RUSSELL-COOKE | SOLICITORS

Exceptions to the without prejudice rule

The without prejudice privilege usually continues to attach even after any agreement resolving a dispute has been concluded, or a matter has been determined by a court or tribunal. This article considers the most important exceptions to the without prejudice rule, as they apply generally in the employment context, and more specifically to negotiations leading to compromise agreements.

What constitutes a dispute?

Employers and employees who wish to part ways often conduct any negotiations on a without prejudice basis. These negotiations will usually take place long before any proceedings have been issued, and often before they have even been threatened. Employers usually want the certainty of outcome that only a compromise agreement will give them. Employees, on the other hand, want to secure the best possible exit package for themselves, even if they have no intention of bringing a claim. Negotiations will therefore often take place before the employee has formally raised any concerns.

In order to be properly without prejudice, negotiations have to be genuinely aimed at resolving an existing dispute between the parties. However, exactly what constitutes a dispute for these purposes is problematic. The fact that the employee has raised a grievance will not necessarily be enough. A grievance may be upheld or dismissed for reasons which the employee finds acceptable. What is needed is that the parties, in the course of the negotiations, have contemplated or might reasonably have contemplated litigation in the event that they could not reach agreement.

Often it is clear from the way in which a grievance is put that the employee is already contemplating litigation and is going through the grievance procedure as a preparatory step. In such a situation it is not usually too early for the employer to initiate without prejudice negotiations. However in practice, the fear that any suggestion that the employee *"might be happier elsewhere"*, for instance, could be relied upon as founding a constructive dismissal claim (and/or as an act of victimisation, where there has been an allegation of discrimination) will often lead the employer to wait for the employee to raise the possibility of a termination payment first.

The unambiguous impropriety exception

A well known exception to the without prejudice rule is the *"unambiguous impropriety"* exception, which is based on the undesirability of very clear wrongdoing (such as perjury or blackmail) being covered up. However the public interest in parties being able to settle their disputes by speaking frankly is so valued by the courts and tribunals that they have, on the

whole, proved extremely reluctant to find unambiguous impropriety, such as to justify their looking into what has been said on a without prejudice basis.

It was not necessary for the Employment Appeal Tribunal to make such a finding, in the case of *BNP Paribas v Mezzotero*, as it had already decided that the discussion in question had not been properly without prejudice because there was not yet any dispute between the parties. However the additional comments made in that case by Cox J about the way in which this exception applied led many to think that it might have been extended in the discrimination context.

The employer had conceded that it would constitute unambiguous impropriety to say to an employee *"we do not want you here because you are black"*, but argued that the statement which had been made to the employee about it being best for all concerned for her employment to be terminated, did not fall within the same category. Cox J disagreed, as she considered that it was undesirable to have to attach *"different levels of impropriety to fact-sensitive allegations of discrimination".*

For the moment, this door has been firmly shut on employees. Richardson J, also sitting in the Employment Appeal Tribunal, in the 2010 case of *Woodward v Santander UK plc,* confirmed that the bar for unambiguous impropriety is not to be regarded as having been set any lower in discrimination cases than in any other type of case. However employers and practitioners need to bear in mind the very real possibility that, when a case on this point eventually falls to be determined by the Court of Appeal, the position may be reversed.

The interpretation exception

The Supreme Court confirmed late last year in the case of *Oceanbulk v TMT Asia* that this new exception allows courts to look into what was said during without prejudice negotiations in order to work out what the parties intended, in entering into a settlement agreement, where a dispute later arises about this. Does this mean that employers can no longer safely depend on the clauses in their compromise agreements which say that the employee cannot rely on anything not referred to in the agreement itself? It does not. The question to be addressed is the same as in any other dispute over the construction of an agreement, namely *"what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean".* In other words, if the parties' intention is not sufficiently clear from the drafting of the agreement and there is some ambiguity, a court may look at what they said and did when negotiating the relevant term, in order to make an objective assessment about this. The best way for an employer to ensure that this exception does not apply is therefore to ensure that the drafting of the compromise agreement is entirely free of any ambiguity.

The proof of a concluded settlement exception

The Court in *Oceanbulk* also said that, looking at what was said in without prejudice negotiations in order to determine the intention of the parties, was the same as looking at them in order to establish whether an agreement had been concluded at all, or whether that agreement needed to be rectified. If, for instance, the final version of a compromise agreement was still marked *"Without Prejudice"*, and it did not contain the usual statement to the effect that it was to be treated as no longer without prejudice on signature, either party could still rely on the agreement.

A party can also rely on without prejudice negotiations to try to demonstrate that a deal has been concluded where there is no compromise agreement, and the other party is denying

that any agreement has been reached. Such agreements can validly compromise contractual claims in the employment context, even if they cannot compromise statutory employment claims. If the parties have not made clear that their discussions are subject to contract, and it is not obvious from the context that this was intended, all that is needed is that the parties have agreed terms.

The rectification exception

The rectification exception would apply where, for instance, it was perfectly clear that the parties had been negotiating a £1,000,000 payment, but neither side had spotted that the compromise agreement or contract only referred to £100,000. If the employer then tried to insist that only £100,000 was payable, the employee could bring a rectification claim relying on the without prejudice negotiations.

Misrepresentation, fraud, or undue influence

This exception can apply in an employment context if either party has induced the other to enter into a contract (which again would include any compromise agreement) by an untrue statement of fact. This means that any assurances as to facts which employers are asked to give, by employees or their representatives, before an agreement is entered into, should be dealt with very carefully, as they may invalidate the agreement if incorrect.

Undue influence is the improper application of pressure by someone in a position of power. It is difficult to establish if someone has taken independent legal advice, as will usually be the case where a compromise agreement has been entered into. However, it might well apply if the parties had reached some other agreement between them, as agreements which compromise contractual claims only (however valuable those claims might be) do not strictly need the employee to have taken separate advice in order to be valid.

Evidence that negotiations took place to explain delay in proceedings

In theory, this exception might be used in an employment context by an employee who was arguing that it would be just and equitable for a tribunal to allow a discrimination claim to be brought late. This might, for instance, be argued if the employer had acted throughout as though negotiations were about to be concluded, even perhaps to the extent of assuring the employee that it was not necessary to issue any claim protectively, only to withdraw from the negotiations once the relevant deadline had passed.

Without prejudice save as to costs

Parties can rely on anything which they have expressed to be *"without prejudice save as to costs"* in order to argue for their costs at some later point, usually if they think they can show that the offer they made at the time was one which should have been accepted, and that they were thereafter forced to incur costs unnecessarily by the other party. Although costs are only rarely awarded in the employment tribunal, this can still be an effective weapon, particularly where one party is acting unreasonably or vexatiously, or bringing a claim which is misconceived.

Demonstrating that loss has been properly mitigated when bringing a negligence or breach of contract claim

An employee who is bringing a negligence or breach of contract claim against his solicitor, for failure to advise properly, can rely on without prejudice negotiations in order to demonstrate that proper attempts were made thereafter to mitigate loss, by negotiating the best possible deal in all the circumstances.

Waiver

The parties can also together agree to waive the without prejudice privilege. This will sometimes happen inadvertently, for instance where one party has allowed the other to refer to without prejudice negotiations in an open context, such as during a disciplinary or grievance hearing. It is therefore very important not to allow to go unchallenged any attempt by the other party to raise in open correspondence, or in an open setting, something which was raised on a without prejudice basis, unless you are happy for this eventually to be referred to in court.

Summary

Those regularly conducting without prejudice negotiations need to have a good understanding of the above-mentioned exceptions and the situations in which they might apply in order to avoid running the risk of having their without prejudice communications referred to and relied on against their wishes in litigation thereafter.

For further information please contact:

Anthony Sakrouge
Partner
020 8394 6504
Anthony.Sakrouge@russell-cooke.co.uk