EMPLOYMENT LAW BAR ASSOCIATION

'The Right to Resist: Privilege for Employment Lawyers'

by

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INTRODUCTION

1. There are may aspects to the law of privilege, but what they have in common is a right to resist the compulsory disclosure of information[1]. The law of privilege is, at least in part, a manifestation of the law of confidentiality. However, the underlying principle is one of public policy: where privilege applies, the law treats the benefits of full and transparent disclosure of information in the context of litigation as being outweighed by the benefits of giving litigants the right to keep information private.

2. In this paper I focus on three areas privilege of particular relevance to employment lawyers[2]:

   2.1. Legal advice privilege;

   2.2. Litigation privilege; and

   2.3. Without prejudice privilege.

3. Having summarised the relevant legal principles, I consider these areas in the context of specific scenarios which frequently arise in employment litigation.

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[1] See Lord Millett in ***B v Auckland District Law Society*** **[2003] 2 AC 736** at [67]

[2] I therefore do not deal with areas such as joint privilege, common interest privilege and the privilege against self-incrimination, which have less frequent application in the field of employment law

LEGAL PROFESSIONAL PRIVILEGE

4. Legal advice privilege and litigation privilege are usually treated as different aspects of a general legal professional privilege[3]. Legal advice privilege applies to relatively small range of documents, but applies irrespective of whether litigation is anticipated. Litigation privilege provides protection for a wider range of documents, but applies only when litigation is in reasonable prospect. The basic principle underlying each of these species of privilege is the need for parties to obtain sufficient legal advice and assistance safely, without fear of production or disclosure.

5. This involves the balancing of two competing public interests, as explained by Lord Nicholls in ***R v Derby Magistrates Court ex p B*** **[1996] 1 AC 487** at 510:

> "The public interest in the efficient working of the legal system requires that people should be able to obtain professional legal advice on their rights and liabilities and obligations. This is desirable for the orderly conduct of everyday affairs. Similarly, people should be able to seek legal advice and assistance in connection with the proper conduct of court proceedings. To this end communications between clients and lawyers must be uninhibited …
>
> The other aspect of the public interest is that all relevant material should be available to courts when deciding cases. Courts should not have to reach decisions in ignorance of the contents of documents or other material which, if disclosed, might well affect the outcome.
>
> All this is familiar ground, well traversed in many authorities over several centuries. The law has been established for at least 150 years, since the time of Lord Brougham L.C. in 1833 in ***Greenough v. Gaskell*** **, 1 M. & K. 98**: subject to recognised exceptions, communications seeking professional legal advice, whether or not in connection with pending court proceedings, are absolutely and permanently privileged from disclosure even though, in consequence, the communications will not be available in court proceedings in which they might be important evidence."

Legal professional privilege: general points

6. If part of a document is subject to legal professional privilege, but part not, it should ordinarily be disclosed, but appropriately redacted: see ***GE Capital Corporate Finance v Bankers Trust Company*** **[1995] 1 WLR 172**.

[3] Historically, there was no clear demarcation between the two species of legal professional privilege

7. Documents which have not been created in privileged circumstances will not usually become privileged simply because they are handed over to a lawyer for the purposes of seeking advice or because they are to be used in contemplated litigation[4].

8. A document subject to legal professional privilege will remain privileged, even in the context of subsequent proceedings, on the principle "once privileged, always privileged"[5].

9. There is no privilege in documents or communications which are themselves part of a crime or a fraud.

10. Legal professional privilege may be waived. There are three principal categories of waiver:

    10.1. Express waiver: where a party decides for tactical reasons to waive privilege in material (but note the risk of collateral waiver – see below);

    10.2. Unintentional waiver: where a party takes a step in proceedings which, despite their lack of intention to waive, causes privilege to be lost. This type of waiver may occur if a privileged document (or part of it) is read out in court or inadvertently sent to the other side. In the latter case, it may be possible to restrain its use[6]; and

    10.3. Collateral waiver: where a waiver of privilege material spreads to associated material.

11. Privilege in a document may be treated as having been inadvertently waived if its contents are referred to in a statement of case, witness statement or affidavit, once served. However, a reference in *inter partes* correspondence to the fact that, for example, positive advice has been received, would not amount to waiver of privilege in that advice.

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[4] A series of copies may become privileged if they would betray the trend of legal advice being given. In some circumstances copies of non-privileged documents obtained from a third party taken in the evidence-gathering process of litigation may become protected by legal professional privilege: see ***The Palermo* (1883) 9PD 6**. However, this case, whilst never having been overruled, has been the subject of much criticism and should be treated with caution

[5] Note that this principle does not apply to without prejudice privilege

[6] In the High Court this is governed by CPR Part 31.20, which provides that a party may rely on a privileged document inadvertently disclosed and inspected by the other side only with the permission of the court. It is likely that an Employment Tribunal would adopt an analogous approach

12. The rationale for the doctrine of collateral waiver is that it may be unfair to allow the court to see only half the picture provided by relevant privileged material: see ***Paragon Finance v Freshfields*** **[1999] 1 WLR 1183** per Lord Bingham CJ at 1188. Collateral waiver may require disclosure of the whole of document only part of which has been the subject of waiver, or even the disclosure of all documents relating to the same "transaction". Collateral waiver will most often occur as an adjunct of express waiver, but in principle may occur even where there has been unintentional waiver. However, the courts will exercise caution before holding that a party should be treated as having waived privilege in collateral material.

LEGAL ADVICE PRIVILEGE

The principles

13. The basic requirements of legal advice privilege may be summarised as follows. Communications will be covered by such privilege if there is:

    13.1. a communication (including oral or written communications);

    13.2. between a client and a lawyer (or intermediate agent of either);

    13.3. made in confidence;

    13.4. for the purpose of giving or obtaining legal advice or assistance.

14. The ambit of legal advice privilege has been extensively considered in the ***Three Rivers*** litigation, in which the creditors of BCCI sought damages from the Bank of England ("**the Bank**") for misfeasance in public office (and on other grounds) on the basis of the Bank's alleged failure to supervise BCCI properly. After the collapse of BCCI, Bingham LJ (as he then was) held an inquiry into its collapse. The Bank set up a Bingham Investigation Unit ("**BIU**") through which all internal communications regarding the inquiry were routed. The BIU communicated directly with the Bank's external solicitors, Freshfields, who provided it with advice.

15. Lord Rodger provided the following working definition of the communications to which legal advice privilege attaches in ***Three Rivers District Council v Bank of England (No 6)*** **[2005] 1 AC 610** at [50]:

> " … all communications made in confidence between [lawyers] and their clients for the purpose of giving or obtaining legal advice even at a stage where litigation is not in contemplation. It does not matter whether the communication is directly between the client and his legal adviser or is made through an intermediary agent of either."

16. In ***Three Rivers District Council v Bank of England (No 5)*** **[2003] QB 1556** the Court of Appeal controversially held that legal advice privilege could be claimed only in respect of communications between the BIU and Freshfields, even if the purpose of internal communications between other employees was to enable Freshfields to be instructed. Preparatory documents produced by other employees did not fall within the scope of the privilege. Further, communications between other members of the Bank (not within the BIU) and Freshfields fell outside the claim for privilege.

17. In ***Three Rivers (No 6)***, the House of Lords rejected a further argument that legal advice privilege did not apply to "presentational" advice as to how to present factual material before the enquiry in an orderly and attractive fashion: see ***Three Rivers (No 6)*** per Lord Carswell at [111]. It did not matter that the advice did not relate strictly to advice on legal rights and obligations. Legal advice privilege applied because there was a "legal context" to Freshfields' retainer. Lord Scott put the test in terms of whether the lawyers were being asked to exercise their legal skills: see ***Three Rivers (No 6)*** at [44].

18. Where a client seeks legal advice from a lawyer, whether or not litigation is in prospect, legal advice privilege may be claimed in respect of both the request and the advice given. Legal advice privilege may <u>not</u> be claimed between the client and a non-lawyer third party, even if the purpose of the communication is to enable a lawyer to be instructed. Nor can it be claimed in respect of communications between a lawyer and a third party. This is a significant difference between legal advice privilege and litigation privilege: see ***Price Waterhouse v BCCI Holdings (Luxembourg)*** **[1992] BCLC 151**. However, if the communication is made to a person who is simply acting as the client or lawyer's agent for the purposes of onward communication, legal advice privilege applies. Moreover, communications with third parties will be subject to legal advice privilege if they amount to the dissemination of privileged communications, or if they constitute secondary evidence of privilege communications.

19. The position is more complicated if the "client" is a legal person, such as a company, a partnership or a public body. In ***Three Rivers (No 5)***, the Court of Appeal controversially rejected the argument that the Bank of England as a whole could itself be

regarded as the client. In that case, it held that the client was the BIU. It would appear that the client for these purposes is the person or persons charged with obtaining legal advice[7]. An alternative and perhaps more workable interpretation of the Court of Appeal's judgment is that the client for these purposes may include all those expressly or impliedly authorised by the company to seek legal advice from the lawyers. This may in appropriate cases include former employees who were so authorised[8].

20. Following ***Three Rivers (No 5)***, legal advice privilege applies only to communications between lawyer and client. Controversially, it thus excludes, for example, internal preparatory materials created by employees of a corporate client so as to enable the company to take appropriate legal advice. As noted above, documents or parts of documents which evidence the substance of lawyer-client communications will also fall within the privilege: ***Three Rivers (No 5)*** at [19], [26]. So will a lawyer's working papers: see ***Balabel v Air India*** **[1988] Ch 317** at 331.

21. It is not clear whether:

    21.1. An organisation can widen the scope of privilege simply by designating the "client" widely;

    21.2. A claim for privilege for communications between employees within the "client" (i.e. within the BIU in ***Three Rivers***) will always succeed; or

    21.3. The narrow view of "client" taken would apply to other entities, such as a partnership or an LLP[9].

22. Legal advice privilege may apply to an in-house lawyer, although only if acting as a lawyer providing legal advice.

23. In order to fall within legal advice privilege, a communication need not include any formal request for advice. The concept of "instructions" is broad enough to include the communication of relevant facts by an authorised employee to a lawyer. However, not every communication between client and solicitor will be covered by legal advice privilege. Communications which have nothing whatsoever to do with obtaining legal

[7] The House of Lords heard argument on this in ***Three Rivers (No 6)***, but declined to express a view
[8] See Thanki '*The Law of Privilege*' (2nd Edition, 2011) at 2.28
[9] Arguably each of the partners in a partnership should be regarded as individually instructing the partnership's lawyers

advice (such as social communications) would not be covered. In ***Balabel v Air India*** **[1988] Ch 317** Taylor LJ suggested that the test was whether the communication was made confidentially for the purposes of legal advice, those purposes being construed broadly. There is no requirement that an express request for legal advice is made by the client, or that specific legal advice is provided by the lawyer. Legal advice is not confined to advice on the legal, but includes practical advice. As noted above, purely presentational advice will fall within the scope of the privilege: see ***Three Rivers (No 6)***. However, there must be some relevant legal context: see ***Three Rivers (No 6)*** per Scott LJ at [38]. One way of framing the test is to ask whether the lawyer is being consulted for his legal skills or expertise. As Lord Rodger suggested in ***Three Rivers (No 6)*** at [60], whether there was whether "*the BIU was asking [Freshfields] to put on legal spectacles when reading, considering and commenting on the drafts*".

24. Extraneous information learned in the context of the provision of legal advice (for example in conference) will not be privileged merely because it was communicated in the context of the seeking and giving of legal advice. For example, information about when a client visited his lawyer, or what car he drives (if that becomes relevant) will not attract privilege, even if that information was obtained by the lawyer when the client attended his offices for a meeting at which legal advice is sought and given. However, information which is closely connected with giving legal advice may well be treated as both confidential and privileged. This will be a question of fact and degree in each case.

Legal advice privilege in the context of employment law

25. Difficulties frequently arise in employment disputes, particularly for employers, as to when legal advice privilege will apply. These difficulties have been exacerbated by the rather limited and controversial approach to such privilege adopted in the ***Three Rivers*** litigation, which remains good law.

26. In particular, the position in relation to communications by an employer, its staff and its lawyers is probably as follows:

    26.1. Internal communications between <u>managers</u> or other employees will not fall within legal advice privilege, unless (perhaps) they are merely communicating legal advice which has been received;

26.1.1. Communications between managers and other employees with Human Resources officers are unlikely to to attract legal advice privilege unless, again, they are merely communicating legal advice which has been received;

26.1.2. Communications between managers and/or HR and in-house lawyers may be covered by legal advice privilege, provided the communications are for the purposes of obtaining legal advice and the in-house lawyer is acting in a legal capacity. This will depend on who is the "client" (or has been authorised to seek advice) within the employer's organisation;

26.1.3. Communications with external lawyers may be covered by legal advice privilege, provided the communication is with the "client" (or persons authorised to seek advice) for these purposes. Post-***Three Rivers***, it is unclear whether communications within the internal "client" will attract legal advice privilege.

27. In all cases, the communications must be for the purposes of giving and receiving legal advice (defined broadly). The belief often expressed by clients (particularly clients from the USA) that any communication copied to a lawyer will automatically be privileged is both incorrect and dangerous in the English legal context.

28. Communications between an employee and a non-lawyer representative will not attract legal advice privilege (although they may attract legal professional privilege – see below).

29. Where a claimant is seeking disclosure over documents which the employer claims to be covered by legal advice privilege, the claimant need not always take this assertion at face value, depending on the circumstances. For example, it may be worth probing who is said to have been the relevant "client" for the purpose of obtaining legal advice, and on what basis they are said to have been so designated. A response that the entire organisation is the client is unlikely to pass muster in the light of ***Three Rivers (No 5)***. If the answers are unconvincing, the claimant may wish to apply for specific disclosure, and the arguments as to the applicability of legal advice privilege will then be determined at a CMD or PHR.

LITIGATION PRIVILEGE

The principles

30. Litigation privilege is the other species of legal professional privilege. It arises only when litigation is in prospect or pending. From that moment, any communications between a client and his lawyer or agent, or between one of them and a third party, will be privileged if they come into existence for the sole or dominant purpose of either giving or obtaining legal advice with regard to the litigation or collecting evidence for use in the litigation.

31. Litigation privilege thus applies to correspondence with witnesses and experts, and the proofs, reports and documents generated by them. The underlying principle of public policy is that a party or potential party to litigation should be free to seek advice without being obliged to disclose the result of his researches to the other side: see ***Lee v SW Thames Health Authority*** **[1985] 1 WLR 845** per Lord Donaldson MR at 850.

32. As noted, for litigation privilege to apply, the sole or dominant purpose of a document must be the obtaining of legal advice. In ***Waugh v British Railways Board*** **[1980] AC 521**, the House of Lords held that a report prepared in the wake of a fatal railway accident was not privileged, because although it was prepared both for operational and safety reasons, and for the purposes of obtaining legal advice in anticipation of litigation, the second purpose was not the "dominant" one.

33. Beyond the dominant purpose test, the key question is whether litigation is in reasonable prospect at the time relevant information is produced. Note that this does not require either that a cause of action has arisen (***Bristol Corp v Cox*** **(1884) LR 26 Ch D 678**), or that the party has decided whether to commence or defend legal proceedings (***Plummers v Debenhams*** **[1986] BCLC 447** per Millett J at 457). Documents subject to litigation privilege remain privileged even if litigation is never in fact commenced.

34. The key test used in determining whether litigation privilege arises is whether litigation is "*reasonably in prospect*": see ***Re Highgrade Traders Ltd*** **[1984] BCLC 151** per Oliver LJ at 172. In ***Axa Seguros SA De CV v Allianz Insurance plc*** **[2011] EWHC 268 (Comm)** Christopher Clarke J noted at [43] that:

> "The dividing line between circumstances which afford a reasonable prospect of litigation (but not necessarily that litigation is more probable than not), on the one hand, and a (mere) possibility of litigation on the other, is not entirely clear. The fact that one or more conditions have to be fulfilled in order for a dispute to arise which requires the commencement of litigation in order to resolve it does not necessarily mean that litigation is only a possibility. Much may depend on what, at the relevant time, is the prospect that the conditions will be fulfilled."

35. For these purposes, the relevant litigation must involve adversarial proceedings, rather than being inquisitorial or investigative: see ***Re L*** **[1997] AC 16**, where litigation privilege was, somewhat surprisingly, found not to apply in child care proceedings. This test would plainly be satisfied by Employment Tribunal or High Court proceedings. It may also be satisfied in professional disciplinary proceedings[10], but not necessarily, it is submitted, in internal disciplinary or grievance proceedings.

36. It would appear that litigation privilege may apply even if no lawyer is in fact involved. Thus, in ***Ventouris v Mountain (The Italia Express) (No 1)*** **[1991] 1 WLR 607**, Bingham LJ appeared to recognise that a litigant in person should be able to enjoy litigation privilege in the context of evidence-gathering. There would seem to be no principled reason why they should not, although there is no authority directly on point.

Litigation privilege in the context of employment litigation

37. The availability of litigation privilege in the context of employment disputes will be highly fact sensitive. The key question is likely to be whether proceedings are reasonably in prospect):

    37.1. Litigation privilege may apply in the context of grievance proceedings, if there is reason to suppose that litigation is reasonably in prospect. If there have been threats of litigation, for example, communications made in this context may fall within the privilege. However, litigation privilege will not apply in the context of grievance proceedings as a matter of course;

    37.2. Similarly, litigation privilege may apply in the context of a disciplinary investigation or proceedings, if there is reason to suppose that litigation is reasonably in prospect. Again, if there have been threats of litigation, for example,

[10] See Hollander '*Documentary Evidence*' (11th Edition, 2012) at 18-11

or if it is otherwise clear from the circumstances that litigation is likely to ensue, communications made in this context may fall within the privilege;

37.3. Communications relating to the preparation of an answer to an Equality Act questionnaire will almost certainly be covered by litigation privilege. The purpose of such a questionnaire (or one of them) is to assist the claimant in deciding whether to commence proceedings or to assist the claimant in bringing them;

37.4. External reports may attract litigation privilege, depending on both the likelihood of litigation ensuing, and the dominant purpose of obtaining the report. For example, a report commissioned from a forensic IT consultant may attract litigation privilege, if its dominant purpose is to assist in legal proceedings, in circumstances where litigation has been threatened or brought by the employee. On the other hand, a report prepared principally or partly for internal governance reasons will probably not attract litigation privilege: see ***Waugh v British Railways Board*** (supra);

37.5. Communications for the purposes of the preparation of an ET3 will generally attract litigation privilege, as will other communications made for the purposes of running the litigation thereafter.

38. Again, claims of litigation privilege may be subject to challenge. Where a claimant is seeking disclosure of documents over which litigation privilege is claimed, it may be worth probing the basis of the privilege claim. For example, the claimant's lawyers might ask from what date the employer considered that litigation was reasonably in prospect. They might equally ask the employer to identify the purposes or which a report was obtained. If the answers are unconvincing, the claimant may wish to apply for specific disclosure, and the arguments as to the applicability of litigation privilege will be determined at a CMD or PHR.

WITHOUT PREJUDICE PRIVILEGE

The principles

39. Written or oral communications which are made for the purposes of a genuine attempt to compromise a dispute between the parties may not generally be admitted in evidence.

The public policy underlying this rule is that parties should be encouraged to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything they say in the course of such negotiations may be used against them in subsequent proceedings.

40. Whilst public policy underlies without prejudice privilege, it is also sometimes said to be based on an implied contract between the parties. However, this rationale will not always work. For example, where one party seeks to open negotiations by sending a "parting shot" without prejudice letter, it cannot be said that at that early stage there is an implied contract between the parties.

41. The privilege belongs jointly to the parties. Accordingly, it cannot be waived unilaterally, but only with the consent of both parties: see ***Rush & Tompkins v GLC*** **[1989] 1 AC 1280**. In this sense, without prejudice privilege is significantly different from legal professional privilege.

42. The test is one of substance. Without prejudice privilege will not be engaged unless there is a genuine attempt to resolve a dispute. Merely using the words "without prejudice" will not in itself render correspondence inadmissible. It does not matter if the communication in question does not contain a concession or offer to compromise: it is sufficient that the communication evinces a genuine desire to negotiate a settlement of an actual or potential dispute: see ***Williams v Hull*** **[2009] EWHC 2844 (Ch)** per Arnold J at [38].

43. Equally, correspondence may attract without prejudice privilege, even though those words have not been used, if it in substance involves a genuine attempt to compromise a dispute through negotiation. However, the position here may not be clear cut: sometimes the parties to a dispute seek to reach settlement on an open basis. The mere fact that the correspondence is seeking a compromise does not entail that it was meant to be without prejudice. The use of the words "without prejudice" will thus often helpfully clarify the position. When those words are not used, however, without prejudice privilege will still apply if the circumstances judged objectively are such that it can be assumed to have been intended that the communications in question should not be admitted in evidence.

44. It does not matter that litigation has not begun. The relevant question is whether the parties contemplated or might reasonably have contemplated that litigation would follow if they could not reach agreement: see ***Framlington Group Ltd v Barnetson*** **[2007] IRLR 598**.

45. In contrast to the position in relation to legal professional privilege, there are a number of well-recognised exceptions to and limitations on without prejudice privilege. In ***Unilever v Procter & Gamble*** **[2000] 1 WLR 2436**, Robert Walker LJ summarised at 2444-5 the circumstances in which without prejudice communications may exceptionally be admitted in evidence:

    45.1. When the issue is whether without prejudice communications have resulted in a concluded compromise agreement;

    45.2. To show that an agreement apparently concluded between the parties during negotiations should be set aside on the grounds of misrepresentation, fraud or undue influence;

    45.3. Even in the absence of a concluded agreement, a clear statement made during negotiations on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel;

    45.4. Evidence of negotiations may be given in order to explain delay and apparent acquiescence. However, this will usually (but not always) permit reference to the fact of without prejudice negotiations, rather than their substance;

    45.5. In cases of unambiguous impropriety;

    45.6. In cases where there is no public policy justification for the exclusionary rule;

    45.7. Where the words "without prejudice save as to costs" are used and the question before the court relates to costs; and

    45.8. In matrimonial cases, where there is distinct privilege extending to communications received in confidence with a view to matrimonial conciliation.

46. Where subsequent litigation is concluded, it may be that without prejudice privilege comes to an end, although it will still apply in any subsequent litigation connected with

the same subject-matter: see ***Rush & Tompkins*** **[1989] 1 AC 1280** and ***Ofulue v Bossert*** **[2009] UKHL 16** per Lord Hope at [9].

47. One party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety": see Robert Walker LJ in ***Unilever*** (supra). Traditionally it has been held that this exception should be applied only in the clearest cases of abuse of privilege.

48. Examples where the exception has been applied include a defendant who told the claimants that unless they withdrew their claim he would give perjured evidence, bribe other witnesses to do the same and, if the claimant succeeded, leave the jurisdiction rather than pay damages: see ***Greenwood v Fitt*** **[1961] DLR 1** (British Columbia). However, test of unambiguous impropriety is not satisfied merely because a party puts forward an implausible or inconsistent case or is facing an uphill struggle if the litigation continues: see ***WH Smith Ltd v Colman*** **[2001] FSR 91**. Similarly, a (disputed) statement made without prejudice will not be treated as admissible merely because it is inconsistent with a subsequent statement made openly or by a party's pleaded case: see the decision of the Court of Appeal in ***Savings and Investments Bank Ltd v Fincken*** **[2003] EWCA Civ 1630**. In that case, the other party sought to rely on the statement merely as an admission, not as evidence of abuse, and so the without prejudice privilege remained intact.

Without prejudice privilege in the context of employment disputes

49. In the employment context, the application of the without prejudice principle will often present difficulties. This is probably because:

    49.1. In the context of the employment relationship, there may be something of a continuum between open discussions and "off the record" negotiations;

    49.2. Aspects of the day to day performance of the employment relationship may have serious legal consequences. For example, management action may be said to give rise to one or more species of discrimination, even if that is wholly unintended. Equally, it will be a matter of fact and degree whether steps taken may be said to give rise, individually or cumulatively, to a breach of the implied term of trust and

confidence. The scope for alleged "impropriety" (defined as breach of legal obligations) occurring in the context of employee/employee negotiations is therefore high.

50. The law on the "unambiguous impropriety" exception took an unorthodox turn in ***BNP Paribas v Mezzotero*** **[2004] IRLR 508**. The employee had alleged sex discrimination in an internal grievance and sought to rely on what was said in a without prejudice meeting as evidence of discrimination. In particular, she relied on alleged statements by her employer that it would be better for all if her employment was terminated.

51. Cox J said that no dispute was extant, notwithstanding the grievance, and so the without prejudice doctrine did not apply at all: see [30]-[31]. This is controversial in itself – a grievance, particularly one alleging sex discrimination, will usually entail some kind of dispute.

52. However, Cox J went on to state *obiter* that, because an employer could use a without prejudice meeting to discriminate flagrantly against an employee, without prejudice privilege should not apply where an allegation of discrimination is made in relation to conduct in such a meeting. She used the example of a express (if rather unrealistic) statement by an employer such as, "we do not wish to employ you because you are black". If that would (as was common ground) fall within the unambiguous impropriety exception, where should the line be drawn? Cox J seemed to conclude that any allegation of discrimination arising in without prejudice negotiations would fall within the unambiguous impropriety exception[11]. In doing so, she seemed to suggest that some extension of the "unambiguous impropriety" exception to the without prejudice rule was required because of the difficulty of "grading" discrimination allegations as to their seriousness: see Cox J at [34]-[39]. This was despite the fact that "grading" unambiguous impropriety will always present its difficulties. There will inevitably be some ambiguity in establishing the boundaries of unambiguous impropriety.

53. Since the ***BNP Paribas v Mezzotero*** decision, the courts have restored a degree of orthodoxy in the application of the without prejudice principle in the employment context. In ***Framlington Group Ltd v Barnetson*** **[2007] IRLR 598** the Court of Appeal approached the question of whether there was a dispute between the parties broadly. In

[11] On another reading of the judgment, Cox J was seeking to establish a new and different exception to the without prejudice principle applicable only in discrimination cases

the context of a wrongful dismissal claim, the employer sought to exclude evidence as to negotiations made in relation to the terms on which the employment of its COO might be terminated. Auld LJ emphasised that a dispute may have arisen long before litigation ensues. The claim to privilege could not turn "on purely temporal considerations": see [34]. In circumstances where the amount of money in issue between the parties and the manner and content of the negotiations between them were such that both parties were clearly conscious of the potential for litigation if they could resolve their dispute without it, the without privilege rule plainly applied: see [37].

54. In ***Brunel University v Vaseghi*** **[2007] IRLR 592** the claimants were academics who had complained to the tribunal of race discrimination against their employing university. Without prejudice negotiations failed, and the university won at tribunal. The vice chancellor then made public comments about the funds that were wasted by the university in defending unmeritorious claims. The claimants alleged that this amounted to victimisation, and referred to the contents of the prior without prejudice negotiations in both their grievance hearings before an independent panel, and in their further claims to the employment tribunal. The Court of Appeal held that the parties (and in particular the university) had waived their right to assert without prejudice privilege. Both parties had given evidence before the independent panel as to the contents of the negotiations, and both had referred to them in their pleadings before the tribunal.

55. Smith LJ considered that it was significant that the grievance procedure was, unusually, not purely internal, having an independent element, and so this could not be characterised as a case where the parties to without prejudice negotiations had merely referred to their contents between themselves: see Smith LJ at [24]. She emphasised (at [25]) that ordinarily references to without prejudice negotiations in an internal grievance hearing would not give rise to a waiver of privilege.

56. The university had also waived without prejudice privilege by referring to without prejudice matters in its ET3: see Smith LJ at [40]. She was influenced on this point by the fact that the university had not applied until some time after lodging its Response to have the without prejudice material excluded. This judgment therefore underlines the importance of asserting without prejudice privilege at the earliest opportunity.

57. The Court of Appeal declined the invitation to express a view on the correctness on the *dicta* in ***Mezzotero*** as to exceptions to the without prejudice principle, although Smith LJ

did recognise the possibility that the principles in relation to overriding the without prejudice rule might be different in discrimination cases.

58. However, the EAT dealt with the ***Mezzotero*** decision head on in ***Woodward v Santander*** **[2010] IRLR 834**. In that case, the claimant had brought unfair dismissal and sex discrimination proceedings against her employer, which were settled following without prejudice negotiations. She subsequently brought a further claim of victimisation on the basis of the allegation that he employer had provided her with poor references of no references at all for potential new employers. She referred in those proceedings to the contents of the previous negotiations. In upholding the tribunal's ruling that such references should be excluded, Judge Richardson firmly rejected the approach in ***Mezzotero***. He emphasised the policy underlying the without prejudice rule, which is that parties should not be discouraged from settling their disputes by a fear that something said in the course of negotiations might be used to their prejudice in subsequent proceedings.

59. Judge Richardson rejected the notion that ***Mezzotero*** had established a new exception to the without prejudice principle (at [58]), and noted at [60]:

> "We would observe that the policy underlying the 'without prejudice' rule applies with as much force to cases where discrimination has been alleged as it applies to any other form of dispute. Indeed the policy may be said to apply with particular force in those cases where the parties are seeking to settle a discrimination claim."

He accepted that unambiguous discrimination would fall within the existing exception, but rejected the submission that there ought to be a wider exception to the without prejudice exception where discrimination is alleged. Thus, evidence from which merely an inference of discrimination might be drawn would not be admitted: see [62]-[64].

60. The decision in ***Mezzotero*** was distinguished in ***AAG v BAA*** **[2010] EWHC 2844 (Comm)**, a commercial case, by Walker J at [78].

61. As a matter of practicality, if a claimant seeks to introduce without prejudice material in the ET1, and the respondent wishes to exclude it, this should be made clear in the ET3, which should indicate that an application will be made to exclude such evidence. The respondent may wish to reserve its right to plead further to the allegation in the event that its application is unsuccessful. Similarly, if without prejudice material is included within a witness statement, an application should be made to exclude it without delay.

The question as to whether the relevant evidence is admissible may then be determined by a tribunal either at a CMD or (more likely) at a PHR.

CONCLUSION

62. Although it is sometimes said that the law of evidence does not apply to Employment Tribunals, the law of privilege is a clear exception to this (in any event doubtful) general principle. The law relating to privilege applies equally in High Court and Employment Tribunal employment litigation. The law as to both legal professional privilege and without prejudice privilege regularly raises practical difficulties and matters of fine judgment in employment law disputes. The EAT's suggestion in ***Mezzotero*** that different principles relating to without prejudice privilege might apply in discrimination cases has not caught on, and, it is submitted, is unlikely to be followed.