

The mental gymnastics under s.111A Employment Rights Act 1996

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[L Tarbuc v Martello Piling Limited \[2026\] EAT 58](#)

Background

1. The Claimant brought claims for unfair dismissal, unpaid wages (contractual bonus) and less favourable treatment as a part-time worker.
2. At a preliminary hearing, the ET Judge decided as follows:
 - a. Evidence of the parties' pre-termination negotiations was inadmissible under **s.111A ERA 1996**.
 - b. All references to these negotiations were to be redacted from the pleadings and the hearing bundle.
 - c. The Claimant's application for specific disclosure of documents relating to the negotiations was refused.
3. The Claimant appealed the ET's approach to **s.111A** as a ground of appeal.

The Law

4. **s.111A (1)** provides that evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under **s.111** (ordinary unfair dismissal), subject to **s.111A(3) – s.111A (5)**.
5. **s.111A (3)** disapples **s.111A (1)** where the complainant was dismissed for an automatically unfair reason, e.g. whistleblowing, union membership or asserting a statutory right.

6. **s.111A (4)** provides that where anything said or done which in the tribunal's opinion was improper or was connected with improper behaviour, **s.111A (1)** protection applies only to the extent that the ET considers just.
7. **s.111A** does not apply to claims other than unfair dismissal claims (*Faithorn Farrell Timms LLP v Bailey* [2016] IRLR 839 at [38] per Eady J).
8. In *Basra v BJSS Ltd* [2018] ICR 793 Choudhury P at [26] stated:
 - a. Unlike 'without prejudice' communications, **s.111A** protection cannot be waived by agreement between the parties.
 - b. When the **s.111A** protection exists, it extends to both fact and content of any pre-termination negotiations.
 - c. In a claim involving several causes of action, including unfair dismissal, a tribunal may well have to exclude consideration of protected conversations for the purposes of that claim whilst taking them into account for the purposes of other claims. This will require a tribunal to treat the same evidence differently according to the claim to which it relates. This will not be an easy task, but it is of the kind of analytical compartmentalisation that tribunals and courts often have to undertake.
9. In *Harrison v Aryman Ltd* UKEAT/0085/19, HHJ Auerbach at [25] stated that where there are mixed claims, **s.111A** will apply to a claim of unfair dismissal, unless it is one of automatic unfair dismissal, but not to the other claims. Tribunals may consider evidence excluded by **s.111A** for determining the other claims.
10. Further, in *Harrison*, HHJ Auerbach held that the judge had erred in failing to raise **s.111A (3)** and **s.111A (4)** for consideration of his own motion before coming to the conclusions on **s.111A**.

EAT decision

11. The EAT held that the ET Judge had erred in law by applying **s.111A** globally to all of the Claimant's claims when **S.111A** protection applies only to ordinary unfair dismissal.
12. This ground of appeal was allowed and the matter was remitted.

Key Takeaway

13. The inadmissibility of evidence under **s.111A** applies only to complaints under **s.111**, i.e. unfair dismissal.
14. If there are claims other than an unfair dismissal claim, the ET will require some mental gymnastics to:
 - a. Disregard evidence caught by **s.111A** for the unfair dismissal claim; and
 - b. Consider that same evidence excluded by **s.111A** for any other claim.

Comment

15. ***Tarbuc v Martello Piling Limited*** is a good reminder that 'protected conversations' under **s.111A** are still admissible as evidence for other heads of claim, even if they are not admissible for unfair dismissal.
16. The common law 'without prejudice' privilege can apply to communications made in a genuine attempt to settle an existing dispute. It does not apply where there has been fraud, undue influence or some other 'unambiguous impropriety' such as perjury or blackmail.
17. By contrast, **s.111A** can apply even where there is no existing employment dispute. **S.111A** will not apply where there is some improper behaviour in relation to the settlement agreement discussions or offer.
18. **Paragraph 21 of the ACAS Code on Settlement Agreements** states that the test of 'unambiguous impropriety' for 'without prejudice' privilege is a narrower test than that of 'improper behaviour' under **s.111A (4)**.
19. It would be prudent to take a proactive approach at an early stage to identify whether communications may be protected under **s.111A**. This way, **s.111A (3)** and **s.111A (4)** can also be considered early to determine whether **s.111A** is applicable.
20. A belt and braces approach to avoid the mental gymnastics of the limited **s.111A** protection would be for communications to be headed '*Without prejudice subject to contract*' and explain in the body of the correspondence that **s.111A** is also applicable. This mitigates the risks of relying solely on the **s.111A** protection.

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