EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106291/2022

Held in Glasgow on 4 October 2023

Employment Judge L Wiseman

Mr Kevin Gallagher **Claimant**

McKinnon's Auto and Tyres Ltd **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided the discussion between the parties on the 1 August 2022 was a pre-termination negotiation and is inadmissible in these proceedings in terms of section 111A Employment Rights Act.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 21 November 2022 alleging he had been unfairly dismissed.

2. The respondent entered a response admitting the claimant had been dismissed for reasons of redundancy but denying the dismissal had been unfair.

3. The hearing today was a preliminary hearing to determine the following issues:

   (i) were the discussions held between the parties subject to "without prejudice" privilege;

   (ii) are the discussions prevented from disclosure by either party on that basis;

   (iii) were the discussions "protected discussions" in terms of section 111A Employment Rights Act 1996 and

   (iv) are the discussions prevented from disclosure by either party.

4. The tribunal heard evidence from Ms Anne McKenzie, Director; Mr Steven McKinnon, Director and the claimant. The tribunal was also referred to a number of jointly produced documents. The tribunal, on the basis of the evidence before it, made the material findings of fact set out below.

5. The respondent's representative, in his submission to the tribunal, confirmed it no longer relied on the position that the discussions were subject to without prejudice privilege. Accordingly the only issue for determination by the tribunal was whether the discussions were protected discussions in terms of section 111A Employment Rights Act and if so, was anything said or done that was improper, and if so, to what extent should section 111A apply. This concession by the respondent limited the material findings of fact necessary for this tribunal to find.

Findings of fact

6. The respondent is a small family run business supplying and fitting tyres and carrying out some general repairs to private motor vehicles.

7. The family (Ms McKenzie and her two brothers) also own a company, McKinnon and Forbes Ltd (based in Paisley) which is involved with the service, repair and maintenance of commercial vehicles.

8. The respondent company employs six employees. The claimant commenced employment in October 2017 and was employed as the Branch Manager until his dismissal on the 22 August 2022.

9. The claimant contracted Covid in June 2022 and was absent for approximately 2 weeks. The claimant returned to work for one week but then broke his foot. The claimant was absent from work from 8 July until the termination of his employment.

10. The claimant was invited (by text message – page 45) to attend at the Paisley office on Monday 1 August for a return to work meeting.

11. Ms McKenzie arranged this meeting because the claimant had been absent from work for some weeks and was due to return to work, but she also wanted

to have an "off the record" discussion with him because during his absence she had found the Directors could cover the depot without the need for a manager.

12. Ms McKenzie had taken HR advice before arranging the meeting.

13. The claimant attended the meeting. Ms McKenzie asked the claimant about his foot and was told it was "getting there" and the claimant was waiting to see a specialist. Ms McKenzie then told the claimant she wanted to have an "off the record without prejudice" discussion with him regarding the manager's role. The claimant was told that during his absence the Directors had covered his role and had decided they could continue to do this and so no longer needed a manager in the depot. The claimant was offered the sum of £10,000 and told this was more than he would be entitled to if made redundant. The claimant was also told that if he accepted the sum a compromise agreement would be signed, but if he rejected it then the company would go through a redundancy procedure. The claimant was given 48 hours to consider the offer.

14. The claimant was shocked by what had been said and stated he was there to return to work. Ms McKenzie told him that would not be happening. The claimant told Ms McKenzie that he wanted to discuss it with his family and he left the meeting.

15. The meeting was conducted without any aggression or raised voices.

16. The claimant text Ms McKinnon later that day (page 47) saying "can you explain the 2 offers you've put to me again".

17. Ms McKinnon replied (page 47/48) with a message entitled "Without Prejudice" stating the job role was no longer required because Ms McKenzie and Mr McKinnon were covering it and would continue to do so. A compromise agreement of £10,000 was on offer, or the lesser payment of statutory redundancy. The text set out holiday pay and notice.

18. The claimant replied to that text (page 49) by asking for a breakdown of the figures again because his head was "scrambled" and he could not remember.

19. Ms McKinnon replied to this (page 49) with another message entitled “Without Prejudice” and provided a breakdown of the figure of £10,000.

20. The claimant sent a further text the following day (page 51) asking what the reason was for wanting him to leave. Ms McKenzie responded to this to confirm the reason was redundancy.

Credibility and notes on the evidence

21. There was a significant dispute in the evidence of the respondent’s witnesses and the claimant’s version of events at the meeting on the 1 August.

22. The claimant told the tribunal that after being asked how his foot was, Ms McKenzie had said she was going to make it easier for him and they were going to make him an offer which was to be accepted or he would be made redundant. He was told the offer was worth more to him and that he should take it or he would get less. Ms McKenzie told him to sign the document, which was on the table, or he would be made redundant. Mr McKinnon said it was £10,000. Ms McKenzie asked if he was going to sign it. The claimant said he was there to return to work, but Ms McKenzie said that would not be happening. The claimant said he wanted to discuss it with his family and as he got up to leave Ms McKenzie said she wanted an answer from him in 48 hours. She followed him out of the room and said she did not want him going anywhere near the depot. The claimant replied that he was not listening to her and had done nothing but try his best for the company. Ms McKenzie replied that he had done nothing but give her fucking grief and headaches.

23. The claimant asserted nothing had been said about the meeting being confidential, or off the record or without prejudice: this had only appeared on the subsequent text messages. There had also been no mention of the Directors covering his role. Ms McKenzie had said to the claimant that his heart wasn’t in the job, he didn’t open on Saturdays, he didn’t want to be responsible for the control of stock, his performance wasn’t good and he had been off a long time.

24. The tribunal, in considering the claimant's version of events, had regard to the fact that he repeatedly told the tribunal that he had been "shattered" at the meeting; that his brain was "fried", his head was "scrambled" and that he was "in shock". The claimant invited the tribunal to accept that all of these emotions related to his memory of the figures only, and that he perfectly recollected what had been said at the meeting. The tribunal had difficulty accepting the distinction drawn by the claimant. The tribunal accepted that the nature of the discussion on the 1 August undoubtedly came as a shock to the claimant and the tribunal considered the impact of this – in terms of the claimant being "shattered", "in shock", his head being "scrambled" and his brain being "fried" – was that he left the meeting understanding the gist of what had been said, but not the detail. The tribunal could not accept that it would be reasonable not to recollect the figures but to recollect what had been said. The tribunal concluded the claimant's evidence was not entirely reliable for this reason.

25. The tribunal did not accept the claimant's evidence that a compromise agreement had been on the table. The tribunal reached that conclusion for a number of reasons: firstly, the claimant stated in his claim form that he received nothing in writing at the meeting; secondly, if there was a compromise agreement on the table, why did the claimant not take it away to consider and thirdly, there appeared to be no dispute regarding the fact the claimant was given 48 hours to consider the verbal offer made at the meeting.

26. The tribunal preferred the evidence of the respondent's witnesses. The tribunal found Mr McKinnon to be a credible witness. He had not played any role at the meeting other than to be present for support for Ms McKenzie. He, however, provided a useful and measured insight into what had happened at the meeting. He confirmed that HR advice had been taken prior to the meeting and that they had been told to "make sure" to tell the claimant the meeting was off the record and without prejudice. Mr McKinnon recalled that the claimant had asked what "without prejudice" and "compromise agreement" meant, and he had explained it to him.

27. Mr McKinnon also confirmed that the claimant was told the Directors had covered the depot when he was off and that they no longer needed a manager

in the depot. The sum of £10,000 was put forward and the claimant had been told that if he did not accept it they would have to "start looking down the line at a redundancy package, which would be less money". Mr McKinnon confirmed there had been no hostility: there had been a normal conversation and Ms McKenzie had dealt with the facts and figures.

28. The tribunal also found Ms McKenzie to be a credible witness although at times in cross examination she was reluctant to concede points until pushed (see below). Ms McKenzie told the tribunal that the respondent had taken HR advice to ask how to go about taking control of the business themselves. A compromise agreement had been discussed so that more than statutory redundancy could be offered. This situation had arisen because Ms McKenzie and Mr McKinnon had covered the depot in the claimant's absence and were content that this could continue and therefore there was no requirement for a manager in the depot. The fact the respondent had sought advice before arranging the meeting with the claimant, lent weight to the respondent's evidence regarding what was said at the meeting.

Respondent's submissions

29. Mr Milne informed the tribunal that the respondent was no longer relying on without prejudice privilege, and therefore the issues for the tribunal to determine were whether all or part of the discussion on the 1 August 2022 was protected in terms of section 111A Employment Rights Act and if so, whether anything improper was said or done and if so, to what extent section 111A should apply.

30. Mr Milne noted a number of allegations had been made regarding the behaviour of Ms McKenzie and Mr McKinnon. He submitted all were without foundation and on close examination it would be seen that the claimant's case was fundamentally flawed.

31. A number of assertions made by the claimant during his evidence in chief ("aye whatever"; "take £10,000 – worth more"; "he's given you nothing but fucking grief and headaches") had either not been put to the respondent's witnesses or had not been mentioned in the written correspondence of the 3

August. Mr Milne suggested that if comments had been made by Ms McKenzie, the claimant would have referred to them in the subsequent correspondence. The first mention of this made by the claimant was at the meeting on the 22 August when he had just learned of his dismissal. He clearly had an axe to grind and the tribunal should draw an adverse inference from the timing of this.

32. Mr Milne invited the tribunal to prefer the evidence of the respondent's witnesses. The claimant had repeatedly said his head had been "scrambled" and "fried". It was submitted his credibility and reliability were in dispute.

33. Mr Milne submitted that in terms of section 111A Employment Rights Act, an offer had been made and discussions held. The key issue was whether there had been any improper conduct by the respondent. Mr Milne referred to the ACAS Code and acknowledged the general rule was that an employee would be given 10 days to consider written terms. In this case, written terms had not been put to the claimant. A verbal offer had been made and in the circumstances being given 2 days to consider was reasonable.

34. Mr Milne submitted the respondent had not been aggressive and no offensive words had been used. It had not been unreasonable for the respondent to set out the offer and explain what would happen if it was not accepted.

35. Mr Milne submitted the discussion on the 1 August passed the first hurdle. Further, there had been nothing inappropriate at the meeting in terms of aggressive behaviour or offensive words. Mr Milne accepted the claimant had been surprised by the fact of the discussion taking place. He submitted there was nothing improper about the fact no notice had been given. He accepted it was best practice for notice of such a meeting to be given and to allow the employee to be accompanied, but failure to do so did not render it inappropriate.

36. Mr Milne invited the tribunal to reject any submission that pressure had been placed on the claimant. He submitted it was not pressure to explain what would happened if the offer was not accepted. Further, a redundancy process did not necessarily mean the claimant would be made redundant.

37. Mr Milne invited the tribunal to find in the respondent's favour and find the conversation on the 1 August was not admissible and that averments in the ET1 should be deleted. The evidence regarding the meeting on the 1 August should be limited to a return to work meeting taking place and the claimant being asked how his foot was.

Claimant's submissions

38. Mr Lee submitted there were three criticisms of the process adopted by the respondent:

    (i) the claimant had been threatened with redundancy if he refused the offer. He had been told he would be "made redundant and out of a job anyway";

    (ii) the claimant was put under undue pressure by being given 48 hours to give a definitive answer and

    (iii) he had attended the meeting expecting a return to work meeting.

39. Mr Lee accepted the 10 day period referred to in the ACAS guidance applied to a written agreement, but submitted, logically, a person would need to issue a written agreement and give 10 days in order to gain protection.

40. The respondent had misrepresented the purpose of the meeting and this was inappropriate conduct. The claimant had been told it was a return to work meeting and out of the blue it turned into something else.

41. Mr Lee referred the tribunal to the cases of ***Faithorn Farrell Timms LLP v Bailey 2016 IRLR 839*** at paragraph 47 and ***Harrison v Aryma Ltd UKEAT/0085/19*** at paragraph 56. Mr Lee also referred to the ACAS Statutory Code of Practice and Guidance regarding Settlement Agreements and to the guidance regarding improper behaviour. Mr Lee submitted that even taking the respondent's case at its highest, there had been improper behaviour arising from undue pressure being placed on the claimant (brought to the meeting under false pretences; given only 48 hours to provide a definitive response to the offer and told he would be made redundant and out of a job

if he did not accept). Furthermore, the claimant had not been offered to be accompanied at the meeting.

42. Mr Lee submitted that for these reasons the conversation on the 1 August was not protected and should be admitted in evidence.

Discussion and Decision

43. The tribunal firstly had regard to the terms of section 111A Employment Rights Act which provides that evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111 (that is, complaints of unfair dismissal). This is subject to anything said or done which in the tribunal's opinion was improper or was connected with improper behaviour. Where there is improper behaviour, anything said or done in pre-termination negotiations will only be inadmissible as evidence in a claim to an employment tribunal to the extent that the tribunal considers it just.

44. The term "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.

45. The tribunal also had regard to the ACAS Guidance on Settlement Agreements.

46. The first issue for the tribunal to determine is whether there have been pre-termination negotiations in this case. The tribunal noted Mr Lee did not directly concede this point albeit his submissions focussed solely on the question of whether there had been improper conduct. The tribunal found as a matter of fact that the claimant was called to a meeting on the 1 August, and at that meeting, discussions took place regarding entering into a compromise agreement to end the claimant's employment because the claimant's role at the depot was no longer required in circumstances where the role was going to continue to be covered by the Directors. A verbal offer of £10,000 was made to the claimant. The tribunal was satisfied that on those facts, pre-termination negotiations had taken place.

47. The next issue for the tribunal to determine is whether there was any improper behaviour in terms of anything said or done in relation to the pre-termination negotiations. The ACAS Guidance makes clear that what constitutes improper behaviour is ultimately a matter for the employment tribunal to decide on the facts and circumstances of each case. It includes but is not limited to behaviour that would be regarded as unambiguous impropriety under the without prejudice principle. The Code gives examples of improper conduct which includes putting undue pressure on a party by, for example, not giving a reasonable period of time to consider an offer and saying the employee will be dismissed if the proposal is rejected.

48. Mr Lee, in his submissions, took issue with three points and the tribunal considered each of these in turn. Firstly, the claimant had been invited to, and therefore expected to, attend a return to work meeting. There was no dispute regarding the fact the claimant was invited to attend a return to work meeting and that he did not know a protected conversation was going to take place. Ms McKenzie was asked in cross examination whether she had misrepresented the purpose of the meeting. Ms McKenzie rejected that suggestion and said she had wanted to get the claimant in to work for a chat. She had wanted to see how his foot was. The question was put to Ms McKenzie again and she replied "..well.. yes".

49. The tribunal, in considering this point, acknowledged Mr Lee's point that as a matter of fairness, an employee should be given notice of the type of meeting they are to attend, so there are no surprises. We balanced this with the fact that if an employee is told in advance that an employer wishes to have a protected conversation or pre-termination negotiations, the reaction to that is unlikely to be positive. There is a risk the employee will refuse to attend and the relationship will be soured.

50. The tribunal considered there is a difference between fairness and improper conduct. The tribunal further considered the respondent had a reason for adopting the approach it did, and that was to ensure the claimant attended the meeting. The respondent's conduct in doing so was not improper because the claimant was provided with details of the figures, and a breakdown of the

offer the same day and given time to discuss the matter with his family, which is what he wanted to do. The tribunal concluded, given these facts, that there was no improper conduct in the actions of the respondent.

51. The second challenge raised by the claimant was that he was told that if he did not accept the offer he would be made redundant and out of a job anyway. There was a dispute between the evidence of the claimant and the respondent's witnesses on this point. The claimant supported his position by pointing to what had subsequently happened. The tribunal, in considering this point, noted that Ms McKenzie accepted, in cross examination, that they (the Directors) had already decided they were taking over the manager's job. She was asked whether, if the claimant refused the offer, he was "going anyway". Ms McKenzie responded "he was going through a redundancy process".

52. The tribunal noted in text messages sent on the 2 August (page 51) the claimant asked why he was being asked to leave, and was informed his position "has been made redundant". The tribunal accepted the respondent's evidence that it did not immediately follow from this that the claimant would be made redundant and his employment come to an end. The respondent had to explore suitable alternative employment.

53. Mr McKinnon told the tribunal that the claimant was told that if he did not accept the offer they would have to start looking down the line at a redundancy package.

54. The tribunal, for the reasons set out above, preferred the evidence of Ms McKenzie which was supported by Mr McKinnon and was satisfied the claimant was not told that if he did not accept the offer he would be made redundant. The tribunal considered it was not improper for an employer to make clear to an employee what would happen if the offer was refused. The tribunal concluded there was no improper conduct in circumstances where the claimant was not told he would be made redundant if he refused the offer. The position was clear that whilst his role would be made redundant, that did not necessarily mean he would be made redundant.

55. The third challenge raised by the claimant related to the length of time he was given to consider the offer. Mr Lee placed reliance on the ACAS Code which provides for a period of 10 calendar days to be allowed to consider an offer, whereas the claimant had only been allowed 48 hours. The tribunal noted the ACAS Code provides that as a general rule a minimum period of 10 calendar days should be allowed to consider the proposed formal written terms of a settlement agreement. The parties in this case were not at that stage: no written offer/written terms of a settlement agreement had been put to the claimant. A verbal offer was made to the claimant and he was given 48 hours to consider that. The claimant could have accepted the offer, rejected it, or come back with a counter-proposal which might have led to further negotiations.

56. The claimant contacted the respondent after the meeting and asked for the financial details to be provided to him and for a breakdown of the figures. The respondent provided this information on the day it was requested.

57. The tribunal noted the claimant wished to discuss the offer with his family. There was no suggestion that he had not had sufficient time to do this.

58. The tribunal acknowledged a more generous amount of time could have been given to consider the offer, particularly as the discussion had been a shock to the claimant. The tribunal did not however consider the time allowed to be inappropriate or to amount to improper conduct on the part of the respondent, because there was no evidence to suggest the claimant had had insufficient time to either seek advice or discuss the matter with his family.

59. The claimant asserted during his evidence to the tribunal that Ms McKenzie had been aggressive and used offensive words as he was leaving. The tribunal preferred the evidence of Ms McKenzie regarding this matter and found as a matter of fact that the discussions which took place were not hostile and that no aggressive or offensive comment had been made as the claimant was leaving. The tribunal did accept Ms McKenzie told the claimant not to return to the depot, but in the circumstances of the discussions taking place, the tribunal considered this appropriate and not unusual.

60. The tribunal, having had regard to all of the above points, concluded there was no improper conduct on the part of the respondent. The tribunal decided the pre-termination discussions held on the 1 August 2022 are inadmissible in terms of section 111A Employment Rights Act and cannot be referred to by the parties in the proceedings. The averments in the ET1 relating to the protected discussion should be deleted and if this matter cannot be agreed, parties should make an application to the tribunal for further directions.

Employment Judge: **L Wiseman**
Date of Judgment: **31 October 2023**
Entered in register: **01 November 2023**
and copied to parties