Beyond the fine print: employer bound by assurances about retention of share options

The High Court's decision in *Dixon v GlobalData Plc* highlights the risks associated with informal promises and unclear drafting in settlement agreements, particularly where share options and discretionary powers are involved. The case revolved around whether a former employee was entitled to retain and exercise his share options after leaving the company, based on verbal assurances and ambiguous settlement terms.

What happened in this case?

The Claimant was a long-serving employee of Canadean Ltd, a market research firm later acquired by GlobalData. During his exit negotiations, the Claimant received verbal and written assurances from the group's CEO, Mr Pyper, that he would retain his share options, and they would *"vest in line with current conditions."* The options were subject to performance targets being met.

Relying on Mr Pyper's assurances, the Claimant agreed to settlement terms under which his employment would be extended by four months beyond the initial proposed termination date, and he would be bound by post-termination restrictive covenants. The assurances about the share options were also incorporated into the settlement agreement. The Claimant assumed that this meant the position regarding the share options was *"watertight."* He did not review the underlying share plan rules, nor were they mentioned during negotiations.

The share options were divided into three tranches.

- The first tranche of share options vested before the Claimant’s employment ended in 2014 and the Claimant went on to exercise these options. There was no dispute about this tranche.

- The Claimant attempted to exercise the second tranche of share options in 2020. However, the company argued that his options had lapsed when he left the company because the necessary discretion had not been exercised to permit the continued exercise of the share options post-termination. The Claimant sought an order that he was either entitled to exercise the options or receive damages.

- Due to the impact of COVID, it was clear that the performance targets for the third tranche of options would not be met, meaning that those options would lapse. In response, in 2020, the company introduced a replacement share plan to compensate the affected employees, including those who had left employment and had approved good leaver status. The Claimant was excluded from the replacement plan on the basis that the company believed his options had lapsed when he left the company. The Claimant argued that he was entitled to participate in the new scheme and, if not, his exclusion amounted to an irrational exercise of discretion for which he should be compensated.

What was decided?

The Court addressed several key issues:

Had discretion been exercised under the share plan in the Claimant's favour?

Rule 7.1 of the share plan allowed the grantor to exercise its discretion to permit the continued exercise of options post-termination. The Claimant's position was that Mr Pyper had exercised the rule 7.1 power. However, the Court found there was no evidence that Mr Pyper had sought to do this. To exercise the power, Mr Pyper would have had to specify the basis on which the options might be exercised, and he did not do this. Even if he had purported to exercise the power, it would have been invalid on the grounds of uncertainty. Therefore, there had been no exercise of discretion permitting the Claimant to retain his share options and exercise them post-termination.

Did the CEO have authority to exercise the discretion?

Because discretion had not been exercised in the Claimant's favour, the Court did not need to consider the question of whether Mr Pyper had the authority to exercise such discretion. However, the Court made some useful remarks on this point which are worth noting.

On the facts, it was clear that Mr Pyper would not have had *actual* authority to exercise the discretion. There was no evidence that the Board of the company had authorised him to do so. Yet the Court said that, given his seniority, it was likely that Mr Pyper would have had *ostensible* authority to exercise the discretion. This would have bound the company had the discretion been exercised.

If the Claimant did not retain his share options, was the equitable remedy of proprietary estoppel available to him?

In the alternative, the Claimant claimed a remedy based upon "proprietary estoppel." To succeed in such a claim, three elements must be satisfied:

- a clear and unequivocal assurance or representation;
- reasonable reliance on that assurance; and
- substantial detriment resulting from that reliance.

The Court found that all three elements were present. Mr Pyper's assurances were sufficiently clear and unambiguous. The Claimant's reliance upon the assurances was reasonable, given the overall context and his understanding. And finally, the detriment he suffered was substantial, namely, working for four additional months and agreeing to be bound by post-termination restrictive covenants. The company had acted unconscionably in not giving effect to Mr Pyper's assurances. Therefore, the claim succeeded.

Did the “Micklefield” clause in the share plan defeat the claim of proprietary estoppel?

The company argued that rule 14 of the share plan prevented claims for loss of benefits due to termination (often referred to as a “Micklefield” clause). The company argued that this clause barred the proprietary estoppel claim. The Court disagreed, finding that the Claimant was not claiming loss due to termination. Instead, he was seeking relief in equity for the denial of promised rights, meaning rule 14 was not engaged. Even if it was, the Court said that the assurance made by Mr Pyper implicitly included a promise not to rely on rule 14. Therefore, the Micklefield clause did not defeat the claim.

Remedy

The question of remedy is to be determined at a later date, although the Court indicated that the Claimant would have been entitled to exercise the second tranche of share options had the assurance been honoured. The burden is on the company to prove that this would be disproportionate.

The position on the third tranche – which related to a new scheme introduced after the original plan had expired – was less clear and would be addressed separately.

What are the learning points?

This decision has wide-ranging implications for both employers and employees.

Key takeaways for employers include:

- **Avoid making assurances unless they align with rules of the relevant share plan:** equity awards are not just a matter of plan rules and contracts. As this case demonstrates, they are also be governed by equitable principles. You may find that an informal verbal promise made by a senior leader, or wording in a settlement agreement which does not reflect the position under the share plan, is enforceable through proprietary estoppel (and a Micklefield clause will not come to the rescue). If you intend to offer post-termination benefits, make sure this is clearly documented and consistent with the share plan rules.

- **Exercise discretion properly:** if discretion is required under a share plan, it must be exercised formally. Be clear on the conditions, basis, and timing of the exercise. Remember that senior leaders in the business may be deemed to have ostensible authority to bind the company in this respect.

- **Think beyond exits:** this case is not just relevant to exit negotiations. It potentially has implications for recruitment, retention bonuses, deferred compensation, and any situation where an employee relies on a promise of future benefit. Employers must consider whether their actions could give rise to proprietary estoppel even in the absence of a formal contract.

Key takeaways for employees include:

- **Check the share plan rules thoroughly:** understand the leaver provisions and what is required for a valid exercise of discretion permitting the retention of share options post-termination. Ask to see evidence that the discretion has been so exercised, for example, request a copy of the relevant Board resolution.

- **Make sure the settlement agreement drafting is watertight:** do not assume that merely referencing the retention of share options in a settlement agreement is sufficient.

- **Get the right parties on board**: if the discretionary power lies with a parent company, it is advisable to either make them a party to the settlement agreement, obtain separate legally binding assurances from them or require the employing entity to procure a parent approval. Otherwise, the agreement may be unenforceable or lead to disputes. If Board approval is required, then the employer should be asked to confirm that it has in fact been obtained.

- **Protect your future position:** consider including protective drafting in the settlement agreement to ensure you are entitled to benefit from any favourable variation to performance conditions and to participate in any replacement scheme or benefits offered by the employer after you have left. For example, seek to include wording that you will be treated no less favourably than active employees.

Dixon v GlobalData Plc

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Victims and Prisoners Act 2024: changes to non-disclosure agreements

effective 1 October 2025

On 1 October 2025, new legislation will come into force affecting the use of non-disclosure agreements (**NDAs**) in England and Wales.

Below, we set out a brief reminder of the current position on NDAs and the changes of which employers should be immediately aware. For further background on these changes, and for full information on the broader changes to NDAs expected under the Employment Rights Bill, see our full briefing here).

What is the current law on NDAs?

NDAs have become an increasingly common feature of employment related agreements, often used as part of settlement agreements on an employee's exit or to otherwise bring disputes to a close. From both an employer and employee's perspective, they can provide security regarding the use of confidential information and the privacy of a dispute, in many cases providing much needed closure for those involved. However, campaigns have highlighted concerns that such provisions are being misused to silence victims of serious workplace misconduct or cover up other wrongdoing.

Whilst the existing law prevents NDAs from prohibiting individuals from whistleblowing, or from making disclosures to the police and/or regulatory bodies where the complaint relates to a criminal offence, their use is otherwise broadly unregulated.

What is changing on 1 October 2025?

Under the Victims and Prisoners Act 2024, individuals will be able to make a "permitted disclosure" in specified circumstances, even if they signed an NDA that would ordinarily prevent their doing so. To the extent that the NDA purports to restrict this, the relevant term will be void..

This will come into force on 1 October 2025 and apply to all NDAs that are signed on or after that date. NDAs that already exist or which are signed before this date will not be caught.

What is a permitted disclosure?

A "permitted disclosure" is a disclosure made by a "victim of crime" (or a person who reasonably believes that they have been a victim of a crime) about criminal conduct, where that disclosure is made to certain specified persons or regulatory bodies.

A "victim of crime" means someone who has suffered harm as a direct result of being subjected to conduct constituting a criminal offence in England and Wales, or as a direct result of witnessing the criminal conduct. There are also other limited categories of connection with the criminal conduct, concerning familial relationships. The offence in question does not have to have been reported and no charge or conviction is required to have occurred. The harm suffered can be physical, mental, emotional or economic.

The specified categories to whom a permitted disclosure can be made about the relevant conduct are:

- Law enforcement.
- Qualified lawyers.
- Any regulated professional or regulator of professionals.
- Victim support services.
- Any individuals who are authorised to receive information on behalf of the above categories.
- Any child, parent or partner of the individual making the disclosure.

In each case, the disclosure is only a qualifying permitted disclosure where it relates to the relevant criminal conduct and is made for the purposes of obtaining support from the relevant function (or, where relevant, co-operating with their functions). For instance, sharing information with a qualified lawyer will only be a permitted disclosure where it is for the purpose of seeking legal advice about the relevant conduct. Where the recipient is a child, parent or partner, the disclosure must be for the purposes of obtaining support from that person.

Importantly, an NDA will not be prohibited to the extent that it precludes disclosures made for the primary purpose of releasing information into the public domain, for example to the media.

What does this mean for employers?

In many cases, employers are already prepared for employees not to be bound by NDAs when it comes to criminal or potentially criminal conduct. Such cases would often already be caught by whistleblowing exceptions. Further, any NDAs negotiated by legal advisers must not prohibit reports to professional advisers, co-operation with a criminal investigation or reports to regulatory bodies and law enforcement agencies.

However, there are some important differences between the current restrictions and those which will be in force from 1 October 2025. Employers should particularly bear in mind the following:

- A worker may be considered a victim where they have been, or reasonably believe they have been, subject of criminal conduct. In the workplace, this could include serious acts of harassment (including sexual harassment), theft, violence or fraud. Any witnesses to such conduct would also be included, and the fact that no police report was ever made will not affect their protection. This could capture a broader range of individuals than employers may anticipate, particularly in cases of unproven allegations or disputed accounts of events.

- Unlike in the existing whistleblowing exceptions, there is no requirement for the permitted disclosure to be made in the 'public interest'. This broadens the scope of what can be permissibly shared, particularly where information is shared for the purposes of obtaining legal, medical or personal support. Disclosure of criminal conduct to any of the regulatory categories of recipient is generally likely in any case to be in the public interest.

In light of these changes, employers will therefore need to review their current confidentiality clauses such as those contained in settlement agreements, employment contracts and any stand-alone NDAs, and remove (or clarify) any provisions that appear to preclude permitted disclosures under this new legislation.

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EAT holds that future discrimination claims may be waived in a settlement agreement

In *Clifford v IBM UK Ltd* the EAT upheld a decision to strike out a discrimination claim, holding that a waiver of future discrimination claims contained in an earlier settlement agreement was effective.

What happened in this case?

The claimant, Mr Clifford, started working for IBM in 2001 and began a period of extended sick leave in 2008. In 2012, he raised a grievance about the fact that IBM had not increased his salary or paid holiday pay to him during his sickness absence. He said this amounted to disability discrimination and he asked to be moved onto IBM's disability plan (**the Plan**). Under the Plan, Mr Clifford would be paid 75% of his former salary until the earlier of recovery, retirement or death.

In 2013, Mr Clifford and IBM entered into a settlement agreement under which IBM agreed to:

- pay a sum to settle the complaint about the unpaid holiday pay, however, no payment was to be made in respect of the unawarded pay rises;

- place Mr Clifford on the Plan, under which he would receive around £54,000 per year until retirement (and the terms of the Plan stipulated that any pay increases were to be at IBM's discretion); and
- pay employer pension contributions based upon his full salary of around £72,000.

In exchange, Mr Clifford agreed:

- to waive his rights to bring claims about the matters raised in his grievance or any other claims that he had against IBM;
- to waive his rights to bring any *future* claims that he may have connected to the matters set out in the grievance and/or the transfer to the Plan; and
- to waive his rights to bring a long list of other possible claims;

Yet, in 2022, Mr Clifford brought claims against IBM, alleging that it was discriminatory (and also a breach of working time rules) to have paid only 75% of his previous salary to him throughout the year. He said he was entitled to 100% of pay in respect of periods of annual leave, which meant that IBM owed him around £69,000. He also claimed that it was discriminatory not to have awarded pay increases to him while he was on the Plan. He argued that the Plan was intended to give security to disabled employees, but inflation had reduced the real value of the benefit.

IBM applied to have the claims struck out arguing, amongst other things, that they were precluded by the waivers contained in the settlement agreement, which extended to *future claims* concerning similar matters raised in the grievance or the transfer to the Plan. Mr Clifford sought to resist the strike out, pointing to the EAT's decision in Bathgate v Technip UK Ltd, which said that settlement agreements *cannot* settle unknown future claims. Mr Clifford also argued that both the blanket waiver (which purported to waive all and any claims) and the kitchen sink waiver (which purported to waive all claims set out in a long list of claims) were ineffective. Therefore, Mr Clifford said that the waivers in the settlement agreement were invalid and did not prevent him from pursuing the claims.

The Employment Tribunal Judge struck out the claims, holding that future claims about holiday pay and pay increases had been expressly waived in the settlement agreement and that waiver *was* effective. The Judge distinguished the EAT's decision in Bathgate, which was directed at future claims which had not yet arisen and were truly unknowable. By contrast, in this case, the issues of holiday pay and pay increases *were* known about at the time of entering into the settlement agreement and had been raised in Mr Clifford's grievance and subsequent appeal. The settlement agreement was clear that he could *not* bring future claims arising out of similar matters to those that had been settled.

Mr Clifford appealed to the EAT.

What did the EAT decide?

It is worth noting that between the Employment Tribunal and EAT hearings in this case, the EAT's decision in Bathgate(which had been relied upon by Mr Clifford) was overturned by the Scottish Court of Session. The Court of Session held that the Equality Act 2010 permitted the settlement of unknown future claims, provided that the claims are clearly particularised and the objective meaning of the word used encompasses settlement of the relevant claim. However, a general waiver of all claims would not be sufficient. You can read our full briefing on the Court of Session's decision here.

The EAT dismissed Mr Clifford's appeal, holding that his claims were precluded by the waiver in the settlement agreement. The EAT reached the following conclusions:

- The EAT agreed with the Court of Session in Bathgate that there was nothing in the Equality Act 2010 which precluded the settlement of unknown future claims, provided that clear language was used. Here, the waiver wording *had* clearly covered future discrimination claims connected to Mr Clifford's grievance and/or transfer to the Plan.

- Although the Equality Act 2010 stipulates that settlement agreements must relate to "particular complaints", Bathgate (and previous authorities) had made it clear that this requirement does not mean the parties must have known about the complaint or that its grounds were in existence at the time of entering into the agreement. If Parliament had intended to prevent the settlement of unknown future claims then it could have spelt this out in the Act, but it had not done so.

- Nor was there any basis for distinguishing Bathgate from Mr Clifford's case – both concerned future discrimination claims that had not arisen at the time the settlement agreement was entered into. The fact that Mr Bathgate's employment had ended, and Mr Clifford's employment was continuing, was not pertinent.

- The EAT also noted the Court of Appeal's decision in Arvunescu v Quick Release (Automotive) Ltd, where it held that future claims may be settled by way of a COT3 agreement. The EAT held there was no sensible basis upon which to distinguish COT3 agreements and settlement agreements in this respect. You can read our full briefing on the Court of Appeal's decision in Arvunescu here.

In any event, even if the waiver had not been valid, the claims had no reasonable prospect of success on the basis that a failure to increase an already very generous benefit would not have amounted to discriminatory treatment.

What are the learning points for employers?

This decision makes it clear that unknown future discrimination claims may be settled by way of a settlement agreement, provided the claims are particularised in the agreement, either by way of a generic description of the claim or by reference to the relevant statutory provision. Helpfully for employers, this decision is binding on Employment Tribunals, whereas the similar decision of the Scottish Court of Session in Bathgate was only persuasive.

However, employers should take care not to rely on general waivers of all claims – these continue to be unenforceable.

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Clifford v IBM UK Ltd

Waiver of future claims in a settlement agreement was effective resulting in the strike out of disability discrimination claims

In Clifford v IBM UK Ltd an Employment Tribunal Judge has ruled that a waiver of future claims contained in a settlement agreement was effective, meaning that the claimant's claims were struck out.

What happened in this case?

The claimant, Mr Clifford, started working for IBM in 2001. He was disabled and began a period of extended sick leave in 2008. In 2012, he raised a grievance about the fact that IBM had not increased his salary or paid holiday pay to him during his sickness absence. He said this amounted to disability discrimination and he asked to be moved onto IBM's disability plan (the Plan). Under the Plan, Mr Clifford would be paid 75% of his former salary until the earlier of recovery, retirement or death.

In 2013, Mr Clifford and IBM entered into a settlement agreement under which IBM agreed to:

- pay £8,685 to settle the complaint about the unpaid holiday pay, however, no payment was to be made in respect of the unawarded pay rises;
- place Mr Clifford on the Plan, under which he would receive around £54,000 per year until retirement (and the terms of the Plan stipulated that any pay increases were to be at IBM’s discretion); and
- pay employer pension contributions based upon his full salary of around £72,000.

In exchange, Mr Clifford agreed:

- to waive his rights to bring claims about the matters raised in his grievance or any other claims that he had against IBM;
- to waive his rights to bring a long list of other possible claims;
- not to raise any further grievances where such grievances were “substantially similar” to the original grievance; and
- to waive his rights to bring any future claims connected to the matters set out in the grievance or the transfer to the Plan.

Yet, in 2022, Mr Clifford brought claims against IBM, alleging that it was discriminatory (and also a breach of working time rules) to have paid only 75% of his previous salary to him throughout the year. He said he was entitled to 100% of pay in respect of periods of annual leave, which meant that IBM owed him around £69,000. He also claimed that it was discriminatory not to have awarded pay increases to him while he was on the Plan. He argued that the Plan was intended to give security to disabled employees, but inflation had reduced the real value of the benefit.

IBM applied to have the claims struck out arguing, amongst other things, that they were precluded by the waivers contained in the settlement agreement, which extended to future claims concerning similar matters raised in the grievance or the transfer to the Plan. Mr Clifford sought to resist the strike out, pointing to the recent EAT decision in Bathgate v Technip UK Ltd, which said that settlement agreements *cannot* settle future claims which had not arisen at the date of the agreement and that both blanket waivers (which purport to waive all and any claims) and kitchen sink waivers (which purport to waive all claims set out in a long list of claims) were ineffective. Therefore, Mr Clifford said that the waivers in the settlement agreement were invalid and did not prevent him from pursuing the claims.

What was decided?

The Employment Tribunal Judge struck out the claims, concluding that they had no reasonable prospect of success.

As far as the claims concerning holiday pay were concerned, the transfer of Mr Clifford to the Plan amounted to a consensual variation of contract, under which all the normal features of the employment contract disappeared, and he only had the right to be paid 75% of his previous salary throughout the entire year. Therefore, pay for any holidays would have been at the rate that he was actually paid.

As to the claim concerning the failure to award a pay increase, the Employment Judge said that, properly understood, this was a complaint that the benefit was not generous enough. The Plan conferred no right to a pay increase, only a *discretion* to award an increase. However, Mr Clifford had not sought to argue that IBM had exercised its discretion in a capricious or arbitrary way – his only claim was for disability discrimination. The Judge said that the terms of something which is *only* given as a benefit to disabled workers, and not to non-disabled workers, cannot amount to less favourable treatment related to disability. Rather, it is *more* favourable treatment.

In any event, future claims about holiday pay and pay increases had been expressly waived in the settlement agreement and that waiver was effective. The Judge distinguished the decision in Bathgate, which was directed at future claims which had not yet arisen and were truly unknowable. By contrast, in this case, the issues of holiday pay and pay increases *were* known about at the time of entering into the settlement agreement and had been raised in Mr Clifford’s grievance and subsequent appeal. The settlement agreement was clear that he could not bring future claims arising out of similar matters to those that had been settled.

What are the learning points for employers?

It is worth noting that the Judge did not go as far as saying that *all* types of future claims could be waived in settlement agreements. Indeed, he said that whether or not future claims could be settled as a matter of principle was an *"academic dispute"* in the context of this claim. Here the "future claims" which were held to have been validly waived arose out of matters which were well known to the parties and had been the subject of a grievance, appeal and settlement agreement. This put them in a different category to claims concerning matters which had not yet arisen, and which were truly unknown.

The Judge also sought to introduce public policy considerations into the debate. He drew a distinction between settling a future holiday pay claim and settling a future sexual harassment claim. There was every reason of public policy for the settlement of past holiday pay claims to extend to future claims on the same issue, otherwise the employer would be compelled to litigate rather than settle. By contrast, it would *"inevitably be contrary to public policy"* if a claimant settling a sexual harassment claim was prevented from bringing a future sexual harassment claim, since this would doom them to suffer future harassment without remedy.

Where does this leave employers entering into settlement agreements?

- **Actual** claims and complaints can settled and must be identified in the settlement agreement either by a description of the claim or reference to the relevant statutory provision.

- Future claims that are **known and in existence** at the point of settlement (but about which no complaint had been raised) may be settled, provided that a description of the claim or the relevant statutory provision is included in the settlement agreement.

- The recent decision of the Court of Appeal in Arvunescu v Quick Release (Automotive) Ltd suggests that future claims that are **unknown but in existence** at the point of settlement may also be settled. However, that case concerned settlement by way of a COT3 agreement, where blanket waivers are permitted. You can read more about the Arvunescu decision here.

- This latest decision suggests that future claims that are a **known risk but not in existence** may also be settled provided that they are expressly addressed in the settlement agreement and there are no public policy reasons why that should not be the case. However, this is a first instance decision and does not bind other Tribunals so it is possible that a case with similar facts would be decided differently by another Tribunal.

- Claims which are **unknown and not in existence** are truly unknowable and may not be settled according to the decision in Bathgate.

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Clifford v IBM UK Ltd

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

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Settlement offer alleged to be an act of victimisation was without prejudice and not unambiguously improper

In Garrod v Riverstone Management Ltd the EAT has held that a settlement offer made to an employee after she had complained about discrimination, but before she had started legal proceedings, was genuinely without prejudice and not unambiguously improper.

EAT rules that unknown future claims may not be waived in settlement agreements

Employers should take note of a recent EAT decision that employees cannot waive the right to pursue claims which are unknown at the time of signing a settlement agreement.

Employee's breach of a

confidentiality clause in a COT3 agreement did not release employer from obligation to pay further settlement monies

If an employee breaches a confidentiality clause contained in a COT3 agreement or, more commonly, a Settlement Agreement, what are the employer’s options? The answer is that it will depend on the importance of the clause or the severity of the employee’s breach.

Stricter controls on the way for non-disclosure agreements in the employment context

It’s hard to believe that the #MeToo movement took off little more than two years ago. Not only has the movement empowered victims to speak up against harassment and encouraged employers to reflect on their approach to dealing with such allegations.

Tottenham Hotspur wins case over taxation of Peter Crouch’s termination payment

Tottenham Hotspur did not need to pay employer’s National Insurance contributions in respect of the payments it made to Peter Crouch and Wilson Palacios when they transferred to Stoke City.

Budget 2016: Amendments to taxation of termination payments

Anyone who has ever been party to a settlement agreement will most likely be aware that an employee gets the first £30,000 of any termination payment tax-free, with any excess subjected to income tax as normal. The current position is that, even for the portion of a termination payment which exceeds the threshold and is taxable, National Insurance Contributions (NICs) are not payable.

Settlement agreements, pre-

termination negotiations and cooling off periods

The ACAS guide on settlement agreements recommends that employers allow employees a minimum of 10 calendar days to consider a settlement agreement and to receive legal advice. That is a lot longer than many employers would want to give staff, so the question is can this guidance be ignored?