

PRIVILEGE TRIGGERED BY CONTEMPLATION OF LITIGATION

The Court of Appeal has held that in considering whether **without prejudice privilege** should apply to protect the contents of settlement discussions, the key consideration is whether the parties involved in the discussions were contemplating or might reasonably be said to have been contemplating litigation if they could not agree terms.

The case of *Framlington Group Ltd v Barnetson* reasserts the public policy interest underlying the need for parties to be able to engage in discussion to try to settle their differences without compromising their position should the matter subsequently proceed to litigation.

In this case, severance negotiations took place between employer and employee against the background of a dispute over employment terms with the employer having indicated its intention to dismiss the employee. Given the large amount of money involved and the way in which the negotiations were conducted, the Court of Appeal held that both parties were conscious of the potential for litigation and the severance discussions had therefore been “without prejudice” and were subject to privilege.

Practical Tips

The Tribunal will not necessarily find that a severance proposal will be privileged just because it has been said to have been made “without prejudice”.

The employer will always be in a stronger position in negotiating severance if, prior to offering terms, a procedure has been followed which has formally identified issues of concern which might lead to the employer considering terminating employment (e.g. attendance, performance, redundancy).

To attract the protection of without prejudice privilege, ensure that in the lead up to your negotiation you identify (and where possible agree with the employee) the areas of dispute which have led to the offer of severance terms and make it clear that any offer made is intended to resolve the dispute.

If you require any specific advice in connection with the material contained in this bulletin, or on any other Employment Law issues, please contact a member of the Employment Team on 0151 600 3000. If you no longer wish to receive the bulletin please let us know by return email.

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