EMPLOYMENT TRIBUNALS

Claimant: **Mr. J Brown**

Respondent: **Laporte Industries UK Limited**

Heard at: **Nottingham**

On: **13th July 2023**

Before: **Employment Judge Heap (sitting alone)**

Representation
Claimant: **Mr. R Robison – Employment Consultant**
Respondent: **Mr. S Robinson - Solicitor**

RESERVED JUDGMENT FOLLOWING A PUBLIC PRELIMINARY HEARING

1. The meeting between the Claimant and the Respondent on 30th September 2022 is inadmissible from the evidence to be heard by the Tribunal in respect of the unfair dismissal claim because it is covered by Section 111 Employment Rights Act 1996.

2. By agreement it is not to be relevant to the disability discrimination complaint.

RESERVED REASONS

BACKGROUND & THE ISSUES

1. This Preliminary hearing followed on from one which took place before Regional Employment Judge Swann on 2nd May 2023. At that hearing the complaints that the Claimant was advancing were confirmed to be harassment relating to the protected characteristic of disability and unfair dismissal. The Claimant represented himself at that hearing but has since secured legal representation from Mr. Robison who has appeared on his behalf today.

2. It was identified at the first Preliminary hearing that there was divergence of views as to whether what happened at a meeting between the Claimant and the Respondent which was held on 30th September 2022 was admissible in respect of the unfair dismissal claim because of the provisions of Section 111A Employment Rights Act 1996 ("ERA 1996). The Claimant said that it was and the Respondent said that it was not. What they did agree on, however, was that the issue needed to be resolved before the full hearing of the claim and for that reason this Preliminary hearing was listed.

3. The Claimant's position as adopted before Regional Employment Judge Swann was that the meeting was not covered by Section 111A ERA 1996 because, in short terms, it was said to have been conducted aggressively. No detail about that was provided but Mr. Robison confirmed today that the only issue relied on was that it was said that one of the attendees on the Respondent's side said *"I don't have to tell you anything sonny[1]"*.

4. Matters had moved on after the Preliminary hearing and the primary position adopted by the Claimant in Mr. Robison's skeleton argument and oral submissions was that the meeting had not been a genuine attempt to negotiate and was instead a disciplinary/suspension meeting. Mr. Robison concentrated on that issue in his oral submissions and elected, even when invited to do so, not to make any submissions about alleged improper behaviour.

5. I did explore with Mr. Robison what was said at paragraph 12 of his skeleton argument that the fact of and content of the meeting would be admissible in respect of the harassment claim because it appeared that that complaint arose many months before[2] and did not appear to have anything to do with the fact of the meeting or what is said to have happened at the meeting itself. Mr. Robison accepted that and said that paragraph 12 could be deleted and that it was agreed that the meeting was not relevant to the harassment complaint.

6. I also confirmed with Mr. Robinson that the only point taken by the Respondent about the meeting was Section 111A ERA 1996 and not any wider without prejudice privilege point. He confirmed that that was the Respondent's position and therefore the only matter that I needed to deal with was Section 111A.

THE HEARING

7. I was provided with an agreed bundle, witness statements on behalf of the Claimant and Respondent, helpful skeleton arguments from both representatives and two authorities from Mr. Robison, although in reality he relied only on one of them.

8. Unfortunately, by the time that the hearing concluded following reading in time, the Claimant's and Respondent's oral evidence, cross-examination and

[1] The Claimant's witness statement referred to this as being "sunny" but I have presumed that to be a typographical error.

[2] The parties will of course need to deal with the question of jurisdiction given the provisions of Section 123 Equality Act 2010 at the full merits hearing.

submissions there was insufficient time to properly deliberate and to give an oral judgment. Accordingly, the decision was reserved and the patience of the parties in awaiting this judgment has been appreciated.

9. It was agreed at the conclusion of the hearing when it was indicated that my decision would be reserved that if I was against the Claimant on the Section 111A ERA 1996 point that my Judgment should be kept sealed in the Tribunal file so that the Judge and members dealing with the full hearing did not inadvertently see them and know what was said at the meeting. That would defeat the purpose of a separate Judge dealing with this hearing. I also indicated that in the event that I was with the Respondent on the point then I would recuse myself from dealing with the full hearing.

10. Whilst I do not rehearse the written and oral submissions made on behalf of the Claimant and Respondent, both representatives can be assured that I have carefully considered all that they have said both in their skeleton arguments and oral submissions and taken into account the authorities to which I was taken.

THE EVIDENCE AND CREDIBILITY

11. As well as considering the hearing bundle and the helpful written and oral submissions of both representatives I also paid reference to the witness statements of both the Claimant and the Respondent’s witnesses and their oral evidence.

12. I heard from the Claimant on his own account and from the Respondent I heard from Paula Sturges and Jean Palmer who were both present at the contentious meeting with the Claimant.

13. I found both of them to be credible witnesses. They answered the questions put to them in cross examination in a straightforward way and in a manner which was consistent with the other evidence, including the documentary evidence.

14. I am afraid that the opposite was the case with the Claimant. As I set out further below his evidence was inconsistent with his own witness statement, what he told Regional Employment Judge Swann at the first Preliminary hearing and the contemporaneous documents, including one that he had penned himself.

15. For those reasons, unless I have expressly said otherwise I prefer the evidence of the Respondent’s witnesses to that of the Claimant.

THE LAW

16. Before turning to my findings of fact I remind myself of the law that I am required to apply to them. It is only necessary to deal with that in relatively brief terms because no one was particularly at odds with the principles that I needed to consider.

17. Section 111A ERA 1996 provides as follows:

"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".

18. ACAS have issued a Code of Practice ("The Code") to provide guidance to employers and employees who wish to enter into pre-termination negotiations or often referred to protected conversations. While the Code is not binding, it was issued under ACAS's general power contained in Section 199 Trade Union & Labour Relations (Consolidation) Act 1992 and pursuant to Section 207 of that Act the Code is admissible in evidence and *"any provision of the Code which appears to the tribunal… to be relevant to any question arising in the proceedings shall be taken into account in determining that question"*.

19. As set out above, the term "pre-termination negotiations" is defined in Section 111A(2) ERA 1996 and encompasses *"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"*.

20. Unlike without prejudice discussions, there is no requirement for there to be any extant workplace dispute or any concern about the employee's performance or conduct at work before a pre-termination negotiation can take place (see paragraph 6 of the Code).

21. Evidence of discussions that did not entail any form of offer or negotiation will not be covered by Section 111A as will any discussions which are conducted with "improper behaviour" on the part of the party wishing to rely on it. A non-exhaustive list of the type of conduct that might be described as improper behaviour is contained at paragraphs 17 and 18 of the Code.

FINDING OF FACTS

22. The Claimant was employed by the Respondent as a factory manager from 8th July 2019 until his employment was terminated by the Respondent on 21st October 2022. I do not need to make any findings about why that was or whether there were genuine problems prior to the meeting on 30th September 2022. That is a matter for the full hearing.

23. On 30th September 2022 the Claimant was asked to attend a meeting with Paula Sturges who is the UK based personal assistant to the President of the Respondent business, Mr. Laporte. Mr. Laporte is based in France and it is common ground that he was not in attendance at the meeting[3].

24. Ms. Sturges was accompanied at the meeting by Jean Palmer who is a Human Resources consultant with the Respondent.

25. It is not in dispute that the Claimant was not told about the meeting beforehand nor did he know what was going to be discussed. However, he accepted that there was nothing particularly unusual about that because he had previously been asked to attend meetings with Ms. Sturges without notice or previous discussion about the subject matter.

26. The Claimant's case is that he attended the meeting and was asked if he knew why he was there to which he answered in the negative. His position was that he was told that he was not living up to expectations and not taking responsibility for his role in the company. He said that he was told *"I don't have to tell you anything sonny"*, that he had replied that they did and that he was then told to leave the site immediately. The position in his oral evidence was that nothing was said about the meeting taking place on a without prejudice basis and his witness statement set out that it was only after the meeting had taken place that he received an email setting out an offer for him to leave employment with a payment of £2,000.00[4].

27. I do not accept the Claimant's evidence in relation to those matters for a number of reasons, but the key ones are these:

    a. The Claimant's evidence is fatally undermined by his own disciplinary appeal letter which he appended to his Claim Form (see page 12 of the hearing bundle). That letter made it plain that he was informed that it was a "without prejudice" meeting and that an offer was made either that he could reduce to the role of a foreman or that he could terminate his employment and receive a payment of £2,500.00. That was inconsistent with his oral evidence in cross examination and when he was taken to that part of the appeal letter by Mr. Robinson his suggestion was that it

[3] Although there is reference to him having been present in the record of the first Preliminary hearing neither party makes any suggestion that he was in fact there.

[4] I have also taken that to be a typographical error as it does not appear to be in dispute that the offer was for £2,500.00.

was not what he had written and that there was "something not right" about it which appeared to be the suggestion that it had in some way been changed. That had never been suggested previously but to ensure fairness I have checked the Tribunal file and the copy of the letter that the Claimant submitted with the Claim Form is identical to that contained in the hearing bundle. It is difficult not to find force in the submission of Mr. Robinson that the Claimant adopted the stance that he did having been caught out being untruthful;

b. Whilst that same letter did refer to a suggestion that he had been told that no reasons needed to be given he did not include the quote that he now attributes was said in connection with his argument about improper conduct and no mention at all was made of the word "sonny". The Claimant did not provide a credible explanation about that omission and again it is difficult not to find force in Mr. Robinson's suggestion that he has now adopted that position to bolster the argument that he relied on before Regional Employment Judge Swann;

c. A few days after the meeting Ms. Palmer sent an email to the Claimant recording what had been discussed and which referred to the offer of the role of foreman having been made (albeit that that was withdrawn in the email for reasons which I do not need to determine here) and the offer of £2,500.00. There was no reply to that to say that it was wrong and that was not what had been discussed; and

d. The Claimant plainly told Regional Employment Judge Swann that he had been called to what he referred to as a "without prejudice" meeting and that the aforementioned offer had been put to him at that point (see paragraph 7 of the case management summary at page 41 of the hearing bundle). Whilst I accept that there was an error in that paragraph in that everyone agrees that Mr. Laporte was not there and that it was his personal assistant who led the meeting, that is very different in my view to the remainder of what is recorded as the Judge having been told by the Claimant being incorrect. The Claimant had a record of the case management summary as long ago as 15th May 2023. He did not write to the Tribunal to say that it was wrong nor did he make any reference to that in his witness statement.

28. I prefer the evidence of Ms. Sturges and Ms. Palmer as to what happened in the meeting and find as a fact that it proceeded as follows:

a. That the Claimant was told that it was a without prejudice meeting at the outset;

b. That it is was explained that the role of factory manager was not the right position for the Claimant and that the Respondent wanted to offer him two options with the first being to take a lower position as a foreman and the latter terminating his employment with a payment of one month in lieu of notice and a tax free lump sum of £2,500.00. That was all set out in paragraph 8 of Ms. Palmer's witness statement and the Claimant accepted in cross examination that it was accurate despite his position

apparently being that no offer was made until he was sent a later email on 3rd October 2022;

c. That he was told that the meeting was not about performance or of a disciplinary nature but because he was not considered the right fit for the factory manager position. That was all set out in paragraphs 9 and 11of Ms. Palmer's witness statement and the Claimant accepted in cross examination that it was accurate despite it being somewhat at odds with the contention that he was told that they did not need to tell him anything;

d. That he was told that he should seek legal advice and that the Respondent would contribute £300.00 towards the cost of his legal fees;

e. That he would be written to and would need to make a decision in the next few days. That was set out in paragraph 12 of Ms. Palmer's witness statement and the Claimant accepted in cross examination that it was accurate; and

f. Due to the fact that he was becoming agitated the decision was made to ask him to leave site immediately and to return only when he had made a decision. I accept that the Claimant was not suspended and had he taken a decision he could have returned to work the following day. Indeed, the Claimant accepted in his evidence that he was not suspended. He was told not to discuss the matter with anyone but given that settlement discussions are generally dealt with on a confidential basis I see nothing unusual in that and he had been told to obtain legal advice.

29. All of the evidence of Ms. Sturges and Ms. Palmer was consistent and that included with contemporaneous documents. That included an email to Mr. Laporte before the meeting took place to set out what was going to be discussed (see page 46 to 47 of the hearing bundle); an email afterwards from Ms. Sturges, Mr. Laporte and his personal assistant in France recording what had been said (see pages 48 to 50 of the hearing bundle) and an email from Ms. Palmer to the Claimant again recording what had been said at the meeting (see pages 51 to 52 of the hearing bundle).

30. For the avoidance of doubt and for the reasons that I have already touched upon above I do not accept the Claimant's evidence that anyone used the words *"I don't have to tell you anything sonny".* I prefer the evidence of the Respondent that that was never said.

31. On 3rd October 2022 Ms. Palmer emailed the Claimant setting out what had happened at the meeting and revising the offer previously made which was now only on the basis of the termination of his employment. I do not need to deal with the reasons for that, but I accept that some further information had come to light which gave the Respondent cause for concern about the Claimant taking the foreman role and after discussion between Ms. Sturges and Ms. Palmer either in the evening of 30th September or over the course of the weekend the revised approach was agreed which was then set out in the email.

CONCLUSIONS

32. The only issues for consideration is whether the meeting on 30th September 2022 was a genuine attempt at negotiation and whether there was any improper behaviour on the part of the Respondent at it.

33. I begin with the first issue because as Mr. Robison set out in his skeleton argument that was the main point advanced on behalf of the Claimant. I am satisfied that the meeting took place in the way described by the Respondent and the offers made were set out at that point and not as the Claimant contends for the first time in Ms. Palmer's email of 3rd October 2022.

34. I do not accept any suggestion that the meeting was a disciplinary meeting or quasi disciplinary in nature or that the Claimant was suspended. It was plainly a meeting held with the purpose of finding a way forward and one of those ways forward was a termination of employment. To that end, it was a pre-termination negotiation because it was, to borrow some of the words of Section 111A(2), a discussion held and an offer made with a view to the Claimant's employment being terminated on agreed terms.

35. I do not accept that anything that happened after the meeting took place in any way changed the shape of what occurred on 30th September 2022 and somehow turned it into a disciplinary meeting as Mr. Robison appeared to submit in his oral representations.

36. The only question then is whether there was any improper conduct at the meeting itself. The only thing that is relied upon as Mr. Robison confirmed at the outset of the hearing is that the Claimant says that he was told *"I don't have to tell you anything sonny"*. I can deal with that with relative ease because I accept that that was never said for the reasons that I have already given.

37. However, even had I found that it had been said then I would not have found that it amounted to improper conduct having regard to the, admittedly non-exhaustive, list within paragraph 18 of the Code.

38. I agree with the submissions of Mr. Robinson in his skeleton argument that at worst it was patronising but I accept that it did not cross over the threshold of harassment, bullying or intimidation by the use of offensive words or aggressive behaviour.

39. With all of those matters in my I am satisfied that the meeting does fall within Section 111A ERA 1996.

40. The result is that the parts of the Claimant's Claim Form that refer to the meeting of 30th September 2022 either at all or what happened at it must be redacted and the Claimant will not be able to rely on the fact of the meeting or what was discussed at the final hearing because it is inadmissible in the context of the unfair dismissal claim and agreed to be irrelevant to the harassment complaint.

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Employment Judge Heap

Date: 13th July 2023

19 July 2023

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