SUMMARY

2010/83: Employee barred from using, in discrimination case, information provided in "without prejudice" discussions (UK)

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Background

Under the law of privilege in the UK, written or oral communications which are made "without prejudice", during negotiations which are genuinely aimed at settlement of an existing legal dispute, cannot subsequently be referred to in the court proceedings. The policy behind the rule is to encourage parties to try to settle their disputes without resorting to litigation. It allows them to talk more freely, without being excessively cautious about what they say for fear that their words could be used in evidence.

However, a case six years ago raised the possibility that discrimination cases might be an exception to the principle (*BNP Paribas – v – Mezzotero* [2004] IRLR 508). The EAT held that the content of a "without prejudice" conversation between an employer and an employee could be used by the latter in support of her subsequent sex discrimination claim. This ruling

was partly based on the established exception to the without prejudice rule for "unambiguous impropriety". The EAT suggested that, in the context of a genuine complaint of discrimination, the employer's conduct would fall within this concept.

In the latest case on this issue, the EAT has interpreted its earlier decision in *Mezzotero* narrowly and confirmed that employers are generally permitted to have "without prejudice" discussions with employees where discrimination is alleged.

Facts

The claimant, Diana Woodward, was employed by Abbey National plc (now Santander UK plc) in the early 1990s. She was dismissed in November 1994 and brought proceedings alleging unfair dismissal and sex discrimination. After "without prejudice" negotiations, these proceedings were settled without admission of liability in November 1996.

Under the terms of the settlement, the company was not required to provide a reference for Ms Woodward and she struggled to find new employment. She later wrote to her former employer on several occasions asking for work but was eventually told that there were no suitable positions available. She issued Employment Tribunal proceedings contending that the company had victimised her, by either not providing a reference or providing a poor reference, and discriminated against her on the ground of sex in the way it had dealt with her application for work.

The Employment Tribunal's Decision

In support of her claims, Ms Woodward sought to use evidence of discussions which had taken place in the course of the negotiations concerning the settlement of her original dispute in 1996. She claimed that she had requested that the terms of the settlement include provision for her to be given a reference, but this had been refused. She alleged that this provided cogent evidence in backing up her current claims for victimisation and sex discrimination.

The company made a successful application to the Employment Tribunal to exclude such evidence, on the basis that the discussions about a reference formed part of negotiations that had been carried out on a "without prejudice" basis. Ms Woodward appealed to the EAT, relying on the *Mezzotero* decision.

The Employment Appeal Tribunal's Decision

The EAT closely examined the decision in *Mezzotero*, which concerned an employee who had returned from maternity leave and was asked to attend a meeting in which she was told, in a discussion said to be without prejudice, that there was no role for her and it would be best if she accepted a redundancy package. The EAT in *Mezzotero* had emphasised that for the without prejudice rule to apply there must be a dispute between the parties that the communications in question were genuinely seeking to compromise. On the facts of *Mezzotero*, there had been no existing dispute between the parties before the relevant conversation took place, with the result that the principle did not apply.

The EAT in *Woodward – v – Santander* reiterated the exception to the without prejudice rule for cases of "unambiguous impropriety", where evidence of the discussions may still be admitted in evidence. However, the EAT said that this exception should only be applied in the clearest of cases, regardless of the nature of the dispute, such as where its application to negotiations would act as a cloak for perjury or blackmail. Another example, the EAT said, would be unambiguously discriminatory words or conduct by an employer in a "without prejudice" exchange.

The EAT said that *Mezzotero* had not, as Ms Woodward had argued, established any new general exception relating to discrimination cases. Any such wider exception would be inconsistent with the policy behind the without prejudice rule, that parties to negotiations should not be discouraged from communicating freely in their attempts to reach a settlement. The EAT emphasised that the policy underlying the rule applies with as much force to cases where discrimination has been alleged as it applies to any other form of dispute.

The EAT observed that it would have a substantial inhibiting effect on the ability of parties to speak freely in conducting negotiations if subsequently one or other could comb through the content of correspondence or discussions – which may have been lengthy or contentious – in order to point to equivocal words or actions in support of or in order to defend an inference of discrimination. Parties should be able to approach negotiations free from any concern that they will be used for evidence-gathering or scrutinised afterwards for that purpose.

The EAT concluded that the Employment Tribunal had been plainly correct to conclude that the evidence which Ms Woodward sought to adduce was barred by the without prejudice rule and there was no basis for contending that it fell within the exception for unambiguous impropriety.

Commentary

While this decision does not establish any new legal principles, it is a sensible reaffirmation of the scope of the general "without prejudice" principle which will be reassuring for employers seeking to resolve discrimination allegations and claims. The *Mezzotero* decision had raised the spectre that there might be a broad and generally applicable exception to the rule in discrimination cases.

The EAT's robust analysis of the policy underlying the rule is especially welcome. It went so far as to say that the principle might be said to apply "with particular force" to discrimination cases, which often place heavy emotional and financial burdens on claimants and respondents alike: "It is idle to suppose that parties, when they participate in negotiation or mediation, will always be calm and dispassionate. They should be able to argue their case and speak their mind, within limits."

On the other hand, employers should still be mindful of the limits to the extent of the without prejudice principle. In particular, any overtly discriminatory communications are likely to fall within the "unambiguous impropriety" exception to the principle.

Comments from other jurisdictions

Austria (Martin E. Risak): This case is a welcome opportunity to point out the impact on the different procedural rules of evidence to successful pre-trial negotiations and mediation. Whereas UK law (and other common law systems) make evidence inadmissible in court that came to be known to the parties during negotiations that have been conducted "without prejudice", the Austrian rules of civil procedure hardly ever make evidence inadmissible even if improperly obtained. It is argued that the court should be able to use everything available to help it find out the truth: considerations of fairness are therefore put in the background. Whereas some efficiency may be achieved using "without prejudice" clauses, for instance, by agreeing on penalties for breach of contract, clients in Austria are usually advised by their lawyers never to speak too freely during negotiations, as that might put them in an unfavourable position in a later legal procedure if no settlement is reached. That this approach does not help with the early resolution of employment relationship problems is evident to many but there is also a widespread belief that to introduce the common law notion of privilege would alter some important underlying principles of Austrian procedural law - and should therefore be avoided.

Germany (Martin Reufels and Helena I. Maier):

1. The decision of the Employment Appeal Tribunal (EAT) is of particular interest for civil law jurisdictions, as it illustrates the risks of settlement negotiations in discrimination claims. The UK "without prejudice" rule tends to make inadmissible in any subsequent litigation, evidence of communications taken from negotiations conducted in a genuine attempt to settle the dispute. It aims at allowing parties to speak freely for the purpose of settlement without fear that if negotiations are unsuccessful, evidence will be deduced from statements made during these settlement negotiations. As the EAT decision points out, this underlying principle applies to discrimination claims just as much as to any other claim. However, this legal privilege rule is not without limits. An exception for statements which are unambiguously discriminatory was first laid down by the EAT in its decision in *BNP Paribas – v – Mezzotero* and reiterated, albeit in a more restrictive way, in the present case.

2. The "without prejudice" rule and concept is unknown to German private law. As a general rule, parties intending to terminate their dispute by means of a settlement in order to avoid further litigation do not benefit from any comparable legal privilege. Thus, evidence can be deduced from statements made within settlement negotiations, just as it can from statements made at any other stage of the dispute. Under the German Code of Civil Procedure (ZPO), the only occasions when parties to a dispute might have evidence excluded in a subsequent trial are when concluding a "procedural contract" on the inadmissibility of certain types of evidence or where there is a shift in the burden of proof. The validity of procedural contracts, however, is subject to judicial control with regard to the requirements, inter alia, of those provisions of the German Civil Code (BGB) which transpose Directive 93/13/EEC on unfair terms in consumer contracts. Furthermore, under German private law, statements made in the course of settlement negotiations accompanying pending court proceedings are only binding if (1) both parties act with the intention to be legally bound and if (2) the formal requirements for a procedural settlement are met. According to § 127a BGB, a procedural settlement requires notarisation in order to be binding upon the parties. For this reason, the problem the EAT had to deal with in the present case is much less common and also less necessary under German law than it is under UK law.

3. Furthermore, the German General Act on Equal Treatment (AGG) serves to enhance the gathering of evidence from prior communications between the parties. This Act transposes Directives 2004/113/EC, 2002/73/EC, 2000/78/EC and 2000/43/EC. Of particular importance is § 22 AGG, which transposes Article 4 of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex; Article 10 of Directives 2004/113/EC and 2000/78/EC; and Article 8 of Directive 2000/43/EC and provides for a partial shift of the burden of proof as soon as facts have been established from which it may be presumed that there has been a discriminatory act. The absence of a general "without prejudice" rule under German law along

with the shift of the burden of proof laid down in § 22 AGG for cases involving the principle of equal treatment, clearly invite claimants to gather evidence in the course of settlement negotiations. Explicit discriminatory statements, which would fall within the "unambiguous impropriety" exception under UK law, are obviously admissible evidence in later court proceedings under German law as well. Within the scope of the AGG, however, the mere establishment of facts from which it may be deduced that there has been discrimination, would already be sufficient and admissible evidence such that the burden of proof would shift to the respondent. As a consequence, in the German legal system particular care must be taken in conducting settlement negotiations.

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