SLAUGHTER AND MAY/

NEWSLETTER

MARCH 2023

EMPLOYMENT BULLETIN

QUICK LINKS

"WITHOUT PREJUDICE" PRIVILEGE DID NOT APPLY TO TERMINATION DISCUSSIONS

Summary: The Employment Appeal Tribunal (EAT) confirmed that "without prejudice" privilege did not apply to discussions between an executive and his employer about outstanding holiday pay on termination because there was no pre-existing dispute between the parties (*Scheldebouw v Evanson*).

Key practice point: The "without prejudice" rule can enable employers to have settlement discussions without those discussions being used as evidence in a court or tribunal. However, the rule only applies if there was a dispute at the time the statements were made and the discussions were a genuine attempt to settle that dispute. Although a "potential dispute" can be sufficient and the protection can in theory apply to correspondence on a negotiated exit, this decision indicates that this should not be assumed; it will depend on the circumstances – in this case, the fact that it was not a fault-based dismissal was relevant.

Facts: In 2018, the employer decided that there was no longer a requirement for the executive's role and the parties met in October 2018 to discuss a termination. At the meeting, where no notes were taken, the employer's general manager made an offer (of over £68,000) for accrued holiday pay. It was agreed that a settlement agreement would be drawn up. Subsequently the executive made a counteroffer. Draft settlement agreements were drawn up in December 2018 before the subsequent breakdown of negotiations. None of the correspondence was marked "without prejudice". The executive made a claim for unlawful deduction from wages, referring to the offer made by the employer in the October 2018 meeting. The Employment Tribunal rejected the employer's contention that the claim referred to without prejudice negotiations and should be redacted; when the offers were made, the parties were not in dispute, so the protection did not apply. The employer appealed.

Decision: The EAT rejected the appeal, confirming the approach in *Framlington*, that there must be actual, or reasonable contemplation of, litigation for the "without prejudice" rule to be capable of applying. The Tribunal had correctly concluded that neither the executive nor the employer would reasonably have been contemplating litigation if agreement was not reached. There was no hostility or threat of dismissal on grounds that would potentially stigmatise the executive; there was no use of the word "without prejudice" by either party; the outcome of the October discussions was described as a "gentleman's agreement"; and the manager had not considered it necessary to take legal advice. The EAT described the settlement proposal as being the result of "commercial sense and caution, not fear of litigation". At the time of the meeting, there was no risk of a fault-based dismissal – this was a different type of case, where an employer no longer wanted a senior executive with no reflection on his abilities. The parties were discussing matters they fully expected to resolve and so were not contemplating litigation until their positions hardened after the exchange of draft agreements.

Analysis/commentary: Under Section 111A of the Employment Rights Act 1996, evidence of "pre-termination negotiations" (even where there is no existing dispute) is inadmissible in claims of ordinary unfair dismissal. However, the evidence remains admissible in all other

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types of claim, such as discrimination, whistleblowing detriment and automatic unfair dismissal; consequently Section 111A is of limited use to employers.

INVESTMENT ASSOCIATION SHAREHOLDER PRIORITIES FOR 2023: DIVERSITY TARGETS

The Investment Association has published its Shareholder Priorities for 2023, outlining progress made by UK listed companies against its Shareholder Priorities for 2022 and setting out investors' expectations for the coming year. To assist investee companies making voting decisions, the Investment Association's Institutional Voting Information Service (IVIS) analyses companies against the Investment Association's guidelines, the UK Corporate Governance Code and best practice, highlighting issues or concerns. Each IVIS report is issued with a colour top: Blue, Amber or Red. A Blue top indicates no areas of material concern while an Amber top raises awareness of areas which require a significant shareholder judgment. A Red top is IVIS' strongest level of concern and used to highlight a breach of best practice or Investment Association guidelines.

The Shareholder Priorities for 2023 document covers responding to and accounting for climate change, audit quality, diversity and stakeholder engagement. The issues of particular relevance for employers are:

- **Gender diversity:** For 2023, IVIS will increase its existing diversity targets by 2%, to align with the target set by the FTSE Women Leaders Review (the successor phase to the Hampton-Alexander and Davies Reviews) of 40% of FTSE 350 board positions being held by women by 2025. IVIS will Red top FTSE 350 companies where women represent 35% or less of the Board or 30% or less of the leadership roles (Executive Committee and their Direct Reports).

  (By way of comparison, the latest annual report from the FTSE Women Leaders Review reveals that, as at October 2022, 40.2% of FTSE 350 board positions were held by women, three years ahead of the December 2025 target, although the figure is 33.5% for combined Executive Committee and Direct Reports.)

- **Ethnic diversity:** IVIS will continue its 2022 approach; it will:
  - Red top FTSE 100 companies that have not met the Parker Review target of one director from a minority ethnic group.
  - Amber top FTSE 250 companies that do not disclose either the ethnic diversity of their Board or a credible action plan to achieve the Parker Review target by 2024. In 2022, 11% of companies in the FTSE 250 were amber topped under this heading.

- **Stakeholder engagement:** IVIS will monitor and highlight areas of the annual report which reflect engagement with stakeholders - employees as well as consumers and suppliers - on the cost-of-living crisis.

DECISION TO OVERTURN REJECTION OF FLEXIBLE WORKING REQUEST DID NOT PREVENT INDIRECT DISCRIMINATION

Summary: The Employment Appeal Tribunal (EAT) decided that the employer's decision that an employee had to work a flexible four-day week, taken when she appealed its decision to reject her request to work three days a week, was the application of a provision, criterion or practice (PCP) for indirect discrimination purposes. The fact that the decision was later revoked did not cure the disadvantage suffered (*Glover v Lacoste UK Ltd*).

Key practice point: Before this decision, it had been thought that an internal appeal process could be used to correct a previous discriminatory decision and prevent any liability from discrimination arising, if that decision had not yet resulted in any detriment or disadvantage to the individual. This case clarifies that, depending on the facts, reversing a decision may not avoid liability. Even if in this scenario an employee would be unable to show more than injury to feelings, the process of having to defend a discrimination claim is clearly one to be avoided where possible.

Facts: While on maternity leave, the employee, who worked five days a week flexibly as set out in a rota, made a request to work three days a week. The request was refused, and the employee appealed. The employer's response to the appeal was to offer part-time work four days a week, but to be worked flexibly. The letter stated that the employer's decision was final with no further right of appeal. Solicitors for the employee wrote to the employer asking that her request be

reconsidered, failing which she might have no option other than to resign and claim constructive dismissal. The employer then acceded to her original request in full. She returned to work but subsequently claimed indirect sex discrimination, on the basis that the employer had applied a PCP – the requirement for fully flexible working. The Employment Tribunal rejected the claim, concluding that the employee had suffered no disadvantage. The employee appealed.

Decision: The appeal was allowed. The EAT found that the PCP had been applied at the stage of the appeal against the employer's original decision. Once an application for flexible working is determined, the PCP is applied even if the employee has not returned to work and attempted to work under the new arrangement. The employer's later decision to agree to the flexible working request did not come at the appeal stage but only after a letter before action had been sent. That constituted the reversal of a previous decision, rather than the final step in a decision.

The EAT sent the case back to the Tribunal to decide the specific nature of the disadvantage or detriment suffered by the employee and the appropriate award for injury to feelings. The EAT Judge commented that it was hard to see how it could be said that she had suffered no disadvantage given that she felt she had to consider resigning.

Analysis/commentary: Under the proposed changes to the right to request flexible working, employers will be required to consult with the employee before rejecting a request. (For details, please see our Employment Bulletin December 2022.) This may provide an opportunity for the employer to discuss any doubts it may have and avoid a situation such as arose in this case. It is also worth noting that an employer is not required to offer an appeal against the decision to reject a request. Similar problems for employers in dealing with requests may be presented by the new right to request a predictable work pattern, contained in a Private Members' Bill currently going through Parliament (please see our Employment Bulletin February 2023). Although the new right is based on the right to request flexible working, there is no duty to consult in the Bill as currently drafted.

HORIZON SCANNING

What key developments in employment should be on your radar?

2023-2024	Strikes (Minimum Service Levels) Bill: minimum service levels during strikes in certain services
2023-2024	Private Members' Bills with Government support: • Worker Protection (Amendment of Equality Act 2010) Bill: duty to take reasonable steps to prevent sexual harassment of employees; protection from harassment by third parties • Protection from Redundancy (Pregnancy and Family Leave) Bill: extension of circumstances in which employers must offer suitable alternative employment to parents at risk of redundancy • Employment Relations (Flexible Working) Bill: amendments to the flexible working request process; separate legislation to make the right to request a "day one" right • Workers (Predictable Terms and Conditions) Bill: right to request a more predictable working pattern • Carer's Leave Bill: entitlement to one week's unpaid leave for employees who are carers (expected to come into force in 2024) • Employment (Allocation of Tips) Bill: obligations on employers to deal with tips, gratuities and service charges

	• Neonatal Care (Leave and Pay) Bill: right to paid leave to care for a child receiving neonatal care
31 December 2023	Retained EU Law Bill: expiry of EU-derived secondary legislation on 31 December 2023 e.g. TUPE, Working Time Regulations and Regulations protecting part-time, fixed-term and agency workers, unless Government legislates to incorporate into UK law (or extends sunset to no later than 23 June 2026)
2023/24	Removal of the bonus cap applicable to banks, building societies, and PRA-designated investment firms.
Date uncertain	Statutory Code of Practice on Dismissal and Re-engagement

We are also expecting important case law developments in the following key areas during the coming months:

Employment status: *Griffiths v Institution of Mechanical Engineers* (EAT: whether trustee of professional body is worker for whistleblowing protection); *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes)

Employment contracts: *Cox v Secretary of State for the Home Department* (Court of Appeal: whether employer withdrawal of check-off arrangements was in breach of employment contract)

Discrimination / equal pay: *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010); *Kocur v Angard Staffing Solutions Ltd* (Supreme Court: whether agency workers were entitled to same treatment on vacancies as directly recruited employees)

Redundancies: *USDAW v Tesco Stores Ltd* (Supreme Court: whether implied term prevented employer from dismissing and re-engaging employees); *R (Palmer) v North Derbyshire Magistrates Court* (Supreme Court: whether administrator could be prosecuted for failure to notify Secretary of State of collective redundancies)

Industrial action: *Mercer v Alternative Future Group Ltd* (Supreme Court: whether protection from detriment for participating in trade union activities extends to industrial action); *UNISON v Secretary of State* (High Court: whether removal of the restriction on employment businesses supplying temporary workers to cover striking staff in the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022 was lawful)

Unfair dismissal: *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Hope v BMA* (Court of Appeal: whether dismissal for raising numerous grievances was fair); *Accattatis v Fortuna Group (London) Ltd* (EAT: whether it was automatically unfair to dismiss for concerns about attending the office during lockdown)

Working time: *Chief Constable v Agnew* (Supreme Court: whether a gap of more than three months in a series of unlawful deductions from holiday pay breaks the series)

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