EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106798/2023

Hearing
Held on the Cloud Video Platform
on 2 February 2024

Employment Judge A Jones

Mrs C Dooley	**Claimant** **Represented by:** **Mr Phillips, solicitor**
Strathkelvin Instruments Ltd	**Respondent** **Represented by:** **Ms Splavska, Litigation Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The content of the meeting between Mr Dooley and Mr Reid on 16 August 2023 is not subject to the without prejudice rule or the provisions of section 111A Employment Rights Act 1996.

REASONS

Background

1. This was a hearing to determine whether the discussions which took place at a meeting between the claimant's husband who was also the Managing Director of the respondent at the time and the respondent's Chairman on 16 August 2023 should be subject to the rule of without prejudice and/or the provisions of section 111A Employment Rights Act 1996 ('ERA'). The claimant seeks to rely on what was said at that meeting as a last straw in relation to her claim of constructive dismissal. The respondent's position is that the discussion was subject to the

rules of without prejudice and also the provisions of section 111A ERA which made it inadmissible in evidence.

2. A bundle of documents was produced for use at the hearing. That included some correspondence which was marked without prejudice from the claimant's solicitor. I clarified at the beginning of the hearing that the only issue to be determined was whether evidence regarding what was said in meeting on 16 August between Mr Dooley and Mr Reid was inadmissible. It was confirmed that the without prejudice correspondence had been produced only to provide a context for the evidence at this hearing and was not to be relied upon at the final hearing.

3. Mr Reid gave evidence for the respondent first, and then the claimant gave evidence as did Mr Dooley. Parties had helpfully provided written submissions in advance. Further oral submissions were made at the conclusion of the evidence regarding in particular a question posed by me.

Observations on the evidence

4. There was very little dispute on the evidence in relation to the issue for the Tribunal to determine. The question for the Tribunal to address was the status of the meeting, and whether what was discussed was admissible in evidence. Witnesses all gave their evidence in a straightforward manner albeit it was clear that the case was very personal to all those involved. The most notable aspect of the evidence was that it was Mr Reid's clear position that the proposal he made at the meeting on 16 August to Mr Dooley was in the context of him being an investor in the company rather than as Chairman of the company, whereby he could be acting in the role of employer.

Findings in fact

5. Having considered the evidence, the submissions of the parties and the documents to which reference was made, the Tribunal makes the following findings in fact. The Tribunal has sought to limit those findings only to those

necessary to determine the issue before it, mindful that it does not wish to limit the scope of enquiry at the final hearing.

6. The claimant was effectively the Chief Operating Officer of the respondent although her title was that of Marketing Director. Her husband Mr Dooley was Managing Director of the respondent and her line manager.

7. Mr Reid was Chairman of the respondent. The Board was made up of Mr Reid, his wife, the claimant and her husband. A Mr Burns who was one of the founders of the company sometimes observed at Board meetings.

8. Mr and Mrs Reid's had made investment in the respondent was through a company called Chimerabio which was co-investors with Scottish Enterprise on a *pari passu* basis. There was an investor agreement in place although this was not before the Tribunal.

9. The respondent's financial performance was very good in 2021/2 as a result of government contracts obtained in relation to a product made by them which measured levels of COVID in water supplies. As a result of this a decision was taken to market the company for sale. Brokers with whom Mr Reid had previously worked were engaged.

10. The respondent experienced cashflow issues from time to time because of the nature of their clients and this was exacerbated in the period after the contracts with the government came to an end.

11. The claimant had primary responsibility for dealing with financial matters although that was subject to instruction from Mr Dooley.

12. Mr Reid's investment company received investor fees in terms of the investment agreement.

13. Prior to 16 August 2023, no issues were ever raised with the claimant which would lead her to believe that she might be subject to any formal procedure or dismissal.

14. A board meeting took place on 15 August. At that meeting the financial performance of the respondent was discussed. The claimant's position was that

without immediate investment the respondent would be at risk of insolvency by the end of the month. Mr Dooley initially expressed a less pessimistic view but then indicated that he agreed with the claimant's assessment. The claimant and Mr Dooley presented two options for loan funding to address the issue and these were discussed. No decision was reached in relation to the funding at the meeting. Mr Reid indicated at the meeting that he and his wife were not going to offer any further funding to the company at present.

15. Mr Reid contacted Mr Dooley after the meeting asking him to meet him the following day at the Dakota hotel. This was not out of the ordinary as Mr Reid and Mr Dooley regularly met at the Dakota Hotel to discuss business matters.

16. At the meeting on 16 August, Mr Reid informed Mr Dooley that he would not approve either of the funding options put forward by Mr Dooley and the claimant at the meeting the day before. As Chairman, and in terms of the investment agreement, Mr Reid was in a position to make such a decision. As Chairman, Mr Reid would have a casting vote and the investment agreement made some provision regarding decisions for further investment which required Mr Reid's approval. Mr Reid went on to say that he and his wife would invest £40,000 but that this was conditional on management change and in particular conditional on the claimant resigning. Mr Reid said he would take over the claimant's role. Mr Dooley was 'blindsided' by this suggestion and said he did not agree with it. There was no mention of the discussion being without prejudice, that the claimant was not performing in her role, or the offer of any settlement terms for the claimant. There was no mention of a settlement agreement, the suggestion was simply that in order for Mr and Mrs Reid to invest further in the respondent, the claimant would have to resign without compensation.

17. Mr Dooley subsequently informed the claimant of what had been said. The claimant subsequently resigned from her employment. She did not sign a settlement agreement.

Relevant law

18. The without prejudice rule in Scots Law is a common law rule which covers correspondence, concessions or statements made with a view to trying to achieve a settlement (see for instance **Daks Simpson Group plc v Kuiper 1994 SLT 689**). Normally a party will make clear that discussions or correspondence is without prejudice, for instance by marking correspondence 'without prejudice'. The rule will not apply where there is no pre-existing dispute between the parties.

19. S.111A of the ERA 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.

20. The ACAS code of practice on Settlement Agreements indicates that "even where no employment dispute exists, the parties may still offer and discuss a settlement agreement in the knowledge that their conversations cannot be used in any subsequent unfair dismissal claim." This would suggest that for section 111A to apply there may be no requirement for a dispute to exist, albeit the guidance clearly envisages this in the context of a settlement agreement being offered to an employee.

Discussion and decision

Was the meeting subject to 'without prejudice'

21. The Tribunal was satisfied that there was nothing about the meeting between Mr Dooley and Mr Reid which attracted the without prejudice rule. There was no pre-existing dispute between the claimant and the respondent as her employer. Mr Reid was not making any settlement offer to the claimant in terms of her employment. He was setting out the conditions which would need to prevail for him to further invest in the company. Mr Reid was Chairman of the respondent but it was his company Chimaerabio which was the vehicle through which he provided investment to the respondent. Mr Reid's evidence was that what he said at the meeting on 16 August was in his capacity as investor, not Chairman. As investor he could not reach any agreement with the claimant as an employee of the respondent. It was only the employer who could reach agreement with the claimant regarding the termination of her employment. Mr Reid's position was that he was *qua* investor asking Mr Dooley *qua* employer to discuss that matter with the claimant. Mr Dooley did not agree that the suggestion was sensible or realistic. The respondent was not however seeking to have the discussions between Mr Dooley and the claimant excluded, only the discussion between Mr Reid and Mr Dooley. The application made to exclude the conversation from evidence was not being made by Mr Reid as an individual but by the respondent.

22. Therefore, as there was no pre-existing dispute between the claimant and the respondent, that the discussion were said to relate to matters between investor and the respondent, the without prejudice rule does not apply to exclude the evidence from being admissible in the context of the claimant's claim of unfair dismissal.

Does section 111A ERA apply?

23. The Tribunal accepted the respondent's submission that section 111A does not specifically indicate that for it to bite the discussion or offer concerned need be made by employer to employee.

24. That said, it is difficult to envisage circumstances in which a party would seek to have discussions rendered inadmissible which did not involve the employer and employee given it is only employer and employee who can reach agreement to terminate an employee's employment. The provision relates only to a claim of unfair dismissal and not to other statutory claims. In the present case, the employer was the respondent.

25. At the meeting of 16 August, no offer was being made to the claimant. What was being suggested was that Mr Reid might facilitate further investment but only if the claimant were no longer employed by the respondent. He was not providing the claimant with an offer to terminate her employment at all. He was making an offer to the respondent in the capacity of investor.

26. Even if the Tribunal is in error that matter, taking into account the guidance provided by ACAS, the Tribunal is satisfied that section 111A(4) would apply. Mr Reid was aware that the respondent company was in a precarious financial position. He knew that the claimant and her husband had investment in the company and that if funding was not obtained immediately, staff would not be paid, bills would not be paid and the business might become insolvent. In indicating to Mr Dooley that he would not agree to the respondent taking the funding options which had been identified, and therefore closing off any alternative funding, he was to all intents and purposes issuing an ultimatum or as the claimant and her husband putting it 'a gun to their heads'. The Tribunal was satisfied that this is not what was envisaged by section 111A, the purpose of which was to allow parties to negotiate settlement terms without fear of these being founded upon should agreement not be reached. In the present case, there was no effort to reach agreement. The Tribunal accepted the evidence of the claimant and Mr Dooley that the extent to which the proposal of Mr Reid could be seen to be an offer, it was not one which was open to negotiation. Moreover the 'offer' would have to be accepted imminently were the respondent's financial position to be stabilised.

27. In all the circumstances, the Tribunal is of the view that section 111A(1) and (2) do not apply, but if the Tribunal is wrong about that then section 111A(4) has the effect of disapplying section 111A(1) and (2).

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Employment Judge Jones

7 February 2024

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Date of Judgment

Date sent to parties **7 February 2024**