EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000119/2023

Held at Dundee on 17 and 31 July 2023

Employment Judge McFatridge

Mr George McDonald	**Claimant** **In person**
Fife Council	**Respondent** **Represented by:** **Ms Sutherland,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that

(1) The discussion held between the claimant and the respondent on 9 February 2023 was a confidential pre-termination negotiation in terms of section 111A of the Employment Rights Act 1996 and as such evidence in relation to this is inadmissible in these proceedings in respect of the complaint of unfair dismissal.

(2) The said discussions and correspondence in relation to these were without prejudice discussions and therefore inadmissible in these proceedings.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unlawfully discriminated against on grounds of disability and that he had been unfairly constructively dismissed by the respondent. The respondent submitted a response in which they denied the claims. In paragraph 2 of the paper apart to their response they noted that in section 8.2 the claimant had made reference to matters which were without prejudice and/or covered by section 111A of the Employment Rights Act 1996. They noted that the respondent did not waive their right in law in relation to these matters and requested that the claimant resubmit the claim without these references or otherwise irrelevant averments within the ET1 would require to be redacted. The matter was discussed at the subsequent case management preliminary hearing on 17 May 2023 and it was agreed to fix an open preliminary hearing in order to deal with the issue of whether these discussions were in fact protected discussions under section 111A and/or subject to the without prejudice rule. It was the claimant's position that discussions were not protected under section 111A on the basis that section 111A(4) applied and that things said or done had been improper or were connected with improper behaviour and that the whole of the discussion should be admissible. It was also his position that the respondent were not entitled to take advantage of the without prejudice rule on the basis that there had been unambiguous impropriety. At the hearing the claimant gave evidence on his own behalf and evidence was then led on behalf of the respondent from Caroline Frances Bruce, Interim Service Manager for Adult Services Resources and Ms Elaine Jennifer Jordan, HR Business Partner. On the basis of the evidence and the productions I found the following essential factual matters relevant to the issue to be determined to be proved or agreed.

2. The claimant has worked for the respondent since March 2003 as a Social Care Worker. Over the years the claimant has had certain mental health difficulties which he attributes to having been seriously abused as a child including abuse whilst he was in the care of Fife Council as a child. The claimant's role as Social Care Worker required him to work with vulnerable service users. The claimant commenced a period of sickness absence on or about 9 March 2022. His absence was managed by the respondent utilising their absence management policy and there were a number of

absence management meetings. During 2022 there were a number of discussions between the claimant and the respondent where the claimant indicated he had various grievances regarding his work but did not lodge a formal grievance. There were issues about precisely where he would return to work when he was fit to do so.

3. During this period there were various Occupational Health reports. The claimant expressed dissatisfaction with some of these referrals.

4. By January 2023 the claimant had been certified as fit to return to work. He did not wish to return to the unit he had previously worked in and it was arranged that he would return to work at a facility called Blairoak. There was a dispute between the parties regarding length of shifts. On 18 January the claimant was due to attend Blairoak for his first shift. He attended this shift but left after it and said that he was not prepared to return to Blairoak. There was some discussions thereafter as to what would happen. On 23 January the claimant emailed Wendy Thomson of Fife Council who was at that time managing his absence. The first email was sent at 08:15 (page 107B). The claimant set out his concerns. He said he would welcome another Occupational Health referral. Ms Thomson responded at 11:13 to say that she would take advice from HR as to a referral to Occupational Health. The claimant then responded at 11:33 and 14:04. In his email at 14:04 he said

> *"If Fife Council offer exit package this time I will gladly accept this. I hope now this will be an option. I'm hoping oh referral will be made and confident that it will be recognised for second time by physician that discrimination has raised its head as per her previous concerns."*

Later that same day (23 January) the claimant sent an email to Caroline Bruce (page 108). Caroline Bruce was four levels of seniority above the claimant within Fife Council. She had not been involved with his absence management but as head of the relevant service she had been nominated to be the single point of contact with the claimant in relation to the claimant's ongoing issues regarding his historic abuse. The claimant's email stated

"Hi Caroline

As discrimination has now been raised as a concern twice within the matter of weeks by 2 medical professionals that I would like to request for final time a fair exit package to terminate my employment.

This whole issue and sickness was completely preventable but its clear that Senior social care workers views are given top and main priority.

I emailed Wendy with all my concerns regarding the issues at Keir Hardie but felt the backing of seniors took priority.

If an oh referral is agreed and OH physician again agrees with her findings the first time regarding her concerns of discrimination and also Dr Campbells my gp findings then I would like to raise a formal grievance for discrimination to be done by an independent investigation whom is impartial. The grievance raised recently was refused and again seniors views and opinions took precedence.

I hope my request for exit package will be given consideration this time round."

The claimant's reference to *"discrimination has now been raised as a concern twice within the matter of weeks by two medical professionals"* was a reference to the claimant's view that the Occupational Health doctor had told him on two occasions that Fife Council were discriminating against him. This issue was not a matter to be determined by this preliminary hearing but suffice to say that the matter was investigated by the respondent and the letter lodged from the Occupational Health doctor indicates that the Occupational Health doctor had said no such thing.

5. On 27 January the claimant sent a further email to Caroline Bruce (page 110). He said he accepted she was busy but was asking for an update. He said -

"Ive asked Wendy numerous times regarding OH referral and told she is awaiting HR advice but generally its not like HR to delay these situations as with the exit package proposal. It would be courteous to have a response just so I have idea going forward from this."

Ms Bruce responded to the claimant on 27 January at 18:09 (page 109). She stated -

> *"Thank you for your email and your understanding of how busy things are. I appreciate you are looking for a response to your request for an OH referral and an Exit package. …."*

The claimant responded to this stating

> *"Thanks Caroline for update. I presume exit package is also not an option. Just for clarity."* (page 109)

He then wrote to the respondent again at 07:41 on 28 January stating

> *"Hi Caroline*
> *Can you please confirm when you receive email if exit package has been refused to allow me to take the next steps for discrimination at work."*

The claimant then wrote again to Ms Bruce on 29 January at 10:30 stating

> *"Hi Caroline*
> *Ive just read you are on annual leave and not returning until 06/2/2023.*
> *When you return I feel it is fair to inform you that after no discussion, help or information has been available regarding the discrimination or exit package which was raised over a week ago that I have now had no choice but to go back to the legal route which was something I was desperately trying to avoid and was hoping this could have been settled amicably within the service. …."*

On 30 January 2023 at 5:56 am the claimant submitted a lengthy email headed To Whom It May Concern which he indicated was to be a formal grievance regarding workplace discrimination. This was lodged (pages 113-115). The claimant complained of workplace discrimination ongoing since March 2022.

6. On 6 February 2023 Ms Bruce wrote formally to the claimant inviting him to a Without Prejudice meeting. The letter was lodged (pages 117-118). It is probably as well to set out the terms of this in full.

> *"**Private and Confidential***
> ***Without Prejudice***
> *Dear George,*
> ***Meeting on 9 February 2023***
> ***Without Prejudice and Confidential under S111A of the Employment Rights Act 1996***
> *I appreciate that you are currently signed off sick from work, but I would like to meet with you on Thursday 9 February 2023 at 15:30, in-person at Fife House in meeting Room 2, on the first floor of the main building (on the right as you exit the lift). While you have no legal right to be accompanied to this meeting, I am happy on this occasion for you to be accompanied if you would like by a colleague, trade union official or trade union representative or immediate family member at this meeting George. It is important that you feel supported. If you do choose to be accompanied, please can you confirm in advance who you want to attend with you. Elaine Jordan, HR Business Partner will also be in attendance to provide HR advice.*
> *Since being signed off sick, you have requested in emails "a fair exit package to terminate my employment". We are prepared to explore this as an alternative to continuing to manage your absence under our absence management procedures and the main purpose of our discussion on 9 February would be to explore this further.*
> *I wanted to let you know in advance of the suggested meeting on 9 February the terms on which we would propose we reach agreement to give you an opportunity to consider this. We would be prepared to agree the following:*
>
> - *Your employment would come to an end on a mutually agreed date which we can discuss on 9 February;*
> - *You would continue to receive sick pay up to the agreed termination date (if you continue to be signed off for this period), subject to appropriate statutory deductions;*

- *You would be paid for any accrued but untaken holidays up to the termination date, subject to appropriate statutory deductions;*
- *We would make a payment in lieu of your notice period of 12 weeks amounting to £8,233.62 (including unsocial hours) which reflects your full salary for 12 weeks, subject to appropriate statutory deductions; and*
- *We would agree the terms of a factual reference.*

Any agreement would be subject to you entering into a settlement agreement with us on terms acceptable to us and under which you would agree not to bring any claims arising from your employment or its termination against the Council in a court or employment tribunal. The terms of the settlement agreement would include agreement to withdraw any grievance and an acceptance that the Council would not be investigating any grievance raised by you. You would be required to take legal advice on the terms of that settlement agreement, and we would contribute up to £350 plus VAT towards your legal fees to obtain that advice. If you indicate that you do want to proceed with this proposal, we will arrange for a draft settlement agreement to be provided to you after the meeting.

Please note that there is no obligation on you to enter into discussions with us in relation to this proposal and it is being made in light of the request made by you. As I have mentioned above, if you do not wish to proceed with the exit package proposed, we would continue to deal with your absence under our absence management procedures and we would deal appropriately with your grievance.

The terms of this letter should be kept confidential except you are entitled to discuss it with any legal adviser or your partner/immediate family provided they agree to keep it confidential.

This letter is covered by section 111A of the Employment Rights Act 1996. This means that the offer contained in this letter and any subsequent discussion about it will not be admissible as evidence in any subsequent unfair dismissal claim.

Yours sincerely"

The letter was emailed to the claimant as well as being hand delivered to him. The claimant responded to the emailed version of the letter 10 minutes after receiving it on 6 February (page 130). He stated

"Many thanks for letter. I will gladly meet with you on Thursday at 3.30pm and would like to say in advance to give heads up that offer wont be accepted. After 20 years service, another 20 years service remains, loss of pension benefits etc that this is quite an unfair and unrealistic offer. I will go for the discrimination claim instead and remain in employment."

Shortly after this at 3:38 on 6 February the claimant emailed again. He said

"Proposal I put forward for serious consideration which is entirely up to the service would be original offer Ross Milvennan (Digby Brown) put forward to Elaine Jordan of
£30,000 ex gratia payment
£15,000 discrimination
3 months pay in lieu including unsocial hours
Reference with immediate termination.
This is a fair offer after 20 years service and loss of pension benefits, salary etc.
This is final offer I would go for allowing all ties historically and presently to be broken in an amicable departure. I will be the one in the long term whom is losing out."

The claimant then sent a further email at 17:00 on 6 February stating

"Hi Caroline
Will make this last email. Not sure if you still want meeting on Thursday as offer from service has been definitely declined. Not sure where you want to go from here and if you want meeting to continue."

7. At 18:34 that evening Caroline Bruce responded to him stating

"Hi George

thanks for your email, I think it is important we still meet as arranged on Thursday, we can discuss your proposal at the meeting."

8. The meeting duly took place on 9 February. It was attended by the claimant, Ms Bruce and Ms Jordan of HR. Ms Jordan produced a handwritten note at the meeting which was lodged (page 123).

9. The meeting was chaired by Caroline Bruce. She began by checking that the claimant was happy to proceed and again stated that the claimant could bring a companion if he wished. The claimant declined a companion and said he was happy to proceed. Ms Bruce confirmed that the meeting was confidential and without prejudice and that it would constitute a protected conversation. She checked with the claimant that he was okay with that and he confirmed that he was. After the claimant made the introductions and confirmed the purpose of the meeting the claimant said that he felt it was time to call it a day. He said he had a lot of history with Fife Council and it was time for him to move on. He felt it would be to everyone's benefit to agree a final fair exit package. This would allow him to sever ties with the organisation. He made it clear that in his view it was time to go.

10. Ms Bruce then went on to explain to the claimant that she felt it was important that he have all the available information at his disposal. She indicated that she had to tell him that there had been complaints made about him by other members of staff which would require to be investigated. She said that these complaints had only just come in and she had not yet been investigated by the Council. It was not clear whether the investigation would end up as a disciplinary but that was a possibility. The claimant said that he welcomed complaints. He also said at this stage that he would welcome being taken to a Capability Hearing since he wanted to be dismissed as this would enable him to go to an Employment Tribunal. Ms Bruce and Ms Jordan considered that it was important to tell the claimant about the complaints so that he would have all information before him before deciding whether or not to accept an exit offer. They did not want to be in a situation where, if the claimant refused the offer

and the complaints were then investigated the claimant could allege that the complaints were only being raised because he had refused their offer.

11. The claimant then mentioned his suggested offer. Ms Bruce read out the terms of the offer the Council would make which were as set out in the letter. The claimant was quite clear that he would not accept this. There was then a discussion where Ms Bruce indicated that the respondent were not prepared to increase their offer. They said that if it was not accepted they would proceed in terms of their policies. They said that the respondent would be following the Absence Management Policy.

12. Neither Ms Bruce nor Ms Jordan said at any point that the claimant would be dismissed. The capability process does not necessarily end in dismissal. At the end of the meeting Ms Jordan took the opportunity to speak to the claimant about what support could be offered to him with regard to getting him to return to work. She asked the claimant if there were any particular places he wished to work. Ms Jordan is involved in supporting a number of units which are run in partnership with Fife NHS. She offered to assist the claimant in moving to work at a unit run by Fife NHS if there were no jobs within the Council which suited him. Ms Jordan tried to be as supportive as she could be with the claimant.

13. Following the meeting on 9 February at 18:15 Elaine Jordan wrote to Rona Laskowski setting out her understanding of what had taken place at the meeting. This email was lodged (page 125-126). She stated

> *"… George has rejected our offer and we explained to George we are not in a position to negotiate a settlement on any other terms.*
> *George requested that we progress to capability hearing.*
> *He has explained as soon as he is 'sacked' he will progress to an employment tribunal as he believes he has a case for discrimination.*
> *We had a conversation with George exploring what we could do to support his employment with Fife Council. But we couldn't agree a way ahead.*

George has made it clear he has come to the end of the road regarding his employment. He does not intend to resign, and he will wait until he is dismissed.

I explained we would follow our Attendance Management procedures and options would be explored with George along the way as part of that process.

George has asked that we progress his current grievance. We have agreed to this.

George is not happy we have made reference to complaints against him. I explained we will inform him of next steps as soon as possible.

I've updated our legal adviser and I'm checking what information we share with George following our meeting today.

Let us know if you would like any additional information at this time."

14. At around 17:10 on 9 February the claimant wrote to Ms Bruce and Ms Jordan stating

"Can I have it recorded that I find it absolutely unfair and unacceptable knowing that I'm off sick with stress had to go through that meeting with allegations etc made against me. How in any way was that meeting beneficial knowing that any allegations made to staff would have a profound effect not to mention when I'm off sick. The meeting to explore the exit package

I'm disappointed that I had to leave the meeting worrying without being told the allegations and unfair to do this to anyone off sick with work related stress. That should not be a council policy.

I now ask these allegations be investigated."

15. Following this there was a further exchange of emails with the claimant setting out his position which was to the effect that it had been unreasonable for the respondent to hold the meeting when he was off with stress and for him to be told about the allegations at the meeting. There was an email exchange whereby the claimant reiterated his position that he had been told by Occupational Health that on two occasions that Fife Council had discriminated against him. The respondent set out their position which was having checked with the Occupational Health nurse

she had said absolutely no such thing. On 13 February the claimant emailed the Council to advise that he considered himself to have resigned and would be going to an Employment Tribunal. Ms Bruce emailed the claimant to give him the opportunity to reflect and retract his resignation if he wished. He was given until 5pm on 17 February if he wished to withdraw his resignation. The claimant wrote again to the Tribunal on 14 February saying that he had terminated his employment with immediate effect and he wanted all further communications to be through legal teams. His resignation was subsequently accepted.

Matters arising from the evidence

16. I considered that both of the respondent's witnesses were giving honest evidence which I found to be both credible and reliable. They made appropriate concessions. Their evidence was entirely in line with the contemporary documents. Although they differed on minor points their evidence as regards what was said at the hearing was generally entirely consistent. I did not find the claimant to be a particularly reliable witness. He would often change his position during his evidence and in many cases what he was now saying was entirely inconsistent with the contemporary documents. The claimant's position was essentially that he believed that the respondent were taking advantage of his mental ill health and trying to browbeat him into resigning. He said they had threatened him with dismissal. He said that he was told that he would be dismissed for gross misconduct as a result of these allegations. He said that he had been presented with an ultimatum. The claimant was unable to expand on any of these broad allegations during cross examination and in fact during cross examination his position was extremely confused and difficult to follow. The claimant accepted that he had sent the various emails mentioned in which he had stated that he believed he had been discriminated against by the respondent. He confirmed that he had on various occasions asked for an exit agreement. He confirmed that if the parties had been able to agree an exit then he would have accepted it and that there would have been a compromise agreement proposed to him which he could take to a lawyer to finalise. His main argument appeared to be that he believed that the exit arrangement which was proposed was

insufficiently generous to him and was unacceptable. He questioned why the meeting should have gone ahead when the respondent's representatives knew in advance that there would be no improvement to the offer they made.

17. I was satisfied having heard the claimant's evidence and compared that with the evidence of the respondent's two witnesses that the evidence of the respondent's two witnesses was entirely to be preferred. Their evidence had a logic to it which the claimant's allegations entirely lacked. It seemed highly unlikely that Ms Bruce or Ms Jordan as seasoned managers would tell the claimant that he was going to be dismissed for gross misconduct when their position was they only knew the allegations in broad outline and no investigation had yet taken place. It is highly unlikely that they would have told him that he should accept the offer or be dismissed on grounds of capability when in all of the contemporary emails they refer simply to continuing the absence management process. It is also strange if having allegedly threatened the claimant with a capability dismissal earlier in the meeting Ms Jordan then went on at the end of the meeting to ask the claimant about further support about how to get him back to work. I therefore based my findings in fact essentially on the respondent's version of events at the meeting. There was no dispute about the emails leading up to it.

Discussion and decision

18. The respondent sought exclusion of any evidence in relation to this meeting on two grounds, both of which have slightly different legal tests. These are set out below. The claimant's position in relation to the without prejudice rule was that the rule should be disapplied on the basis that the respondent had behaved with manifest impropriety. This was on the basis that

    (1) They had invited him to the meeting on false pretences in that he understood an exit package better than the one mentioned in the letter would be offered to him and it was not.

(2) During the meeting the claimant had been pressurised into taking the unacceptable package by being threatened that he would be dismissed for gross misconduct if he did not resign.

(3) That during the meeting he had been given an ultimatum that if he did not resign he would be dismissed on capability grounds.

Discussion and decision

19. The respondent produced written submissions setting out the law on the subject the terms of which I broadly agreed with. The claimant made his submissions orally essentially setting out the position which I have summarised above. He stated that the respondent was aware he had been off sick for a significant period and suffered mental health difficulties. He stated that the letter on 6 February said the main purpose of the meeting was to discuss his exit. It was his position this was not the case. He stated he believed he had been given an ultimatum, he had already refused the offer twice in writing. It was clear they didn't want to enter into a discussion. He felt the respondent lied to him to get him to attend the meeting to address an agenda that could have waited until he was back at work. He stated that once he said he wasn't going to accept the offer the meeting should have been cancelled. He also felt the respondent had failed in their duty of care to him.

20. As the respondent has indicated in their submissions there is a strong public interest in ensuring that where parties are in dispute they may have free and frank discussions with a view to settling their dispute without running the risk that anything said during these discussions may be used against them in court. This is summarised in the extract from ***Harvey*** lodged which states that *"the evidence of the content of those negotiations will as a general rule not be admissible at the trial and cannot be used to establish an admission or partial admission."* It is also clear law that for the without prejudice rule to come into effect there must be a dispute between the parties. In this case I was in absolutely no doubt that that was the case. The claimant had lodged a formal grievance alleging discrimination. This was against a background where there had clearly been an ongoing dispute between the claimant and his employers for a

considerable period of time. It was however the claimant's view that the rule was excluded on the basis that, again as set out in ***Harvey*** *"the rule cannot for example be relied on if the exclusion of evidence of what a party said or wrote in without prejudice negotiations would act as a cloak for perjury, blackmail or other unambiguous impropriety."* This is derived from the fact that the without prejudice rule is at the end of the day an equitable rule and it would simply be inappropriate if such an equitable rule were used to promote such an inequitable purpose. It is clear from the authorities including those listed by the respondent that unambiguous impropriety is not to be interpreted widely but is to be reserved for behaviour that shows a serious abuse of the privilege. In this case I was in absolutely no doubt that the exception did not arise. It was clear to me that the meeting was arranged to be conducted on a without prejudice basis. This is abundantly clear from the letter calling the meeting. It is also abundantly clear from the purpose of the meeting. There was a dispute between the claimant and the respondent. The claimant had several times mentioned that he wanted an exit agreement. Matters had now reached the stage where he had put in a formal grievance. It was clear that the matter would likely end up in an Employment Tribunal if the parties did not reach an agreement. This is precisely the kind of situation where it is appropriate for parties to enter into without prejudice discussions.

21. I do not consider that the respondent was guilty of any kind of impropriety, far less an impropriety of the level required by inviting the claimant to the meeting whilst he was off sick with stress. The claimant himself had instigated the discussion of an exit package. The most recent information was that the claimant was actually fit to return to work albeit that his return to work had lasted around one day before he went off sick again. It appears to me that it was entirely reasonable for the respondent to conclude that it would probably be helpful all round if a meeting could be held which might result in the various disputes between the parties being resolved amicably. Although the point was not raised by the claimant I did not consider that there was anything wrong with the amount of time given before the meeting. It was clearly going to be more helpful if the meeting was held sooner rather than later. There was no suggestion of the

claimant having to sign anything at the meeting. If the meeting reached an agreement then a formal compromise agreement would require to be drawn up and the claimant would be given adequate time to consider this. In addition the respondent say in their letter they would pay for him to have legal advice on this. I also note that in the letter the respondent quite helpfully say that they would be happy for the claimant to be accompanied at the meeting by a fairly wide range of companions should he so wish. There is no obligation on them to do this.

22. I considered whether the claimant having said that he was not prepared to accept the offer, the respondent should have allowed the meeting to continue. It is clear that the claimant is now saying that this was something which greatly upset him. My view was that there was absolutely no impropriety in the respondent behaving as they did. It is not at all unusual for each party to go into a meeting with the knowledge that their position is currently unacceptable to the other party. What is hoped is that during the course of the meeting each party will discuss the strengths and weaknesses of their position and it may be that positions will change. I do not consider there was anything untoward in the respondent and Ms Jordan wishing to go ahead with the meeting despite the claimant having said that he was not prepared to accept their offer. I consider this to be true in any situation however in this particular case I also accepted the evidence of Ms Bruce. She indicated that in her previous dealings with the claimant she had become concerned that he often said things in emails which he later departed from. She felt that he tended to be confrontational in emails and hoped that a face to face meeting might prove to be more productive. Ms Jordan also wanted the meeting to go ahead because although she had been providing HR support to his managers she had not actually met him before. My view was that it was entirely reasonable for the respondent to want to have a without prejudice meeting with the claimant in these circumstances even if the claimant was saying in advance that he was not going to accept the offer on the table and they knew they were not going to offer more.

23. The claimant also complained that having asked Ms Bruce whether the meeting should still go ahead she had confirmed to him that it should.

Ms Bruce's position was that she felt the meeting should go ahead for the reasons stated. The meeting was still entirely voluntarily for the claimant as was made clear in the initial letter. I rejected the claimant's assertion that he had been ordered to do something by the Head of Service and had to go along with this. In my view the claimant well knew that the meeting was voluntary on his part from the clear statement of that given to him in the initial letter.

24. With regard to the conduct of the meeting itself I can find absolutely no impropriety. I believe that Ms Bruce and Ms Jordan's reasoning for telling the claimant about the allegations against him was entirely reasonable. They were not in a position to go into further detail since there had as yet been no investigation. It seemed to me on the evidence that the claimant, as he appears to do on a regular basis, leapt to a conclusion that if there was any kind of disciplinary investigation this must result in disciplinary allegations being brought to a hearing and this must in turn result in his dismissal. It appeared to me he was entirely unjustified in basing those conclusions on anything the respondent said or did.

25. With regard to the discussions around capability it appeared that it was the claimant who raised the subject of being dismissed for capability and then going to an Employment Tribunal. The claimant accepted this at various points in his cross examination. His take on matters at the time was that if he did not return to work then the likelihood was that he would be dismissed on capability grounds and he was then intending to go to an Employment Tribunal as it was his view he had been discriminated against. He accepted that during the hearing he had said that he would not be resigning but would wait until he was dismissed. In my view there was absolutely nothing untoward in what did happen which was that the respondent's representative simply advised him that if no exit agreement was reached then matters would proceed down the road they had been going in that the claimant would be absence managed in accordance with the respondent's normal policy.

26. It is my clear view that there was absolutely no unambiguous impropriety.

27. With regard to section 111A this would only apply to the unfair dismissal claim. It is my view that these were clearly pre-termination negotiations in terms of section 111A(1), accordingly any evidence of these would be inadmissible in respect of the unfair dismissal complaint. In my view the terms of section 111A(4) have no application since in my view there was nothing said or done which in my opinion was improper. I make this decision on the same basis as I have decided that the discussions were without prejudice.

28. For the above reasons I have decided that on the basis of the evidence the discussion at the meeting on 9 February 2023 and any documents relating to that meeting are inadmissible in the present proceedings. I was not invited to make any orders beyond that. The case shall proceed to the final hearing which I understand is listed for later in the year.

Employment Judge : I McFatridge
Date of Judgment : 17 August 2023
Date sent to parties : 21 August 2023