An unfair advantage?

Chris Bryden and **Michael Salter** warn against tampering with the "without prejudice" rule

IN BRIEF

- Genuine written or oral attempts to resolve a dispute between parties cannot be used as evidence in court.
- There appears to be some judicial sympathy for litigants who are unable to prove their cases owing to the operation of the "without prejudice" rule.
- However, unless the case falls within the established exceptions the rule, for now, will prevail.

It is a well-established doctrine that, subject to certain exceptions, written or oral communications made in a genuine attempt to compromise a dispute between the parties cannot be admitted in evidence. The "without prejudice" rule is a clear example of public policy, as the promotion of the settlement of disputes without recourse to litigation is a central aim in our legal system. It enshrines the principle that parties are able to negotiate openly without fear of being attacked by having their words quoted back at them in open court.

In the recent case of *Brodie v Nicola Ward (t/a First Steps Nursery)* [2008] All ER (D) 115 (Feb), UKEAT/0526/07, an employee attempted to overturn a ruling by the employment tribunal that a letter sent to her by solicitors acting for her employer was subject to the rule and therefore inadmissible. She argued that the letter amounted to a "last straw" that had caused her to resign and claim constructive dismissal. The employment tribunal found as a preliminary issue that the letter was privileged. The Employment Appeal Tribunal (EAT) agreed. Had it not, the alarming conclusion (for employers at least) would be that the act of sending an offer to settle a dispute could itself be used as evidence for a further claim based on a breach of the duty of trust and confidence.

The basis of the argument put forward on behalf of Brodie was that the letter fell within an exception to the rule as to exclude it would involve the respondent putting forward a "dishonest case" or engaging in unambiguous impropriety. Before turning to the facts of the case it is important to consider some basic principles.

FIRST PRINCIPLES

There is plenty of authority relating to the "without prejudice" rule, and its scope is tolerably settled. Several important principles emerge from the case law.

- Simply attaching the words "without prejudice" to a letter does not attract the privilege. The content and tone of the letter must be such that it falls within the ambit of the rule and therefore the letter must be a genuine attempt to compromise a dispute.
- Generally, "once privileged, always privileged" so that in subsequent litigation between the same parties, privilege still attaches: *Instance v Denny Bros Printing* [2000] FSR 869, [2000] 05 LS Gaz R 35; *Brunel University v Webster & Vaseghi* [2007] EWCA Civ 482, [2007] IRLR 592. This is so even where the communication in question is the "first shot".
- There are certain exceptions to the rule, demonstrating that no rule of policy can always be "sacred". However, these exceptions are tightly constrained and apply in limited circumstances. The exceptions, allowing the admissibility in evidence of privileged communications, were set out in the recent case of *Unilever v Proctor & Gamble* [2001] 1 WLR 2436:
  - (i) where the issue is whether or not there is a concluded compromise agreement;
  - (ii) to show that an apparent agreement should be set aside due to misrepresentation, fraud or undue influence;
  - (iii) an estoppel situation;
  - (iv) to explain delay or apparent acquiescence;
  - (v) where there is no public policy justification;
  - (vi) where "without prejudice save as to costs" is used, in respect of cost arguments only;
  - (vii) in certain matrimonial cases in respect of matrimonial conciliation; and
  - (viii) in cases of impropriety.

It is the final exception that has generated the most argument, and it is that exception that Brodie sought to rely upon in order to overturn the judgment of the employment tribunal.

THE FACTS

Brodie was employed as a teacher by First Steps nursery school for just under 10 years until 8 February 2007. The respondent, Ms Ward, acquired the nursery business in 2000 and the contract of Brodie and the other employees passed to her under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

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The parties were involved in litigation in 2006 relating to a dispute over contractual sick pay. During the course of those proceedings Ward instructed her solicitors to put an offer to Brodie. The subsequent letter, headed "without prejudice" and dated 25 January 2007, offered to fully satisfy the claim for outstanding contractual sick pay but on the basis that Brodie immediately terminate her employment.

Brodie relied upon this letter in subsequent proceedings based upon a complaint of unfair (constructive) dismissal. She contended that the letter was the last straw that caused her to resign.

LEGAL BACKGROUND

The employment tribunal found that the letter of 25 January 2007 was privileged. It was submitted on behalf of Brodie that the "without prejudice" rule was not engaged because the communication related to earlier litigation and because it was not a

genuine attempt to settle a dispute. It is clear that privilege survives, as discussed above, and it was found by the tribunal that the letter was a genuine attempt to settle the dispute.

RESIGNATION EXPLANATION

Brodie further argued that an exception to the rule was engaged and relied, in effect, on the unambiguous impropriety exception. This was rejected. She also argued that she would suffer unfair prejudice if she was left unable to explain why she resigned. In its judgment the tribunal asked itself:

"If [Ms Brodie] cannot tell the tribunal why she resigned on 8 February 2007, how can she show that she was constructively dismissed on that day? We confess that we can see no obvious answer to that question. Even if she established that there were circumstances entitling her to resign and treat herself as constructively dismissed before 8 February, she did not elect to do so. Her case is that something more—if not a fresh breach of contract at least something worthy of complaint—brought about the resignation, and if the rule applies, she cannot identify that 'last straw'." (Employment tribunal decision para. 17.)

> "To extend the ambit of the exception to all cases of discrimination would fly in the face of the policy reasoning behind it"

This demonstrates clearly the tension in the law between the public interest in deciding cases on the relevant evidence, and the policy rule of encouraging settlement of disputes. However, it is settled law that unless special circumstances apply, the policy of the "without prejudice" rule will apply, even if hardship is caused thereby, for example in *Savings & Investment Bank Ltd v Fincken* [2003] EWCA Civ 1630; [2004] 1 All ER 1125.

RENEWING THE SUBMISSION

Brodie renewed her submissions before the EAT. She argued there that not to allow her to rely upon the contents of the letter of 25 January 2007 amounted to a dishonest case or alternatively that the unambiguous impropriety exception should apply. It was accepted that in both situations an extension of existing case-law would be required.

It should be noted that there have been recent attempts to extend the ambit of the unambiguous impropriety exception in the field of employment law. As it stands, the law regarding this exception is that one party may be allowed to give evidence of privileged discussions if the exclusion of such evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety.

The "dishonest case" argument is a subspecies of this exception, arising out of the case of *Independent Research Services v Catterall* [1993] ICR 1: "… whether the 'without prejudice' material involves, if it is suppressed, something amounting to a dishonest case being prosecuted if the pleaded case continues".

FURTHER EVIDENCE

In *BNP Paribas v Mezzoterro* [2004] IRLR 508, Mr Justice Cox, obiter, expressed the view that it was in the public interest that allegations of unlawful discrimination should be heard and properly determined, as such complaints are inherently difficult to prove. She therefore found that evidence relating to a "without prejudice" meeting that arose following allegations of sex discrimination, in which an offer of payment was made in return for the termination of employment, would fall within the unambiguous impropriety exception.

Further, in *Webster & Vaseghi* Lord Justice Smith, again obiter, expressed the view that some sympathy might be found in respect of the submission that victimisation is difficult to prove at times if the "without prejudice" rule is rigorously applied.

CAREFUL ASSERTIONS

It may be, therefore, that some attacks on the "without prejudice" rule may be sustainable. However, in this case Brodie was patently unable to come within the unambiguous impropriety exception. Her argument in respect of the "dishonest case" amounted to no more than an assertion that she would not be able to put or prove her case. Relying on the effect of the well-established rule of policy does not equate to dishonesty or dishonest conduct by the respondent, and it cannot be said that not being able to put forward privileged matters makes the claimant's case in any way "dishonest".

Nor was there anything in the sending of the letter that could amount to unambiguous impropriety. As is clear from the case law, to fall within this exception the conduct must be so bad, so wrong, as to tip the scales away from the strong policy arguments underpinning the "without prejudice" rule.

In effect the conduct of the party seeking to rely on the rule must be so bad that it is not conscionable to allow it to be maintained. But the bar is set extremely high—in *Fincken* the rule was applied notwithstanding it appeared to mask an admission of perjury.

IMPACT AND IMPLICATIONS

For Brodie to succeed, the EAT would have had to stretch the exception to the "without prejudice" rule to breaking point, or beyond. The end result of her contentions would be that wherever a party was unable to demonstrate their case due to the operation of the rule, the rule would be disapplied. This is not borne out by the case law.

The obiter indications of Cox J and Smith LJ are of interest in this area. It appears that there is some judicial sympathy for litigants unable to prove their cases owing to the operation of the "without prejudice" rule, although this appears confined to the discrimination/victimisation field. It is submitted that to entertain a blanket exception, even in those limited circumstances, is an erosion too far. Clearly if discrimination is being cloaked by the operation of the rule, there may conceivably be circumstances in which a preliminary issue hearing to determine whether or not the rule is in fact being used as a cloak for unambiguous impropriety should be necessary; but, as the law stands, those circumstances will be rare. To extend the ambit of the exception to all cases of discrimination would fly in the face of the policy reasoning behind it.

Employers can rest easy that they are entitled to put genuine offers to employees to settle disputes and retain the protection of the without prejudice rule in subsequent litigation. Where an employee claims that such an offer amounts to a last straw and resigns they will be prevented from relying on the contents of the letter unless it can be shown that there is some unambiguous impropriety; but the mere sending of such a letter cannot possibly amount to this.

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