

the Claimant at his home address. On that day there were two separate conversations, and the Respondent contends that they were protected conversations pursuant to section 111A of the Employment Rights Act. This Preliminary Hearing was convened in order to deal with that issue.

3. **The Law**

Section 111A of the ERA reads as follows:

(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.

4. In unfair dismissal cases, by virtue of s 111A(1) of the ERA 1996, evidence of pre-termination negotiations is inadmissible. Such negotiations (also known as 'protected conversations') are defined as ***'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'*** (s 111A(2)).
5. The introduction of this provision was designed to enable negotiations to take place between an employer and an employee without employers running the risk of breaching the implied term as to trust and confidence and thus engendering a constructive dismissal complaint if they instigated the negotiations, and also to protect the confidentiality of the discussions in circumstances where the common law 'without prejudice' principles, which only cover an existing dispute, would not apply.
6. There are, however, limitations to the scope of s 111A(1). First, it does not apply where it is the Claimant's case that the dismissal was automatically unfair (s 111A(3)). Second, if anything that was said or done in such negotiations was, in a tribunal's opinion, improper or connected with improper behaviour, it will only apply to the extent that the tribunal considers just (s 111A(4)). Third, it does not prevent a party from giving evidence about an

offer made in such negotiations, in connection with a question as to costs, where the right to refer to it on that question has been reserved (s 111A(5)).

7. A Code of Practice on Settlement Agreements has been issued by ACAS to assist employers and employees and their representatives in understanding the implications of s 111A. This gives useful guidance on settlement agreements in a number of areas and sets out (at para 18) examples of what is likely to constitute improper behaviour under s 111A(4). Such examples include all forms of harassment, bullying, intimidation, actual or threatened physical assault, all forms of victimisation, discrimination and putting undue pressure on a party.

8. In ***Faithorn Farrell Timms LLP v Bailey [2016] IRLR 839***, EAT, a case concerning both the interpretation of ERA 1996 s 111A and the relationship between it and the common law without prejudice privilege, Judge Eady QC made the following points of general importance:

(a) Whilst s 111A was designed to run alongside the without prejudice principle (see the foreword to the Code of Practice), the section is not to be viewed 'through the lens' of that principle but must be construed on its own, statutory, terms and independently of the without prejudice case law.

(b) Although evidence of discussions where there is no dispute can only be rendered inadmissible under s 111A (unlike the position under the without prejudice rule, where there must be an existing dispute for the privilege to apply), the subsequent existence of a dispute does not mean that s 111A falls away; it remains applicable in any unfair dismissal claim before the employment tribunal.

(c) The section renders not just the content of the negotiations inadmissible, but also the fact that they took place. So, if the Claimant were to rely on the existence of pre-termination negotiations in support of his claim of unfair dismissal, any reference to the fact that they had occurred would be prohibited by s 111A(1).

(d) Although evidence of pre-termination negotiations is inadmissible in unfair dismissal claims, this does not render it inadmissible for the purpose of any other claim, such as discrimination. Therefore, if there are multiple claims, including unfair dismissal, evidence of pre-termination negotiations will be admissible in relation to the other claims but inadmissible in relation to the unfair dismissal claim.

(e) The scope of s 111A extends not only to render inadmissible relevant discussions between employer and employee but also discussions within the employer – for example, discussions between different managers or a manager and an HR adviser – as it would run counter to the purpose of the section if evidence of those reports were ruled admissible.

(f) The term 'improper behaviour' in s 111A(4) is, as stated in paragraph 17 of the Code of Practice, wider than the term 'unambiguous impropriety' in relation to the without prejudice principle. This allows the tribunal to take a broader approach to the behaviour in question and gives it greater flexibility when exercising its discretion under s 111A(4). With regard to the exercise of that discretion, Judge Eady pointed out that it involves a two-stage task by the

tribunal. The first is that it must consider whether there was improper behaviour by either party during the settlement negotiations, this being a matter to be determined on the particular facts of the case, having due regard to the non-exhaustive list of examples in paragraph 18 of the Code. If there was, the second stage requires the tribunal to decide the extent to which the confidentiality should be preserved in respect of those negotiations.

(g) An important distinction between s 111A and the without prejudice principle is that, whereas the without prejudice privilege can be waived, there can be no waiver of confidentiality under s 111A.

The Facts

9. The Respondent is a manufacturer based in Shrewsbury. Mr Homden is the CEO of the Respondent. The Claimant was an employee who had over ten years of service when he was dismissed on 1 July 2019. As at the date of his dismissal the Claimant was the Respondent's Operations Director. that was an important role within the Respondent.
10. The Claimant and Mr Homden had a good relationship for a substantial period both inside and outside of the office. As an example, Mr Homden invited the Claimant to be the godfather to his eldest son.
11. In the summer of 2018, the Claimant separated from his wife. The Claimant found the circumstances difficult to deal with and explained that he started drinking as a means of coping. It was flagged up as an issue of concern when the Claimant was prosecuted for drink driving following an incident on 30 October 2018. Mr Homden attended at the Magistrates Court on 16 November to support the Claimant.
12. Mr Homden states that he began to see a decline in the Claimant's performance and that that was particularly marked in January to March 2019. In March 2019 the Claimant took some time off for what could colloquially be called a nervous breakdown and later in March 2019 the Claimant had a serious panic attack. According to the Claimant his mental health difficulties declined at the same time as his drinking accelerated.
13. On 28 March Mr Homden wrote a letter to the Claimant in which he expressed concern for the Claimant's health and his ability to carry out his role within the Company.
14. On 5 April the Claimant admitted himself to the Priory Hospital in Birmingham and a 28-day programme in relation to alcohol dependence was commenced. The course cost £10,000 and was paid for by the Respondent all be it that the payment was said to relate to "71 days holiday you have accrued over previous years". It is far from clear how the PAYE was dealt with on this sum Mr Homden expressed that the Respondent was keen for the Claimant to return to work when fit and would be there to support him.
15. A note was sent to staff on 8 April 2019 explaining that they needed to keep the Claimant away from any work issues and that they needed to effectively leave him alone.

16. On 23 April the Claimant was sent a letter by Mr Homden. So far as is relevant it read as follows:

I sincerely hope this letter finds you well and that your treatment is progressing as planned. I have tried to leave you in peace as I didn't want there to be any distraction to your recovery. Naturally, though, we need some communication on your current situation and the bigger picture.

Please ask your treatment team for a written outline of the journey you are expected to follow and guidelines on time scales. To be clear, I am primarily concerned that you recover fully with the best prospects of long-term well-being. Meanwhile we will be better able to manage the business if expectations are realistic.

Our thought process is "one step at a time". We need to be kept informed without pressure on you. This may, with your permission, be best done by your professional carers on a planned and regular basis. Similarly, when appropriate, we will be happy to keep you in the picture regarding the business.

17. Mr Homden told me that the 23 April letter had been drafted by Mr McNair a solicitor and that he believed that whilst options were going to be kept open a return was unlikely. There is no note of that conversation, but I accept Mr Homden's evidence that it took place.
18. On 1 May Mr Homden spoke with the Claimant's therapist over the telephone from this he gleaned that the therapist's view was that the Claimant used work as his identity and that he was exceptionally fearful about losing his job. He indicated that the Claimant had responded well to his treatment, but it was a difficult journey that the Claimant had to follow. Again, I accept this account and it would appear that the Claimant himself realised that because of the current circumstances there would be question marks over his ongoing employment with the Respondent.
19. Mr Homden spoke with the Claimant at the Priory that evening. The Claimant made it clear that the 28-day programme ended on 3 May 2019. Mr Homden notes that he made it clear that there was no question of an automatic immediate return to work, and it was necessarily a question of "when", but it could be "if". Mr Homden stated that the Claimant would need to be fit and ready to return. Mr Homden noted that it was "great to see a positive difference to (the Claimant's) posture and complexion and that he looked and sounded much better." He concluded that there was obviously still a long way to go and that he was concerned that the Claimant might be in a bit of denial about certain aspects of his condition and past behaviours. The conclusions he came to do not seem to be unreasonable ones in light of the information available.
20. In oral evidence Mr Homden explained that he went to visit the Claimant in order to "affirm the doubts that (he) had" and they were affirmed.
21. Mr Homden states that he made his decision that the Claimant would not be returning to the Respondent at that point. The reason was because of the

Claimant's alcoholism and the fact that he did not believe the Claimant would be able to maintain the progress and/or recover adequately. Mr Homden believed that contrary to the Claimant's denials that the Claimant had been drinking at work and that the Claimant was yet to fully admit the extent of his issues with drink, which he concluded was an ongoing problem.

22. Mr Homden was aware that the Claimant would be leaving the Priory on 3 May and used the letter of 23 April and the visit of 1 May to begin to lay the ground for the Claimant not returning to work straight away.
23. On 3 May Mr Homden went to see Miss Workman, an employment solicitor and privilege has been waived in respect of the discussion. The notes of that meeting from the solicitor's file were at 532 of the bundle. Mr Homden stated that his gut feeling was that he did not want the Claimant back at the Respondent and indicated his belief that he had evidence that the Claimant had been drinking in the workplace. Mr Homden stated that if there was no personal relationship then he would have sacked the Claimant already.
24. Within the notes are the following entries:
 - "SA? Offer with therapist present and fund extra few days".***
 - "Richard going to have an honest conversation (PC) with Lee..."***
 - "Have grounds to sack – should be going through disciplinary process don't want to as don't want to affect progress made here".***
25. It is clear that Mr Homden is in a dilemma. He does not want the Claimant back and would have dismissed him but for the personal relationship but also does not want to act in a manner that may affect the progress of the treatment.
26. Whilst the notes are not absolutely clear about the advice which was tendered there is sufficient within them to suggest that the possibility of having a protected conversation was raised (PC) and that it might end up in a Settlement Agreement (SA). I am satisfied that at least one of the reasons why Mr Homden wished to go along an agreed route was to avoid a disciplinary process as he believed that would cause the Claimant some form of relapse. Having said that an objective view would suggest that whatever means of exiting the Claimant from the Respondent was unlikely to be beneficial for his health. I am satisfied however that Mr Homden had effectively made up his mind at this point to terminate the Claimant's employment one way or another.
27. On 5 May the Claimant sent Mr Homden a message stating that he had had a really great weekend and was looking forward to coming back into work on Tuesday which would be the first day back after the bank holiday. This brought matters to a head and Mr Homden felt he had to act decisively, and he arranged to meet the Claimant at his home the following day. As stated earlier he had decided that the Claimant was not going to return, and he needed to discuss matters with him before he reappeared at work.
28. On the way to meet the Claimant, Mr Homden called the Claimant's father Malcolm Pearson. He knew what was going to happen and that there were

risks that the Claimant would not take it well. What was going to happen was that Mr Homden was going to communicate that the Claimant was not going to come back to work and there were to be discussions about how that was going to be achieved. I accept the evidence of Mr Pearson that Mr Homden did not specify that he was going to have a protected conversation although I do find that is what he was intending to do. When Malcolm Pearson communicated with Ms McClelland he told her what he had honestly deduced from the conversation i.e., that the Claimant was going to be sacked because that is what he had picked up from the discussion. I do not accept however that it was clear from what Mr Homden said on the telephone that the Claimant was going to be sacked that day but that he was going to be leaving at some point.

29. The actions of Mr Homden were impulsive and driven by the message from the Claimant that he was looking to return on the following Tuesday. As is often the case with impulsive actions, it was not fully thought through. Time might be needed, and full focus should have been on the matters in hand. Travelling with a young family and leaving them in the car whilst dealing with matters was always going to be a recipe for problems.
30. When Mr Homden arrived, he had a conversation with the Claimant. The Claimant's account of that conversation was very brief in his statement. It was not that much more detailed or clear in his oral evidence. He told me that Mr Homden asserted that he had been drinking at work and it was made clear that the Claimant would be leaving. He said that the conversation which lasted 15-20 minutes was punctuated with Mr Homden taking calls from his wife about the children being agitated in the car.
31. In that conversation I accept that Mr Homden made it clear that there did not appear to him to be any options whereby the Claimant would be able to stay with the Company and that he did say that they would need to "part company". Having said that I do not accept that the Claimant was dismissed there and then. Whilst I do not believe that Mr Homden specifically used the words "protected conversation" the possibility of leaving on terms was communicated and was the main thrust of the discussion. I believe it also to be the case that as Mr Homden felt very uncomfortable about what he was doing and because he was being pressurised from the car outside that at the end of the first conversation he did say that he would try and think of other options.
32. Mr Homden left the house but after sorting his son out he decided that leaving the Claimant with some hope was not the right thing to do and so went back to the house to reiterate that the options were limited and if the Claimant did not accept a settlement via an agreement then he would have to invoke the disciplinary process on account of the drinking at work. I do not accept the Claimant's evidence he dismissed the Claimant on his return. I accept that Mr Homden's evidence that he pointed out that if there could be no agreement then the disciplinary route would need to be undertaken. Having carefully considered both accounts of what took place I prefer Mr Homden's more detailed account.

33. On 10 May having taken further advice on 9 May the Respondent sent the Claimant a letter which was headed Protected Conversation and put forward terms for the Claimant's consideration. That letter was drafted by his solicitor.

The Issues

34. The parties' representatives drew up the issues which I was required to determine:

In relation to each of the conversations:

(i) Did the conversation include "pre-termination negotiations" as defined by section 111A(2) of the ERA 1996, namely "any offer made, or discussions held ... with a view to [the Claimant's employment] being terminated on terms agreed" between the Claimant and the Respondent?

(ii) If the answer to (i) is "yes", was anything said or done by Richard Homden (acting on behalf of the Respondent) which was improper, or connected with improper behaviour? Insofar as it is necessary for him to do so, the Claimant relies upon example (e) at paragraph 18 of the ACAS Code of Practice on Settlement Agreements (attached).

(iii) If the answer to (ii) is "yes", to what extent, if at all, does the Tribunal consider that it would be just to apply section 111A(1) to render evidence of the relevant conversation inadmissible.

Conclusions

35. My conclusions are as follows in respect of (i) above. I find that both meetings fell within the definition set out at section 111A (2). There is no obligation to specify that a protected conversation is taking place and one must view the facts objectively to assess whether the definition is met. There is sufficient evidence for me to find that Mr Homden attended with a view to have a protected conversation and to discuss a settlement agreement and that this was his clear preference as opposed to going down a disciplinary route.
36. I do not consider that Mr Homden planned the meeting particularly well at all. He was taken aback at the Claimant's suggestion that he would be returning to the workplace imminently and was thus pressed into immediate action. It was unhelpful during the first meeting to have the pressures from his family waiting outside although no blame is attached to them. It was never a good idea to have them with him in the first place when undertaking such a delicate task. I am satisfied that both meetings would be protected under section 111A of the ERA 1996 and contained pre-termination discussions as defined at section 111A (2) ERA.
37. The Claimant contends that Mr Homden exhibited improper behaviour and specifically cites paragraph 18 (e) of the ACAS Code of Practice in relation to Settlement Agreements. They include not giving sufficient time for considering any offer or perhaps more pertinently ***"an employer saying before any form of disciplinary process has begun that if a settlement proposal is rejected then the employee will be dismissed."***

38. Paragraph 19 of the Code of practice states:

“The examples set out paragraph 18 above are not intended to prevent, for instance, a party setting out in a neutral manner the reasons that have led to the proposed settlement agreement or factually stating the likely alternatives if an agreement is not reached, including the possibility of starting a disciplinary process if relevant. These examples are also not intended to be exhaustive.”

39. I do not consider that there was any improper conduct in the first meeting between the two men. I fully accept that the overarching message to the Claimant was that Mr Homden could not see the Claimant returning but the emphasis was very much on explaining that a settlement agreement could be the best way to bring matters to a close. Due to the Claimant's desire to stay and the pressures from outside the house Mr Homden yielded at the end of that conversation to say that he would think of alternatives.

40. I also do not consider that there was improper behaviour in the second conversation. Mr Homden was trying to avoid going down a disciplinary route because he knew that would be detrimental to the Claimant's ill health. As stated earlier I find that he misjudged how his alternative plan would be received as it is clear to me that ending the employment relationship in any guise would be very likely to set the Claimant back.

41. Having left the meeting Mr Homden realised that he was not going to have any thoughts that would assist the Claimant and returned to set out the facts which were that in the event that the Claimant did not accept a settlement agreement he would have to instigate disciplinary proceedings in respect of the allegation of drinking in the workplace. I take the view that this situation falls within the caveat set out at paragraph 19 of the ACAS Code and that he did not assert that the Claimant would definitely be dismissed. I accept that the Claimant himself may have viewed his dismissal as very likely because he realised the potential seriousness of the allegation of drinking at work, but I am satisfied that Mr Homden did not use the disciplinary process as a stick with which to beat the Claimant in order to cajole him into signing up to the agreement. He did not say that the Claimant would be dismissed in the disciplinary process but merely that the disciplinary route would be gone down. He, as set out at para 19 of the Code, was providing a factual backdrop that disciplinary proceedings would be very likely in the future if an Agreement could not be reached.

42. It follows from my findings that the conversations on 6 May were protected conversations pursuant to section 111A ERA and there should be no reference to the content of them or the fact that they happened at all pursuant to the authorities.

43. The parties are encouraged to consider the pleadings to this case in order to amend them so that the findings above are applied. This matter will have to be relisted for a final hearing and I will direct that a Telephone PH be convened for any outstanding issues to be dealt with. Although it would normally make sense for me to undertake that hearing I have, since the last hearing stopped being an Employment Judge in the Birmingham region and

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have now moved to another region on a full-time basis. That transition has also led to the delay in sending out this judgment for which I apologise. A different Employment Judge will take this matter forwards.

Signed by: Employment Judge Self

Signed on: 26 July 2021