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Difficulties surrounding compromise agreements

Without prejudice discussions are commonly used to facilitate settlement. Settlement negotiations often arise whilst someone is still in employment and long before proceedings have been issued in the Employment Tribunal. Employees who have no intention of bringing proceedings are often keen to negotiate an exit package with employers, sometimes before altering their employers to their concerns or issues on a formal basis.

It is well known that in order to attract without prejudice status there must be a "genuine dispute" between the parties. On a literal reading of this statement it is not clear at what stage in the process a court will determine that there is a genuine dispute.

The cases of ***BNP Parabis v Mezzotero*** and ***Framlington Group v Barnetson*** made it clear that a crucial consideration was whether in the course of negotiations parties contemplated or might have reasonably contemplated litigation if they could not agree. The point was made in ***BNP Parabis v Mezzotero*** that the act of raising a grievance does not by itself mean that the parties to an employment relationship are necessarily in dispute. A grievance may be upheld or dismissed for reasons which the employee finds acceptable therefore the parties never reach a stage where they are said to properly be in dispute. If a compromise agreement does not attract without prejudice status at the time that it is presented to an employee, then an employee may later rely on its existence to demonstrate the employer's intention to dismiss them at that stage.

Furthermore, the courts have held that in certain circumstances the content of settlement negotiations in the lead up to the signature of a compromise agreement can be relied on in court. The above cases established that the protection given to without prejudice discussions can be overruled by public policy reasons to enable courts to consider all relevant evidence to support claims for discrimination.

Furthermore, in the recent case of ***Oceanbulk Shipping and Trading SA v TMT Asia Limited and 3 others*** the court held that the contents of settlement negotiations were admissible as evidence of the meaning of the terms of a compromise agreement where the meaning is in dispute. It has long been established that without prejudice discussions are admissible to establish whether a binding settlement agreement has been reached. However, the extent to which the contents of without prejudice discussions are admissible is now unclear. The principle of placing reliance on informal, without prejudice discussions contradicts the position where an entire agreement clause exists in a compromise agreement. Such a clause is drafted so as to prevent the parties from relying on earlier agreements and discussions not referred to in the agreement.

Given the uncertainty surrounding what can be treated as without prejudice, it has always been best practice to advise employers to ensure that where dismissal/disciplinary action is contemplated fair procedure is followed on an open basis.

However, without prejudice discussions culminating in a compromise agreement are often used as a tool to avoid the time consuming and costly process of following fair procedure particularly where performance or capability issues are concerned. An employer will often

take the view that informal settlement options are particularly attractive as it enables both parties to part on amicable terms. This is of particular importance for an employee heavily reliant on receiving a favourable reference.

On the flipside, problems can arise where parties incorrectly treat without prejudice discussions on an open basis. The danger lies in the failed negotiations where amicable settlement is nearly reached but not quite. It is often easy to get caught up in negotiations on the belief that settlement will be reached and lose sight of the position I they do not. The case of ***Kirklees Metropolitan Council v Radecki*** decided in 2009 was an important reminder of this danger. An agreed termination date was negotiated by both parties and included in the final version of the compromise agreement to be signed. Negotiations broke down and in the end the agreement was not signed by the employee. The employer stopped paying the employee on the termination date in the unsigned compromise agreement.

The employee then brought a claim for unfair dismissal in the employment tribunal on the basis that he was still employed. The solicitor acting for the employer during the negotiations had placed reliance on an acceptance slip which the employee signed indicating that he would seek advice on the agreement by a solicitor (which had been negotiated by his union representative) and her belief that he had made those arrangements. The solicitor never received a copy of the final agreement signed by the employee or his representative.

The Employment Judge found in favour of the employer on the basis that the termination date had been mutually agreed. The EAT and Court of Appeal overturned the rational for the decision on the grounds that the reasoning was fundamentally flawed as the negotiations and draft agreement could not be relied upon until the agreement was signed by the relevant parties.

The higher courts still found in favour of the employer and agreed that the claim was out of time as failure to pay the employee from the proposed termination date demonstrated the employer's intention to terminate his employment.

The case acts as a reminder of the importance of continuing to follow a fair dismissal procedure and to notify employees on an open basis of their effective date of termination.

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