EMPLOYMENT TRIBUNALS

Claimant: Mr Mark Shanahan

Respondent: National Opera Studio

Heard at London South via CVP **On: 27th July 2023**

Before:

Representation
Claimant: Mr M Palmer (Counsel)
Respondent: Ms J Shepherd (Counsel)

JUDGMENT

The discussions contained in the meeting of 31st March 2021 are without prejudice for the purposes of the age discrimination claim and protected under s.111A Employment Rights Act 1996 for the unfair dismissal claim.

REASONS

The Issue

1. The issue before me was identified by EJ Dyal in the case management preliminary hearing on 1st February 2023. It is as follows:

2. Is the fact and/or content of the meeting of 31st March 2021 admissible and if not, should reference to it in the pleadings and evidence be redacted?

    a. Does without prejudice privilege apply?
    i. Claimant says its does not because there is no extant dispute.
    ii. Litigation was not in contemplation.
    iii. The iniquity exception applies.

b. Does s.111A apply?

i. Was this a pre-termination negotiation?
ii. Was anything said or done that was improper?
iii. If so, to what extent if any should s.111A apply?

Findings of Fact

3. The Respondent is a charity and a professional opera training provider for young artists ('YA's') which provides professional training for careers in the Opera. The Claimant is an internationally recognised conductor and coach and was employed as Head of Music from 1st September 2010 until his dismissal on 3rd September 2021. The Claimant's line manager was Chief Executive, Emily Gottlieb.

4. The Claimant has brought an ET1 dated 23rd December 2021 presenting claims for unfair dismissal and age discrimination. In the list of issues produced by EJ Dyal the allegations of age discrimination comprise the Respondent's decision to investigate the Claimant's conduct in an effort to manufacture a purportedly fair reason for dismissal and his dismissal on 3rd September 2021.

5. I heard evidence from the Claimant and Ms Gottlieb. Ms Gottlieb's evidence was that over the course of the Claimant's employment there had been informal complaints against the Claimant but nothing had ever been dealt with as part of a formal process. The Claimant was questioned about a prior concern raised about the use of pronouns in respect of a Young Artist who had just commenced training. His evidence was that this was resolved to the satisfaction of everyone concerned. Whether it would have been clear to the Claimant that any matters raised previously were 'complaints' as such was unclear to me but it is accepted that the Claimant was never subjected to formal disciplinary proceedings in his career up to that point.

6. Both the Claimant and Ms Gottlieb's evidence was that they had a reasonably good relationship. In February and March 2021 Ms Gottlieb says she received a number of complaints about the Claimant from several Young Artists, coaches, staff members and external colleagues and she also received a formal complaint. She formed the view that those complaints formed a pattern of behaviour and that the nature of the behaviour was that it was intimidating, bullying and possibly discriminatory, which was contrary to the organisation's Code of Conduct and its values as an organisation.

7. On 18th March 2021 Emily Gottlieb had a meeting with the Claimant. The Claimant believed this meeting was a meeting in which they would discuss auditions. At the meeting Ms Gottlieb told the Claimant that there was going to be an investigation and suspension in respect of allegations of bullying and intimidation. The Claimant proceeded to record the meeting and a transcript that the Claimant has produced is at page 109. The Claimant was, understandably, shocked by what he had heard. There was then some discussion of what a disciplinary procedure might lead to and

the word 'warning' is mentioned and then the words 'or is'. Then Ms Gottlieb suggests a without prejudice conversation. The Claimant at one point says 'if you want me to leave just say it'. Ms Gottlieb mentions that there have been worrying conversations and that there was enough to have her very worried. Ms Gottlieb told the Claimant that there was going to be an investigation which she said would be painful.

8. It was clear from Ms Gottlieb's evidence and from the minutes that she was finding the topic of conversation uncomfortable. Ms Gottlieb accepts that she did not provide the Claimant with specifics of the allegations and that at that stage he would simply have had the 'headline' descriptions of the allegations rather than any specifics. That remained the case leading up to and including 31st March 2021.

9. On 18th March Ms Gottlieb referred to George Floyd and Me Too in the course of discussions. It seems from the minutes that this was in an attempt to say that we were living in a different world now where people were likely to call out behaviours. At page 116 the Claimant asks what would be achieved in the chat to which Ms Gottlieb says *'it would be likely be you leaving the organisation but on terms that were more favourable than on you leaving with dismissal and without pay.'* I find that the reference to that is a reference to the possibility of the Claimant being dismissed summarily for gross misconduct. At one stage the Claimant says if you want me to leave then say so. She then goes on to say that she is not suggesting that dismissal would definitely be what would happen but I find that it is apparent that at that stage it was foreseen to be a possible outcome of the investigatory process.

10. Having read those minutes I find that Ms Gottlieb posited the possibility of the WP conversation at that stage as a potential alternative to the Claimant going down the disciplinary route as it would have been apparent to her at that stage that the allegations were serious and dismissal would be a likely result of the process. Her views about the seriousness of the allegations were made clear to the Claimant. It was suggested by Ms Gottlieb that the Claimant may wish to conduct his own research into what without prejudice meant.

11. Following that meeting the Claimant was informed that the investigation would commence after the weekend and that he would be suspended. By letter dated 19th March 2021 the Claimant was informed that there would be an investigation and that if there was found to be a case to answer he would be invited to attend a formal disciplinary process. The Claimant was suspended. The allegations that were put to the Claimant were not particularised but were in headline form.

12. On 19th March 2021 Ms Gottlieb emailed the Claimant heading the email 'without prejudice meeting' and said that he could bring a friend, colleague or trade union member along with him. On 26th March 2021 the Claimant emailed Ms Gottlieb saying '*with regard to your offer of a without prejudice meeting I would be happy to meet with you.'* The Claimant said that given the circumstances he was attempting to be conciliatory. By letter of that

date, Lorna Parker wrote to the Claimant to inform him that she was conducting an investigation into his actions relating to:

-complaints that appear to reveal a pattern of what is being perceived as bullying, intimidating, possibly discriminatory behaviour
-alleged behaviour which is counter to Dignity and Respect Code of Conduct as well as our values as an organisation.
-conduct and behaviour that have the potential to bring the Studio into disrepute.

13. The Claimant was invited to an investigation on 7th April. He was given the right of accompaniment.

14. The off the record meeting took place on 31st March 2021. Lucinda Harvey took notes and sent these afterwards to the Claimant and asked him to comment if there was anything that was a 'glaring omission.' The notes are at page 98. The Claimant then amended them and sent them back (p.102).

15. By the time the Claimant came to the meeting of 31st March 2021 he was aware that he was under formal investigation for bullying, discrimination and intimidation, allegations contrary to the Code of Conduct and conduct and behaviour which may bring the Respondent into dispute. He had been suspended. He did not know the particulars of the allegations. However, he knew from his conversation with Ms Gottlieb that dismissal may be one of the outcomes and it would have been reasonable for him to conclude that even at this stage given the nature of the meeting on 18th March.

16. I find that Ms Gottlieb was looking at ways to mitigate what could be damaging for both the Claimant and the organisation as well as the people involved in the investigation. I take into account that both the Claimant and Ms Gottlieb had had a good relationship. I find it was a difficult conversation that Ms Gottlieb was uncomfortable with conducting. I do not consider that there was evidence of any malign motive or underhand behaviour on her part during that meeting in holding a without prejudice discussion.

17. At the meeting on 31st March Ms Gottlieb explained to the Claimant what without prejudice meant. She mentioned that there would be some protection from the law, that they could talk freely and that discussions and correspondence could not be referred to in court. The meeting was described as to discuss options about the Claimant's future with NOS. Throughout that meeting the Claimant made it clear that he did not know what he was discussing and that he wanted to know the specifics. I do have some sympathy with his position in relation to that but he would reasonably have known of the seriousness of the nature of the allegations. During that meeting it was said by Ms Gottlieb that one option was to talk about an exit with a monetary package and an agreed set of words. Another option that was posited was that he became an external advisor or consultant or an external coach. One of the action points following the meeting was that Ms Gottlieb was to talk to the Board and come up with a proposal confidentially. There were further discussions which crystallised in an offer being made to the Claimant on 10th May 2021.

Submissions

18. On behalf of the Claimant it was submitted that the Tribunal needed to look at events from that time. The without prejudice rule does not apply. Neither party would have known on the information at that point in time how the allegations would have developed. There was no extant dispute on the facts as the Claimant did not know the allegations so could not have any sense of a dispute. There could have been no consciousness for the possibility of litigation if there were no details given. No investigation had been commenced. The Claimant claims discrimination about the decision to progress the investigation but there was nothing to advance an allegation of discrimination beyond that for the purposes of the iniquity exemption to the rule.

19. For the Respondent it was submitted that the parties' agreement was highly relevant in this case. The basis for the discussions was made clear to the Claimant. The Tribunal is entitled to look at the context and there had been a history of complaints raised. The Respondent can see what is coming down the line. This time it was a number of serious complaints. There was every possibility of it ending in termination. It was going to be unlikely that the Claimant would accept that and would go to the tribunal. By the time of 31st when the basis for the discussion was put to him and the investigation had started it would have been reasonable for the Claimant to believe that litigation was a possibility. The discrimination allegation was insufficient to make out the iniquity exception. There was no evidence of deliberate discrimination in March meeting. There was nothing to suggest that there was improper behaviour for the purposes of the s.111A claim.

The Law

20. I am grateful for Counsels' skeleton submissions and the authorities that they provided. They were agreed on the authorities.

Unfair Dismissal

21. I am reminded that I am to consider this independently of the common law principles of privilege applying to the without prejudice rule generally – **Faithorn Farrell Timms LLP v Bailey EAT [2016] ICR 1054**.

s.111A ERA 1996

(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.**]**

22. There is an ACAS Code of Practice which accompanies the section. That provides at paragraph 6 that pre-termination negotiations can be treated as confidential even where there is no current employment dispute or when one of the parties is unaware that there is a problem. Under paragraph 17 the Code says that what constitutes improper behaviour is ultimately for the Tribunal to decide but that it will include behaviour that would be regarded as unambigious impropriety. Examples of such are provided and include discrimination and putting undue pressure on a party.

Age Discrimination

23. In **Independent Research Services v Catterall [1993] ICR 1** Knox J upheld the application of the without prejudice rule to Tribunal proceedings and stated that *'the without prejudice privilege is correctly so described is one that is founded on a very clear public policy that it is desirable that the parties be free to settle their differences without the fear of everything that they say in the course of their negotiations being used in evidence thereafter.'*

24. In **Unilever v Procter and Gamble [2000] WLR 2436** at page 2441 Walker LJ referred to the authorities and described the rule as mentioned the dicta of Griffiths LJ in **Ruch &Tompkins Ltd v Greater London Council [1989] AC 1280** who stated:

> The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in *Cults v. Head* [1984] Ch. 290, 306: '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 B failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in *Scot! Paper Co. v. Drayton Paper Works Ltd* (1927) 44 R.P.C. 151, 156, be encouraged fully and frankly to put their cards on the

table . . . The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence."

25. In **Portnykh v Nomura International [2014] IRLR 251** the issue of whether there was an 'extant dispute' for the purposes of that case was considered by Hand J. He said that for the rule to operate there did not need to be extant litigation but an extant dispute where the parties are conscious for the potential for litigation. He went on to say that there only need be a dispute or even potential for dispute. At paragraph 21 he considered the authority of **BNP Paribas v Mezzotero [2004] IRLR 508.** At paragraph 34 he stated that if the employer announced an intention to dismiss an employer for misconduct then however amicable those discussions might be there might be a potential for dispute in the future. He also makes the point at paragraph 35 that extant proceedings are not necessary for there to be a dispute.

26. In **Mezzetero** Cox J considered that there could be no dispute to which the without prejudice rule could attach. That was a case where the without prejudice offer was a response to the Claimant's grievance for maternity discrimination. Cox J considered that the meeting had not been genuinely aimed at settling the Claimant's discrimination complaint. She found that the tribunal was entitled to find that there was no extant dispute between the parties.

27. Contemplation of litigation was discussed in **Scheldebouw v Evanson [2022] EAT 157** in which there was reference to the case of **Barnetson v Framlington Group [2007] EWCA Civ 502**. In that case the proximity of litigation was discussed at paragraph 32 by Auld LJ. At paragraph 34 he referred to the subject matter of the dispute being of import. He said that the crucial consideration was whether the parties could have contemplated or might reasonably have contemplated litigation if they did not agree. If so the privilege applies.

28. The without prejudice rule can be exempted where there is found that the rule would otherwise serve as a cloak for unambiguous impropriety. There must be a high threshold of seriousness reached before that can be preyed in aid: **Savings and Investment Bank ltd v Fincken [2004] 1 WLR 667 CA**.

29. In **Garrod v Riverstone Management ltd [2022] EAT 177** it was found that simply because there had been an allegation that the settlement proposal had been made with a discriminatory motive did not render it a species of unambigious impropriety. In that case **Mezzotero** was distinguished as a case where the alleged without prejudice communications were also the alleged unlawful acts on which the claim was based.

30. In **Woodward v Santander UK plc 2010 IRLR 834**, the EAT held that the 'unambiguous impropriety' exception did not apply in the absence of blatant discrimination and refused to extend the exception to include comments from which an inference of discrimination might be drawn.

Conclusions

31. Turning to the issues, the conclusions on the without prejudice rule are as follows.

Was there an extant dispute?

32. The parties at that stage had reason to believe that the case would progress to a disciplinary hearing and that the allegations were serious as the alleged conduct was bullying, intimidation, discrimination. The Claimant ought reasonably have known that these allegations may lead to a dismissal in my finding notwithstanding the lack of specificity, owing to their seriousness and what had been discussed with Ms Gottlieb. There was an alleged breach of the Code of Conduct. I find that there was certainly the grounds for a dispute or potential for a dispute to take place. The Claimant was shocked at the allegations and disagreed that he was a bully in the notes. I consider that it was likely that he would continue to dispute the allegations. It was also likely that this was going to be a serious matter potentially leading to a contested dismissal.

Contemplation of litigation

33. There was a reasonable contemplation of litigation as the Claimant, if he disagreed with the outcome of any investigation or dismissal, would likely seek redress in a Tribunal. I did consider that there was a paucity of specific allegations but on the facts I find that it was not necessary for there to be provision of specifics at that stage for litigation reasonably to be in contemplation. The allegations were serious and the nature of the allegations were in breach of the Respondent's Code of Conduct. This was going to be formal. That was enough. Both parties agreed to the meeting and the Claimant was advised about the effect of the rule and that it would mean that any discussions could not end up in court. The mention of that indicated that there was some expectation that this was indeed what may be likely to happen as a possibility. While the Claimant himself may not have contemplated litigation at that stage it would have been in his reasonable contemplation that tribunal proceedings might ensue.

Iniquity exception

34. I do not find any unambiguous impropriety. The Claimant was given an opportunity to research the without prejudice rule and to bring a companion to the meeting. He was asked to put forward suggestions. There was no underhand behaviour. There is no allegation that the conduct of that meeting was discriminatory.

S.111A

35. Were there pre-termination negotiations? Termination was in fact an option so I find that there were. There was a discussion about terms. It was apparent to both parties that a leaving on terms was on the table. I take into account that Ms Gottlieb had mentioned that the chat would discuss the Claimant leaving on terms more favourable than a dismissal with no notice. The Claimant had previously asked if he was going to be asked to resign. It matters not that there were other options posited to remain in some capacity in the organisation.

Was there improper behaviour?

There was no improper behaviour for the reasons that I have given in respect of the iniquity exception above.

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Employment Judge A Frazer
Dated: 27th July 2023