

White Paper Conference

The Trouble with Protected Conversations

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The Problems

- What do they cover – when can they be relied upon?
- In what circumstance does the “protection” disappear?



Background

- **Section 111A**

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.

Background

- **Section 111A** (continued)
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.

Background

- Key points
 - Imposed by Statute 111A
 - Render inadmissible evidence of any offer made or discussions held with a view to terminating employment on agreed terms – both fact of discussion and content
 - Must be pre-termination
 - Only applied to ordinary unfair dismissal
 - Applies whether or not there is a “dispute”
 - Cannot be waived
 - May not apply if improper behaviour



Background



- Without Prejudice rule
 - Public Policy – to encourage extra-judicial settlement of disputes
 - Must be a “dispute” – *Faithorn Farrell Timms LLP v Bailey 2016*
 - Can be waived
 - Does not apply if unambiguous impropriety
 - Only content – not fact of discussions
 - Substance not form

Problem

- When can they be replied upon?
 - Without Prejudice – covers all claims but beware unambiguous impropriety and inadvertent waiver (*Bailey case*)
 - 111A – only ordinary, unfair dismissal – not automatic unfair dismissal, breach of contract or discrimination
 - The problem of multiple claims
 - The problem of the Claimant's perception of their claim
 - Covers internal related correspondence



Problem



- When would protection disappear?
 - 111A – Improper Behaviour (wider than unambiguous impropriety)
 - Harassment, bullying and intimidation
 - Physical assault or threat of physical assault
 - Victimisation
 - Discrimination
 - Undue pressure
 - Without Prejudice – “unambiguous impropriety”
 - Dishonesty
 - Fraud
 - Discrimination(?)

Problem

- When would protection disappear?
 - Waiver
 - Establishing Termination Date



Way Forward

- Overlap between 111A and Without Prejudice
 - Ideally seek to reply upon both
 - Clearly document and signpost
 - Follow ACAS Code
 - Neutrality at all times



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