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.