Since July 2013, employers and employees have been able to enter into 'off the record' discussions and negotiations about parting ways on the basis of mutually agreed terms, without fear that negotiations will later be used against them in an unfair dismissal claim.

Three years on, we have the first Employment Appeal Tribunal (EAT) guidance on the scope of pre-termination negotiation confidentiality under section 111A of the Employment Rights Act 1996 (ERA).

In short, unlike the longstanding common law 'without prejudice' privilege rules, section 111A privilege inadmissibility extends to the fact that negotiations have taken place at all, not just the content of those negotiations, and it cannot be waived by the parties.

Unfortunately, the EAT declined to decide whether section 111A could apply to negotiations initiated by an employee where an employer failed to make any offer, or the extent to which an employer's conduct could amount to 'improper conduct' rendering the discussions admissible. These questions instead have been sent back to the tribunal to determine.

So what does this mean for employers managing what may be delicate employee exits? Below, our employment and equalities law experts explain and contrast the potential protection for employers under the common law 'without prejudice' privilege rules and statutory protection under section 111A ERA.

**Common law 'without prejudice' privilege or Section 111A privilege**
Unlike the longstanding common law ‘without prejudice’ principle, section 111A enables employers to have discussions with employees about a proposed settlement in a situation where there is not yet an existing dispute.

Section 111A prevents tribunals taking into account any offer made, or discussions held, with a view to an employee’s employment terminating on agreed terms. This allows an employer to raise, for example, a performance or capability issue and include within that discussion a proposal to end the employment relationship on negotiated terms. That conversation could not be used in later ordinary unfair dismissal proceedings as evidence that the decision to dismiss has been predetermined and therefore unfair, regardless of
the procedure followed.

The new section 111A provision may provide comfort to employers seeking to resolve a delicate situation. However, there are important limitations. Section 111A only applies in relation to claims for ordinary unfair dismissal. It does not apply to claims of automatically unfair dismissal or other claims, for example, discrimination or breach of contract.

Tribunals have a degree of discretion to include consideration of ‘anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour’. The ACAS Code of Practice on Settlement Agreements provides a non-exhaustive list of examples of what may constitute ‘improper behaviour’.

Under the Code, ‘improper behaviour’ will include:

a. All forms of harassment, bullying and intimidation, including through the use of offensive words or aggressive behaviour.
b. Physical assault or the threat of physical assault and other criminal behaviour.
c. Victimisation and discrimination.
d. Putting undue pressure on a party.

What will not usually be considered improper behaviour includes:

e. Setting out in a neutral manner the reasons that have led to the proposed settlement agreement.
f. Factually stating the alternatives if agreement cannot be reached, including the possibility of disciplinary action if relevant.

What is the common law 'without prejudice' rule?

Where a genuine attempt has been made to settle a dispute, details of the settlement negotiations are inadmissible in evidence before the court or tribunal. The rationale for the rule is that parties should be encouraged to have full and frank settlement discussions without fear that any admissions or prejudicial comments which they might have made to try to settle the matter may be used against them in evidence should the settlement discussions fail.

Key points to note:
The rule will not apply where the parties are not yet in dispute. The communication, whether made orally or in writing, must be in a genuine attempt to settle a dispute. Merely labelling a document 'without prejudice' will not guarantee protection. On the other hand, failing to label a document 'without prejudice' will not necessarily result in a loss of protection. The key is whether the document viewed objectively is part of a genuine attempt to settle a dispute. Generally extends to any dispute subject to litigation. The fact that without prejudice negotiations have taken place may be admissible, when the content is not. The 'without prejudice' protection can be waived by the mutual consent of the parties. This may occur inadvertently by the conduct of the parties. The protection is not absolute. There are limited exceptions which may result in loss of protection, including fraud and 'unambiguous impropriety' - for example, blatant unlawful discrimination. In 2004, the EAT held that it was in the public interest that allegations of unlawful discrimination in the workplace are heard by a tribunal. Discriminatory comments made in the course of without prejudice discussions may be admissible as evidence under the rule of unambiguous impropriety.

The case of Bailey v Faithorn Farrell Timms LLP

Mrs Bailey was employed part-time as office secretary for a firm of surveyors from 2009 until she resigned in February 2015 after it was made clear that she could no longer work part-time.

In December 2014, Mrs Bailey initiated discussions about a settlement agreement and in January 2015, she and her employer exchanged ‘without prejudice’ correspondence about possible settlement terms. The situation quickly deteriorated with Mrs Bailey raising a grievance in which she referred to the previous discussions ‘in open correspondence’. When the employer replied in a further ‘without prejudice’ letter, Mrs Bailey responded to say that she did not accept that the discussion was privileged.

When Mrs Bailey went on to bring claims of unfair constructive dismissal and sex discrimination, she referred to the settlement discussions in her claim. The employer did not object and also cited the same material in support of its own case. The question of admissibility was later raised at the tribunal hearing.
Guidance from the EAT

Common law 'without prejudice' privilege

1. Scope of the protection

The EAT held that common law 'without prejudice' privilege applied in this case as it was common ground that the parties were in dispute by 7 January 2015. The period before that date could only be considered under section 111A. In addition, under the common law, the tribunal was entitled to consider evidence as to the fact that negotiations had taken place.

2. Common law 'without prejudice' privilege waived

The EAT was not persuaded that references to without prejudice material in the course of an internal grievance would ordinarily lead to the conclusion that the parties must be taken to have impliedly agreed to waive privilege. However, the fact that Mrs Bailey had gone on to refer to the material in her claim form and the employer had not objected and referred to the same material in its response, demonstrated that the parties had clearly agreed that any privilege should be waived.

Section 111A privilege

1. The fact that negotiations have taken place, not just their content, is covered.

What is rendered inadmissible by section 111A is evidence of any offer made, or discussions held, with a view to terminating the employment on agreed terms. That extends to the fact of the discussions, not simply to their content. In addition, this is not limited to the relevant discussions between the employer and employee, but also discussions within the employer, for example between different managers or a manager and a Human Resources adviser.

2. Privilege under section 111A cannot be waived.

It is not possible for the parties to agree (expressly or implicitly) to admit the negotiations in evidence. Unlike the common law 'without prejudice' rule, privilege cannot be waived by the parties, intentionally or unintentionally.

The reference to the negotiations in Mrs Bailey’s claim form to which the employer had
failed to object and, indeed, referred to in its response form, demonstrated that the parties had clearly agreed that any common law 'without prejudice' privilege should be waived. However, this was irrelevant to section 111A privilege, which could not be waived.

3. Section 111A still applies even where there are additional claims.

The existence of another claim, such as a discrimination claim, does not render admissible for all purposes evidence otherwise inadmissible in an unfair dismissal claim under section 111A. The tribunal would allow the evidence to be admitted for the discrimination claim, but still treat it as inadmissible in relation to the unfair dismissal claim.

What the EAT judgment does not do is:

- address whether negotiations can fall within the scope of section 111A when the employer makes no actual offer of settlement, where it is the employee who starts negotiations; or
- provide guidance on an employer’s behaviour that could be classed as "improper behaviour".

**When are settlement discussions really off record?**

Employers wishing to have confidential discussions with an employee to end the employment relationship can and should utilise both section 111A privilege and common law 'without prejudice' privilege. The two are not mutually exclusive.

Use of the privilege rules is desirable as otherwise an employer could find that an employee attempts to use the fact that an offer was made as evidence that:

- a subsequent decision to dismiss was predetermined regardless of procedural obligations; or
- where a disciplinary or performance management procedure is already running, that the ongoing disciplinary or performance procedure, was a sham which justified the employee resigning and claiming constructive dismissal.

**Common law 'without prejudice' privilege or Section**
### 111A privilege

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<tr>
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<th>Common law privilege</th>
<th>Section 111A privilege</th>
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<tbody>
<tr>
<td>Must be an existing dispute between the parties</td>
<td>Yes</td>
<td>No</td>
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<td>Restricted to ordinary unfair dismissal claims</td>
<td>No</td>
<td>Yes</td>
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<tr>
<td>Protection can be waived by agreement (explicitly or inadvertently)</td>
<td>Yes</td>
<td>No</td>
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<tr>
<td>Exemptions apply</td>
<td>Yes 'unambiguous impropriety' (narrow)</td>
<td>Yes 'improper behaviour' (broader)</td>
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<tr>
<td>The fact that negotiations have taken place covered</td>
<td>No</td>
<td>Yes (in relation to ordinary unfair dismissal claims only)</td>
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### Steps in an employer-initiated termination negotiation

**Step 1:** Invite the employee to a meeting at a mutually convenient time and place. While not a legal requirement, the ACAS Code recommends that the employer should allow the employee to be accompanied by a colleague or a trade union official.

**Step 2:** At the meeting:

- State that all meetings and correspondence are confidential and without prejudice.
• Remember, if not already 'in dispute', then only section 111A privilege will apply to ordinary unfair dismissal claims. There is no requirement to specify that the conversation is under section 111A. However, depending on the situation, you may want to point out that the discussions/offer would not be admissible in any unfair dismissal claim if settlement discussions are ultimately unsuccessful.

• Explain your concerns (for example, performance issues, redundancy or the breakdown of the working relationship) and that you are proposing an exit with an agreed settlement package.

• Explain that the employee is under no obligation to enter into the discussion and whether they choose to or not will have no bearing on any subsequent redundancy process/performance management/disciplinary procedures if settlement discussions are ultimately unsuccessful.

**Step 3:** If the employee agrees to explore the suggestion of settlement, produce formal written terms. While the initial proposal may be oral, for a settlement agreement to be legally binding it ultimately must be put in writing. A written proposal also reduces the risk of later misunderstandings.

**Step 4:** Give the employee time to consider the offer. Under section 111A, the employee must have a 'reasonable period' in which to consider the formal written terms. What constitutes a reasonable period of time will depend on the particular circumstances, but the ACAS Code refers to a minimum of 10 calendar days generally being allowed. Remember, do not put pressure on the employee to accept the offer and avoid any potentially discriminatory actions/comments.

**Step 5:** If the employee is interested in proceeding with the settlement, provide the employee with a settlement agreement documenting the terms. The employee will need to take independent legal advice on the implications of entering into the agreement.

**Step 6:** If the employee is not interested in exploring settlement, cease settlement negotiations and move on to plan B, which may be a formal process to tackle the underlying problem or may be moving straight to dismissal in any event, depending on the circumstances.

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Related Employment, Labour & Equalities
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