The dangers of springing an “off the record” settlement discussion on an employee

The EAT’s recent decision in *Tarbuc v Martello Piling Ltd* clarifies the scope and limits of the protected conversation regime under s.111A of the Employment Rights Act 1996. It reminds us of the limited nature of the protection and highlights that when assessing whether there has been “improper conduct” Tribunals must consider the full circumstances surrounding the conversation. Ambushing an employee and denying them the chance to have a companion may mean protection is lost.

What is the background law?

Section 111A of the Employment Rights Act 1996 allows an employer or employee to initiate a “protected conversation” about terminating employment on agreed terms on a confidential basis, without that conversation being admissible as evidence in any subsequent ordinary unfair dismissal claim. It operates in a similar way to the common law “without prejudice” principle, but with two key distinctions. First, without prejudice protection applies only where there is an existing dispute between the parties, whereas section 111A protection can apply even where no dispute has crystallised. Second, without prejudice protection can apply across all proceedings, whereas s.111A protection is confined to complaints of ordinary unfair dismissal and does not extend to other claims an employee may bring

Both protections are subject to an "impropriety" exception, whereby the protection may be lost. Without prejudice communications lose their protection where there has been "unambiguous impropriety" such as fraud, perjury or blackmail. However, section 111A protection may be lost where a Tribunal considers there has been "improper behaviour". The Acas Code of Practice on Settlement Agreements gives examples of improper behaviour including harassment, bullying, intimidation, discrimination, victimisation, physical threats, and putting "undue pressure" on a party. Examples of undue pressure include failing to allow a reasonable time to consider the proposed settlement agreement (with Acas suggesting at least 10 calendar days) or telling an employee they will be dismissed if they reject the offer before any dismissal process has begun. Where improper conduct occurs, the Tribunal may allow evidence of the discussion to be admitted in an ordinary unfair dismissal claim to the extent it considers just.

What happened in this case?

Mr Tarbuc (**the Claimant**) began working for Martello Piling Limited (**the Respondent**) as an Estimating Engineer on 19 February 2018. In April 2024, an issue arose about the Claimant's entitlement to a bonus. On 23 April 2024, the Claimant was unexpectedly called into a meeting with the Managing Director Mr Macklin (**the 23April discussion**). At the outset of the meeting, Mr Macklin told the Claimant that the discussion was a "protected conversation". When the Claimant queried what that meant, Mr Macklin said it was a "legal term".

The Claimant said Mr Macklin went on to accuse him of being "entitled", said that he "did not trust him" and that he

wanted him to leave the business. He then passed the Claimant an envelope setting out the terms of a settlement offer and told the Claimant that he did not have to accept it but, if he did not, a redundancy process would follow, and he would "guarantee" that the Claimant would come last (i.e. that he would be made redundant). The Claimant also alleged that Mr Macklin said that he had offered three months' salary which was more than he thought the Claimant was worth and that the Claimant would not receive a discretionary bonus due to his "entitled attitude". The Claimant immediately declined the offer, and he was dismissed on 13 June 2024.

In August 2024, the Claimant brought claims for ordinary unfair dismissal, unlawful deductions from wages and less favourable treatment for being a part-time worker. In his claims, the Claimant referred to the 23 April discussion. The Respondent argued that the 23 April discussion was a protected conversation and was, therefore, inadmissible in the proceedings. In response, the Claimant argued that it was not protected because the Respondent had behaved improperly by:

- threatening him with redundancy if he did not accept the offer;
- not giving him advance notice of the meeting or a right to refuse to go;
- not giving him the option to bring a companion; and
- immediately moving to make him redundant once he had declined the offer.

Mr Macklin disputed the Claimant's account of the 23 April discussion. He denied threatening the Claimant or saying that he would "guarantee" that he would come last in any redundancy process. However, he accepted that he had said that if the Claimant did not accept the offer, then a redundancy process *may* follow and that if he (Mr Macklin) were tasked with the scoring – which he said he would not be – then the Claimant would *likely* come last. He also noted that the Clamant did not complain about the conduct of the 23 April meeting at the time.

A Preliminary Hearing was held in March 2025. The Employment Tribunal preferred Mr Macklin's version of events. It was satisfied that he had genuine concerns about the Claimant's performance and attendance and made the offer as an attempt to bypass the unrest that a redundancy situation would cause. In conclusion, the Tribunal was satisfied that there was no improper conduct. As a result, the 23 April discussion was a protected conversation and was not admissible. The Tribunal Judge ordered all references to the 23 April discussion to be redacted from the pleadings, documents and witness statements and directed that the Respondent did not need to disclose related documents.

The Claimant appealed to the Employment Appeal Tribunal (**EAT**) on the following key grounds:

- Ground 1 – that the Tribunal erred by determining inadmissibility applied globally to all of his claims (both existing and pending claims) and failed to recognise that protected conversations are inadmissible

in ordinary unfair dismissal claims only.

- Ground 2 – that the Tribunal failed to give proper consideration to the Acas Code of Practice on Settlement Agreements when reaching its decision. In particular, it failed to consider the cumulative effect of the Respondent's conduct, including being ambushed before the meeting, not being given a chance to take a companion and the short timeframe of five days to consider the offer.

Separately, the Claimant applied to amend his claims to add on an automatic unfair dismissal claim (on several different grounds) and a whistleblowing detriment claim. That application was refused and is the subject of a separate appeal to the EAT.

What was decided?

Ground 1 – was the 23 April discussion inadmissible for the ordinary unfair dismissal claim only?

On Ground 1, the EAT held that the Tribunal Judge had erred in failing to recognise that the 23 April discussion was inadmissible in his ordinary unfair dismissal claim but *admissible* in his unlawful deductions from wages and part-time

worker claims. This left the Tribunal with the *"very difficult task of analytical compartmentalisation",* noting that *"mental gymnastics"* would be required to decide the case. The EAT Judge went on to order the Respondent to disclose documents concerning the 23 April discussion for the purposes of the unlawful deductions from wages and part-time worker claims.

Further, as part of Ground 1, the EAT also considered whether the Claimant had pleaded the factual basis for an *automatic* unfair dismissal claim and, if so, whether the Tribunal had erred in failing to identify the claim and confirm that the 23 April discussion was admissible in relation to it. However, the EAT Judge found that the factual basis for such a claim was *not* clearly set out in the original claim (and, even if it had been, the Tribunal Judge would not have erred in failing to identify an un-labelled claim of her own motion).

Ground 2 – was proper consideration given to whether the conduct of the meeting was improper?

On Ground 2, the EAT held that the Tribunal Judge had approached the improper conduct question too narrowly, focusing exclusively on the content of what Mr Macklin said in the meeting and how he said it. She had not engaged at all with the circumstances in which the meeting was called. The EAT accepted that in a previous case (*Gallagher v McKinnon's Auto and Tyres Ltd*)it had been held that a very short notice meeting without a companion was *not* improper conduct. However, that did not create a hard and fast rule. Such conduct may still be improper in other cases, when combined with other conduct.

However, the EAT discounted the argument that only being given five days to consider the offer was improper. The EAT said this was a "red herring" because the Claimant had rejected the offer outright in the course of the 23 April discussion. Therefore, the five-day window did not place him under any pressure. In any event, the Acas Code recommendation of 10 calendar days for consideration related to the formal written terms of a settlement agreement, not to heads of terms contained in an initial offer letter (as was the case here).

The EAT Judge remitted the question of whether there was improper conduct to a different Employment Tribunal Judge to consider.

What does this mean for employers?

This decision reminds us that section 111A protection does not provide blanket protection across all claims (as without prejudice protection does). If an employee has *other* claims alongside an ordinary unfair dismissal claim (e.g. an automatic unfair dismissal claim or a discrimination claim), then evidence of the protected conversation will be admissible in relation to those other claims, even if it remains excluded for ordinary unfair dismissal purposes. Employers should plan for this from the outset and ensure any such conversation is conducted carefully.

Importantly, the decision highlights that the *manner* in which a protected conversation is initiated matters as much as what is said in it. Ambushing an employee with no notice, no companion and no warning of the meeting's purpose will all be relevant to an assessment of improper conduct. On top of this, what is said in the meeting will also be relevant.

Telling an employee, even in qualified terms, that they will come last in any redundancy selection if they reject a settlement offer is risky. Employers should seek legal advice before any such meeting and keep a clear record of what was said (and be mindful that the employee may covertly record the meeting).

An employer seeking to safely conduct a section 111A discussion should:

- Give the employee reasonable notice of the meeting and make it clear that the purpose of the discussion is about a proposed settlement intended to end employment on agreed terms. The employee should also be told that this voluntary and they are not required to engage with or accept the proposal.

- If the employee agrees to the meeting, consider whether any reasonable adjustments are needed if the employee has a disability. Also consider whether flexibility in the arrangements is required to accommodate any caring commitments or part-time / hybrid working pattern.

- Hold the meeting at the agreed time and place and allow the employee to bring a colleague or trade union representative.

- At the start of the meeting, explain to the employee that the conversation is off the record and explain the meaning of a section 111A protected conversation (and of without prejudice if appropriate). Ask the employee to confirm that they understand.

- Conduct discussions professionally and avoid harassment, bullying, intimidation, offensive language, aggression, threats or victimisation.

- Avoid the risk of placing undue pressure on the employee. If the employee is vulnerable, unwell, or visibly distressed suggest an adjournment.

- Allow reasonable time to consider the proposal. As a general rule, allow at least 10 calendar days to consider the written settlement terms and obtain independent advice, unless both sides agree otherwise. Although a shorter amount of time may be given to consider heads of terms, this should also be reasonable.

- Present the reasons for the proposal neutrally and factually. While it is permissible to explain possible alternatives, including that a dismissal process may commence if there is no settlement, do not say that dismissal is inevitable.

- Mark all written communications "Without Prejudice" and "Subject to Section 111A ERA 1996" where appropriate, especially if there may already be a dispute.

Tarbuc v Martello Piling Limited

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