BCLP. Client Intelligent

Insights

UK HR TWO-MINUTE MONTHLY: JANUARY 2023

"WITHOUT PREJUDICE" DISCUSSIONS, 100% POLKEY REDUCTIONS, CALCULATION OF LONG PERIODS OF LOSS OF EARNINGS AND GENERAL NEWS ROUNDUP

Jan 19, 2023

SUMMARY

Our January update includes new cases on "without prejudice" conversations on termination of employment, the difficulties of applying 100% "Polkey" reductions in unfair dismissal awards, and issues of employers introducing evidence to counter claims by employees for very long periods of loss of earnings – we also have a news roundup including CIPD recommendations for Diversity and Inclusion, April 2023 increases to statutory maternity, paternity, adoption, parental bereavement and sick pay, companies signing up to a four-day week and last but not least, whether the term "HR" is out of date.

CAN A "WITHOUT PREJUDICE" DISCUSSION HELD PRIOR TO TERMINATION OF EMPLOYMENT BE LEGALLY PRIVILEGED AND PROTECTED FROM DISCLOSURE?

Most readers will be familiar with the process of a "*without prejudice*" conversation. The circumstances can vary, but ultimately it represents a stage at which the employee agrees to speak "off the record". The employer is then free to raise the issue of settlement, usually with a settlement agreement and severance payment. However, what happens when settlement talks fail, and the employee tries to refer to the "*without prejudice*" conversation in legal proceedings? The whole point of having a "*without prejudice*" conversation is to make that conversation legally privileged and to prevent it from ever being referred to in legal proceedings or any other kind of "open" document, like a witness statement, letter/email or pleading.

This case examines what happens when a tried and tested process goes wrong.

The claimant was a senior employee who returned from maternity leave in July 2019. On 17 October 2019, she told her manager that she was pregnant again. This allegedly did not go down

well. The claimant then lodged a grievance on 30 October, alleging breaches of her legal rights including bullying, pregnancy/maternity discrimination and mistreatment.

On 6 November the claimant received an email from a Mr Sherrard, an HR and employment law adviser to the respondent. He said he had been asked to deal with matters and arranged a private meeting on 8 November at a local golf club. He said he was happy for the claimant to have a legal adviser at the meeting, and offered £500 plus VAT to pay for legal fees. The claimant declined and brought her husband to the meeting. It is relevant that both the claimant and her husband have degrees in law (the husband a PhD) and the claimant has completed the legal practice course.

After some preliminary discussions relating to the grievance, Mr Sherrard asked the claimant if they could have a "*without prejudice*" conversation. He assumed the claimant knew what this meant (and did not ask). Mr Sherrard then offered a settlement deal on behalf of the respondent. He said this discussion was purely exploratory. He went on to describe the employment relationship as "fractured" and "problematic". He discussed the option of a severance payment of circa £80,000, with the claimant entering into a settlement agreement. The claimant was upset by this suggestion and did not take it up.

She later claimed that she had been constructively dismissed (not because of the meeting with Mr Sherrard), and brought proceedings at the employment tribunal, including for the matters referred to in her grievance. The 8 November meeting was referred to in the tribunal pleadings, but did not form part of the claimant's case. The respondent asked the claimant to remove the references because the meeting was "*without prejudice*", legally privileged and could not be referred to in open documents. The claimant disagreed and refused to remove the reference.

The respondent applied to the tribunal to strike out the offending paragraph, also applying for costs. The tribunal found in favour of the respondent. The Employment Judge (EJ) held that the "*without prejudice*" conversation on 8 November was privileged and should be removed from the ET1. At a later hearing the EJ also awarded costs against the claimant for reasons explained below. The claimant appealed both the EJ's decision and the costs decision to the EAT.

The relevant legal arguments are as follows. The tribunal followed the law and said that, for a pre-proceedings "*without prejudice*" conversation to be legally privileged, the following features must be present:

- There must be an existing dispute between the parties. The tribunal's view was that the grievance constituted an existing dispute, but the claimant argued that the 2004 case of *Mezzotero* established that a mere grievance could not be a dispute for these purposes. The EAT held that *Mezzotero* had established that a grievance *might* not be a dispute, but it depended on the facts. There were features of the claimant's grievance, very different from that of *Mezzotero*, that were indicative of a dispute, including:
    - references to breaches of specific statutory provisions, including references to cases;

- references to ACAS Early Conciliation or mediation;
- the fact that the claimant was well-versed in legal matters – she had a degree in law and had passed the LPC; and
- the fact that, unlike *Mezzotero,* where the "*without prejudice*" discussion was the cause of the dispute and the tribunal proceedings, there was already a dispute before Mr Sherrard made his proposal. Also, the "*without prejudice*" discussion did not form part of the claimant's case and in fact was arguably irrelevant to the claimant's substantive case, although no doubt prejudicial.

The claimant was keen to draw parallels between her case and that of *Mezzotero* but the EAT held there were critical differences (below);

- The conversation/communication must be a genuine attempt to settle the dispute. The claimant argued that a proposed termination of employment with a severance payment was not a legitimate attempt to settle a dispute about ongoing discrimination during employment, but the EAT held that it was acceptable – most settlements involve termination of employment and it was held that Mr Sherrard was genuinely trying to settle the dispute;
- The rule cannot be used if it is used to cloak "*..perjury, blackmail or other unambiguous impropriety*". The claimant argued that Mr Sherrard used the "*without prejudice*" rule to end her employment with the respondent in retaliation for making discrimination allegations. The claimant had originally alleged that Mr Sherrard's manner had been unpleasant, bullying and that he had used "*trickery, perjury and dishonesty*" at the 8 November meeting. These allegations were rejected by the tribunal who found that Mr Sherrard's manner had been polite and professional. The EAT said that the bar was very high for unambiguous impropriety, not just because it should be as grave as perjury or blackmail, but also because it was very important as a point of public policy that parties should not feel inhibited in resolving disputes through settlement rather than through litigation. This applies even if the dispute involves discrimination. The unambiguous impropriety rule is for "*truly exceptional and needy circumstances*" and the EAT's view was that this case did not come close. The claimant's misleading characterisation of the 8 November meeting was also a decisive issue in the award of costs; and
- The parties must know what "*without prejudice*" means. This was not an issue specifically considered by the EAT but the claimant alleged that neither she nor her husband understood what "*without prejudice*" meant when it was mentioned by Mr Sherrard. The tribunal did not accept this on the part of the claimant, bearing in mind her and her husband's legal training, although arguably Mr Sherrard ideally should have explained, or at least summarised, the meaning of the term. The tribunal felt strongly about what it perceived as the claimant making

untrue statements about her understanding of the phrase, and this was another factor in the award of costs against her.

Based on the above, it is probably not difficult to guess the EAT's findings. The claimant's appeal was dismissed and the relevant parts of the ET1 were ordered to be removed.

The claimant lost her appeal essentially because Mr Sherrard's proposal met all the legal requirements for a "*without prejudice*" discussion, and her impropriety argument was simply not strong enough.

What about the award of costs? The EAT were equally firm on this point. The claimant's attempts to mischaracterise the meeting with Mr Sherrard, along with the assertion, found to be false, that she did not know what "*without prejudice*" meant were noted. Not only did the claimant give evidence that was untrue, she also refused to remove the relevant parts of the ET1 voluntarily, she made numerous and repeated allegations of impropriety, and a great deal of time and costs were expended because of the claimant's actions. The order for costs, in the sum of £3,400, was upheld by the EAT.

WHY THIS MATTERS

Bearing in mind how frequently "*without prejudice*" discussions relating to settlement are held prior to termination of employment, it is surprising how few cases there are on the subject. It is helpful to have an EAT case that sets out the principles so clearly and gives guidance on the unambiguous impropriety rule.

However, this case does show causes for caution on the part of employers. First, it was held there was a pre-existing dispute in this case. However, the claimant was legally qualified and the grievance was legalistic and indirectly threatened legal proceedings. This is not the case with most grievances. Secondly, the claimant's assertion that she did not know what "*without prejudice*" meant was again based on her legal qualifications, which most employees will not have. It is important therefore that employers, before they have a "*without prejudice*" discussion prior to termination/legal proceedings, to check that the requirements, set out in this case, are met and that the meaning of the phrase "*without prejudice*" is explained or summarised prior to any discussion.

Garrod –v- Riverstone Management Limited

**please note that Riverstone Management Limited is part of Riverstone International, an insurance and reinsurance business*

IN A REDUNDANCY DISMISSAL, CAN A 100% "POLKEY" REDUCTION BE JUSTIFIED WHERE THERE IS ZERO CONSULTATION?

As a preliminary point, we will briefly explain what a “Polkey” reduction is. Based on the 1988 case of *Polkey-v- A E Dayton Services Limited*, a Polkey reduction may reduce compensation where an employer has dismissed an employee genuinely for redundancy, but has not followed a full and fair procedure. The question the tribunal must ask is that, if the employer **had** followed a full and fair procedure, would the outcome (the claimant’s dismissal on the date of dismissal) have been exactly the same. If the answer if 100% yes, then any compensation awarded by the tribunal will be reduced by 100%. If the answer is 50/50, and there is a 50% chance that the employee would still have been dismissed even if a full and fair procedure had been followed, compensation will be reduced by 50%.

This is a difficult task for the tribunal because (a) they must judge what an individual employer would have done (not what the tribunal would have done) and (b) it involves a substantial element of speculation - what might have happened if circumstances had been very different.

The claimant commenced employment at an Indian restaurant in August 2015 as one of two “tandoor chefs”. He was dismissed by reason of redundancy in April 2020 ostensibly because of the impact of the first 2020 Covid-19 lockdown on restaurants. There were ten chefs at the restaurant but only the claimant was dismissed. The other nine were furloughed. The nine furloughed chefs, said the respondent, were different from the claimant and could not be pooled for redundancy purposes with him. The respondent argued that the claimant was not a “speciality” chef and:

- was a helper in five departments but could not run any of them;
- was nowhere near as experienced as the other chefs; and
- the other “tandoor chef” was much more senior than the claimant.

The claimant was told he was dismissed without any consultation, and the respondent admitted this. It argued that the claimant was in a “pool of one” and consultation would have been fruitless. The tribunal accepted the dismissal was procedurally unfair but, in terms of remedy, applied a 100% Polkey reduction. As set out above, the tribunal had to decide whether the claimant would have been dismissed even if a full and fair procedure had been followed.

The tribunal (basically) found in favour of the respondent, finding that it was not objectively unreasonable to say that the claimant was in a pool of one, being a pool of non-speciality chefs. All the other nine chefs were speciality chefs. The tribunal went on to say that, even if the claimant had been pooled with any of the other chefs, he would have scored the lowest in any selection process and would still have been dismissed. The tribunal held there was a 100% likelihood that, if a full and fair procedure been followed, the claimant would still have been dismissed/selected for redundancy on the same date, and therefore applied a 100% Polkey reduction. The claimant received no compensation and appealed to the EAT on three grounds:

- the tribunal erred in law in determining there was a 100% chance that the claimant would have been fairly dismissed at the same time as his actual dismissal had a fair process been followed;
- the decision that the claimant could be placed in a pool of one was perverse; and
- the decision that if the claimant had been pooled with other chefs he would still have been dismissed was perverse.

The EAT upheld the appeal.

It added another element in that, although it agreed with the tribunal's principles of how a 100% Polkey reduction should be applied, the test should also show that the dismissal would have taken place on the same date.

Further to this point about timing, the EAT held that the tribunal had not taken into account, when applying the Polkey test, the requirement for warning and consultation. This requirement would still be applicable in the case of a small employer and even where a pool of selection of one might be found to be valid. Any fair redundancy would require warning and consultation and, in the case of the claimant, he had received neither. The claimant had been telephoned and told he was to be made redundant.

Further, the EAT held that a degree of warning and consultation, using again a degree of speculation, could have resulted in a pool of more than one, and might have affected the choice of any selection criteria.

So, even if dismissal was 100% inevitable, it was unlikely that it would have been 100% inevitable on the same date, which in itself would result in additional compensation for the Claimant, for the time it would have taken for the respondent to carry out a redundancy warning/consultation process, particularly if it expanded the pool to more than one.

The case was remitted to the same tribunal for determination, giving guidance that it took into account the timing issue, the requirement for proper warning/consultation, and the possibility that the pool of selection could have been increased to more than one. If the pool were increased in size, the tribunal should consider what selection criteria would have been applied, and what chance the Claimant would have had of being selected for redundancy and (procedurally) fairly dismissed.

WHY IT MATTERS

This is a good example of the difficulties of applying a Polkey reduction and the twists and turns of speculating what a specific employer would have done had it followed a fair procedure. The EAT also indicated that the speculation might go as far as a hypothetically larger pool and the choice and application of (hypothetical) selection criteria, which might be a particularly difficult exercise for a tribunal.

WHEN CALCULATING LOSS OF EARNINGS, ARE THERE LIMITS ON THE EVIDENCE AN EMPLOYER CAN INTRODUCE?

In this case, the claimant successfully argued that the respondent had discriminated against him at the recruitment stage because of a perceived disability.

At the remedy hearing, the claimant sought compensation for five years loss of earnings. The respondent challenged this and wanted to introduce evidence (in the form of documents) relating to the claimant's previous period of employment with the respondent. In his previous role (from April 2008 to January 2011), there were performance issues and the claimant resigned after just over 2.5 years of employment.

The position of the respondent was that, in terms of assessing five years' claimed loss of earnings, the tribunal would have to consider the likelihood of the claimant remaining in the new role for such a long period. The respondent's view was that the documents, evidencing matters relating to his previous employment, would assist.

The tribunal disagreed. The employment judge held that the documents were inadmissible. This decision related to whether the evidence was "relevant". The judge held that, whilst the evidence of the claimant's previous employment might be theoretically relevant, it was nonetheless marginal. Some of the documents were over ten years old and the judge struggled to see how the tribunal would be able to make any findings based on them. The judge applied the test of whether the documents were "*logically probative…of some matter that requires proof*". The judge's view was that the documents were "marginally relevant", but no more than that, and for that reason were inadmissible.

The respondent appealed on two grounds. First on a purely legal point that the judge had failed to take into account the relevant case law relating to calculation of loss. Secondly, the respondent argued that the decision was perverse – no reasonable tribunal could have reached this decision.

The EAT allowed the appeal on both counts. The key elements of the decision were as follows:

- In reaching her decision on the documents, the judge had only considered the issue of admissibility of evidence, not **why** the evidence might be admissible. In particular, the judge had not considered the critical cases of *Chagger v Abbey National (2010)* and *Software 2000 –v- Andrews (2007)*. These cases set out the questions that a tribunal must ask when calculating loss. The tribunal must carry out an assessment of what would have happened if the claimant had remained employed (or in this case had been employed), and in particular how long that period might be. The tribunal must consider the issue of whether the claimant might realistically have remained in post for the period claimed, in this case five years. The

EAT found that the tribunal had failed to do this and, if the judge had engaged with the legal principles involved, she would have "*inevitably concluded*" that documentation relating to the claimant's earlier employment had relevance that was more than "marginal" or "theoretical";

It was wrong for the tribunal to have excluded documents at a preliminary stage. The issue of whether documents relating to remedy were admissible was an issue to be decided at a full hearing, not a preliminary one;

- The tribunal's decision that the documents were of such marginal relevance that they should be excluded from any remedy hearing was perverse. To find a tribunal judgment perverse is very unusual but stemmed from the tribunal's failure to engage with the legal principles involved in calculation of loss.

An additional point that arose was whether the documents were inadmissible due to a breach of data protection obligations (i.e. that the documents were not deleted when they were legally required to be). The EAT found that the documents were relevant to the remedy decision and if there was a data protection breach, there was no reason why this issue could lead to their exclusion.

The EAT substituted the tribunal's decision with an order that the documents were admissible and could be relied on by both parties at the remedy hearing.

WHY THIS MATTERS

The fact that the EAT held that the tribunal's decision to exclude documents relating to calculation of a period of loss was not just an error of law but was perverse demonstrates the importance placed on a proper and thorough calculation of loss. With the UK in recession and the job market tightening, it seems likely that we will see longer periods of loss claimed and calculating long periods of loss may become more prevalent.

Loss of earnings and the ability for a claimant to mitigate that loss is never an easy question for tribunals and it is far from a scientific assessment. If there is evidence available to the tribunal that helps it to assess the period of loss, it will be very rare for such evidence to be excluded from the proceedings.

Health and Safety Executive v Jowett

NEWS ROUNDUP

CIPD MAKES RECOMMENDATIONS TO IMPROVE DIVERSITY AND INCLUSION

A report based on responses of 2,009 senior decision-makers in UK organisations shows that less than half (48%) have a stand-alone Diversity and Inclusion (D&I) strategy. In addition, the research shows that 18% of employers that have a D&I strategy take no steps to monitor its effectiveness.

The CIPD warns that organisations may be losing track of D&I or assuming wrongly that all is well. Only 5% of respondents said their organisation had not focused on areas of D&I (such as mental health) in the last five years, 36% said that their organisation was not planning to focus on any D&I areas in the next five years.

Based on this, the CIPD has made seven recommendations to improve D&I practices:

- Create a long-term D&I plan and monitor its progress;
- Collect and use data to inform approaches to D&I;
- Assess approaches to people management from a D&I perspective;
- Empower and train managers on D&I;
- Support leaders to champion D&I;
- Tailor approaches to D&I to suit organisations; and
- Maintain focus on long-term D&I aims.

APRIL 2023 INCREASES TO STATUTORY MATERNITY, PATERNITY, ADOPTION, PARENTAL BEREAVEMENT AND SICK PAY ANNOUNCED

The Department for Work and Pensions (DWP) has published its proposed increases to several statutory benefit payments. The following rates will apply from April 2023:

- The weekly rate of statutory sick pay (SSP) will be £109.40 (up from £99.35);
- The weekly rate of statutory maternity pay (SMP) and maternity allowance will be £172.48 (up from £156.66);
- The weekly rate of statutory paternity pay (SPP) will be £172.48 (up from £156.66);
- The weekly rate of statutory shared parental pay (ShPP) will be £172.48 (up from £156.66);
- The weekly rate of statutory adoption pay (SAP) will be £172.48 (up from £156.66); and
- The weekly rate of statutory parental bereavement pay (SPBP) will be £172.48 (up from £156.66).

The new rates, which represent an increase of 10.1% on the rates applicable for 2022/2023, are due to come into effect on 10 April 2023.

A HUNDRED COMPANIES SIGN UP FOR PERMANENT FOUR-DAY WORKING WEEK

A hundred UK companies have signed up to a permanent four-day working week. The companies have 2,600 staff between them, who will work fewer hours without losing pay. This follows on from a survey of 70 companies that took part in a 6-month pilot of a four-day week.

The survey revealed that 88% of companies found the four-day working week to be working "well" for their businesses and 95% of companies reported that productivity had either remained the same or improved. The CIPD published a report in October 2022 which found that a third of employers believe a four-day working week will be attainable within a decade.

THE TERM "HUMAN RESOURCES" VIEWED AS OUTDATED BY HR PROFESSIONALS

The term "human resources" is seen as outdated by many HR professionals, according to a global survey conducted by Sage. Around 75% of HR leaders and 85% of senior executives in small to medium businesses believed that "human resources" was not a good description of the nature of the role. In particular, it was felt that viewing people as “resources” rather than as individuals was not reflective of current practice and even reductive. Instead, terms such as "People and Culture" were felt to offer a more accurate description of what HR actually does. Almost all respondents agreed that the scope of HR roles has changed significantly over the past 4/5 years and over 30% believe it will need to evolve over the next five years.

This article was co-written with Trainee Solicitor-Apprentice Ellie Serridge.

RELATED CAPABILITIES

- Employment & Labor

MEET THE TEAM

Ellie Serridge

London

ellie.serridge@bclplaw.com
+44 (0) 20 3400 3904

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be "Attorney Advertising" under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.

© 2025 Bryan Cave Leighton Paisner LLP.