Neutral Citation Number: [2022] EAT 157

Case No: EA-2021-000290-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25th March 2022

Before:

THE HONOURABLE MR JUSTICE CAVANAGH

- -

Between:

SCHELDEBOUW	**Appellant**
- v -	
MR MARTIN EVANSON	**Respondent**

- -
- -

Georgina Leadbetter (instructed by **Downs Solicitors**) for the **Appellant**
Paras Gorasia Counsel (instructed by **Pinney Talfourd LLP**) for the **Respondent**

Hearing date: 25th March 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The issue in this appeal was concerned with the point at which discussions between the parties became covered by "without prejudice" privilege. The judgment reviewed the relevant case law, including the leading case of **Framlington v Framlington Group** [2007] EWCA Civ 502; [2007] ICR 1439. The EAT held that the central question is that identified by the Court of Appeal in **Framlington**, namely whether, at the relevant stage in the course of negotiations, the parties contemplated or might reasonably have contemplated litigation if they could not agree.

The EAT dismissed the Appellant's appeal, holding that the Employment Judge directed herself correctly by reference to the **Framlington** test, did not fall into any error of law, and did not reach a perverse conclusion.

THE HONOURABLE MR JUSTICE CAVANAGH

Introduction

1. This is an appeal against the ruling of Employment Judge Norris, handed down after a preliminary hearing, which was concerned with the application of the "without prejudice" privilege rule. The judgment was entered in the Register and sent to the Parties on 14th December 2020. The Appellant was the Respondent below. To avoid confusion, I will refer to the Parties as they appeared in the Employment Tribunal ("ET"). Therefore, I will refer to the Appellant in this appeal as the Respondent, and the Respondent to the Appeal as the Claimant.

2. In the Employment Tribunal proceedings, the Claimant makes a claim for unlawful deduction from wages against the Respondent, his former employer. The Claim is concerned with a substantial sum due by way of holiday pay which was accrued but untaken at the time of the Claimant's termination of employment.

3. The issue with which the Appeal is concerned relates to whether a passage in the Claimant's Grounds of Claim should be redacted from the version of the Claim Form which would be seen by the Employment Tribunal at the Full Hearing, on the basis that the subject matter of the passage is covered by "without prejudice" privilege. The passage is in paragraph 12 of the Grounds of Claim and states as follows:

> **"On 20th 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.]"**

4. The Claimant accepted that the final few words in this paragraph, within the square brackets, which refer to a counter-offer by the Claimant to accept 200 days' worth of holiday pay

equivalent to £81,190.00, referred to "without prejudice" negotiations and, for that reason, is privileged and should be redacted. It was, of course, in the Claimant's own interest to accept this, as it meant the Employment Tribunal would not be informed of the amount of holiday pay that the Claimant was prepared to accept in negotiations. However, the Claimant took the position that the remainder of the paragraph, including an offer to pay 168 days' worth of holiday pay equating to £68,199.60, was not covered by the "without prejudice" principle, and so could go before the Employment Tribunal. The Respondent disagreed.

5. The Parties' motives are obvious: it would suit the Claimant for the ET and the Full Hearing to know the Respondent offered to pay over £68,000 in relation to 168 days' holiday pay. It would, conversely, not be in the Respondent's interest for the Employment Tribunal to be aware of this. How far, if at all, in practice, this would influence the Employment Tribunal at a full hearing is debatable but, as the judge said when granting leave to proceed with the Appeal in the Rule 3(10) proceedings, the question is not academic.

6. EJ Norris heard evidence and submissions at a hearing on 25th September 2020 and, as I have said, later delivered a reserved judgment. She found in favour of the Claimant on this point. The operative part of her judgment states:

> **"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)."**

7. The Respondent appealed. On the paper sift under Rule 3(7), His Honour Judge Tayler refused permission to proceed to a full hearing. However, at a Rule 3(10) hearing, Michael Ford QC, sitting as a judge of the EAT, allowed the Appeal to proceed to a full hearing on all five grounds that were relied upon by the Respondent.

8. Before me the Respondent has been represented by Ms Georgina Leadbetter of Counsel and the Claimant by Mr Paras Gorasia of Counsel. I am grateful to them both for their clear,

thorough and helpful submissions. This case has been argued with conspicuous skill on both sides.

The relevant legal principles

9. There is no dispute that "without prejudice" privilege applies to proceedings in the ET. The legal principles that apply to "without prejudice" privilege is now well-established, and parties are not significantly in disagreement about them, although there are differences in emphasis. The authorities stress that the application of the principles is fact-specific and their application to an individual case can often give rise to difficulty. This applies especially to the question as to the point at which the "without prejudice" privilege comes into being. That is the issue that arises in the present case.

10. In a family case, **BE v DE** [2014] EWHC 2318 (Fam), at paragraph 20, Mr Justice Bodey helpfully summarised the relevant principles, which were taken from Phipps on Evidence, 18th edition, as follows:

> "… The starting-point is that written or oral communications made in a genuine attempt to settle a dispute between the parties will not generally be admitted into evidence: *Phipson* paras.24-09 and 24-13. The policy is that parties should be encouraged to settle their disputes without resort to litigation and such that they can speak freely: **Cutts v. Head** [1984] Ch 290 at 306 per Oliver LJ. A first unsolicited letter offering settlement or negotiations marked 'without prejudice' will as a matter of policy therefore be protected; and so it is that the without prejudice principle is said to rest partly (a) on that public policy just mentioned and partly (b) on an express or implied agreement between the parties that they will not later rely in an open context on the contents of settlement negotiations. There has to be a bona fide attempt to resolve a dispute, in the absence of which the without prejudice principle is not engaged: *Phipson* 24-11. As Mr. Bishop QC says, the words "without prejudice" are not essential, although clearly persuasive. When they are not used, the occasion or document may still be found to be without prejudice "...if it is clear from the surrounding circumstances that the parties were seeking to compromise the action": **Rush & Tompkins v. GLC** [1989] 1 AC 1280 at 1299 per Lord Griffiths. At para.24-13(d) *Phipson* puts it in this way:
>
> **"Even if the words 'without prejudice' were not used, the without prejudice principle will still apply if the circumstances, judged objectively, were such that it can be assumed to have been intended that the communications in question, being made with a view to settlement, be not admitted in evidence."**

11. At paragraph 22 of **BE v DE**, Mr Justice Bodey stated that the applicable test is objective; it is not what the parties objectively thought about the communication at

the relevant time that matters. Rather, the court has to work out what, on a reasonable basis, the intention of the author was and how it would be understood by a reasonable recipient. At paragraph 23, Mr Justice Bodey stated that:

> "23. … Whilst this [i.e. the existence of "without prejudice" privilege] clearly does not require the existence of legal proceedings, it must surely mean a reasonably choate 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. …"

12. In **A v B & C** [2013] UKEAT/0092/13, on 10th April 2013 Mr Justice Keith indicated that it was sufficient for "without prejudice" privilege to apply that one of the parties might reasonably have contemplated that litigation was at least a possibility if a compromise could not be reached. However, Ms Leadbetter rightly emphasises that this does not detract from the position that the test is an objective one and that the Employment Judge should not focus solely on the subjective views of one or other party.

13. The leading authority on "without prejudice" privilege is now **Barnetson v Framlington Group** [2007] EWCA Civ 502 [2007] ICR 1439. This was an appeal from an employment tribunal. The leading judgment was given by Lord Justice Auld, with whom Lord Justices Longmore and Toulson agreed. At paragraphs 27 LJ Auld stated that:

> "27. … for the "without prejudice" rule to give full effect to the public policy underlying it, a dispute may engage the rule, notwithstanding that litigation has not yet begun. …"

14. At paragraph 29 of his judgment, LJ Auld said that:

> "29. A good instance of the working of the rule can be seen in the "opening shot" cases, in which an initial proposal in negotiations before commencement of proceedings may be protected by the privilege. Were it not so, a party to a dispute could never safely make, by way of negotiation, an initial offer in response to a claim; see **South Shropshire District Council v Amos** [1986] 1 WLR 1271, CA, a Lands Tribunal case, which concerned "without prejudice" negotiations in a dispute that arose long before reference to the Tribunal as to the amount of compensation payable in respect of a discontinuance of business use order made under section 51(1) of the **Town and Country Planning Act 1971**. Parker LJ, giving the judgment of the Court upheld, at 1276D-1278A, the ruling of Gatehouse J that "without prejudice" negotiations could begin with an "opening shot", that is, an initial offer from one party in dispute with another setting out his proposal for settlement of his or the other's claim giving rise to the dispute, and could continue with the ensuing exchanges, all before the commencement of proceedings."

15. Auld LJ gave guidance about where the line should be drawn in cases in which proceedings have not yet been commenced in paragraphs 32 to 34 of his judgment, which are worth setting out in full:

> "32. The question remains, how proximate, if at all, must unsuccessful negotiations in a dispute leading to litigation, be to the start of that litigation, to attract the "without prejudice" rule. Must there be, as Mr Oldham contended, an express or implied threat of litigation underlying the negotiations, or, failing any such threat, some proximity in time to the litigation eventually begun? In answering that question, the courts are logically driven back, as Mr Nicholls submitted, to the public policy interest behind the rule, of encouraging parties to settle their disputes without "resort" to litigation or without continuing it until the needless and bitter end. If the privilege were confined to settlement communications once litigation had been threatened or shortly before it is begun, there would be an incentive on both sides to escalate their dispute with threats of litigation and/or to move quickly to it, before they could safely start talking sensibly to each other. That would be a slippery slope to mutual hardening of positions and commencement of litigation hardly the encouragement to settle their disputes without resort to litigation that Oliver J had in mind in **Cutts v Head**.
>
> 33. On the other hand, the ambit of the rule should not be extended any further than is necessary in the circumstances of any particular case to promote the public policy interest underlying it. The critical question for the court in such a case is where to draw the line between serving that interest and wrongly preventing one or other party to litigation when it comes from putting his case at its best. It is undoubtedly a highly case sensitive question, or put another way, the dividing line may not always be clear. The various judicial pronouncements in the leading cases to which I have referred do not provide any precise pointers, and there are seemingly no other authorities directly in point.
>
> 34. However, the claim to privilege cannot, in my view, turn on purely temporal considerations. The critical feature of proximity for this purpose, it seems to me, is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so, they could avoid the need to go to court over the very same dispute? On that approach, which I would commend, 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. Confining the operation of the rule, as the Judge did, to negotiations of a dispute in the course of, or after threat of litigation on it, or by reference to some time limit set close before litigation, does not, with respect, fully serve the public policy interest underlying it of discouraging recourse to litigation and encouraging genuine attempts to settle whenever made."

16. Accordingly, the matter is highly case-sensitive. It is wrong to apply a temporal test; that is, how far in advance of litigation commencing the communication took place. The key

question, as identified by LJ Auld, is whether, in the course of negotiations, the parties contemplated or might reasonably have contemplated litigation if they could not agree. If so, the privilege applies; if not, the privilege does not apply.

17. In the **Framlington** case itself, the Court of Appeal held that the privilege applied because (to use the words of Auld LJ) at the time the disputed communication was made, the parties were already well and truly at odds as to the claimant's contractual entitlement (see paragraph 36). He added at paragraph 37:

> "37. The amount of money in issue between the parties and the manner and content of the negotiations were such that both were clearly conscious of the potential for litigation if they could not resolve the dispute without it." …

18. At paragraph, 38 Auld LJ stated:

> "38. The resultant picture is one of negotiations arising out of a dispute as to Mr Barneston's contractual entitlement on his early dismissal, all against the backcloth of potential litigation if they could not resolve the dispute by compromise. It is not a picture of negotiations to vary his contractual entitlement against the possibility that he might not be dismissed after all, or to accommodate the proposed early dismissal, with no thought given on either side to potential litigation if variation were not agreed."

19. In the passage I have just cited, LJ Auld referred to the "opening shot" principle. This had previously been referred to in **Standrin v Yenton Minster Homes Ltd** (The Times) 22nd July 1991. In that case, Lloyd LJ stated 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 … 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* is not protected."

20. In my view, though, the "opening shot" principle is subordinate to the test as set out in **Framlington**. The fact the parties are making proposals to each other is relevant, but it does not conclusively establish that the "without prejudice" privilege applies. Such proposals may be made in discussions and yet the parties are neither contemplating litigation or reasonably contemplating litigation. In a standard commercial negotiation, there will be offers and counter-offers but without the contemplation of litigation.

21. The next authority that is worth mentioning in relation to the "without prejudice" privilege is the EAT judgment in **Portnykh v Nomura International PLC** [2014] IRLR 251. At paragraphs 34 and 35, His Honour Judge Hand QC stated:

> "34. ... 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 … that axiomatically there is a "dispute" or "potential dispute", although when that stage is reached I think that will very often be so. There is no need to go so far in this case, however, because the earlier factual matrix clearly establishes the "actual dispute" or, at the very least, the "potential dispute". If the 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.
>
> 35. If I am wrong about that and the matter should be confined to a construction of the correspondence only, I cannot see how one could arrive at the conclusion that the correspondence does not disclose an "actual dispute" or "potential dispute". Mr Pilgerstorfer submitted that the concept of a "potential dispute" had clearly been raised by paragraph 19a of the Respondent's skeleton argument before the Employment Tribunal. This was structured as a submission that there was no "dispute" but, to my mind, it really amounted to an acceptance of a "potential dispute" of the kind referred to in **Framlington**, something which the Employment Tribunal should have recognised and acted on. I accept Mr Pilgerstorfer's analysis that the issue raises a mixed question of fact and law. The whole purpose of any compromise agreement pursuant to section 203(2) of the Act is to reach a compromise and at the same time prevent the Claimant from having access to a Employment Tribunal in order to litigate about his dismissal. Whilst it may be true that the parties appear to have travelled some distance along the road towards reaching an agreement, to conclude that there is no "dispute" is to my mind to reject the process of negotiation as a species of dispute and, in effect, to require there to be the existence of proceedings in order to find a "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."

22. This shows that "without prejudice" privilege can attach to something that can be described as a "potential dispute" but the key point, in my view, is that there must be actual or reasonable contemplation of litigation as identified in **Framlington**.

23. Finally, in **Faithorn Farrell Timms LLP v Bailey** [2016] ICR 1054, Her Honour Judge Eady QC (as she then was) stressed that whether or not a communication is protected by "without prejudice" privilege does not depend upon whether the communication contains the words "without prejudice".

The Employment Tribunal's treatment of this issue

24. The Employment Tribunal referred to the key authorities in section 5 of the Judgment. At paragraph 5.2, the Employment Judge set out the key guidance in the **Framlington** case; namely, that the crucial consideration is whether, in the course of negotiations, the parties contemplated or might reasonably have contemplated litigation if they did not agree. No criticism is or could be made of the review of the authorities in this part of the Judgment.

Findings of fact in the Judgment

25. The Employment Tribunal heard evidence from the Claimant and from two employees of the Respondent, Mr Calzolari and Mr Beukers. It was Mr Calzolari, the Respondent's General Manager, who had been engaged in discussions with the Claimant about the termination of his employment. The Employment Tribunal did not find the Claimant to be as reliable as Mr Calzolari in his evidence and, in particular, in his evidence as to the timing when he began to contemplate litigation as a real possibility. This assessment of the Claimant's evidence is, of course, not open to challenge and, in any event, it is in the Respondent's favour.

26. The Claimant had worked for the Respondent from 17th January 2005 onwards and, at the time of his dismissal on 19th March 2019, he was the Chief Risk Officer. There is no suggestion that his dismissal had anything to do with misconduct or reprehensible behaviour on his part; it was simply that the need for the services he provided had declined. Whether or not the Claimant was redundant by reference to the statutory definition of redundancy is immaterial; the Respondent decided that he was no longer needed. The Employment Tribunal found that the first meeting between the Claimant and Mr Calzolari to discuss terms for the termination of the Claimant's employment and related financial matters was on 12th October 2018 (see Judgment, paragraphs 7.16 and 7.18).

27. The Claimant had alleged there had been a previous meeting on 20th September 2018, but the Employment Tribunal preferred Mr Calzolari's evidence on this. In the event, nothing rests on this difference of recollection.

28. It was confirmed before me by both Counsel that the Employment Tribunal proceeded on the basis that it was at the meeting on 12th October 2018 that the suggestion by the Respondent that it would pay £68,199.60 for accrued holiday pay was made. The Employment Tribunal found as a fact that, at this meeting on 12th October 2018, there was no dispute between the Parties; no minutes were taken; and there was no suggestion by either Party that it considered the matter to be "without prejudice". The Employment Tribunal stated that each appears to have put in an "opening shot" only about the amount of holiday pay that the Claimant may have been entitled to upon termination of employment. At paragraph 6.7, the Employment Tribunal stated that the Claimant and Mr Calzolari:

> "… reached agreement without apparent difficulty on a number of points of principle. Mr Calzolari did not agree that the Claimant's asserted entitlement to be paid in lieu of his accrued but untaken holiday pay, but was prepared to consider it as one element of a comprehensive agreement for the Claimant's employment to terminate on 31st December 2018".

29. It was agreed that a settlement agreement would be drawn up and the parties agreed, at Mr Calzolari's suggestion, to keep the matter confidential. The correspondence that followed between the parties was not marked "without prejudice" by either side (see paragraph 7.19).

30. On 23rd October 2018, Mr Calzolari sent an e-mail to the Claimant in which he set out the "gentleman's agreement" that they had reached (paragraph 7.18). This confirmed Mr Calzolari's understanding of the outstanding holiday pay entitlement but did not refer to matters such as pension, car allowance or pay in lieu. Mr Calzolari proposed that the Claimant's employment would end on 31st December 2018. In a telephone conversation on the same day, mutual agreement was reached on three of the four outstanding points, leaving only the annual leave issue to be determined between the parties.

31. On 24th October 2018, there followed e-mail correspondence between the Claimant and Mr Calzolari, after which Mr Calzolari asked Mr Beukers to produce a draft settlement agreement. Then on 12th or 13th December 2018, there was a meeting between the Claimant and Mr Calzolari at Dusseldorf Airport at which Mr Calzolari provided the Claimant with written

draft settlement terms. This was the first time that a draft settlement agreement had been provided. On 17th December 2018, the Claimant responded with a written counter-settlement agreement. In the event, agreement was not reached, and the Claimant was dismissed on 19th March 2019, with the dispute relating to holiday pay unresolved.

32. The Employment Judge found that before the 12th October meeting there was no particular reason for an expectation that the Respondent would be sued and, hence, litigation was not in Mr Calzolari's contemplation. He was aware of the possibility of litigation due to his commercial experience. However, there was no particular reason for it to be in his contemplation at that time (paragraph 7.13 and 6.14). Even after 12th October, the Tribunal found that Mr Calzolari did not think it necessary to take legal advice other than to formalise what the Parties had verbally agreed (paragraph 7.13).

33. The Employment Tribunal also found that there was no dispute about whether the Claimant's employment should end; the dispute was not about whether to end the Claimant's employment or, particularly, about when to do so, but arose in connection with the financial settlement. The Employment Judge held that there appeared initially to have been little dispute about what the parties were prepared to agree to (paragraph 7.1). It was not until the Draft Settlement Agreements began to be exchanged that the dispute between the parties became clear. Indeed, up until that point, such disagreements as there were related to commercial matters, which were not to do with the terms of the agreement for the termination of the Claimant's employment.

34. The Employment Tribunal said, also, that there was no potential stigma surrounding the termination of the Claimant's employment (see paragraph 7.12). At paragraph 7.14, the Employment Judge said:

> "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 [QC Counsel for the Claimant] asserted, the "watershed" moment in the case."

35. At paragraph 7.16, the Employment Judge concluded that, whether there had been two meetings, in September and October 2018, or just one on 12th October 2018, there was no dispute between the parties at that stage. Each put forward their "opening shot" only. At this stage, the Claimant was awaiting Mr Calzolari's offer on holiday pay when the latter had thought about it.

Summary of the Employment Tribunal's findings

36. It is fair to say, with respect to the Employment Judge, that the Employment Tribunal's findings and conclusions are not entirely easy to follow because the section of the Judgment which deals with them at times mixes together findings of primary fact; conclusions based on findings of primary fact; and comparisons between the present case and other important cases on "without prejudice" privilege. Also, the findings of fact are not set out in a purely chronological manner. As a result, the reasoning of the ET requires some unpicking.

37. Nonetheless, in my judgment, it is clear that the Employment Tribunal found the "without prejudice" privilege did not come into existence until the first Draft Settlement Agreement was given to the Claimant at the meeting at Dusseldorf Airport on 12th or 13th December 2018, and not at the earlier stage of the meeting on 12th October or at the date of the subsequent exchange of e-mails late in October and the reasons for this conclusion were the following:

    i) this is what was said expressly in the operative part of the Judgment at paragraph 1: "Prior to December 2018, the parties were not in dispute";

    ii) the Employment Tribunal recognised that the issue was whether, at the relevant stage in the discussions, the parties contemplated or might reasonably have contemplated, litigation if they could not agree (see paragraph 5.2);

    iii) the Tribunal considered that, in that regard, the background context was relevant; this

was not a hostile termination for alleged fault such as misconduct, there was no risk of stigma for the Claimant; rather the discussions about the proposed termination of the Claimant's employment took place because (in the Respondent's view) there was no longer a need for the Claimant's services. This took most of the heat out of the matter and meant there was no reason to think, from the outset of discussions, that litigation was an option. There was no hostility on either side of that stage (see paragraphs. 7.8, 7.10, 7.12 and 7.16);

iv) the Tribunal found that the only area of disagreement (apart from commercial matters which were irrelevant to the Termination Agreement) was concerned with the narrow issue of holiday pay (see paragraphs. 7.10);

v) the Tribunal took account of the fact that, at the meeting on 12th October 2018, there was no dispute between the parties and the parties went a long way towards reaching agreement. Although they had not reached agreement on holiday pay, Mr Calzolari was going to go off to think about it; and there was no reason to think that the discussion would not end amicably. A reasonable person would not think otherwise. At paragraphs 7.16, the Employment Tribunal stated:

> "The Claimant was not offering, at this stage to take less in settlement, but was awaiting Mr Calzolari's offer, once he had thought about it"

and that, 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."

vi) The fact that the outcome of the discussions on 12th October 2018 was described as a "gentleman's disagreement" was regarded by the Tribunal as a further indication that neither party was contemplating litigation at this stage (paragraphs 7.18), as was the fact that, at this stage, Mr Calzolari did not think it necessary to take legal advice (as at paragraph 7.14). The Tribunal recognised that, in October 2018, the Claimant had proposed to accept payment reflecting fewer days of accrued holiday than he said he

was actually entitled to. However, the Tribunal found (at paragraphs 7.16) that he was not suggesting at that stage that 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 was merely awaiting Mr Calzolari's offer once he had thought about it;

viii) the Tribunal decided that the fact that Mr Calzolari was proposing to formalise the eventual agreement in a settlement agreement was not a sign that he was contemplating litigation; this was just done for the sake of good order and was a sensible commercial precaution in the employment context (see paragraphs 6.14, 7.14 and 7.20);

ix) it is relevant that neither party referred to the discussions on 12th October as being "without prejudice" in subsequent correspondence (paragraphs 7.19). This means, in the Tribunal's view, that the Parties were not seeing it as consisting of negotiations for the settlement of a dispute, because none had then arisen;

x) it was only at or after the meeting at Dusseldorf Airport in December 2018, when the Draft Settlement Agreements began to be exchanged, that the positions hardened on holiday pay and from then on there was a real risk of litigation if the parties were unable to agree (see paragraphs 7.11, 7.14 and the operative part of the Judgment). There was some suggestion, at paragraphs 7.13 and 7.20 of the Judgment, that the Employment Judge thought that the change in attitude might have happened somewhat earlier than 12th December; namely, on 24th October 2018 but, in my judgment, properly understood, the Employment Judge rejected this. At paragraph. 7.13, the Employment Judge left open the possibility that the position changed so as to give rise to "without prejudice" privilege:

> "… at the earliest on 24 October 2018, … or at the latest sometime in December when the parties could not agree to the terms of a settlement agreement."

However, in the next paragraph, paragraph 7.14, she opted definitively for the latter possibility, saying that the position did not change until the Dusseldorf Airport meeting. She said:

> "… 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."

This is consistent also with paragraph 7.11 in which the Tribunal stated:

> "It was not until the draft settlement agreements began to be exchanged that the "dispute" between them became clear"

and is also consistent with the operative part: "prior to December 2018 the Parties were not in dispute." Still further it is consistent with findings of fact at paragraphs 6.14 and 6.15 of the Judgment. As for paragraph 7.20, I accept that this is somewhat confusing. The Employment Judge said that:

> "thereupon [i.e. following the 24th October e-mail], …, 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."

However, in my judgment, the correct interpretation of this passage is not that the Employment Judge was saying that the "without prejudice" privilege arose on or about 24th October when Mr Calzolari asked Mr Beukers to draw up the document; rather, she was saying that the dispute arose when the positions hardened after the draft was handed to the Claimant and discussed on 12th December. This is indicated by the introductory words: "As I have indicated above …". This is a reference to paragraph 7.14, in which the Employment Judge said that the position changed at the Dusseldorf Airport meeting in December. There is perhaps some looseness of language at the latter part of paragraph 7.20 for, when the Reasons are read as a whole, there is no doubt, in my view, that the Employment Judge was finding that the "without prejudice" privilege did not come into being until mid-December 2018, when the attitudes hardened, and litigation became a possibility. As she put it in paragraph 7.14, this was "the "watershed" moment in the case."

38. I should add that, even if the earlier date of around 24th October were the right one for the commencement of "without prejudice" privilege, the conclusion on the "without prejudice"

privilege issue relating to paragraph 12 of the Claim Form would remain the same. As the material set out in paragraph 12 (which the Respondent wishes to exclude) refers to the discussions on 12th October 2018 (which the Claimant says happened even earlier, on 20th September 2018). So, in any event, even if the alternative construction should be applied to the Tribunal's reasons, the "without prejudice" privilege did not arise until 24th October, after 12th October meeting.

The Appeal

39. It is trite law that the Employment Appeal Tribunal can only overturn the Employment Tribunal's ruling on a matter such as this if the Employment Judge has misdirected herself in law, or if the findings of fact or conclusion reached upon the findings of fact are so irrational as to be perverse. It is also trite that the threshold for a perversity appeal is a very high one (see **Yeboah v Crofton** [2002] IRLR 635).

40. In the present appeal, Ms Leadbetter's primary case is that the Employment Tribunal misdirected itself in law. She does not submit that EJ Norris expressly misdescribed or misinterpreted the relevant authorities in her Judgment, but she submits that, at the heart of the Appeal is that the Tribunal erred in law in having put the pass mark for "without prejudice" privilege being engaged significantly too high. She says that, where the Respondent criticises the position taken by the Tribunal on the facts, it is on the basis that the Tribunal failed to take into account undisputed evidence and/or drew conclusions contrary to its own factual findings. In other words, to the extent that the Appeal is a perversity charge, Ms Leadbetter emphasises that she is not challenging the primary findings of fact of the Employment Tribunal but is contending for the conclusions drawn from the primary findings of fact were perverse.

41. On behalf of the Claimant, Mr Gorasia submits that the Employment Tribunal applied the law as set out in **Framlington** and that the Appeal is, essentially, a perversity challenge to the findings made by the Employment Tribunal or an attempt to appeal on the basis of nit-picking criticisms of isolated passages in the Judgment.

42. I will deal with the five Grounds of Appeal in turn.

Ground 1:

43. This is that the Tribunal erroneously focussed exclusively on whether litigation was contemplated, in particular, by Mr Calzolari, thus neglecting to apply the full test in **Framlington**, which requires that consideration be given to whether, in the course of negotiations, the parties contemplated or might reasonably have contemplated litigation if they could not agree.

44. I do not accept this submission: The Employment Judge directed herself that she should apply the **Framlington** approach at paragraph 5.2 of the Judgment, and that is what she did. She gave reasons in the Judgment as to why neither the Claimant nor Mr Calzolari would reasonably have been contemplating litigation if agreement wasn't reached until 12th December 2018. These included that there was no hostility or threat of dismissal on grounds that would potentially stigmatise the Claimant; that there was no use of the words "without prejudice" by either party, which was not conclusive as relevant; and that the reality was, in the Tribunal's view, that the Parties were amicably moving on towards a settlement of a straightforward separation agreement until things went wrong in mid-December 2018. These reasons apply equally to the Claimant and to Mr Calzolari. It was not necessary for the Employment Tribunal to make an express finding about the state of mind of the Claimant as the test is, ultimately, an objective one. The reason why the Employment Tribunal focussed more on Mr Calzolari's attitude was that it had been submitted, on behalf of the Respondent, that the very fact that Mr Calzolari talked about preparing a settlement agreement at the 12th October meeting shows that he must have anticipated the potential for litigation as early as that date.

45. It is also worth noting that the Employment Tribunal did not accept the Claimant's evidence. At paragraph 7.6, the Employment Tribunal directed itself quite properly that, when doubting the credibility of a witness' evidence, it is essential to test the veracity of the evidence by

reference to the facts proved independently of the witness's testimony. This was the right approach. The fact that the Employment Tribunal did not accept the Claimant's evidence did not mean, in particular, that it had to reject his argument that "without prejudice" privilege did not arise until December 2018. It is not a valid criticism of the Tribunal, in these circumstances, to say that it gave undue weight to Mr Calzolari's views and I do not accept Ms Leadbetter's submission that the only realistic finding for the Tribunal to make on its findings of primary fact was that the Claimant might reasonably have contemplated litigation as early as 12th October 2018 if the discussions did not reach an amicable conclusion. It is clear that the Tribunal thought that, at this stage, both Parties considered that an amicable conclusion would be reached in this matter. The Tribunal gave ample reasons for this conclusion (which I have summarised above) and there are also reasons why the parties had not given any thought to the possibility of litigation at that stage.

46. Again, I do not accept Ms Leadbetter's submission that the Tribunal lost sight of the fact that the test for the "without prejudice" privilege is objective rather than subjective. There was no misdirection and the conclusion reached was not perverse. As I have said, the Tribunal's Judgment was, arguably, somewhat disorganised in its structure, but the conclusions that the Employment Judge reached are nonetheless clear. The fact that, as the Tribunal found at paragraph 7.13, Mr Calzolari was aware of the possibility of litigation in the light of his general commercial experience, does not contradict or detract from the Tribunal's conclusion that, in relation to the Respondent's discussions with the Claimant, he was not contemplating litigation. The Tribunal was entitled to find that the proposal that there be a settlement agreement was the result of commercial good sense and caution, not the result of fear of litigation in a particular case. Experienced people will be aware that there is always some theoretical risk of litigation arising out of almost everything they do. That does not mean that they are contemplating litigation every time they become involved in discussions.

47. I have already dealt with the suggestion that there is an inconsistency in the Judgment on the

basis that there are passages which suggest that the "without prejudice" privilege came into being on or about 24th October 2018 and passages which suggest that the privilege came into being on or about 12th December 2018. For the reasons that I have given, I do not accept that there is such an inconsistency in the Judgment. Properly understood, it is clear that the Employment Judge concluded that the "without prejudice" privilege applied from the time of the meeting at Dusseldorf Airport on 12th or 13th December 2018, and this is reflected in the operative part of the Judgment. In any event, as I have already said, any such inconsistency or uncertainty would not give rise to a ground of appeal. Whichever of the two dates is the right one, the Respondent's claim, to the effect that the discussions on 12th October are covered by "without prejudice" privilege, will fail.

48. Put bluntly, even if, contrary to my view, the Employment Judge can be criticised for inconsistency on this issue, none of this supports the contention that her ultimate decision on the "without prejudice" privilege was an error of law and can be set aside. Furthermore, I do not accept that the submission that the Tribunal fell into the trap of focussing on when the parties did, in fact, fail to agree, rather than when they might have reasonably contemplated litigation if they, ultimately, could not reach agreement. It is absolutely clear from the terms of the Judgment, in my view, that the Employment Judge had the right test clearly in mind and took the view that, it was only when the attitudes hardened, in December 2018, the possibility of litigation presented itself to either side as a possibility.

49. Again, there is no basis, in my judgment, for the contention made by the Respondent that the Employment Judge fell into the trap identified in the **Nomura** case of directing herself that some degree of hostility is necessary for the "without prejudice" privilege rule to be engaged. Nothing in **Nomura** prevents an employment tribunal from taking account of the background context and subject matter of the discussions which, in this case, are perfectly amicable. This is a relevant consideration when deciding whether litigation is reasonably in contemplation, even though overt hostility is not required. In **Framlington**, the Court of Appeal took account

of the subject matter of the discussions when deciding if "without prejudice" privilege existed (see paras. 37 and 38 of the Judgment), so did the judge in **Nomura** (at paragraph 34). In that case, HHJ Hand QC noted that, if the discussion was about dismissal for misconduct, it would be likely that litigation would be in the parties' reasonable contemplation from the outset.

50. Once again, I do not accept the criticism that the Employment Tribunal found the "without prejudice" privilege had not been engaged, simply because the Parties were still in discussion. It is clear that the Tribunal took the view that, whilst discussions were taking place, it was not until December 2018 that the litigation was in reasonable contemplation. Ms Leadbetter points out that, at paragraph 7.13, the Employment Tribunal stated that there was no particular reason for an expectation that the Respondent would be sued and, hence, litigation was not in its contemplation. She said that this places the bar too high.

51. I do not think that this is a fair reading of the Judgment. That observation should not be read in isolation; as I have said, looking at the Judgment as a whole, it is clear that the Employment Tribunal applied the correct **Framlington** test, and it is relevant to consider whether litigation was actually in the Respondent's contemplation. I do not think that the Judgment is tainted by a failure to appreciate any metaphysical distinction between expectation and contemplation. I say, once again, that the Tribunal directed itself to apply the **Framlington** test and did so.

52. As Ms Leadbetter submitted, it is, on the face of it, somewhat surprising that the offer made by the Respondent is not covered by "without prejudice" privilege but the offer made by the Claimant is. However, for the reasons given by the Employment Judge, an explanation was provided for this and that explanation is not perverse. Ultimately, the Tribunal was entitled to conclude that, as of October 2018, the was (to use the words of the **BE** case) "no 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 is clear here that the Tribunal considered that that is, indeed, what there was: a number of reciprocal

differences or grievances that might or might not prove soluble with reflection and discussion.

Ground 2:

53. This is that the Tribunal erroneously applied the "opening shot" principles and/or reached a conclusion on this point that was perverse in the light of its own factual findings.

54. I do not accept that the Employment Tribunal erred in law in its understanding or application of the "opening shot" case law. In fact, in the present case, the "opening shot" case law is of limited relevance; the key is that the Employment Judge applied the **Famlington** test. She was entitled to conclude that there was no contemplation of litigation, even though the Parties had set out their respective positions at the 12th October 2018 meeting. The Tribunal found that this did not lead to a dispute on holiday pay for which litigation was then in reasonable contemplation. Rather, it was left that Mr Calzolari would go away to think about the issue and let the Claimant know what he came up with. This was the subject of express findings in paragraph 7.16 of the Judgment.

55. The mere fact that the Claimant offered to accept less than his potential maximum legal entitlement does not mean that he or Mr Calzolari were contemplating litigation or could reasonably be contemplating litigation at the time of the 12th October meeting.

Ground 3

56. The Tribunal failed to make any finding that the Claimant had used the words "without prejudice" in his counter-agreement and, to the contrary, perversely held that "neither man labelled the meeting or their ensuing correspondence "without prejudice"". As Ms Leadbetter accepts, fairly, this is a perversity ground.

57. I do not accept this ground. The Employment Tribunal accepted at paragraph 7.1 that it would make minimal findings of fact because the definitive findings will follow the Full Merits Hearing. Ms Leadbetter doesn't criticise this but says that the Tribunal went too far in so doing and did not make enough findings. I do not accept this submission; the Tribunal gave sufficient findings to explain and justify its conclusions, as I have set out above.

58. The question that the Tribunal had to focus upon was whether there was "without prejudice" privilege at the time of the meeting on 12th October 2018. It was not suggested, and certainly not found by the Tribunal, that either party used the words "without prejudice" at that meeting or in the weeks that followed, even though the Claimant had some legal training. It was relevant that they did not, as that gives an insight into their positions, even though, as the EAT has made clear in the **Faithorn** case, this is not determinative; the fact that the phrase "without prejudice" was used in the Claimant's counteroffer in December is neither here nor there. The Tribunal accepted that, by that stage, "without prejudice" privilege existed.

59. I do not think that it is a fair criticism of the Tribunal to say that the Tribunal should have expressly considered whether the inclusion of this wording in December 2018 sheds light on the Claimant's attitude to the discussions in October. It was much more significant that, in the communications later in October (following the 12th October meeting), neither the Claimant nor the Respondent made any reference to that "without prejudice".

Ground 4

60. This is that the Tribunal erroneously considered or concluded that there was no dispute as to termination, on the basis that there was no dispute as to the potential reason for termination, notwithstanding that the terms for potential termination were potential matters of dispute. The Respondent submits that, in doing so, it failed correctly to apply **Nomura** principles, and, in the alternative, Ms Leadbetter submits, that the Tribunal's conclusion, that there was no dispute as to the potential reason for termination, was perverse.

61. In my judgment, this Ground amounts to an overly critical analysis of the Tribunal's Judgment. The Tribunal was entitled to take into account that, as of 12th October 2018, there was no risk of a fault-based dismissal of the Claimant. This was a different class of case which one often sees in a case of senior executives; the employer no longer wants or needs the executive, though this is no reflection on his abilities. In those circumstances, albeit with perhaps understandable reluctance on the part of the employee, the parties discuss appropriate

terms for leaving. In the vast majority of cases, this will not lead to litigation and, in many cases, neither party, when entering the discussions, will think for a moment that they will lead to litigation.

62. The Employment Tribunal was entitled to conclude that this was the position in the present case. The Tribunal was also entitled to take into account that there was no allegation of a fault-based ground for dismissal. If there had been, then the stakes would have been infinitely higher, and it might well be that the Parties would start contemplating litigation at an earlier stage.

63. In the present case, the Tribunal took the view that the parties were discussing matters (such as outstanding holiday pay entitlement) that they fully expected to resolve, and so they were not contemplating litigation until their positions hardened, in December 2018, after exchange of draft agreements.

64. This conclusion was consistent with **Framlington** and the other authorities and was one which was not perverse on the facts of the case; the Tribunal was entitled to point out that this case was different from the **Nomura** case because there was no threat of a misconduct dismissal floating in the background to raise the temperature and direct the Parties' minds towards litigation. In **Nomura** (as I have said), HHJ Hand QC regarded the fact that there was a threat of misconduct dismissal as being a strong indication that litigation would have been in the reasonable contemplation of the parties. That did not apply here.

65. The Tribunal was entitled to find in the present case, as it did at para. 7.10, that the scope of the disagreement was a narrow and, apparently, readily resolvable one; namely, a disagreement about holiday pay. The Employment Tribunal referred at some length to the **Nomura** case in its Judgment but that was because it was relied upon by the Respondent's then-Counsel. Each case depends on its own facts, as **Framlington** makes clear, and the Tribunal was plainly right to distinguish **Nomura** from the present case.

66. Ms Leadbetter also submits that the Employment Tribunal misdirected itself about **Nomura**

because the Tribunal did not take on board the proposition to be derived from **Nomura**, that "without prejudice" privilege may apply even if there is no actual dispute. She points out that, at para. 1 of the operative part of the Judgment, the Employment Tribunal stated that "prior to December 2018, the parties were not in dispute" and she suggests that this shows the Tribunal felt that, if the Parties were not in dispute, then, *ex hypothesi*, "without prejudice" privilege did not apply.

67. I do not accept that this is a fair criticism of the Tribunal's reasoning; it is clear that, in the operative part of the Judgment, the Tribunal was using the phrase that "the parties were not in dispute" as a shorthand for meaning that there was no contemplation or reasonable contemplation of litigation. Taken as a whole, it is clear that the Tribunal was applying the right test; a dispute can arise even if there is no final breakdown in negotiations, and so "without prejudice" privilege can arise even before such a final breakdown. However, in this case, the Tribunal plainly took the view that the nature of the discussions at the time, prior to December 2018, did not indicate that the Parties were contemplating or could reasonably have contemplated litigation.

Ground 5

68. This is that the Tribunal's conclusions as to when a dispute arose are internally inconsistent, in particular, given that the Tribunal appears to have found that:

1) the dispute had arisen, and Mr Calzolari asked Mr Beukers to prepare a draft settlement agreement on or about 24th October 2018;

2) at the same time that this request was made following the meeting on 12th October 2018; and

3) the dispute arose in December 2018.

69. Ms Leadbetter accepts that, even if 24th October was the right date, it wouldn't get her home on the "without prejudice" privilege point because the matter she seeks to exclude relates to what was said earlier on 12th October but, she submits, that this error and lack of clarity is so

fundamental that it fatally undermines the Employment Tribunal's Judgment and means that it cannot be relied upon. As she put it, this was a point at the very heart of the decision.

70. I have already dealt with this point. For the reasons I have already given, it is clear from the Judgment as a whole that there was no such internal inconsistency. The Tribunal found that a dispute giving rise to "without prejudice" privilege arose in December 2018 and not before.

Conclusion

71. For the above reasons I reject the contention that the Employment Tribunal erred in law by making the 'pass mark' for "without prejudice" privilege too high. Whilst the Judgment of the Tribunal might have been clearer in some places than it was, the outcome and the reasons for it are clear from the Employment Tribunal's Judgment, and the Tribunal did not err in law or come to a perverse decision in its rule.

72. For these reasons, the Appeal is dismissed.