Case Number: 3305333/2024

EMPLOYMENT TRIBUNALS

Claimant: Mrs K Jarvis

Respondent 1: Keyloop (UK) Limited

Respondent 2: Mr T Kilroy

Heard at: Bury St Edmunds

On: 23 May 2025

Before: Employment Judge Graham

Representation
Claimant: Mr A McPhail, Counsel
Respondents: Mr A Francis, Counsel

RESERVED JUDGMENT

1. The Respondents' application succeeds and the complaints of victimisation at Issues 15(c) and 15(d) are struck out.

REASONS

Introduction

1. By ET1 dated 22 May 2024 the Claimant makes complaints of discriminatory constructive dismissal, constructive unfair dismissal, direct sex discrimination, harassment related to sex, and victimisation. By ET3 dated 14 August 2024 the Respondents deny the claims.

2. The matter was the subject of a private preliminary hearing for case management before EJ Flanagan on 12 March 2025.

3. Today's hearing was listed to consider what was described as the Respondents' application for a strike out of part of the claim. It initially appeared to me that this was more properly the determination of a preliminary issue under Rule 52(1)(b) with respect to the admissibility of certain discussions between the parties, and if it followed that they were not admissible, that would then result in consideration of a strike out of those complaints on the basis of no reasonable prospects of success under Rule 38(1)(a) Employment Tribunal Rules of Procedure 2024. The parties were

content with this approach, it appeared to have been their understanding as well.

4. The issues for me to decide today were agreed as follows:

   Issues pertaining to the without prejudice principle:

   Issue A *- Subject to the potential exception at (b), was the offer of 4.1.24 covered by the without prejudice public policy principle?*

   Issue B *- If so, does the exception of unambiguous impropriety apply?*

   Issue C *– If not, has R waived privilege by way of para 26 of its Grounds of Resistance?*

   Issues pertaining to s111A:

   Issue D *- Was the relevant conduct (4.1.24) improper, or was it connected with improper behaviour? If so, to what extent if at all should it in any event be excluded?*

   In respect of the correspondence of March and April 2024:

   Issues pertaining to the without prejudice principle:

   Issue E *- Does the exception of unambiguous impropriety apply to the relevant correspondence (March and April)?*

5. There was an Issue F which was no longer pursued.

6. There are very few facts in dispute with respect to the matter I have to decide, and I made it clear at the start of the hearing that given that this is an interim hearing I am purposely making findings of fact solely for the issues that I need to decide. The findings I make are not intended to bind a future tribunal at a future hearing of this matter.

7. I was provided with a hearing bundle of 95 pages, witness statements from the Claimant and the Second Respondent, a joint authorities bundle, as well as skeleton arguments from both sides. I heard live oral evidence but solely limited to the issue of whether the words “without prejudice” were used on 4 January 2024.

Findings of fact

8. The Claimant started working for the First Respondent in 2003. At the time of her resignation on 9 January 2024 the Claimant was employed as Global Head of Professional Services after having been promoted in early September 2022. The Claimant had previously performed the role of Product Director. As Global Head of Professional Services the Claimant reported to the Second Respondent as Chief Executive Officer.

9. After her appointment the Claimant was provided with performance feedback by the Second Respondent. The Claimant was not placed on a

performance improvement plan whilst in this role.

10. At some point towards the end of 2023 the Second Respondent determined that the Claimant should be replaced. The Second Respondent had planned to speak to the Claimant on 8 January 2024 however he did so briefly on Tuesday 2 January 2024 as he had observed her in the office that day.

11. The Second Respondent informed the Claimant that he had decided to replace her as Global Head of Professional Services but indicated that he wished to retain her. No other role was mentioned at that time. That evening the Claimant emailed the Second Respondent and asked what options she had. The Second Respondent suggested speaking the following day to which the Claimant agreed.

12. The discussion took place via Teams on Wednesday 3 January 2024. The Second Respondent gave the Claimant very basic information about an alternative role in Product which he said would be a senior role reporting to the Chief Product Officer. The Second Respondent then discussed an alternative option which would be an exit package. The Second Respondent says that he expressed that this offer would be on a without prejudice basis. The Claimant denies that this was said. The Second Respondent says he qualified as a lawyer and is used to conducting such meetings and is always careful to distinguish between open communication and without prejudice communication to avoid ambiguity or confusion.

13. On Thursday 4 January 2024 the Second Respondent spoke to the Claimant twice. On the first occasion the Second Respondent explained that he would put something in writing as soon as possible.

14. The Second Respondent spoke to the Claimant again briefly at the end of the day in an open area in the office. At this time the Claimant was in the process of leaving the office to go to her car. The Second Respondent handed the Claimant an options document which included details of the new role as Senior Vice President of the Product Team ("Option A") and details as to the remuneration package. The Claimant was also given a document setting out a settlement package which is marked "without prejudice and subject to settlement agreement" ("Option B") and this included sums for notice and severance and a bonus, and there was reference to equity being subject to Board approval.

15. The parties agree that the new role was a demotion but still a senior position.

16. The Second Respondent says that he said *"Option A is the alternative role, Option B is the severance offer made without prejudice, and subject to a settlement agreement"* or words to that effect. The Claimant again denies that the words "without prejudice" were used.

17. The words used is a dispute of fact I must resolve. I found both witnesses to be honest and neither counsel sought to argue that either witness was lying nor seeking to mislead me. In her evidence the Claimant accepted that she had been shocked when she was handed the document although

she then told me the shock kicked in some time later when she got home. The Claimant's evidence was slightly equivocal as to when the shock kicked in. On the other hand the Second Respondent remained consistent that he had conducted many of these meetings, he used the words "without prejudice" as his practice having conducted many such meetings either with or without HR present.

18. Counsel for the Respondents reminds me that memories are fallible and points out that the Second Respondent is a trained lawyer and the Options B document was marked "*without prejudice and subject to a settlement agreement."*

19. I find, on the balance of probabilities, that the Second Respondent did use the words "without prejudice" during the discussions on 3 and 4 January 2024 as alleged as his account is consistent, credible and supported by the contemporaneous written document containing those words and I believed him. This does not mean I believe that the Claimant has lied, rather I consider that she is mistaken, perhaps due to the passage of time, and also what she expressed was the shock around that time.

20. After the options were handed to the Claimant by the Second Respondent they agreed to speak on Monday 8 January.

21. On Friday 5 January the Claimant did not attend work and told the Second Respondent that she had not slept well.

22. On Monday 8 January the Claimant informed the Second Respondent that she was not well and would not be in work. The Second Respondent asked if the Claimant would be able to discuss the proposals later that day or another time, however there was no reply.

23. On Tuesday 9 January the Claimant emailed the Second Respondent and said that she would not be in work and would be going to a doctor's appointment. The Second Respondent replied to the Claimant and said:

    "When we last spoke on Thursday afternoon, I gave you two options and asked you to come back to me by Monday. As that hasn't happened and I cannot reach you, I need to progress the announcement of the changes. I am going to talk to your team this morning. I am not going to mention what you will do next as I have not heard from you."

24. The Second Respondent appointed a man to the Claimant's role. This was announced on 9 January.

25. At some point later that day the Claimant spoke with the Second Respondent, and whereas the Claimant was offered more time to consider the offer as she said she had been ill, the Claimant declined and said she had taken legal advice and would be leaving the First Respondent. The Claimant sent a resignation email that evening and alleged that she had been treated unfairly compared to her male colleagues.

26. The Claimant's employment ended with immediate effect on 9 January 2024.

27. On 15 January 2024 the Claimant filed a grievance.

28. The solicitors for the Claimant and Respondents entered into settlement negotiations via email marked without prejudice and subject to contract during January and February 2024. On 26 March 2024 the Claimant's solicitor informed the Respondents' solicitor that the Claimant "will shortly be initiating a claim via ACAS."

29. On 28 March 2024 the Claimant notified ACAS of her intention to being a discrimination claim.

30. Discussions took place between the solicitors on 9 April 2024 and an email from the Claimant's solicitor on that date recorded that the Respondents were not offering the Claimant any entitlement to retain her shares and it was assumed that the Claimant's bonus had now been withdrawn from the Respondents' offer. The Claimant's solicitor said the Respondents' offer was notably lower than the initial offer when she was given an ultimatum, and it was the first counter offer following the Claimant having notified ACAS of discrimination. The Claimant' solicitor said such detrimental behaviour would be an act of victimisation and he asked the Respondents' solicitor to clarify whether the bonus formed part of the offer.

31. The Respondents' solicitor replied on 17 April denying that the offer had been changed because the Claimant had contacted ACAS or any other nefarious reason, and she said that the simple reason the offer changed was because the situation had changed since the point in time that the first offer was made, for example her client had incurred legal fees. Victimisation was denied and it was confirmed that the bonus was not included in the offer.

32. It is not disputed that the change in offer by the Respondents in April 2024 was considerably less generous. It is unnecessary for the figures to be specified in this preliminary hearing judgment.

33. Both counsel have questioned each other's witness on the contents of the particulars of claim and the grounds of resistance. Whilst this has identified some minor errors in both, those had been prepared by lawyers not the parties themselves, and they would have been prepared upon instruction but under pressure to comply with strict time limits. Pleadings are not witness statements and I drew no negative inferences from the errors in either.

Law

Without prejudice

34. The purpose of the without prejudice rule is to encourage parties to try to settle disputes to avoid the need for litigation. The principle is that where there is a dispute between the parties any written or oral communications between them which are genuine attempts to resolve their dispute will not generally be admitted in evidence at a subsequent hearing of the claim – per Cox J in ***BNP Paribas v Mezzotero*** **[2004] IRLR 509** [12].

35. It was held in ***Cutts v Head*** **[1984] Ch. 290** per Oliver LJ that:

"That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings." [306]

36. Clearly parties are much more likely to resolve or settle their disputes if they are able to speak freely in the knowledge that whatever is discussed cannot be used against them later at a hearing if those discussions do not succeed. It was recalled in ***Unilever PLC v The Proctor and Gamble Co*** **[2000] 1 WLR 2436** that *"the rule, if not "sacred"… has a wide and compelling effect"* [2443].

37. The protection of the without prejudice rule only arises if and when the parties are in dispute with one another. The court in ***Barnetson v Framlington Group Ltd*** **[2007] ICR 1439** considered the ambit of a dispute and how proximate it should be to litigation to engage the rule. In that case it was noted by reference to ***Rush v Tompkins Ltd*** **[1989] AC 1280** that the rule is "*founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish"* [26].

38. It is clear from the judgment in ***Barnetson*** that litigation does not need to have begun in order for the rule to apply, but rather the question is whether the parties contemplated or might reasonably have contemplated litigation if they could not agree. The court held:

"34. However, the claim to privilege cannot, in my view, turn on purely temporal considerations. The critical feature of proximity for this purpose, it seems to me, is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so, they could avoid the need to go to court over the very same dispute? On that approach, which I would commend, the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree. Confining the operation of the rule, as the Judge did, to negotiations of a dispute in the course of, or after threat of litigation on it, or by reference to some time limit set close before litigation, does not, with respect, fully serve the public policy interest underlying it of discouraging recourse to litigation and encouraging genuine attempts to settle whenever made."

39. As to what amounts to a dispute, it has been held in ***BE v DE*** **[2014] EWCA 2318 (Fam)**:

"there must be a reasonably cohate and definable issue or series of issues,

not just a number of reciprocal differences or grievances which might or might not prove soluble with reflection and discussion." [23]

40. The mere fact of raising a grievance may not be indicative that there is a dispute – ***Mezzotero*** [28].

41. In ***Portnykh v Normura International plc*** **[2014] IRLR 259** it was held that whilst not in every case, the offer of a compromise agreement (now settlement agreement) will "very often" mean that there is a dispute or potential dispute [paragraph 34] and further:

"…as the Court of Appeal made clear in Framlington Group Ltd v Barnetson [2007] IRLR 598 for the "without prejudice" exclusion to be effective there does not need to be extant litigation there only needs to be an extant dispute where the parties are conscious of the potential for litigation." [28]

42. There must be both a genuine dispute and also a genuine attempt to resolve it – ***Avonwick Holdings Limited v Webinvest*** **[2014]** [19].

43. The absence of the words "without prejudice" will not necessarily be fatal if the negotiations meet the principle, in other words there was a dispute.

44. The without prejudice protection may be disapplied only in very limited circumstances including where the exclusion of such without prejudice evidence would "act as a cloak for perjury, blackmail, or other "unambiguous impropriety"" – ***Unilever*** [2444].

45. In ***Motorola Solutions Inc v Hytera Communications Corp Ltd*** **[2021] EWCA Civ 11** the Court of Appeal held:

"I do not regard the fact that the test of good arguable case is used in other interim contexts as a sufficient reason to apply it to the issue of unambiguous impropriety when that issue arises at an interim stage of litigation. Rather, the position should be that the test remains one of unambiguous impropriety. ***Nothing less will do****.* ***That is a test which, deliberately, is difficult to satisfy*** *but the fact that it arises on an interim application is no reason to dilute it. In view of the necessary limits to the conclusions which a court can reach at an interim stage, the existence of a credible dispute about what was said (or what was meant by what was said) may mean that a court cannot be satisfied that there has been an unambiguous impropriety and therefore does not admit the evidence, but that is simply the result of applying the test which has consistently and for good reason been held to apply. Plainly it would not be appropriate on an interim application to direct a trial of an issue to resolve such a dispute."* [64]

46. Moreover in ***Portnykh*** it was noted that, as per earlier authorities, the exception should not be applied too readily, and it applied the following high threshold before that exception should be granted:

"…that no matter how important the admission might be for the potential litigation, unless it can be said to arise out of an abuse of the privileged occasion, such as where it is made to utter "a blackmailing threat of perjury" (see 684E) its significance alone cannot result in the admission being released from the cocoon of the "without prejudice" exclusion and into the

glare of the forensic arena." [20]

47. The courts have examined the situation where it is alleged that the unambiguous impropriety was discriminatory. In ***Mezzotero*** the respondent in that case had argued that for the exception to apply there must be a very clear case of abuse of a privileged position before the without prejudice public policy could be overridden, however the claimant argued that a genuine and legitimate complaint of (sex) discrimination would fall within the concept of unambiguous impropriety and thus an exception to the rule. The EAT held:

"35. In my judgment, Mr Galbraith-Marten's submissions are the more persuasive. What lies at the heart of the issue in this case is that this Applicant alleges direct sex discrimination and victimisation against her employers in seeking to terminate her employment after she had raised a grievance concerning discriminatory treatment following maternity leave. The sex and race discrimination legislation seeks to eradicate what the Court of Appeal have referred to as the "very great evil" of discrimination — see Jones -v Tower Boot [1997] IRLR 168 , and I consider that it is very much in the public interest that allegations of unlawful discrimination in the workplace are heard and properly determined by the Employment Tribunal to whom complaint is made, as the appropriate forum under the legislation. Further, it is widely recognised that cases involving allegations of sex and race discrimination are peculiarly fact-sensitive and can only properly be determined after full consideration of all the facts — see Anyanwu -v- South Bank Students Union and South Bank University [2001] IRLR 305 , and in particular the speeches of Lord Hope and Lord Steyn.

36. It is also widely recognised that proving direct discrimination is not an easy task for any complainant. Before the recent changes to the Sex Discrimination Act , following the EC Burden of Proof Directive, the case law had established that a complainant had to prove primary facts showing less favourable treatment, from which Employment Tribunals could, if they considered it appropriate, and without any, or any adequate explanation being advanced by the Respondent, infer that the less favourable treatment was on grounds of sex. The primary facts from which inferences of unlawful discrimination could be drawn were therefore a vital part of any complaint of direct discrimination before an Employment Tribunal. In my judgment, they remain equally important under the Act as amended, where section 63A(2) now provides:

"Where on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent —

> *(a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part 2,*
>
> *…*

the tribunal shall uphold the complaint unless the respondent

proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act."

37. In the present case, as Mr Galbraith-Marten points out, the logical result of Mr Davies' submission is that an employer in dispute with a black employee could say during discussions aimed at settlement in a meeting expressed to be being held without prejudice, "we do not want you here because you are black" and could then seek to argue that the discussions should be excluded from consideration by a Tribunal hearing a complaint of race discrimination.

38. Mr Davies immediately says that such a remark would obviously fall under the umbrella of unambiguous impropriety. I agree. However, Mr Davies is then faced with the unattractive task of attaching different levels of impropriety to fact-sensitive allegations of discrimination, in order to submit that the present remarks do not fall under the same umbrella. I do not regard that as a permissible approach. I would regard the employer's conduct, as alleged in the circumstances of the present case, as falling within that umbrella and as an exception to the "without prejudice" rule within the abuse principle, rather than it was as previously described, in terms of prejudice in the case of re Daintrey.

39. I do not regard this case as creating an impermissible extension to the categories of the rule, exceptions which will always fall to be considered within the particular factual context of the case and which, in the present case concerns discriminatory conduct by employers towards one of their employees."

48. However the EAT in ***Woodward v Santander UK Plc*** **[2010] IRLR 834** held:

"58. Reading the judgment in Mezzotero as a whole, we do not think that it establishes any new exception to the without prejudice rule. In paragraph 38 Cox J expressly stated that she would regard the employer's alleged conduct as an exception to the without prejudice rule "within the abuse principle". This had been the Tribunal's conclusion. Speaking for ourselves, we can see why. It was Ms Mezzotero's case that her employers sought to use the cover of "without prejudice" language to announce a course of action which was blatantly discriminatory. The two reasons why the employer's alleged conduct was admissible ran together: there was no genuine dispute to which the without prejudice rule could apply; and the employers sought to engage in a cynical abuse of the without prejudice rule to act in a way which was plainly discriminatory.

59. We doubt whether Cox J intended to say that it was unnecessary, in a discrimination case, to find unambiguous impropriety. We appreciate that paragraph 38 of her reasons, in which she refers to "the unattractive task of attaching different levels of impropriety to fact sensitive allegations of discrimination", can be read in that way. But Cox J went on to say that she regarded the employer's alleged conduct as "within the abuse principle".

60. We would observe that the policy underlying the "without prejudice" rule applies with as much force to cases where discrimination has been alleged

as it applies to any other form of dispute. Indeed the policy may be said to apply with particular force in those cases where the parties are seeking to settle a discrimination claim.

61. Discrimination claims often place heavy emotional and financial burdens on claimants and respondents alike. It is important that parties should be able to settle their differences (whether by negotiation or mediation) in conditions where they can speak freely. A claimant must be free to concede a point for the purposes of settlement without the fear that if negotiations are unsuccessful he or she will be accused for that reason of pursuing the point dishonestly. A respondent must be free to adhere to and explain a position, or to refuse a particular settlement proposal, without the fear that in subsequent litigation this will be taken as evidence of committing or repeating an act of discrimination or victimisation. And it is idle to suppose that parties, when they participate in negotiation or mediation, will always be calm and dispassionate. They should be able, within limits, to argue their case and speak their mind.

62. What are the limits? To our mind they are best stated in terms of the existing exception for impropriety. This exception, as we have seen, applies only to a case where the Tribunal is satisfied that the impropriety alleged is unambiguous. It applies only in the ***very clearest of cases****. A court or Tribunal is therefore required to make a judgment as to whether the evidence which it is sought to adduce meets this test. Words which are unambiguously discriminatory will of course fall within the exception: see the example given by Cox J at para 37 of Mezzotero.*

63. It may at first sight seem unattractive, given the fact sensitive nature of discrimination cases, to exclude any evidence from which an inference of discrimination could be drawn. But it would have a substantial inhibiting effect on the ability of parties to speak freely in conducting negotiations if subsequently one or other could comb through the content of correspondence or discussions (which may have been lengthy or contentious) in order to point to equivocal words or actions in support of (or for that matter in order to defend) an inference of discrimination. Parties should be able to approach negotiations free from any concern that they will be used for evidence-gathering, or scrutinised afterwards for that purpose.

64. We therefore reject Mr Bacon's submission that there ought to be a wider exception to the without prejudice rule where discrimination is alleged. We do not think such an exception is consistent with the policy behind the rule. We cannot see any workable basis for applying such an exception while preserving the parties' freedom to speak freely in conducting negotiations."

49. Accordingly there should be no difference in the application of the without prejudice rule between claims for unfair dismissal and discrimination, and that the exception for unambiguous impropriety applies only in the clearest cases, for example where there is blatantly discriminatory conduct.

Section 111A Employment Rights Act 1996

50. Section 111A: Confidentiality of negotiations before termination of

employment, 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 …."*

51. For section 111A to apply there is no need for a dispute to be in existence. However, the Tribunal must consider whether anything said or done was improper or connected with improper behaviour and then, to consider whether it is just and equitable for that to affect the application of section 111A - ***Harrison v Aryma Ltd*** **[2019] UKEAT/0085/19/JOJ**. The burden of proof rests with the party alleging the improper behaviour.

ACAS Code on Settlement Agreements (28 July 2013)

52. The Code provides as follows:

Improper behaviour

15. If a settlement agreement is being discussed as a means of settling an existing employment dispute, the negotiations between the parties can be carried out on a 'without prejudice' basis.

'Without prejudice' is a common law principle (i.e. non statutory) which prevents statements (written or oral), made in a genuine attempt to settle an existing dispute, from being put before a court or tribunal as evidence.

This protection does not, however, apply where there has been fraud, undue influence or some other 'unambiguous impropriety' such as perjury or blackmail.

16. Section 111A of the ERA 1996 offers similar protection to the 'without prejudice' principle in that it provides that any offer made of a settlement agreement, or discussions held about it, cannot be used as evidence in any subsequent employment tribunal claim of unfair dismissal. Unlike 'without prejudice', however, it can apply where there is no existing employment dispute.

The protection in section 111A will not apply where there is some improper behaviour in relation to the settlement agreement discussions or offer.

17. What constitutes improper behaviour is ultimately for a tribunal to decide on the facts and circumstances of each case. Improper behaviour will, however, include (but not be limited to) behaviour that would be regarded as 'unambiguous impropriety' under the 'without prejudice' principle.

18. The following list provides some examples of improper behaviour. The list is not exhaustive:

(a) All forms of harassment, bullying and intimidation, including through the use of offensive words or aggressive behaviour.

(b) Physical assault or the threat of physical assault and other criminal behaviour.

(c) All forms of victimisation.

(d) Discrimination because of age, sex, race, disability, sexual orientation, religion or belief, transgender, pregnancy and maternity and marriage or civil partnership.

Strike out

53. Rule 38 Employment Tribunal Rules of Procedure 2024 provides as follows:

Striking out

38.—(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—

(a)that it is scandalous or vexatious or has no reasonable prospect of success;

…

(2) A claim, response or reply may not be struck out unless the party advancing it has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

Submissions

54. I have recorded all of the caselaw to which I was referred (above) and I will focus on the key arguments.

55. The Respondents accept that the Claimant carried out protected acts in her resignation email (9 January 2024), her grievance (15 January 2024) and her notification to ACAS (28 March 2024).

56. Both parties are in agreement that s. 111A ERA 1996 cannot not apply to the March/April 2024 settlement discussions as they were not pre-

termination, and they agree that they were without prejudice discussions. The Claimant's position is that privilege is lost due to unambiguous impropriety.

57. The Respondents argue that it is sufficient for there to be a potential dispute for the without prejudice rule to be engaged and say that this was the case here. The Respondents say that the Claimant's victimisation complaints at 55c and 55d of the Grounds of Complaint can only be pursued if she establishes unambiguously improper behaviour, and they maintain the 4 January 2024 offer was nothing other than an attempt to settle a potential dispute between the Claimant and Respondents. The Respondents take support from the Claimant's subsequent resignation five days later, however the Claimant argues that the focus should be on what was happening at the time of the offer, not subsequent.

58. The Respondents accept that the 4 January offer was not repeated but say this falls far short of the extremely high threshold for unambiguous impropriety. The Respondents remind me that the test for unambiguous impropriety is deliberately difficult to satisfy and must be of a similar seriousness or level such as perjury or blackmail, and the exception only applies in the clearest of cases, and they ask me to consider is there a clear case of victimisation? The Respondents do not give a specific reason for the change in position with the offer but rather suggest that it can often happen during negotiations for example, due to having incurred legal costs, or reflecting a party's changing assessment of the claim, including merits and value, or it can reflect changing commercial realities. The Respondents also point out the original offer was made by the Second Respondent whereas the later offer was made by solicitors.

59. The Respondents address the timing of the change in offer and deny this could support an inference of unambiguous impropriety and they rely upon the judgment of the EAT in ***Woodward*** above that "*A respondent must be free to adhere to and explain a position, or to refuse a particular settlement proposal, without the fear that in subsequent litigation this will be taken as evidence of committing or repeating an act of discrimination or victimisation."* The Respondents tell me that the reference to refusing a settlement must be read to include making and amending one as well. The Respondents argue that that if the Claimant's claims were allowed to proceed, the floodgates would open to similar claims of victimisation based entirely on flimsy inference and material that would otherwise be privileged, and this would fly in the face of the policy objective of encouraging settlement.

60. The Respondents tell me that paragraph 64 of the judgment in ***Motorola*** provides a complete answer to this case and they remind me that in that case it was held that a good or arguable case by the Claimant is not sufficient to engage the exception and nothing short of unambiguous impropriety will do, and it is a deliberately difficult test to satisfy. The Respondents tell me that this a recent authority from the Court of Appeal which should be followed.

61. The Claimant denies that the offer of 4 January was covered by the without prejudice public policy principle and she says that there must be an extant (rather than potential) dispute, and the offer must be an attempt to settle

that dispute. The Claimant denies any sort of dispute at all, and in reliance on ***BE v DE*** she says that this matter did not reach the stage of a reasonably cohate and definable issue or series of issues and that it is questionable whether it even reaches the stage of a number of reciprocal differences or grievances which might or might not prove soluble with reflection and discussion.

62. Whereas the Claimant does not dispute she was told on 2 January she would be changing her role, she says this does not bring into an existence a qualifying dispute, and she reminds me that I must look at things objectively based on what occurred at the time and not what occurred later. The Claimant says she said very little between 2 and 4 January, she did no more than to ask what her options were and to agree to a meeting, and there is no suggestion she objected to anything or complained at all, she simply asked for information.

63. The Claimant acknowledges the options document was labelled as without prejudice but says it does not follow that it would proceed to litigation, and she says the Respondents' motives in seeking to exit her were discriminatory. The Claimant maintains that all that was done was to make her an offer with financial incentive and that is something quite different from a perception that litigation was going to arise based on the events to date.

64. The Claimant says that even if the Respondents did perceive that litigation may arise, a dispute by its very nature entails more than one person's view and there is no sign that the Claimant had litigation in mind by the relevant time.

65. The Claimant says that s. 111A ERA 1996 has a very different effect from without prejudice principle, and it was intended to allow off the record offers to be made in the absence of a dispute, and absent the improper behaviour it would be the type of scenario for which s. 111A was designed.

66. As regards whether the offer was an attempt to settle a dispute, the Claimant disputes that the 4 January offer was an attempt to set the same pre-existing dispute as the actual content of the offer was very light on information, and most it was an offer for an agreed termination. The Claimant says if it was a qualifying dispute, the Respondents fail to show it was an attempt to tackle that same dispute.

67. As to whether the exception of unambiguous impropriety applies, the Claimant relies on two alternative arguments. The first is that the offer formed an integral part of her claim of victimisation. The second is that the Claimant seeks to argue that the events of 4 January are consistent with the Second Respondent's unlawful and discriminating behaviour leading to her resignation. The Claimant places much reliance on ***Mezzotero*** where the employee raised a grievance including about demotion and thereafter the employer indicated their role was no longer needed. The employer in that case made an offer for termination and that employee presented a tribunal claim based on what was said at the meeting, and the tribunal concluded it would be an abuse of the rule to prevent any reference to the fact the Respondents sought at that meeting to terminate her employment.

68. The Claimant reminds me that in that case the EAT concluded *"I would regard the employer's conduct, as alleged in the circumstances of the present case, as falling within that umbrella and as an exception to the "without prejudice" rule within the abuse principle."* The Claimant's position, in reliance on ***Mezzotero*** is that an allegation of discrimination or victimisation is sufficient to amount to unambiguous impropriety and for the exception to apply.

69. The Claimant maintains the Respondents changed the settlement proposal to a very significant degree once she had done a protected act, and she says that was the reason for doing so. The Claimant again places considerable weight on ***Mezzotero*** and invites me to adopt a similar approach. The Claimant says it is not necessary for the purposes of determining the abuse issue, for the Tribunal to determine whether victimisation has in fact taken a place, and in ***Mezzotero*** no such finding was made and the EAT had recognised the difficulty faced by victims of discrimination proving their claims, and such claims should only be considered in the light of all the evidence, and that the matter proceeded on the basis of the conduct being alleged victimisation rather than proven victimisation.

70. Nevertheless, the Claimant says that if she is required to prove her victimisation claim she relies on the clear change in approach by the Respondents following her protected acts, the striking timing of that change, the absence of any other changes in that period, and the lack of explanation about the change in stance from the Respondents. The Claimant argues that the Respondents' legal fees could not have been the reason as they would not have incurred fees equivalent to the reduction in offer in that period, there must be another reason. The Claimant says that I should apply the burden of proof and that there is enough to shift that burden. The Respondents oppose this approach, they place weight on ***Woodward*** to which I have referred, and argue that without prejudice is a common law principle and the statutory burden of proof under s. 136 EQA 2010 has no role in the matter I am to decide.

71. The Claimant argues the events of 4 January are consistent with alleged unlawful and discriminatory behaviour and that for the Respondents to be allowed to present a case on the basis they were only wishing to change her role would be to allow an incomplete picture to be presented, and it would be improper for the Tribunal to exclude the striking and sudden offer of a termination package for January.

72. The Respondents argue that the reliance on ***Mezzotero*** is misconceived, they dispute that an allegation of discrimination or victimisation is sufficient to amount to unambiguous impropriety, to do so would open the floodgates and was rejected by the EAT in ***Woodward*** (at paragraph 64), and it is only in the clearest cases that the exception can be applied. The Respondents say that it is wrong to approach the matter from looking at "shades of impropriety" perspective. Further the Respondents say that in ***Mezzotero*** the court found no dispute, without prejudice did not apply at all as there was no privilege in the first place, the comments of the court about allegations were made at a basic level and that this is a weak authority.

73. The Claimant also accuses the Respondents of waiving privilege at paragraph 26 of the grounds of resistance as they have expressly pleaded the facts of the offer, and she says that they could instead have said nothing or simply that there had been an offer without going into the detail, but they had chosen to waive privilege by stating the contents of that offer. The Respondents deny waiving privilege, they say that they had to respond to the allegations made by the Claimant, to have done otherwise would have left a gap in the chronology or incomplete answer.

74. The Claimant relies on her same submissions for unambiguous impropriety as for improper conduct for the purposes of s. 111A ERA 1996, and draws to my attention that the ACAS Code expressly includes victimisation as an example of improper behaviour. The Respondents acknowledge that the ACAS Code says that victimisation is provided as such an example however it must be read as proven victimisation rather than a mere allegation – the floodgates argument applies here as much as for unambiguous impropriety exception to without prejudice rule.

Conclusion

75. There are very few factual disputes between the parties with respect to the issues I need to decide, and I have already made a finding that the Second Respondent did use the words "without prejudice" on the dates in question. In any event this was of very limited significance in connection with the matters I need to decide.

76. My first task is to decide whether the offer of 4 January 2024 is covered by the without prejudice policy principle (**Issue A**). In doing so I am required to decide if there was a dispute, and if so, whether the offer was a genuine attempt to settle that dispute. The Claimant argues that there was no dispute, she says that a potential dispute is not sufficient, and she suggests that both parties need to be of the same mind that there is a dispute. The Claimant goes further and says even if there was a dispute, the offer was not aimed settling **that** dispute.

77. The Respondents place more emphasis on a potential dispute rather than an extant dispute, they says that a potential dispute is sufficient and still falls within the definition of a dispute for these purposes, and that the Claimant's arguments are semantics. The Respondents say it is sufficient for just one of the parties to consider that there is a dispute. The Respondents do not invite me to consider the alleged performance concerns which have been referred to in the pleadings and the Second Respondent's witness statement, therefore I have put them out of my mind.

78. By the time the offer was handed to the Claimant on 4 January 2024 she had already been told she was to be removed from post and to be replaced, she had been aware of this since 2 January when she was told in person in a brief discussion and it was again discussed briefly on 3 January via Teams. The options documents were handed to her in person as she was on her way out of work. The Claimant had not said anything at this time which was indicative of a dispute from her point of view.

79. The Second Respondent is well used to discussions of this nature having

given evidence that he has conducted a number of them, and he would have been well aware of the potential for the discussions to result in either agreement or disagreement with the potential for litigation. Both individuals are highly intelligent, sophisticated professional people, and both knew what was on offer was either a demotion or an exit. The Claimant enjoyed a very senior position within the First Respondent, she had been promoted only a short time before, a demotion in such circumstances would have been a difficult thing to accept.

80. Whereas I am not persuaded that there was an extant dispute by the afternoon of 4 January, I am persuaded that the Second Respondent perceived that there was a genuine potential for a dispute in circumstances such as these where the Global Head of Professional Services was to be demoted to Senior Vice President of the Product Team. It seems to be unrealistic and implausible to argue that the Second Respondent would not have been cognisant of the potential for that decision to be challenged or disputed, or to result in litigation. I have put out of my mind the fact that it has so in fact resulted in litigation, nevertheless it is inconceivable that the Second Respondent did not genuinely believe at the time that demoting the Global Head of Professional Services may result in dispute and in litigation.

81. The question therefore is whether a potential (as opposed to an extant) dispute is sufficient, and further is it sufficient for only one the parties to perceive there to be a potential dispute?

82. With respect to potential disputes I find assistance from the judgment in ***Barnetson*** which simply asks the question of whether the parties contemplated or might reasonably contemplated have contemplated litigation if agreement was not reached. It seems to me that the answer is yes, it was reasonable for the Second Respondent to have considered that if agreement was not reached on either the demotion or the exit, then litigation might reasonably follow. The Respondents say that it is simply semantics to try and exclude potential dispute from inclusion within the without prejudice rule, and I agree. The whole purpose of the rule is encourage parties to settle their differences without the need for litigation – if it were not so then there would be no point in employers (or employees) making early offers such as Option B to avoid litigation.

83. I also find that the offer was made in connection with a reasonably cohate and definable issue, namely the demotion of the Claimant from her role, with the option of an exit if that could not be agreed. The fact that Option B makes specific reference to a settlement agreement supports my view, and this is consistent with the judgment in ***Portnykh***. In the appeal judgment in that case the EAT had determined that there did not need to be extant litigation, rather there needed only to be the potential for litigation. Accordingly I find that the potential dispute in this case was sufficient for the without prejudice principle to apply.

84. The authorities to which I have been referred do not directly address whether it is sufficient for just one of the parties to perceive that there is a potential dispute. Given that the definition of dispute is wide enough to encompass potential disputes it appears to me that it follows as a matter of logic that it is sufficient for only one side to perceive a potential dispute. I

have in mind the situation where an employer genuinely and reasonably believes that an employee is falling far below performance expectations whereas the employee is oblivious of the fact and genuinely believes that they are doing what is expected of them. The employer in that situation may wish to avoid a long drawn out capability process and instead offer an exit package on a without prejudice basis to avoid potential unfair dismissal proceedings later on.

85. The Claimant has rightly indicated that in order to be protected by the without prejudice rule the offer should relate to that dispute, and I agree. In this case the options package offered by the Second Respondent was clearly aimed at resolving the potential dispute as I have recorded above. I see no basis for arguing otherwise.

86. I will then move on to consider whether the exception of unambiguous impropriety applies here (**Issue B**). The allegation is that the Respondents sought to exit the Claimant and the motivations were discriminatory. The burden rests with the Claimant to persuade me that there was unambiguous impropriety at this time. The Claimant has not succeeded in doing so. Based upon the very limited material before me today this is a bare allegation of sex discrimination, there is nothing more to it than that.

87. The Claimant places significant weight on the judgment in ***Mezzotero*** and this is understandable when one reads the passage which I have included above, however in that case, as the Respondents argue, the without prejudice rule was not engaged as there was no dispute in the first place. The passage relied upon in that judgment was made by way of helpful observation, but it is clear that it does not lay down any binding principle that in every case where it is alleged that the offer was discriminatory it acts as an exception to the without prejudice rule. The judgment is clear that each case must be judged within its own particular factual context, and it was agreed that the explicit discriminatory words as provided for in the theoretical example referred to in the judgment, would amount to an exception for unambiguous impropriety.

88. The Respondents argue that were I to find that a bare allegation of discrimination is sufficient for the exception to apply, this would open the floodgates. I agree. The purpose behind the rule in the first place which is to allow the parties to speak freely and for those discussions to be excluded, and to encourage settlement and to avoid the need for litigation. If the exception were to be applied in the way suggested by the Claimant it would drive a coach and horses through the purpose of the rule, and as the Respondents argue, open the floodgates. Something more is needed before it may amount to unambiguous impropriety.

89. The question as to what is needed before something will amount to unambiguous impropriety is answered head-on in ***Woodward*** which addressed the judgment in ***Mezzotero***. In ***Woodward*** the EAT held that it would only apply in the clearest of cases, a tribunal is required to make a judgment as to whether the evidence meets this test, and that words which are unambiguously discriminatory would fall within the exception. The EAT was clear that an allegation discrimination on its own was insufficient.

90. The Claimant does not present a clear case of unambiguous impropriety, she had presented me with an allegation of sex discrimination. I do not consider that to be sufficient for the exception to apply. There were no unambiguously discriminatory words or conduct put before me. I cannot therefore find that the exception applies in this case. I find support for this in the ***Motorola*** judgment referenced above noting that this is a difficult test which the Claimant has not satisfied before me.

91. I will briefly deal with the issue of waiver of privilege by reference to paragraph 26 of the Grounds of Resistance (**Issue C**). I do not find that the Respondents waived privilege. The Respondents were required to respond to the allegations made by the Claimant, they have done so, and there is no more to it than that. Had the Respondents failed to do so then they may equally have been criticised for not actively pursuing the defence.

92. Having found that the offer was covered by the without prejudice rule, and the exception of unambiguous impropriety does not apply, it is not strictly necessary for me to deal with the question of whether the conduct on 4 January 2024 was improper for the purposes of s. 111A ERA 1996 (**Issue D**), nevertheless I will address that briefly.

93. I am not persuaded that the Respondents did act improperly in the context of the offer communicated to the Claimant on 4 January 2024. The Code refers to victimisation and discrimination as examples of improper behaviour, and the Respondents say that this should be interpreted to mean proven rather than alleged. I am not satisfied that a bare allegation would be sufficient for the exception to apply, had that been intended then the Code would have expressly recorded that however it does not. It is clear to me that the Code is referring to either proven acts of discrimination or victimisation, or at least obvious or blatant examples of either of these things. In the present case there is no proven act of discrimination, and there is no obvious or blatant discrimination either, there is an allegation which remains to be decided at a final hearing.

94. I will now address whether the exception of unambiguous impropriety applies to the relevant correspondence of March and April 2024 (**Issue E**). The parties are agreed that these were without prejudice discussions, the issue is about the change or diminution in the offer made by the Respondents at that time. It is agreed that the offer was less generous. I remind myself that it is the Claimant not the Respondents who has the burden of persuading me that there was unambiguous impropriety.

95. I am not persuaded that the change in the offer amounts to unambiguous impropriety. The Respondents have not proffered a reason but they do not have to do so at this stage – it is for the Claimant to persuade me in the context that the exception will only apply in the clearest of cases. This is not one of those clearest of cases.

96. The offer of 4 January 2024 was made when the Claimant was still employed, before legal costs had been incurred, and presumably before legal advice had been obtained and before litigation strategy had been discussed. The first offer was made a by the Second Respondent, the second was made by a practising lawyer. There could be any of a number

of reasons why the offer was changed, the fact that the Claimant complained of discrimination in her resignation, her grievance and to ACAS is one possible explanation but it is no more than one of many possibilities.

97. As discussed above, there needs to be more than an allegation of victimisation for the exception to apply. I have not been presented with anything beyond that. I therefore do not find that the change in offer between 4 January and March/April 2024 amounts to unambiguous impropriety.

Strike out

98. Having determined that the offer of 4 January 2024 was without prejudice and cannot be referred to, I have determined that that issues 15(c) and 15(d) of the Agreed List of Issues have no reasonable prospects of success within the meaning of Rule 38(1)(a) and should therefore be struck out.

99. I direct that that the last line of paragraph 6, as well as paragraphs 41, 55(c) and 55(d) be deleted from the Grounds of Complaint as well as paragraphs 15(c) and 15(d) of the Agreed List of Issues.

100. The Claimant will have 14 days from the date this judgment is sent to the parties to file and serve Amended Grounds of Complaint which removes the references I have identified. The Respondents will have 14 days thereafter to file and serve an Amended Grounds of Resistance which removes the response to those issues.

101. I thank Mr McPhail and Mr Francis for their valuable assistance and co-operation during this hearing, and also for their oral and written submissions of such a high quality.

Approved by:

Employment Judge Graham
27 May 2025

JUDGMENT SENT TO THE PARTIES ON

27 May 2025

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision. If written reasons are provided they will be placed online.

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments

are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/