Employment

Keeping schtum

Chris Bryden & **Michael Salter** trace the origins & history of the without prejudice rule

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IN BRIEF

- The general rule of public policy is that without prejudice communications cannot normally be referred to save on the issue of costs.
- There are exceptions to the rule but they are narrowly defined.
- The EAT in Woodward has made clear that there is no special exception to the rule in discrimination cases.

As with all litigation, claims to an employment tribunal carry risk. Even what appears to be the strongest claim, or most powerful defence, can be upset by a witness that does not come up to proof, a previously undisclosed document or a tribunal that simply does not agree with the argument on the day. For that reason, combined with the desire to save face, expenses or simply the hassle of attending a tribunal and the difficult experience of submitting to cross-examination, many litigants seek to compromise claims.

Offers to settle

A time-honoured and standard method of seeking to compromise is by the simple means of one side or the other making an offer to settle. Any genuine attempt to compromise proceedings will usually fall within what is commonly known as the "without prejudice" rule (whether or not it is marked as such), meaning that, usually, any such negotiations will not come to the notice of the employment judge and wing-members hearing the case, because they are privileged, and thus cannot be referred to.

The purpose of the rule is to ensure, as far as possible, that parties can put forward their best positions without risk of showing their hand to a tribunal. This is a rule of public policy, and has been taken by the courts in all jurisdictions to be one that, if it is to be displaced, extremely strong factors must weigh against it. These factors include, for example, where the question of whether a concluded compromise has in fact been reached; whether a dishonest case would otherwise be advanced, and where there is an element of unambiguous impropriety.

> **"Any genuine attempt to compromise proceedings will usually fall within the 'without prejudice' rule"**

It is this latter example that has exercised the employment tribunal most recently, notwithstanding recent affirmations of the rule in a number of high-level cases, including *Rush & Tomkins v GLC* [1989] AC 1299 HL *Unilever plc v Proctor & Gamble Company* [2000] 1 WLR 2436, [2001] 1 All ER 783, *Savings & Investment Bank Ltd v Fincken* [2004] 1 WLR 667, [2004] 1 All ER 1125 and *Ofolue v Bossert* [2009] 2 WLR 749, [2009] 3 All ER 93. These authorities trace the origins and development of the rule.

Unambiguous impropriety

"Unambiguous impropriety" amounts to a catch-all description of situations where the cloak of the without prejudice rule acts so as to shield some bad action on behalf of the party invoking it, and is in effect an exception based upon the rule of unconscionability—that such bad action should not be protected by a rule of public policy. Thus, for example, if in a meeting held without prejudice, an employer stated to an employee that, "we do not want you because you are black", the public policy in withholding that statement is outweighed by the requirement that such a statement should come to light: *BNP Paribas v Mezzotero* [2004] IRLR 508.

Nevertheless, the rule is one which the courts have historically taken extremely seriously. For example, in *Savings & Investment Bank Ltd v Fincken* [2003] EWCA Civ 1630; [2004] 1 All ER 1125, a case in which Mr Fincken has lied, in a sworn document, made clear: "All four authorities in this court, while allowing the existence of an exceptional rule to cover cases of unambiguous impropriety, have stressed the importance of the public interest which has created the general rule of privilege and have cautioned against the too ready application of the exception".

This sentiment is in accord with the dicta of Robert Walker LJ in *Unilever Plc v The Proctor & Gamble Co* [2001] 1 All ER 783 that: "…this court has… warned that the [unambiguous impropriety] exception should be applied only in the clearest cases of abuse of a privileged occasion".

Exception applied

There have, however, been attempts in the employment tribunals to widen the scope of the exception. In the case of *Mezzotero*, the claimant returned to work after maternity leave. She raised a grievance concerning the way she had been treated prior to and on her return from maternity leave. At a meeting her employers said they wanted the discussions to be "without prejudice", and she was told that it not viable to return to her old job and that no alternative was available, and that her employment should be terminated, with her accepting a redundancy package. Ms Mezzotero was not prepared to do so and claimed direct sex discrimination and victimisation. The contentions before the EAT revolved around whether what had been said at the meeting could be referred to in the tribunal. The EAT (upholding the employment tribunal) found that there was no extant dispute at the time of the discussion, and thus the without prejudice rule did not apply. However, Cox J went on to consider the alternative submission that the unambiguous impropriety exception applied.

Cox J accepted the submission that, particularly in sex and race discrimination cases, which by their nature are fact sensitive and thus it is essential that all the facts are known, in the example of the employer that states under the cloak of the without prejudice rule "we do not want you because you are black", such a statement would fall within the unambiguous impropriety exception.

This obiter comment has been the subject of significant academic criticism, on the bases, inter alia, that it artificially sought to create a further exception to the without prejudice role in the field of discrimination; and that it ran contrary to the case law, such as *Fincken*, which made clear that the unambiguous impropriety exception should be confined to very tight parameters, despite *Ofolue* making clear that the categories of exceptions to the rule were not closed. An example of the strict application can be seen in *Brodie v Nicola Ward (t/a First Steps Nursery)* [2008] All ER (D) 115 (Feb) UKEAT/0526/07/LA.

Those criticisms have now been silenced by the decision of HHJ Richardson in *Woodward v Santander UK plc* UKEAT/0250/09/ZT, reported earlier this year. While sitting at the same level as Cox J, HHJ Richardson in a detailed and careful judgment, put to rest any speculation that *Mezzotero* had sought to create a new exception to the rule. At para 58 of the judgment, HHJ Richardson makes clear that, reading *Mezzotero* as a whole, it does not establish any new exception to the rule. This must be correct, bearing in mind the dicta in the leading cases in relation to the caution that must be extended to considering new exceptions. Indeed, HHJ Richardson makes clear that Cox J expressly stated that she would regard the alleged conduct as falling "within the abuse principle" (at 38). HHJ Richardson went on to state:

> 59. We doubt whether Cox J intended to say that it was unnecessary, in a discrimination case, to find unambiguous impropriety. We appreciate that para 38 of her reasons, in which she refers to "the unattractive task of attaching different levels of impropriety to fact sensitive allegations of discrimination", can be read in that way. But Cox J went on to say that she regarded the employer's alleged conduct as "within the abuse principle".
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> 60. We would observe that the policy underlying the "without prejudice" rule applies with as much force to cases where discrimination has been alleged as it applies to any other form of dispute. Indeed, the policy may be said to apply with particular force in those cases where the parties are seeking to settle a discrimination claim.

The judgment further recognises that discrimination claims place heavy burdens on parties, and that there is importance in attempts to settle differences in conditions where they can speak freely. The limits to such free speaking fall within the existing exception of unambiguous impropriety, which "applies only in the very clearest of cases". HHJ Richardson recognised the initial unattractiveness of excluding evidence from which inferences of discrimination could be drawn, given the fact-sensitive nature of discrimination cases. However, this was outweighed by the need to speak freely in conducting negotiations: "Parties should be able to approach negotiations free from any concern that they will be used for evidence-gathering, or scrutinised afterwards for that purpose."

It is now much clearer that the putative exception for discrimination cases that appeared to have been postulated by Cox J in *Mezzotero* is no more, and the tolerably clear exceptions to the without prejudice rule remain as set out in the leading authorities. *Woodward* goes some considerable way to easing the concerns of parties seeking to negotiate in without prejudice discussions or correspondence that, unless what is said unambiguously amounts to an impropriety, those discussions cannot later be brought up to found or support a claim. NLJ

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