EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102945/2017 and 4105527/2017

5 **Held in Glasgow on 9 August 2018**

Employment Judge: Robert Gall

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Mr S Basude — **Claimant**
By Written Submissions

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Scottish Hydro Electric Transmission Pic — **Respondent**
Represented by:
Mr A Clark - Solicitor (By Written Submissions)

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25 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is:

1. The meeting held between the respondents and the claimant on 30 June 2017 involved discussions which were on a "without prejudice" basis. The passages in the claim forms and further particulars will therefore be redacted
30 to exclude the pleadings for the claimant set out in paragraph 4 of this Judgment. Any reference in form ET3 to the allegations in relation to the meeting on 30 June 2017 which are set out in forms ET1 and any further particulars are also redacted.

35 2. That the parties are each ordered to produce no later than seven days prior to the hearing fresh copy of the pleadings excluding the pleadings detailed in paragraph 4 below.

3. A decision as to whether the discussion between the claimant and the respondents held on 24 March 2017 is a matter about which evidence can be led, or which is a matter excluded from evidence by reason of being a without prejudice discussion and/or a protected conversation in terms of Section 111A of the Employment Rights Act 1996 is reserved. That decision is to be taken once evidence has been heard in relation to there having been possible unambiguous impropriety or improper conduct, resulting in evidence as to the content of that meeting being admissible evidence.

4. The following elements of pleadings on behalf of the claimant are the specific pleadings to be excluded and redacted on the basis that they relate to without prejudice discussions. For the avoidance of doubt, there was no unambiguous impropriety involved in those discussions such that the without prejudice privilege is lost.

The passages excluded from the pleadings for the claimant are as follows:-

a. Paragraph 21:

'He *said that the way things are going on, you will definitely get dismissed at the end of formal improvement process so better leave company. Every time I met him about requesting good working condition and/or change of working arrangement he didn't do anything other than threatening me that / will get dismissed at the end of formal improvement process. Having explained this it is clear that Mr. Anthony Scott and department senior management team has already decided/planned about my dismissal and they are Just waiting for that dismissal day.*"

b. ***Paper Apart to the ET1 lodged 6 November 2017 under case number 4105527/2017***

Paragraph 6

"Sections with paragraph 21 of the document 'Shrikant Basude-Claim Statement.rtf' submitted in employment tribunal claim ET1 form (case number - 4102945/2017) clearly explains the root cause/ strategic plan behind termination of my employment/unfair dismissal."

c. *ET1 Paragraph 21 (page 15):*

"He said that 'the way things are going on, you will definitely get dismissed at the end of formal improvement process so better leave company'. Every time I met him about requesting good working condition and/or change of working arrangement he didn't do anything other than threatening me that I will get dismissed at the end of formal improvement process. Having explained this it was clear that Mr. Anthony Scott and department senior management team had already decided/planned about my dismissal at the end of 2017 and finally terminated by employment without giving 3 month notice. "

d. ET1 Paragraph 26 & Final summary and comments (page 17):

20 April 2017: *"(As per reference to Sections within paragraph 21 of* the ET1 document)"

9 June 2017 - Grievance Appeal Hearing Outcome: *"(as per reference to Sections within paragraph 21 of the ET1 document)"*

9 June 2017 - Stage 1 Capability Appeal: *"(as per reference to Sections within paragraph 21 of the ET1 document)"*

27 Sept 2017 - Stage 2 Capability Appeal: "(as per reference to Sections within paragraph 21 of the ET1 document)"

16 Nov 2018 - Stage 3 Capability Appeal: “(as per reference to Sections within paragraph 21 of the ET1 document)”

REASONS

Background

1. This is a claim of discrimination, the protected characteristic being age, and of unfair dismissal.

2. A Preliminary Hearing (“PH") took place at Glasgow on 14 May 2018. A Note was issued following that hearing. That Note is dated 21 May 2018.

3. That PH was held for case management purposes. The respondents raised during that PH a preliminary point. They maintained that the claimant had sought to rely upon evidence which in their view was inadmissible. It was inadmissible, they said, as the meetings and discussions to hich he wished to r re were in fact properly viewed as being without prejudice (“WP") discussions. In the alternative, insofar as they related to the claim of unfair dismissal, they were protected conversations in terms of section 111A of the Employment Rights Act 1996.

4. The r' nt did not accept that the content of the meet'r jhich had been mentioned were such that evidence about those conversations ought to be excluded.

5. It was agreed that the respondents would set out the passages which they regarded as being properly excluded from the pleadings and subsequently from evidence. The claimant would respond to this and a decision would then be taken as to whether the pleadings in question were excluded, meaning that evidence on those matters were also excluded. Alternatively, of course, the outcome of examination of the position of the respondents and of the claimant would be that the pleadings on those points were properly included, thereby permitting evidence on those points to be led.

6. It was agreed that it was likely to be the case that the Employment Judge who determined the issue of admissibility of those pleadings and therefore of evidence would not appropriately hear the case when it proceeded to hearing.

5 7. It was also agreed that arguments in relation to the inclusion or exclusion of the pleadings and related evidence would be advanced by written submissions.

Submissions

Submissions for the respondents

10 8. The respondents set out that the claimant was subject to performance management from 25 October 2016, being warned that formal action under their Capability Policy might ultimately result in dismissal by reason of capability. The claimant had been invited to a formal capability meeting on 16 February 2017. On 27 February 2017, the claimant had lodged a
15 grievance making various allegations and also challenging conclusions reached by the respondents in relation to his performance.

9. There had been meetings with the claimant held on 24 March 2017 and on 30 June 2017. Those had been agreed as being on a WP basis. They had
20 proceeded on the footing that there would be negotiation of a possible resolution to the dispute. The claimant had confirmed that he wished to proceed on that basis. The discussions were with a view to employment being terminated on an agreed basis.

25 10. It was the position of the respondents that these conversations were WP and/or, in the alternative, were pre termination negotiations in terms of section 111A of the Employment Rights Act 1996 (“ERA”).

11. The respondents set out in their written submissions the passages which they
30 regarded as being excluded from the pleadings on either or both of those bases, leading to evidence on those matters also being excluded when the case proceeded to hearing.

Submissions for the claimant

12. By email of 20 June 2018, the claimant attached his response to the submissions of the respondents.

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13. The claimant agreed that he had lodged a grievance. That however did not result in there being a dispute, he submitted. There was no need or requirement for settlement as there was no dispute.

10 14. The meeting on 24 March, he said, was an act of victimisation which occurred due to the grievance he had lodged. Without any mention of it before the meeting, the person who took the meeting had *"decided to do settlement".* The claimant had anticipated a catch-up meeting. Whilst the claimant had said yes to proceeding further with the conversation, he had not anticipated 15 that the person who held the meeting would say to him that he should finish work for that day with there being no reason to return to work. The person who held the meeting with him had said that he had information that the claimant would eventually be sacked by the end of 2017 through the formal improvement process, would get no good feedback from anyone within the 20 respondents' organisation and that he should leave the company that day. There had also been, the claimant said, an angry reference to the fact that he had raised a grievance. These remarks by the person who held the meeting with him constituted abuse of the WP privilege.

25 15. The claimant's position in respect of the meeting on 30 June 201 7 was slightly unclear to me. The claimant was therefore asked to clarify whether there had been mention by Mr Scott who held that meeting with him that the discussion was to be without prejudice and whether there was some dialogue between the claimant and Mr Scott at this meeting in relation to possible settlement or 30 agreement. The claimant said he had been told at this meeting that he was definitely being dismissed.

16. The claimant responded to those questions, confirming that Mr Scott had mentioned that the discussion was without prejudice. That had been halfway

through the conversation, he said. The claimant also said that settlement or agreement had been mentioned by Mr Scott. Again however that had been halfway through the conversation he said. The claimant said that he had replied stating he did not wish a without prejudice offer but wanted to continue working with the respondents.

17. The events which had occurred during the meetings ought to be matters before the Tribunal, the claimant argued.

Applicable Law

ERA section 111 A

18. In an unfair dismissal claim, although not in other types of claim, there will be excluded from consideration by the Tribunal any evidence as to termination negotiations between an employer and employee, save in a situation where there has been *"improper behaviour".*

19. It is not necessary for there to be a dispute between the parties for these provisions to apply. The discussions must however be with a view to termination of employment both the content of any offers made and discussions held and also the fact that there have been any such offers or discussions are matters excluded from evidence if the provisions of section 111A of ERA apply. This is confirmed in the case of *Faithorn Farrell Timms LLP v Bailey [2016] ICR1054.*

20. Whether there has been *"improper behaviour"* is a matter for determination by the Tribunal.

21. Guidance in relation to section 111A of ERA has been issued by Acas in its Statutory Code of Practice on Settlement Agreements. Examples given are harassment, bullying and intimidation, criminal behaviour, victimisation, discrimination or putting undue pressure on a party.

WP discussions

22. For a discussion or negotiation to be excluded under the WP exception, that discussion must have occurred in circumstances where there is a dispute between the parties. That dispute does not require to relate to termination of employment nor does the discussion have to be directed to that subject matter.

23. If a discussion is regarded as being WP then, unless there has been unambiguous impropriety, it will be excluded from matters before the Tribunal. On that basis, if the WP exclusion applies, consideration of applicability or otherwise of section 111A of ERA becomes unnecessary.

24. For evidence to be excluded on the basis of any communications being WP, the dispute between the parties need not have reached the stage of litigation. There must be contemplation of litigation however or it must be the case that litigation would reasonably be expected to have been contemplated. Relevant cases in this regard are ***Barnetson v Framlington Group Limited and another 2007 ICR1439*** and ***A v B and another EAT 0092/13.***

25. The WP rule does not apply if there has been unambiguous impropriety as mentioned above. That can occur where negotiations are said to have involved discrimination. The case of ***Woodward v Santander UK Pic [2010] IRLR 834*** confirms that the exception applies where there is blatant discrimination. It does not apply where the comments are such that it is said an inference of discrimination can be taken from them.

The Issue

26. The issue for the Tribunal was whether pleadings relating to meetings between the claimant and the respondents on 24 March 2017 and 30 June 2017 were to be present or to be absent in the pleadings before the Tribunal for the hearing in the case. That would determine whether evidence was heard in relation to those meetings. The issue turned upon whether the

pleadings were such that the content of the meetings constituted either conversations in terms of section 111A of ERA or WP discussions.

Discussion and decision

27. No evidence has as yet been led in this case. That presents a difficulty where there is a difference between the parties as to what occurred at the meeting on 24 March 2017 specifically. I shall return to that meeting and the pleadings and potential evidence relating to it shortly.

28. Firstly, the more straightforward matter with which to deal is in my view the meeting of 30 June 2017.

29. By that stage, a grievance had been lodged (that occurring in February 2017). There had been proceedings in relation to the capability process resulting in the outcome of stage one of that process. The respondents had referred to the process potentially leading to termination of employment of the claimant.

30. From the clarification obtained by the Tribunal, it is clear that the claimant accepts that on 30 June 2017, Mr Scott with whom he met said that the conversation was being held without prejudice. There was discussion during this meeting, again this being an agreed position, that settlement or agreement as to termination occurred.

31. The claimant's position is that mention of WP occurred in the middle of the conversation.

32. It is my view looking to the cases and principles involved in relation to WP that if a discussion is regarded as being WP, not only are the terms of that discussion precluded from evidence but the fact that there was such a discussion is also precluded from evidence.

33. The claimant says that Mr Scott *"threatened"* him that he would be dismissed at the end of the formal improvement process. The respondents deny the claimant's version of this meeting. Taking it for the moment that Mr Scott

said that the claimant would be dismissed at the end of the formal improvement process or that it was likely that he would, in my view that does not amount to unambiguous impropriety having regard to the cases in this area.

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34. Looking at the narration of that meeting by the claimant, he says that his request to change working arrangements was refused by Mr Scott. Mr Scott, the claimant says, asked him to continue working with Mr Clark as normal. That seems to me to be something which can appear in the pleadings and about which there can be evidence. There is no admission on this by the respondents. It is covered by the general denial in their pleadings. They also challenge the passage set out by the claimant in essentially the same terms when it is added by way of further particulars. That is as set out in paragraph 2.3.5 of the written submissions in relation to the exclusion of these pleadings.

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35. The view to which I have come in relation to the meeting on 30 June 201 7 is that the meeting was without prejudice from the time that discussion as to possible termination of employment took place. The fact that there was a meeting and that Mr Scott is said to have denied the request by the claimant to change his working arrangements and to have asked the claimant to continue working with Mr Clark, are matters which can appear in the pleadings and be subject of evidence. Anything beyond that however is in my view covered by the WP exception.

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36. I have concluded that there was a relevant dispute between the parties at that point and that there was no unambiguous impropriety by the respondents in relation to this matter.

37. Turning to the meeting on 24 March 2001 7, 1find this to be a trickier situation. The respondents’ version of events is that there was discussion as to settlement and the WP exemption applies. They deny the version of events put forward by the claimant. The claimant alleges that when he asked Mr Scott why he was being asked to leave and not to return that day, Mr Scott

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was very angry and said that the claimant had *"gone and raised a grievance".* As mentioned the respondents dispute the claimant's version of events.

38. I have come to the conclusion that if the claimant is right as to what happened, what he is saying is that he lodged a grievance and that almost four weeks later a meeting was held where he was told that he should finish work that day with there being no requirement for him to return to work. When he asks why this is so, the explanation he is given is that it was because he had raised a grievance. That is implicit from the answer which he says Mr Scott gave to him and which is as mentioned above.

39. If that is indeed what happened, then there would potentially be a submission by the claimant that the raising of the grievance is a protected act. He might then submit that the respondents have subjected him to a detriment because of that protected act. As so framed, and assuming all the constituent parts are established by way of evidence, there is a potential claim for victimisation in terms of section 27 of the Equality Act 2010, it seems to me.

40. Viewed in that light, there is a basis for the view that unambiguous impropriety has occurred in that, depending upon facts found, it could be argued that there was clear and blatant discriminatory conduct on the part of the respondents at this meeting.

41. The difficulty at present is that for any conclusion to be reached on that point, facts have to be found. This is as the respondents dispute the claimant's version of events.

42. A Tribunal might therefore find that the remark which the claimant says was made was not in fact made. If that was the view of the Tribunal having heard the evidence in relation to what was said at the meeting, my view would be that this was a WP meeting.

43. It seems to me that I cannot at present decide whether the matters discussed at the meeting on 24 March 2017 are admissible or not. I would regard the

content of the meeting as being WP and therefore *"off limits",* save for the fact that the claimant makes a clear statement that he was told that he was required by the respondents to go home that day, this being because he had raised a grievance. If that is accepted as being accurate, then it seems to
5 me that there has been unambiguous impropriety and the WP exemption is therefore lost. If however the conclusion as to what happened in the course of the meeting is that the remark alleged to have been made as to why the claimant was asked to go home that day was not in fact made, then it seems to me that the discussion was WP and falls to be excluded.

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44. As I see it, there are two options in relation to the meeting of 24 March and how matters are dealt with at Tribunal.

45. Firstly, the matter can go to the hearing with evidence being heard as to what
15 happened on 24 March. A decision can then be taken as to whether the contents of that meeting and any discussion at it are either matters to which the Tribunal can have regard or are matters which are, to use the phrase mentioned above, "off *limits*⁰ for the Tribunal.

20 46. Secondly and in the alternative, there could be a PH at which evidence was led to establish whether or not the comment attributed to Mr Scott was made. A conclusion could then potentially be reached on admissibility of evidence.

47. Neither option is straightforward. If the first option is followed then the
25 Tribunal will hear evidence which it may require then to ignore. That is something which Tribunals do on a reasonably regular basis, finding it possible to omit from the deliberations information about which they have heard. It occurs if, for example, evidence is taken under reservation and is later ruled to be inadmissible. It is not of course without its difficulties and
30 risks. I am confident however that a Tribunal hearing evidence in the matter would be able to exclude from its mind if that was the decision which was appropriately reached.

48. The second option is not particularly straightforward either in that I suspect that credibility would be at the heart of any decision made by the Tribunal as to whether the comment attributed to Mr Scott was in fact made. It would be very difficult to hear an extremely limited amount of evidence and to form a view upon credibility. Whilst it is of course perfectly possible and permissible to form a view on credibility in relation to one point without necessarily accepting whether a witness is credible on all points, it is generally the case that a view on the credibility of a witness is informed by observing and listening to that witness give evidence in chief and be cross examined in relation to more than one particular matter.

49. The view to which I have come is therefore that the issue of whether the content of the discussion between the claimant and Mr Scott on 24 March 2017 is WP or not and is admissible or not is a matter to be determined after hearing evidence upon it, that evidence being heard as part of the hearing in the case itself.

50. It is of course possible that the conversation insofar as it related to something said to form part of the basis of an unfair dismissal claim would also be excluded from evidence as being *"a protected conversation"* in terms of section 111A of ERA. A Tribunal would in my view be likely to conclude that there had been improper conduct if the comment attributed by the claimant to Mr Scott was in fact made.

51. As I see it therefore, it is not possible to determine whether the evidence is excluded or not in terms of section 111A of ERA without there being evidence. As mentioned above, of course, if the conversation is regarded as WP then it matters not whether it is a protected conversation in terms of section 111A of ERA.

Conclusion

52. In short therefore, my view is that the passages which the respondents seek to have redacted in relation to the meeting on 30 June 2017 fall to be redacted with evidence in that regard not being appropriate. The passage in relation

to the meeting on 24 March 2017 will remain in the pleadings under reservation of the respondents' right to request the Tribunal to exclude them from consideration on the basis that the discussions are WP.

5 53. I should also say that whilst the respondents sought to have redacted the terms of paragraphs 19 and 20 of the paper apart to form ET 1 and references to those paragraphs in other documentation, I do not see a basis for such redaction. Those paragraphs remain in place. It does not seem to me to be suggested in those paragraphs or in the response from the respondents in 10 relation to them that there was discussion as to possible settlement at either of the meetings referred to in paragraphs 20 and 21 of form ET1.

54. I do not therefore see that there is a possibility of the content of these meetings or the fact of their occurrence being regarded as being excluded 15 from the pleadings and subsequently being excluded as a subject matter of evidence.

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Employment Judge: R Gall
Date of Judgment: 14 August 2018
Entered in register: 22 August 2018
and copied to parties

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