

## Without Prejudice conversations

The Without Prejudice rule prevents statements made in a genuine attempt to settle an existing dispute from being put before a court or Tribunal as evidence. However, in order to attract this protection in an employment context there must already be a dispute between the parties at the point the first Without Prejudice communication is made. In practice it can be difficult to identify what will constitute a dispute for these purposes, particularly as a grievance or disciplinary process alone may not constitute a dispute.

A recent case considered the issue. In *Portnykh v Nomura International Plc* the Claimant contended that he had been unfairly dismissed for making protected disclosures without being given any reasonable explanation. The employer argued that the reason for dismissal was misconduct. The status of correspondence between the parties about the reason for the dismissal was considered.

In the Tribunal the employer sought to adduce documents that had been marked "Without Prejudice." The Employment Tribunal found that the Without Prejudice rule did not apply because there was no dispute at the time the correspondence was entered into. Further, that it would be an abuse to exclude evidence showing the Claimant's request that his dismissal be characterised as a redundancy.

However on appeal the Tribunal's decision was overturned as the EAT considered that the context of the Without Prejudice correspondence clearly indicated that there had been a dispute or potential dispute. The EAT considered that if, as in this case, an employer has announced an intention to dismiss and there are then discussions about an alternative label for the dismissal, there is clearly a dispute or the potential for a future dispute. The EAT also considered that the correspondence itself disclosed a dispute about the settlement on offer and the reason for the termination of employment.

This case is helpful for employers. In particular, the EAT accepted that a present or potential dispute was sufficient for the Without Prejudice principle to apply. However, the case also demonstrates that the context in which conversations take place is critical when considering whether a dispute exists to attract this protection.

[Portnykh v Nomura International Plc EAT 5/11/13 \(0448/13\)](#)

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