EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Evanson	**v**	Scheldebouw BV

Heard at: Central London Employment Tribunal (V) **On: 25 September 2020**
Before: Employment Judge Norris, sitting alone (by CVP)

Appearances
For the Claimant: Ms H Williams, QC
For the Respondent: Ms S Berry, Counsel

RESERVED JUDGMENT – PRELIMINARY HEARING

1. Prior to December 2018, the parties were not in dispute. Accordingly, the discussions and correspondence between the parties that pre-date December 2018 were not "without prejudice"/privileged and may be relied on in evidence before the Tribunal at the Full Merits Hearing.

2. Paragraph 12 of the Claimant's claim accordingly remains as drafted (subject to the redaction proposed by the Claimant in the email from his solicitor of 17 January 2020).

WRITTEN REASONS

1 Background

1.1 The Claimant worked for the Respondent from 17 January 2005 from May 2010 as Chief Risk Officer, until his dismissal on 19 March 2019.

1.2 On 13 August 2019, the Claimant lodged a claim for unlawful deductions from wages, specifically in relation to what he contends is pay for holiday accrued but untaken at the date of termination. The Respondent denies that the Claimant was permitted to carry untaken holiday over from one year to the next and/or was entitled to be paid in lieu for leave that was accrued in this way.

2 Prior conduct of the case

2.1 The matter came before Employment Judge Burns on 21 February 2020 for a Preliminary Hearing (Case Management). She listed it for a further Preliminary Hearing to determine whether a paragraph of the Claimant's Grounds of Claim

should be struck out on the basis that the meeting referred to within it had been conducted on a "without prejudice" basis. She also listed the case for a full merits hearing on 24 and 25 September 2020.

2.2 As a result of the COVID-19 restrictions, the preliminary hearing, which had been listed for 15 May 2020, had to be postponed; the second day of the full merits hearing was converted to deal with the preliminary issue, to be conducted by CVP, and the full merits hearing itself was to be relisted at the earliest opportunity. The matter duly came before me on 25 September 2020. Although the full trial had been scheduled to last two days, before me the time estimate was extended to four days and it has been listed for 6 to 9 September 2021 before an Employment Judge sitting alone.

3 Issue

3.1 The issue for the Tribunal to decide at the Preliminary Hearing (PH) was whether the contents of paragraph 12 of the particulars of claim were properly described as without prejudice and if so whether that paragraph should be struck out. The Claimant asserts in that paragraph as follows:

> "*On 20 September 2018, the Claimant had a meeting in London to discuss his possible retirement, his outstanding holiday entitlement and his car allowance. It was agreed that the issue of the Claimant's potential retirement would be reviewed in December 2018 along with his outstanding holiday entitlement. Discussions were held between the parties to attempt to amicably resolve the issue of the outstanding holiday entitlement accrued by the Claimant which led to an offer by the Respondent to pay the Claimant for 168 days of accrued holiday (equating to £68,199.60) which was rejected and a counter offer proposed for 200 days (equating to £81,190.00) by the Claimant. This offer was accepted by the Respondent. Ultimately negotiations broke down in February 2019, over other issues*".

3.2 The Respondent asserted in the response that this was a reference to a "without prejudice" meeting between the Claimant and Mr Nicola Calzolari, General Manager of the Respondent's parent company, on 20 September 2018 and subsequent negotiations. However, in the witness statement prepared by Mr Calzolari for the PH, the Respondent asserts that in fact the meeting between the two men did not take place on that date but on 12 October 2018.

3.3 There followed written communications and a further meeting at Dusseldorf airport two months later. There is a dispute as to whether this was on 12 or 13 December, but nothing turns on this point. Drafts of a settlement agreement were exchanged but, the Respondent agrees, ultimately no mutually acceptable position could be reached.

3.4 It is the Claimant's position that there were two meetings (on 20 September and 12 October) that were "open" because there was no relevant dispute in existence at the time. He accepts that a dispute (for legal purposes) arose from the date in December 2018 when the Respondent supplied the first draft of the settlement agreement.

4 The Preliminary Hearing

4.1 I heard evidence from the Claimant on his own behalf and Mr Beukers (HR Officer) and Mr Calzolari for the Respondent. They were each cross-examined in the usual way. I heard submissions, each Counsel speaking to their written skeleton argument. By the time we had completed the evidence and submissions, it was just gone 17.00 hours and I had to reserve my decision. Regrettably, other intervening professional commitments have prevented me from completing this decision sooner.

4.2 Directions are made separately to progress the matter to the full merits hearing in September 2021.

5 Law

5.1 I had the advantage of hearing the tested live evidence of the parties rather than dealing with the matter exclusively on the papers and consider that I should seek to resolve the preliminary issue on the balance of probabilities.

5.2 In *Framlington Group Limited v Barnetson*[1], the Court of Appeal held that when determining if there was "a dispute" at the material time, "the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree". The rule can be engaged in a dispute in which litigation has not begun but should not be extended further than was necessary. The crucial consideration is whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they should not agree.

5.3 In *Portnykh v Nomura International PLC*[2] Hand J held as follows:

> "It is, after all, very obvious that the operation of the [without prejudice rule] is likely to cause a forensic disadvantage to one party or another but the public policy supporting the exclusionary rule is predicated on that disadvantage being overridden by the need to create the most beneficial circumstances so as to encourage and facilitate the settlement of disputes and avoid litigation…
>
> I do not need to go to the extreme of suggesting that in *every* case where the parties reach the stage of proffering and considering a compromise agreement… axiomatically there is a "dispute" or "potential dispute", although when that stage is reached I think that will very often be so… If an employer announces an intention to dismiss the employee for misconduct and there are then discussions around the question of the alternative of the dismissal being for redundancy, no matter how amicable all that might be, it seems to me beyond argument that it either demonstrates a present dispute or contains the potential for a future dispute… But the existence of extant proceedings is not a necessary and essential feature of a "dispute" for the purposes of the application of the "without prejudice" exclusion."

5.4 Hand J also set out a number of points by way of synopsis, which I set out/summarise very briefly here:

i) The concept that "without prejudice" negotiations are not admissible is an exception to the rule that admissions against interest are admissible and

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[1] *[2007] IRLR 598*
[2] *[2014] IRLR 215 (EAT)*

the exception rests on the public policy "… of encouraging litigants to settle their differences rather than litigate them to the finish".

ii) in some cases, the exception may rest on "the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues".

iii) the exclusion may not operate where it might lead to "some more powerful principle … such as the need to prevent a litigant deceiving the court with perjured evidence" or where the exclusion would "act as a cloak for perjury, blackmail or other unambiguous impropriety";

iv) the rule has a "wide and compelling effect";

v) in a number of situations, the "without prejudice" label will not be effective to exclude the evidence (and I add – see *Faithorn* below - by analogy, a failure to apply that label will not necessarily be fatal to its exclusion);

vi) the without prejudice label cannot be used indiscriminately so as to immunise an act from its normal legal consequences where there is no genuine dispute or negotiation.

5.5 He went on to quote from Cox J's determination in *BNP Paribas v Mezzotero*[3], in which it was held "it is clear that the rule to have any application at all, there must be dispute between the parties and the written or oral communications to which the rule is said to attach must be made for the purpose of a genuine attempt to compromise it".

5.6 In *Faithorn Farrell Timms LLP v Bailey*[4] Eady J QC upheld a first instance Judge's decision to describe correspondence headed without prejudice simply as "correspondence" and not to attach privilege thereto. She noted that "the [without prejudice] principle provides that, where there is a dispute between parties, any written or oral communications between them amounting to a genuine effort to resolve the dispute will not generally be admitted in evidence at a subsequent hearing of the claim. This enables parties to negotiate frankly without the risk that anything said in negotiations will be used against them in subsequent legal proceedings. Without prejudice privilege is, however, not invoked merely by the party's description of negotiations as such: if there is no extant dispute, or no genuine efforts at resolving the dispute, the rule will not apply, regardless of the label used. Conversely, absence of the label "without prejudice" will not be fatal if the negotiations meet these criteria: the principal is one of substance, not form."

5.7 Referring back to the principle in *Barnetson*, she confirmed that the confidentiality bestowed by the without prejudice rule should not be extended further than necessary to promote the general policy objective, acknowledging that where that line will fall may not always be easy to determine.

5.8 While Eady J held that both the fact and the content of "pre-termination negotiations" pursuant to a protected conversation under section 111A ERA 1996 are inadmissible and that such protection cannot be waived even by agreement

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[3] *[2004] IRLR 508*
[4] *[2016] ICR 1054*

between the parties, she also held that the section applies only to complaints of unfair dismissal. For completeness, therefore, I note that it would not have been applicable in the present case.

6 Evidence

6.1 It is the Claimant's case, according to his witness statement, that on 17 September 2018, Mr Calzolari asked him to attend a meeting on 20 September and he did so. There were no minutes taken and it was not suggested by Mr Calzolari that the meeting was to be without prejudice. The Claimant says they agreed that his workload was diminishing and that Mr Calzolari indicated he would like to discuss the possible future termination of the Claimant's employment and a way to resolve his outstanding holiday entitlement.

6.2 The Claimant says he mentioned an option he had tabled to Mr Calzolari's predecessor, in which he would be placed on a variation of garden leave until his entitlement was used up, with any days worked during that time being added to the balance of holiday owed to him. Mr Calzolari countered by offering a payment in lieu of a proportion of the outstanding days, which the Claimant said he would consider. The Claimant raised queries about the impact of his pension and car allowance on the figures to be put forward, which he says Mr Calzolari in turn indicated he would consider having reviewed the Claimant's timesheets. Mr Calzolari suggested, and the Claimant agreed to, a further meeting.

6.3 The Claimant asserts that there had been no prior discussions between him and Mr Calzolari about either his outstanding holiday entitlement or the possibility of his retirement (this is not disputed, though it appears to be common ground that discussions of a similar nature had taken place between the Claimant and Mr Calzolari's predecessor(s)).

6.4 The Claimant says further that Mr Calzolari called him on 8 October 2018 to invite him to a meeting that Friday, 12 October, to which the Claimant agreed. Again, no minutes were taken and there was no suggestion by either party that the discussion was to be considered without prejudice. Mr Calzolari said he had considered the Claimant's time sheets and he was increasing the offer of pay in lieu of holiday, to include also a payment into the Claimant's pension fund and a portion of his car allowance. A settlement agreement was to be drawn up. Mr Calzolari asked the Claimant to keep their discussions confidential, to which the Claimant agreed. It was also agreed that the Claimant would use up as much of his outstanding holiday entitlement as possible in the meantime.

6.5 On 23 October 2018, Mr Calzolari emailed the Claimant to confirm the outstanding entitlement, but included a provision that the Claimant's employment would terminate on 31 December 2018. He did not refer to pension, car allowance or pay in lieu of notice. Further email correspondence took place but they did not meet again or discuss the issues until the Dusseldorf airport meeting which the Claimant says took place on 13 December. At this meeting Mr Calzolari provided a draft settlement agreement. It is accepted on the Claimant's behalf that the discussions from this point onwards were privileged.

6.6 The Respondent's case is that there was no meeting on 20 September 2018; the first occasion when Mr Calzolari discussed the issues with the Claimant was on 12 October. Mr Calzolari says in his witness statement that they reached a

"gentleman's agreement" at that meeting on the matters that would need to be formalised by way of settlement agreement. He agrees that the Claimant raised questions regarding the proposed way in which his accrued holiday entitlement, car allowance and pension would be dealt with. Mr Calzolari acknowledged the questions and agreed to consider the points before addressing them in written proposals. Mr Calzolari did not agree with the Claimant's asserted entitlement to be paid in lieu of his accrued but untaken holiday, but was prepared to consider it as one element of a comprehensive agreement for the Claimant's employment to terminate on 31 December 2018.

6.7 Mr Calzolari also referred in his witness statement to a subsequent email exchange regarding a project on which the Claimant was working. The Claimant believed that Mr Calzolari had reneged on an agreement as to the Claimant's involvement in the project, and said he assumed "the status quo is now to apply". It is the Claimant's position that these discussions were on an unrelated point and are a red herring. In any event, Mr Calzolari replied on 22 October reminding the Claimant of their agreement, reached at the 12 October meeting, that the Claimant would reduce his working week to two days with effect from 15 October. The Claimant responded on the same day to raise assertions as to the work he had carried out over weekends and bank holidays, seeking to add this to his accrued but untaken annual leave entitlement. The two men spoke on the phone on 24 October and there was a further email exchange, but with no meeting of the minds.

6.8 Following this email exchange, Mr Calzolari instructed Mr Beukers to arrange for a settlement agreement to be drawn up, which he did. Mr Calzolari and the Claimant met at Dusseldorf Airport on 12 December and Mr Calzolari handed over the draft agreement. Mr Calzolari refutes the suggestion that he ever accepted the Claimant had a legitimate claim for payment in respect of holiday that he had not taken during his employment.

6.9 Mr Beukers' statement is almost exclusively concerned with events post-dating the meeting in December 2018 at Dusseldorf airport. He agrees he had instructed the Respondent's solicitors to prepare a draft settlement agreement following the Claimant and Mr Calzolari's discussions on 12 October. The Respondent has drawn attention however to a sentence later in the statement, where Mr Beukers states: "This [a recital in the Claimant's version of the draft settlement agreement] was consistent with my understanding of the status of the conversations between the Claimant and Mr Calzolari from September 2018 onwards".

6.10 In oral evidence in chief, the Claimant was taken to pages that he said were an extract from his 2018 diary. The entry from 20 September states "Nicola Calzolari – P'isa London Office 14.00". The entry for 12 October also refers to a meeting with Mr Calzolari in the UK office, this time at 08.30.

6.11 In cross examination, so far as is relevant to the preliminary issue, the Claimant denied having told Mr Calzolari that he is a barrister, saying that he had described himself as the "equivalent of". He was adamant that there had been a meeting on 20 September as well as 12 October and denied that the email exchanges referred exclusively back to the latter. He agreed that his work for the Respondent had been diminishing and would have continued to do so, and he had no objection to Mr Calzolari's proposal that his employment terminate on 31 December 2018, though he, the Claimant, had not offered that himself.

6.12 The Claimant further confirmed that if all the other points being discussed (holiday, pension and car) had been agreed, the Respondent would have terminated his employment on 31 December 2018. He had been prepared to accept a negotiated position of 200 days' holiday paid in lieu (plus pension and car allowance) rather than the 277 or more days to which he thought he was entitled. He agreed that this reduction from 277 to 200 was for the purpose of an agreed exit package and that he had not waived his right permanently. However, he then said that he **was** waiving his rights permanently and had agreed without question to reduce the number of days to 200. He repeated this in re-examination – that he would reduce his entitlement to 200 days and would "totally throw away" the remainder with no reimbursement.

6.13 Under cross examination, Mr Calzolari said that the Claimant was not opposed, at the meeting on 12 October, to the termination of his employment, but had reminded Mr Calzolari of matters that needed to be addressed. Mr Calzolari could not answer the points because he did not have grounds to do so, but said he would look into them. He did not think it was right that this exchange had taken place on 20 September so that the meeting on 12 October was a follow up. He thought the meeting on 12 October was the first they had had on the subject. He acknowledged he did not have a note of a meeting with the Claimant on either date in his own diary.

6.14 Mr Calzolari also acknowledged that at the point when the Respondent instructed its solicitor to draw up a settlement agreement, he was not expecting the Claimant to sue the Respondent, though he said he was aware, from experience, of it as a possibility. There was no particular reason for it to be in his contemplation at the time.

6.15 In re-examination Mr Calzolari said it was not until December 2018 that he realised he and the Claimant were not in agreement. However, the question of whether the Claimant's holidays taken before the proposed termination date should reduce the figure of 200 or whether that figure should remain "static" was, he confirmed, raised by the Claimant on 24 October 2018.

7 Findings and conclusions

7.1 I make minimal findings of fact, because the definitive findings will follow the full Merits Hearing listed for next September. However, I must deal with some of the evidence before me so as to reach a conclusion on the preliminary issue.

7.2 I start by saying that although not directly relevant to that preliminary issue, I did not find the Claimant to be as reliable as Mr Calzolari in his evidence. It appeared that Mr Calzolari was honest in his recollections and answers, even where that might be against the Respondent's interests, and in particular in his evidence as to the timing of when he began to contemplate litigation as a real possibility.

7.3 I was particularly sceptical about the Claimant's evidence in relation to his draft "counter settlement agreement". The Claimant had set out recitals in which he referred to the incorporation into Employment Rights Act 1996 ("ERA") of "settlement agreements" (and the date on which the relevant provision came into force) and a reference to "pre-termination negotiations (protected conversations)". These clauses had not been in the Respondent's original draft. The Claimant sought in his witness statement to assert that in fact no such protected

conversations took place and that he was using the phrase as a synonym for confidentiality.

7.4 Notwithstanding his attempts later in the agreement to suggest that he was, in terms, competent to advise himself on the agreement and did not require an independent legal adviser, the wording the Claimant used indicated, to me quite obviously, that he had done at least **some** legal research. He claimed however that despite never having drafted a settlement agreement before, he had only cut and pasted clauses from old documents that he had created and asserted that it was merely coincidental that his wording directly mirrored section 111A ERA (and accurately referred to the date on which the ERA wording came into effect). This oral evidence also conflicted in a minor way with his witness statement which said he believed he had used a "template statement" on his work computer.

7.5 I was not entirely clear what motivation the Claimant may have had or hence why he was untruthful on this issue (other than perhaps to try to resile from the position that protected conversations **had** taken place), but that is what I find him to have been. If he wanted to use the word "confidential", he could have just used it. Whether or not he has ever held himself out as a barrister, he asserts that he holds qualifications equivalent to such status and his initial employment with the Respondent had been as Legal Manager. I find it very unlikely that he would have been ignorant of the meaning of the words he used or to have thought they were synonymous with confidentiality. It also seems very unlikely that he would have had a template settlement agreement, particularly one specifically referring to protected conversations, on his computer when he had never had cause to prepare one in the past. I conclude that his assertion was likely to be because he was concerned that his use of these words might have suggested a dispute had arisen earlier than he now contends.

7.6 In any event, I have reminded myself that the fact a witness has lied about one matter does not necessarily mean he or she has lied about another, and that when considering the credibility of a witness, it may be essential to test their veracity by reference to the facts proved independently of their testimony, in particular by reference to the documents in the case and by having regard to their motives and the overall probabilities[5].

7.7 I have therefore looked at all the evidence in the round as to what was agreed and when, and on what apparent basis. A "gentleman's agreement" is commonly perceived to be an unwritten one, often consummated by a handshake, reached between two "gentlemen", i.e. enforceable in honour only, backed by both sides' integrity and not necessarily legally binding. That idea of a moral consensus might in fact be considered the very antithesis of a legally-binding settlement agreement, with its statutory requirements including the taking of independent legal advice from a qualified and insured adviser, committing the agreement to writing and requiring the employee to identify the issues which are raised and which the settlement agreement intends to settle, by reference to applicable legislation. If the strict provisions are not fulfilled, either the agreement will not be binding at all or issues not raised will not be "compromised" once the agreement is finalised. The two types of agreement are very different animals indeed.

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[5] See for instance Robert Goff LJ in *The Ocean Frost [1985] 1 Lloyd's Rep 1; Gorgeous Beauty Limited v Liu [2014] EWHC 2952*

7.8 Ms Berry seeks to argue that this case is a similar one to *Nomura* in that the Respondent wished to agree an exit package as an alternative to redundancy. She asserts that Mr Calzolari did not, at any stage, agree that the Claimant was entitled to 200 days' annual leave entitlement but was willing to negotiate around that assertion to avoid the Claimant's employment terminating by redundancy. That negotiation, she says, commenced on 12 October and proceeded in the parties' emails later that month, with the parties drawing up settlement agreements to prevent Employment Tribunal litigation.

7.9 I disagree that this is a *Nomura*-type situation, not least because I consider that in *Nomura*, the parties were concerned to record the alternatives for dismissal in what might be termed either "fault" or "no-fault" terms*,* i.e. misconduct or redundancy. The present case, by contrast, had only "no-fault" options – mutually-agreed termination or redundancy – but in reality, both parties recognised the diminution in the Claimant's workload, which satisfies the test for redundancy, whether it is described as such or not.

7.10 I do not accept the Respondent's argument that it wanted to agree a mutually acceptable exit for the Claimant "as an alternative to redundancy". Absent a redundancy situation, there is no evidence that either party would have sought to end the employment relationship at all; indeed, even though he recognised that the work was diminishing, the Claimant had no intention of stepping down from his role, and the Respondent has not suggested that there was any other reason to contemplate dismissal. There is no claim before the Tribunal for unfair dismissal. The "dispute" was not, therefore, about whether to end the Claimant's employment (or indeed when to do so; both parties appear to have agreed quite early on that it would be at the end of 2018) but arose in connection with - and the "gentleman's agreement" ultimately foundered on - the Claimant's assertions as to his holiday entitlement.

7.11 Therefore, a second difference in this case from *Nomura* lies in the extract quoted in Ms Berry's skeleton argument: "I would hold that consideration of the travelling draft of the Compromise Agreement amply illustrated the parameter of the dispute that had arisen. It was about money and it was about the reason for termination. It was endeavouring to tie up a lot of loose ends and it covered a wide area but, despite that apparent breadth, it was about the termination of the Claimant's employment. I regard that as sufficiently specific".

In the present case, however, there appears initially to have been little dispute over what the parties were prepared to agree to. For the meaning of the word "dispute" I was referred to the authority of *BE v DE*[6] in which it was described as "a reasonably cohate and definable issue or series of issues, not just a number of reciprocal differences or grievances which might or might not prove soluble with reflection and discussion". It was not until the draft settlement agreements began to be exchanged that the "dispute" between them became clear. Indeed, until that point, such disagreements as there were related to commercial matters. The Claimant had not, for example, sought to raise a grievance around his claimed holiday entitlement (though even if he had, I note Cox J in *Mezzotero* indicated that this might not necessarily mean the parties were in dispute).

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[6] *[2014] EWHC 2318 (Fam) Bodey J*

7.12 Further, quite clearly there is stigma and reputational damage when an employee is dismissed for misconduct. It impacts on that person's ability to find future work, for instance, potentially for a prolonged period and may signal the end to their career unless and until a Tribunal determines the dismissal was unfair and/or in breach of contract. There is no such stigma to a redundancy dismissal. Hence, the impetus to enter a settlement agreement is greatly lessened on an employee's side in what I have termed a "no-fault" scenario, such as the one in the present case.

7.13 In any event, Mr Calzolari readily accepted and I therefore find as facts that 1) before the meeting which he says took place on 12 October, there was no particular reason for an expectation that the Respondent would be sued and hence litigation was not in his contemplation; 2) he was, however, aware of the possibility of litigation due to his (commercial) experience; 3) even after 12 October he did not think it necessary to take legal advice other than to formalise what the parties had verbally agreed and 4) this position did not change for him until at the earliest 24 October 2018, on the Claimant's reference to having the 200 days' holiday "static", or at the latest sometime in December when the parties could not agree to the terms of a settlement agreement.

7.14 Therefore, I conclude that Mr Calzolari did not have the settlement agreement drawn up because the parties were in "dispute" but because, like any prudent senior manager, he wished to ensure that the Respondent was not about to part with what would be on any analysis a large sum of money without tying off loose ends and leaving itself open to suit thereafter. It was commercial sense and caution, not fear of litigation, that prompted him to ask Mr Beukers to instruct solicitors to draw up the agreement, and the position did not change, in my view, until the Dusseldorf airport meeting at which it became clear the "gentleman's agreement" Mr Calzolari thought they had reached was fatally undermined. That was, as Ms Williams asserted, the "watershed" moment in the case.

7.15 This conclusion is also supported by decision in *Standrin v Yenton Minster Homes Limited*[7], to which I was referred and in which the Court of Appeal had to determine the point at which "negotiations start" along a continuum commencing (in that case in a dispute over insurance issues) with an initial claim and the final settlement thereof. It concluded that "the opening shot in negotiations may well be subject to privilege where, for example, a person puts forward a claim and in the same breath offers to take something less in settlement, or, to take Parker LJ's example in *South Shropshire District Council v Amos*, where a person offers to accept a sum in settlement of an as yet unquantified claim. But where the opening shot is an assertion of a person's claim and nothing more than that, then prima facie it is not protected."

7.16 In the present case, whether the parties had one meeting in September and another in October 2018 or only the latter, when I consider the email from Mr Calzolari dated 23 October 2018, it appears that at the meeting on 12 October 2018, there was no dispute between the parties. Each appears to have put forward what might have been described as the "opening shot" only. The Claimant had apparently agreed at the meeting to try to use up his holiday but according to his email on 22 October, was finding that difficult and in any event had changed his

[7] *1991 WL 838514*

calculation to add an additional 57 days of entitlement. He was not suggesting at that stage anything other than that Mr Calzolari should consider this and make a decision on it. He was not offering to take something less in settlement but merely awaiting Mr Calzolari's offer once he had thought about it. In the circumstances, I do not consider the discussions up to this point to reflect a dispute between the parties and hence conclude that they were not privileged.

7.17 As I have said above, I did not find that the Claimant to be as credible a witness as Mr Calzolari but I do accept that he has produced a handwritten diary entry showing that there was a meeting between the two men on 20 September 2018 as well as one on 12 October 2018. I have also noted Mr Beukers' evidence that there were conversations between the claimant and Mr Calzolari "from September 2018 onwards".

7.18 On balance, nonetheless, I find that the first and only meeting to discuss the Claimant's position was on 12 October 2018. This is because within a comparatively short space of time, Mr Calzolari had set out in an email the "gentleman's agreement" that they had reached but in neither that email nor any of the associated correspondence did either man refer to an earlier meeting. Since Mr Beukers had not been actively involved until he was asked to arrange for a settlement agreement to be drafted, I do not find his witness statement determinative.

7.19 I also find it significant that the Claimant wrote to Mr Calzolari after the 12 October meeting having completed the analysis of his timesheets that led to him suggesting that in fact 200 days was an under-representation of his entitlement. I consider that if there had been a meeting the previous month, the Claimant would have carried out that analysis prior to the second meeting (and tabled the commensurate increase when the men met for the second time). That neither man labelled the meeting or their ensuing correspondence "without prejudice" (given their background and experience) suggests to me that they were not seeing it as the settlement of a dispute, because none had arisen.

7.20 Had I found there to have been an earlier, September, meeting, I would have been more open to persuasion by the Respondent that the "opening shot' took place on that occasion and hence the meeting in October and emails thereafter would have attracted privilege. However, I accept Mr Calzolari's evidence that the two men met for the first time on 12th October, reached agreement without apparent difficulty on a number of points in principle (with Mr Calzolari later confirming on 24 October 2018 that in a telephone conversation the previous day, mutual agreement had been reached on three of the four points, leaving only the annual leave issue to be determined between them) and thereupon, for the sake of good order, Mr Calzolari asked Mr Beukers to arrange for a draft settlement agreement to be produced. As I have indicated above, it was at this point the "dispute" arose and discussions thereafter are privileged on any analysis.

7.21 Accordingly, paragraph 12 must be redacted as set out in the Claimant's solicitor's email of 17 January 2020, so that it does not refer to matters which are properly "without prejudice". In light of my findings above, it should also remove reference to the date on which the meeting was held so that it now reads as follows:

"The Claimant had a meeting in London to discuss his possible retirement, his outstanding holiday entitlement and his car allowance. It was agreed that the issue

of the Claimant's potential retirement would be reviewed in December 2018 along with his outstanding holiday entitlement. Discussions were held between the parties to attempt to amicably resolve the issue of the outstanding holiday entitlement accrued by the Claimant which led to an offer by the Respondent to pay the Claimant for 168 days of accrued holiday (equating to £68,199.60)."

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Employment Judge Norris
13 December 2020

Sent to the parties on:

14/12/2020

For the Tribunal: