as section 111A ERA). The fact that the conversation is inadmissible in the unfair dismissal claim but admissible in the discrimination and part time workers complaints and therefore presents something of a procedural conundrum is not a good reason to exclude it from the latter. The Employment Tribunal Rules provide for considerable flexibility and I do not think the issue of separate hearings is insurmountable. There are ways to ensure that the claim is heard fairly and justly without being disproportionate, provided one is prepared to exercise that flexibility. Any prejudice to the respondent in separating the hearing of the different complaints can be minimised by a full Tribunal panel hearing the complaints sequentially. Thus the first part of the hearing can be dedicated to hearing the unfair dismissal complaint using evidence from which all reference to the Conversation has been redacted. The second part of the hearing (with the same panel) can be dedicated to hearing the remaining complaints, using evidence including that relating to the Conversation.

Without prejudice

38. Finally, and separately, was the Conversation 'without prejudice'? If so, it will be inadmissible in both unfair dismissal and discrimination and part time worker complaints. The question of whether the Conversation attracted 'without prejudice' protection hangs, in this case, on whether there was any unambiguous impropriety by the respondent and/or whether the Conversation was a genuine attempt to compromise an existing dispute between the claimant and the respondent.

39. As improper conduct is construed more narrowly than unambiguous impropriety, it will be obvious from my earlier findings that I do not consider Mr Thompson or the respondent to have done anything which approached the definition of improper conduct, so as to disturb any 'without prejudice' protection. The fact that Mr Thompson did not use the words 'without prejudice' is immaterial, particularly as both parties understood that the conversation would be confidential ('off the record').

40. I find that the conversation was a genuine attempt to discuss an offer of voluntary redundancy. What it was not, however, was an attempt to compromise an existing dispute. I find that there was no existing dispute. Mr Nuttman submitted that the Respondent's wish to restructure, it's identification of the claimant as being most at risk, followed by the claimant's agreement to have an 'off the record' discussion, amounted to the creation of a dispute. He suggested that the respondent created the dispute and then attempted to resolve it.

41. I do not agree. It has not been suggested that the 'dispute' in question was about anything other than termination of the claimant's employment. I find there was no dispute as to termination of her employment at the time of the offer. Mr Thompson sprang the offer on the claimant completely out of the blue. Before agreeing to have the conversation 'off the record', the claimant had no knowledge that she was even at risk of redundancy. The only hint Mr Thompson gave that there might be a potential for redundancy was a mention of 'restructure'. Even once he told her about the likelihood of her selection for redundancy, he reassured her that the redundancy process would be carried out properly and that alternatives to redundancy would be sought. The respondent has emphasized at this hearing how Mr Thompson made clear during the course of the Conversation that no decision had been taken to terminate her employment.

42. The facts before and at the time of the Conversation therefore do not indicate any contemplation of a dispute. There was no evidence that I was pointed to, prior to or during the Conversation, indicating that either party contemplated an outcome in which a) the claimant refused the offer and b) she was selected for redundancy and c) there were no alternatives to save her job and d) she contested the redundancy and e) it led to litigation. There was nothing to suggest to the respondent that she would not simply go quietly and accept her redundancy. This was not akin to notifying an employee that they were facing disciplinary proceedings or dismissal for misconduct. It cannot, in my view, be assumed that parties would contemplate litigation in the context of a properly conducted redundancy process. Rather, it seems to me, the respondent was simply trying to engineer a termination of the claimant's employment by mutual agreement, under the guise of a 'without prejudice' discussion. I find that there was no existing dispute and the conversation was not therefore 'without prejudice'.

43. The evidence of the Conversation is therefore admissible in relation to the claimant's discrimination and part time workers complaints, but not in her unfair dismissal complaint owing to it being a protected conversation under section 111A ERA.

Employment Judge Bright
20 September 2021
Sent to the parties on:
14/10/2021