Settlement offer made in the context of exit discussions was not without prejudice

In the recent case of Scheldebouw BV v Evanson, the EAT upheld an Employment Tribunal's decision that a settlement offer made by an employer in the context of amicable exit discussions was not "without prejudice" because there was no dispute between the parties at that stage. Accordingly, the fact of the offer could be referred to in Tribunal proceedings.

What happened in this case?

Mr Evanson worked for Scheldebouw BV as its Chief Risk Officer from January 2005 until his dismissal on 19 March 2019.

In 2018, the company decided that it no longer needed a Chief Risk Officer and so it initiated exit discussions with Mr Evanson. A meeting was held on 12 October 2018. Neither party asked that the meeting be held on a without prejudice basis. A "gentlemen's agreement" was reached on the majority of the exit terms, save for the sum to be paid in respect of accrued but untaken holiday.

In the meeting, the company offered to pay the sum of £68,000 in lieu of the unused holiday, yet Mr Evanson believed he was entitled to more. However, the parties were confident that the holiday pay issue could be resolved, and they agreed to enter into a settlement agreement. In December 2018, a draft settlement agreement was prepared and sent to Mr

Evanson. However, a final agreement was not achieved, and the company eventually dismissed him in March 2019.

Mr Evanson claimed unlawful deductions from wages in respect of the unpaid holiday. In his claim form, he referred to the company's initial offer of £68,000. The company applied to have this removed from the claim on the grounds that the offer had been "without prejudice" – meaning it was off the record and should not be before the Employment Tribunal.

What was decided?

The Employment Tribunal disagreed with the company, finding that the offer was not truly "without prejudice". In order for without prejudice privilege to apply, it is necessary for the parties to be attempting to resolve a "dispute". At the point that the offer of £68,000 was made, it could not be said that the parties were in dispute. The parties were confident that exit terms would eventually be agreed and did not contemplate (and could not reasonably have contemplated) that litigation would follow if an agreement could not be reached. It was only after the draft settlement agreement was rejected that a dispute arose.

The company appealed to the Employment Appeal Tribunal (**EAT**). However, the EAT upheld the Tribunal's decision and said the offer of £68,000 was not off the record and, therefore, could be referred to in Mr Evanson's claim. Importantly, the EAT found that the decision to enter into a settlement agreement was made for commercial reasons and did not indicate that litigation was in contemplation.

What are the learning points for employers?

In order for without prejudice privilege to be engaged, a settlement offer must be aimed at resolving an existing "dispute". A dispute will always exist once litigation has started. However, a dispute may also exist *before* litigation has started if the parties had contemplated (or might reasonably have contemplated) that litigation would follow if settlement was not forthcoming. It is not necessary for a threat of litigation to have been made in order for the parties to reasonably contemplate that litigation may follow.

However, where the parties did not contemplate (or could not reasonably have contemplated) that litigation would follow if the negotiations fell apart, then a dispute will *not* exist. Against this background, simply labelling a settlement discussion, letter or agreement as "without prejudice" will not be enough to engage without prejudice privilege.

Where there is no dispute, there remains the ability to have "pre-termination settlement discussions" under section 111A of the Employment Rights Act 1996. However, these discussions are off the record for the purposes of ordinary unfair dismissal claims only and could still be referred to in other types of claim, such as discrimination claims. Therefore, it is better to ensure that without prejudice privilege applies wherever possible, since this will protect the communications from disclosure in *any* proceedings.

If you are unsure about whether you are in "dispute" with a departing employee, it would be sensible to obtain legal

advice before making any settlement offers.

Scheldebouw BV v Evanson

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

Should employers only deal with formal bullying complaints which cross a certain threshold?

On 21 April 2023, Dominic Raab resigned as Justice Secretary and Deputy Prime Minister after an independent investigator found that he had bullied civil servants. In this article we consider the learning points for employers and how complaints of bullying should be managed.

Why is bullying in the news again?

Bullying in the upper echelons of Government has hit the headlines once again.

Back in December 2020 news broke that a Cabinet Office inquiry had found evidence that the then Home Secretary, Priti Patel, had bullied staff and broken the Ministerial Code. It later emerged that she had a history of such behaviour when in previous roles. The alleged behaviour included shouting, swearing, belittling people and making unreasonable demands. The Cabinet Office inquiry found that Ms Patel was "action orientated", could be "direct" and felt justifiably frustrated with civil servants on occasions. However, this manifested itself in "forceful expression, including some occasions of shouting and swearing" which had upset staff. It concluded that her behaviour had breached the Ministerial Code, even if this was "unintentional".

Fast forward to 2023 and an independent investigator has concluded that Dominic Raab committed acts of bullying when he was Foreign Secretary and Justice Secretary. The report found that Mr Raab was "persistently aggressive" in meetings and had abused or misused his power in a way which could undermine and humiliate colleagues. It also emerged that he had acted in an "intimidating" manner, had described colleagues' work as "utterly useless" and "woeful" and had threatened disciplinary action. Mr Raab resigned in response to the findings. He apologised for any "unintended" stress or offence felt by colleagues but expressed concerns that the "threshold" for bullying had been set too low.

Why is this of interest to employers?

What is interesting in these cases is that the senior perpetrators viewed their own behaviour as robust management rather than bullying. Further, the behaviours in question were tolerated by multiple colleagues for some time before formal investigations were triggered. It is easy to see how

similar scenarios could arise in the workplace.

Unless perpetrators are made aware of the impact of their oppressive behaviour, they will be unable to take steps to correct it. Therefore, it is important for employers to support employees to come forward with bullying complaints. A frequent problem that employers face in these situations is that victims do not want to "rock the boat" – particularly where the perpetrator is very senior. If a victim *is* prepared to speak up, they tend to want to do so on an informal or "off the record" basis.

This puts an employer in a difficult position. On one hand, it is now on notice of the alleged bullying and may be exposed to risk if they do nothing. On the other hand, the victim does not want to take any formal action.

How should employers respond to informal complaints of bullying?

There is no "one size fits all" answer to the question of how an employer should respond to such a complaint. In practice, employers will need to grapple with a number of preliminary questions in order to decide upon a suitable response.

Is it bullying?

Dominic Raab said that the "threshold" for bullying had been set too low. Is there a threshold before behaviour qualifies as bullying? In contrast to the related concept of discriminatory harassment, there is no legal definition of

bullying. The non-statutory Acas Guide for Managers and Employers on Bullying and Harassment at Work offers a wide-ranging definition of bullying as: "Offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient". It does not matter whether or not the perpetrator deliberately *intended* to bully. It is also not necessary for such treatment to be related to a protected characteristic under the Equality Act 2010.

Typically, internal policies will usually spell out what types of behaviour may be viewed as bullying and will often seek to distinguish this from behaviours associated with active management of staff. However, things like speaking in an aggressive and threatening way, shouting, swearing, mimicking, making comments that belittle or humiliate employees, levying excessive and undue criticism, and/or making unwarranted threats of disciplinary action will usually fall on the wrong side of the line.

Is it a grievance?

The statutory Acas Code of Practice on Disciplinary and Grievance Procedures (**Acas Code**) defines grievances as: "…concerns, problems or complaints that employees raise with their employer". This broad definition means that *any* disclosure by an employee that they are (or someone else is) being bullied at work would be viewed as a grievance for the purposes of the Acas Code.

Employers should not be tempted to avoid dealing with a complaint simply because it is felt that an overly sensitive employee is merely "venting" or looking for moral support.

However, it may lead an employer to favour an informal response. Where matters are minor and/or the employee over-sensitive, resolution with the support of HR may be all that is required to get things back on track.

Yet employers should exercise caution when making such assessments and ensure that they build up a full picture of what has happened. As the Acas Guide to Bullying highlights: "People being bullied or harassed may sometimes appear to overreact to something that seems relatively trivial, but which may be the last straw in a series of incidents". Indeed, in the case of Green v DB Group Services (UK) Ltd EWHC 1898 (QB) the High Court held that the cumulative effect of the alleged conduct had to be considered, rather than individual incidents. In that case, Ms Green was subjected to a long-term campaign of mean and spiteful behaviour which included actions such as blowing raspberries as she walked by, telling her she "stank", removing her image from the company intranet and hiding her work. In isolation, acts of this nature may seem minor but, together, they expose the employer to significant risk if no action is taken. Indeed, in Green, the bullying campaign led Ms Green to have a nervous breakdown and she was award £817,000 in damages.

In short, the learning point is that even an informal complaint about minor bullying may amount to a grievance requiring *some* form of response from the employer. In appropriate cases, it may be that the response is limited to informal resolution. However, what an employer should *not* do is turn a blind eye or hope that it blows over. Action of some sort will always be required.

What legal claims could the employee have?

Although there is no stand-alone legal claim for bullying, there are a suite of other legal claims available to an employee who has been the victim of bullying including claims for:

- constructive dismissal;
- personal injury;
- failure to make reasonable adjustments (if disabled);
- discriminatory harassment (if the bullying relates to a protected characteristic such as sex, race, age, religion, sexual orientation);
- victimisation (if the bullying followed a protected act such as complaining of sexual harassment);
- whistleblowing detriment (if the bullying was as a result of the employee raising concerns about, for example, regulatory breaches); and/or
- harassment under the Protection from Harassment Act 1997.

When deciding on how to respond to an informal bullying complaint, employers should, as far as possible, consider their exposure to these legal claims. The more serious the alleged bullying, the higher the legal risk and the more likely it is that the employer will need to pursue a formal

approach.

What other factors are important?

Employers should consider other issues such as compliance with internal policies and procedures, and also with a regulator's expectations, if applicable. By way of example, financial services employers subject to the Financial Conduct Authority's (**FCA**) Senior Managers and Certification Regime must assess senior managers and certification employees to be "fit and proper". The "fit and proper" test focuses on honesty, integrity and reputation amongst other things. Accordingly, allegations of bullying may mean that a Senior Manager or a Certification Employee is not fit and proper. Where such allegations are raised, it is imperative that the employer investigates to decide whether those allegations are well-founded and should be reported to the FCA.

Employers should also consider the wider consequences for their organisation of leaving bullying unchecked. The Acas Guide to Bullying highlights that the problem can fester and cause serious problems for the employer including poor morale and employee relations; loss of respect for managers and supervisors; poor performance; lost productivity; absences; resignations; and reputational damage.

Conclusion: what are the employer's options?

Employers should consider all of these preliminary issues in light of the complaint, including the severity of the alleged behaviour, the length of time it has been going on, the number of victims and the seniority of the perpetrator. They will

then be in a position to form a view about what steps to take in response. There are four possible options.

- **Option 1 – Note the complaint and do nothing else:** this is a high-risk option and should be avoided in most cases.

- **Option 2 – Informal resolution:** where the complaint appears minor or a one-off, a better option for the employer would be to propose some form of informal resolution such as a supported discussion or mediation.

- **Option 3 – Formal procedure with the employee's participation:** in more serious cases a formal investigation should be undertaken. This is the only route by which the employer can reach a conclusion on whether the allegations are true or false and issue sanctions and take remedial action. The employer should apply the procedure set out in its own Grievance Policy.

- **Option 4 – Formal procedure without the employee's participation:** there may be cases where the employee is simply unwilling to pursue a formal complaint under any circumstances. This puts the employer in the difficult position of having to go against the employee's wishes. However, in serious cases the risk of doing nothing is too high. Inaction jeopardises the health and safety of the employee (and possibly other employees), fails to afford the perpetrator the chance to explain their

behaviour and exposes the employer to legal risk and possibly regulatory censure.

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New Acas guidance on making reasonable adjustments for mental health conditions

For the first time, Acas has published specific guidance on how reasonable adjustments can be used for staff with mental health conditions. The guidance considers how adjustments should be agreed and the role that managers have in managing employees once adjustments are in place. In this article we summarise the key points to note.

What are reasonable adjustments for mental health?

Employers have a positive duty to make reasonable adjustments to the workplace to remove or reduce a disadvantage related to a person's disability. "Disability" covers both physical and

mental impairments which have a substantial and adverse effect on a person's ability to carry out day to day activities. Examples of mental health impairments that may qualify as a disability include depression, anxiety, bipolar disorder, ADHD and OCD.

The duty covers disadvantages caused by working practices, policies, physical features of the workplace or by the absence of an auxiliary aid. What is "reasonable" will depend on a number of factors including whether the adjustment is practicable, the financial and other costs of making the adjustment and the size and financial resources available to the employer. Importantly, the duty to make reasonable adjustments applies whether or not a disabled employee requests them.

The new Acas guidance highlights that employers and works should work together to agree and review reasonable adjustments over time. When it comes to mental health, the guidance underlines that what works for one situation or employee, may not work for another. Furthermore, what works at one point in time, may not work in the future if the mental health condition changes. In other words, a flexible approach needs to be taken. The benefit of doing so is that the right adjustments will help keep the employee in work, enabling them to work safely and productively.

Although the guidance is non-binding, it would be sensible for employers to follow it when dealing with employees with mental health conditions. Being able to demonstrate compliance with the recommendations will put employers facing claims of failure to make reasonable adjustments in the best possible position to defend them.

Examples of reasonable adjustments for mental health

The guidance sets out a non-exhaustive list of examples of adjustments that can be made for those with mental health conditions. These include:

- **Changing someone's role and responsibilities –** for example, reviewing tasks and deadlines to help someone have a reasonable workload while managing their mental health.

- **Reviewing working relationships and communication styles** – for example, agreeing a preferred communication method to help reduce anxiety such as avoiding spontaneous phone calls.

- **Changing the physical working environment** – for example, relocating someone's workspace to a quieter area to reduce sensory demands.

- **Policy changes** – for example, being flexible with "trigger points" for sickness absence management, so that someone is not disadvantaged by mental health related absence.

- **Providing additional support** – for example, providing regular check ins to help with prioritising work and structuring the working day.

Requesting reasonable adjustments for mental health

The legal duty to make reasonable adjustments requires employers to proactively identify and make adjustments to remove or reduce disadvantage for disabled people. Nevertheless, the guidance encourages employees to who feel they need an adjustment to open a discussion with their employer.

The guidance offers lots of tips on how employees can best prepare for such discussions. Before making a request, the guidance suggests that employees consider the following issues:

- **Think about how their mental health affects their work** – for example, are there times in the day or week that are better or harder?
- **Think about how work affects their mental health** – for example, are there some tasks that cause anxiety or worry?
- **Talk to a friend or family member** – this can help the employee to better recognise patterns in their own behaviour, especially when they are experiencing mental health problems. For example, the employee can ask for views on when they seem confident, settled and happy and when they do not.
- **Look through examples of reasonable adjustments** – looking through examples (including the examples contained in the guidance) may give the employee ideas

of the kinds of things that might be possible and could help them.

- **Get advice from an occupational health professional** – occupational health professionals can provide expert advice on what adjustments might be suitable for the employee.

Having done this preparation, the guidance recommends that employees have a conversation and agree a plan with their employer. It also recommends that any adjustments are trialled and monitored over time and that a record is kept of any changes made. Beyond this, the guidance recommends keeping adjustments under review and holding regular follow up meetings to discuss how the adjustment is working for both parties. These meetings could be weekly, monthly or less frequently.

Responding to requests for reasonable adjustments for mental heath

The guidance also offers pointers for employers on how to respond to requests for reasonable adjustments for mental health. In terms of preparation, it recommends that the person having the discussion with the employee considers any relevant organisational policies relating to mental health, absence and reasonable adjustments. It also urges the person to reflect on how confident they feel talking about mental health at work (and consider undertaking training if necessary) and to try to put themselves in the employee's position and think about what is going on for them.

In terms of identifying the right adjustments, the guidance recommends looking through examples of reasonable adjustments and seeking advice from an occupational health professional on what adjustments might be suitable. Possible adjustments should then be discussed in a meeting with the employee. The guidance offers a checklist of the things to be covered in any such meeting and recommends that the employee be allowed to bring a trusted person with them to take notes if desired. Once adjustments are agreed, the employer should confirm them in writing and keep them under review.

Managing employees with reasonable adjustments for mental health

Helpfully, the guidance offers specific advice to managers of employees who have reasonable adjustments in place for their mental health. This includes a checklist of practical steps that can be taken to support someone access the support they need – these are:

- Check in with the employee, ask how they are and if they need help.
- Learn to recognise changes in their behaviour.
- Try to understand how their mental health impacts them.
- Understand that adjustments might not work the first time and may need to be changed over time.
- Be flexible in your approach and respond to changing needs.

- Show ongoing support throughout any fluctuations in mental health and put in place adjustments as needed.

- Consider the needs of the employee and their team in case anything needs to change.

- Know when to ask for help from others such as HR and occupational health.

Further guidance is given on how to handle conversations about adjustments sensitively and on the follow up steps that should be taken by managers.

Reviewing policies with mental health in mind

Finally, the guidance encourages employers to review relevant policies (such as absence policies) to make sure that they are suitable for employees with mental health problems. For example, by ensuring they use clear, accessible and empathetic language. Such policies should be clear on what needs to be done by who and when and be well understood by managers and implemented consistently by them.

It is also recommended that employers have a policy which specifically addresses reasonable adjustments for mental health. This will help make it clear how adjustments can be accessed, how managers will deal with requests and keep them under review. Such a policy could also signpost other sources of support, such as employee assistance programmes or mental health champions and outline the organisation’s overall

wellbeing strategy.

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Acas – Reasonable adjustments for mental health guidance