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Employment Appeal Tribunal decision in Diana Woodward v Santander UK plc (formerly Abbey National plc)

In this article, Alex Bearman comments on the Employment Appeal Tribunal decision in Diana Woodward v Santander UK plc (formerly Abbey National plc) which concerns the application of the 'without prejudice' rule in discrimination claims. Alex acted for Mrs Woodward.

Where parties to a dispute become involved in negotiations aimed at settlement, any communications in those negotiations will generally be inadmissible as evidence in any ongoing or subsequent litigation. This is known as the without prejudice rule. The principle behind it is that litigants should be able to speak freely when they are attempting to resolve their differences, without fear that their words might be used against them if the negotiations break down.

There are, however, recognised exceptions to the rule. For example, it will not be applied where doing so would act as a cloak for 'unambiguous impropriety'. This case concerned the interpretation of that exception in the context of discrimination claims.

In the early 1990's Mrs Woodward worked for Abbey National. Following the termination of her employment she brought a claim for unfair dismissal and sex discrimination which was subsequently settled. Settlement agreements in these circumstances often include a provision requiring the former employer to provide a reference in an agreed form but in this case there was no such obligation. Mrs Woodward alleges that this was because, although it was something that had been requested by her solicitor, Abbey National had refused the idea. No explanation for the absence of an agreed reference was ever put forward by the bank.

In the claim to which this appeal relates, Mrs Woodward alleges that, following the settlement, Abbey National obstructed her attempts to find alternative employment by failing to provide a reference and/or by making adverse comments about her to prospective employers. She says that the refusal to agree a reference as part of the settlement is evidence that the bank planned to victimise her in this way.

At the outset of the main hearing, the bank applied to exclude evidence relating to the absence of reference provisions in the settlement agreement on the basis that this was evidence to which the without prejudice rule applied. The employment tribunal granted the application and excluded the evidence. Mrs Woodward appealed.

The principal argument considered by the Employment Appeal Tribunal (EAT) was that this was a case where the unambiguous impropriety exception applied. An earlier EAT case, *BNP Paribas v Mezzotero*, had considered this exception in the context of discrimination proceedings. Mezzotero is generally regarded as authority for the proposition that there

should be a wide interpretation of what amounts to unambiguous impropriety in a claim of discrimination, on the basis that such claims tend to be particularly fact sensitive and cannot, therefore, be determined properly without a consideration of all the evidence.

In Mezzotero the claimant raised a grievance about the way she had been treated following her return from maternity leave. Subsequently she was invited to a 'without prejudice' meeting at which she was told that her employer wished to terminate her employment. She alleged that what was said to her at this meeting amounted to direct sex discrimination and victimisation. She sought to rely on the 'unambiguous impropriety' exception to allow evidence of the meeting to be adduced. Her employer argued that it would be setting the test too low to find that the circumstances of this case fell within the exception. However, the EAT disagreed and commented that it would be undesirable to have to attach "different levels of impropriety to fact sensitive allegations of discrimination".

In Mrs Woodward's case the EAT seemed to backtrack somewhat from this position, suggesting that there ought not to be a wider interpretation of the exception in discrimination claims and finding that it should only be applied in the very clearest of cases. It went on to find that what Mrs Woodward had alleged did not amount to unambiguous impropriety and so the evidence in question had been lawfully excluded.

To some extent, the difficulty in applying the unambiguous impropriety exception is that it necessarily has to be considered at an early stage, before all the evidence in the case has been heard. In many cases, the factual circumstances surrounding the without prejudice communication will be in dispute and, without hearing evidence, a court or tribunal is likely to be in difficulty in determining the extent to which there has been any impropriety. For example, in Mezzotero, to the extent that the impropriety alleged was the making of discriminatory comments or comments which amounted to victimisation, assessing whether or not this had happened required findings to be made as to the employer's reasons for saying what it did. At the point at which the appeal came before the EAT, those findings had not been made. It would seem therefore that, for the purposes of the legal issue being considered, the EAT proceeded on the basis that what the claimant was saying had been said constituted discrimination and/or victimisation. In Mrs Woodward's case, it might be argued that if the EAT had similarly accepted that Abbey National had refused to agree a reference for her in settling the earlier claim and that it had done so because it wished to ensure that it was not contractually restricted from victimising her through the provision of a poor reference, this too would undoubtedly amount to unambiguous impropriety.

The without prejudice rule competes with another important tenet of public policy, namely the principle that, in deciding a case, a court or tribunal should hear all the relevant evidence. It is unlikely, therefore, that it will be long before there are more appellate decisions in this area.

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