Appeal No. UKEAT/0448/13/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 30 October 2013
Judgment handed down on 5 November 2013

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

DR VLADIMIR PORTNYKH — APPELLANT

NOMURA INTERNATIONAL PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARCUS PILGERSTORFER (of Counsel) Bar Pro Bono Unit
For the Respondent	MR DALE MARTIN (of Counsel) Instructed by: Mayer Brown International LLP 201 Bishopsgate LONDON EC2M 3AF

SUMMARY

PRACTICE AND PROCEDURE – Admissibility of evidence

The Employment Judge had misdirected herself on the "without prejudice" rule. She had looked only in the correspondence itself for an actual "dispute" and by failing to consider the factual matrix in which the correspondence arose she had misdirected herself by excluding the possibility of "a potential dispute". Alternatively, even confining the issue to the actual correspondence, she had misdirected herself as to "dispute"; that does not need to be extant litigation nor a hostile atmosphere only the potential for litigation. In a further alternative the conclusion that there was no "dispute" was one that no reasonable tribunal could have arrived at on the evidence before it (**Unilever plc v The Procter & Gamble Co** [2000] 1 WLR 2436; **PNB Paribas v Mezzotero** [2004] IRLR 508; **Framlington Group Ltd v Barnetson** [2007] IRLR 598; **Ofulue v Brossert** [2009] 1 AC 990 considered and applied). It was unnecessary to consider the extent to which the "without prejudice" rule might rest on "negotiation" alone in the absence of any "dispute".

She had also misdirected herself as to the concept of "unambiguous impropriety". Although helpful guidance is to be found in decisions of this Tribunal in **PNB Paribas v Mezzotero** [2004] IRLR 508 and **Woodward v Santander UK plc** [2010] IRLR 834 the principle underlying, and the nature of, that exception is identified in the judgment of Rix LJ in **Savings & Investment Bank Limited (in liquidation) v Finken** [2004] 1 WLR 667 and it must always be considered whenever the exception is raised. In this case the Employment Judge identified only the disadvantage that the Respondent might suffer and confused that with the abuse of the privileged position necessary before the "unambiguous impropriety" exception can apply.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal from the judgment of Employment Judge Lewzey sitting alone on a Pre-Hearing Review ("PHR") at London Central on 23 July 2013 her written reasons having been sent to the parties on 6 August 2013. The Appellant, who is the Claimant below and who I will refer to as the Claimant has brought proceedings against his former employer, the Respondent, complaining of unfair dismissal by reason of him having made a protected disclosure or disclosures. An issue arose at the PHR as to the admissibility of certain correspondence marked "without prejudice". The Claimant contended that this material was not admissible in evidence but the Employment Judge ruled that it was. It is against that part of the determinations made on the PHR that the Claimant appeals. The full hearing is due to commence at London Central on 27 November 2013 and so the matter is one of some urgency.

2. The Appellant has been represented by Mr Pilgerstorfer of counsel and the Respondent has been represented by Mr Martin of counsel. One of the advantages of sitting at this Tribunal is the opportunity, on occasion, to hear submissions of the highest quality. This has been one of those occasions and I am grateful to them for their helpful submissions. The hearing before me was in camera.

The issues

3. The Respondent's case is that the reason for dismissal was misconduct. After it had proposed to dismiss the Claimant for misconduct negotiations commenced between the Claimant, his legal advisers and employees of the Respondent during the course of which it is alleged the Claimant put forward the suggestion that the reason for dismissal should be stated to be redundancy and the Respondent agreed to that course. Only six or so weeks later, after

negotiations had broken down, did the Claimant contend that he had been dismissed as a result of having made protected disclosures.

4. The Respondent's position both here and in front of Employment Judge Lewzey was that there was no dispute between the parties at the relevant time sufficient to justify the exclusion of the documents notwithstanding that they had been marked "without prejudice and subject to contract" or, if there was, the specific factual situation here brought the case within the well known exception that excluding the material from consideration would result in what has been called "unambiguous impropriety". Here the "unambiguous impropriety" is that if the "without prejudice" material is excluded the Claimant will be able to put forward an entirely distorted perspective as to the reason for dismissal.

5. Employment Judge Lewzey has not explored the factual matrix in very much detail in her judgment. This is not surprising, submitted Mr Martin; firstly, the parties were agreed that, as often happens, the matter would be considered without any oral evidence; secondly, the Appellant's case, as put to Employment Judge Lewzey, was that there was no dispute until 13 March 2012. Mr Martin's submission has led to a controversy as to what is open to the Appellant on this appeal and I will come back to that shortly but before I do, irrespective as to how the case was put and irrespective as to whether the issues are purely those of fact or raise mixed questions of law and fact, it seems to me to be appropriate to look into the factual background at least in sufficient depth to see what might be at issue. Mr Martin submits that the competing contentions, leading to anxiety on the part of the Respondent that unless the "without prejudice material" is admitted into evidence the Claimant will be able to create a false impression at the hearing, are:

a. on the part of the Claimant that on Friday, 9 March 2012 Ms Javaid of the Respondent's HR department *"confirmed to the Claimant that the Respondent*

would structure his exit as redundancy and that his termination date would be 30th April" and that he had "*never been given any reasonable explanation for his dismissal*" (see paragraph 12 of his Grounds of Claim at page 38 of the bundle).

b. On the part of the Respondent that on Thursday, 8 March 2012
   i. the Claimant was told that he would be dismissed by reason of his misconduct;
   ii. but the Respondent might have been agreeable to presenting the termination to the world at large as a resignation;

and on the following day it was the Appellant who asked if the Respondent would be agreeable to his leaving being structured as a termination by reason of redundancy and the Respondent did agree.

The correspondence

6. This last step was confirmed in an e-mail later that same day (timed at 15: 55 on 9 March 2012) from Ms Javaid to the Appellant (see page 52 of the supplementary bundle). The following Tuesday, 13 March 2012, Ms Javaid wrote a letter to the Appellant, which, above the name and address of the recipient, was headed "STRICTLY PRIVATE & CONFIDENTIAL" and above the substantive part of the letter was in addition headed "WITHOUT PREJUDICE/SUBJECT TO CONTRACT". The letter (see page 53 of the supplementary bundle) confirms an offer of "an ex gratia redundancy payment of £20,000", which is only going to be paid "if you enter into a Compromise Agreement on terms satisfactory to the Company." The letter enclosed a "Compromise Agreement" (presumably in draft) and went on to offer a contribution of £500 "towards your legal costs incurred in connection with the Compromise Agreement", the obtaining by the Appellant of "legal advice from a qualified lawyer" being necessary "in order for the Compromise Agreement to be valid and binding on both parties". Clearly, this was a reference to the species of "compromise agreement", which by section 203(2) of the **Employment Rights Act 1996** ("the Act") provides an exception to the

otherwise comprehensive exclusion from contracting out of various statutory employment rights provided by section 203(1) of the Act. This particular species is defined by section 203(2)(f) of the Act as being "any agreement to refrain from instituting or continuing… any proceedings" of the kind which have arisen in this case.

7. On the same day Ms Javaid wrote to the Appellant, again with the heading "STRICTLY PRIVATE & CONFIDENTIAL" immediately above the recipient's name and address and with the heading "Notice of Redundancy" above the substantive part of the letter but without any other heading. The substance of the letter is that, no alternative employment being available, the Appellant will have his employment terminated by reason of redundancy on 30 April 2012. Some references are made to entitlement to salary and payment in lieu of untaken holiday but otherwise there is no discussion of compensation. An old-fashioned view of these "twin" letters expressed in old-fashioned terms would be that one was "closed" correspondence and the other "open" correspondence. One was meant to be seen by the world at large; the other was not.

8. The Claimant engaged the services of a solicitor, Mr Fletcher of Russell Jones and Walker[1], presumably expressly for the purpose of dealing with the Compromise Agreement, and from then on he conducted the correspondence on behalf of the Claimant for several weeks. The Respondent relies on some passages in that subsequent correspondence, which was largely via e-mail. As I understand his argument, Mr Martin suggests that all this material is admissible, notwithstanding the "without prejudice" label, which continued to be applied. So Mr Martin regards it as otiose for Mr Fletcher to have labelled many of his emails "Without Prejudice & Subject to Contract". Therefore the Respondent can rely on a passage in the e-mail

[1] He appears to have been a friend of the Appellant and up to that point he may have already been advising him in the background.

from Mr Fletcher to Ms Javaid timed at 12:37 on 21 March 2012 (see page 56 of the additional bundle) where he says:

> **"I am instructed that it was agreed that the reason for termination will be redundancy. My client wishes this reason to be set out in the wording of clause 2.1 and within the agreed reference wording."**

The Respondent can also rely on a passage in the e-mail from Mr Fletcher to Ms Javaid timed at 16:33 on 28 March 2012 (see page 64 of the additional bundle), which reads:

> **"Unless there is some reference within the agreement to the company referring to the reason for Vladimir's termination being on grounds of redundancy he is, as discussed, essentially taking it entirely on trust that this will be done."**

Likewise the statement in the e-mail from the Appellant himself to Ms Javaid timed at 17:16 on 4 May 2012 (see page 99 of the additional bundle), which reads:

> **"can you confirm whether the redundancy as a reason of this agreement is mentioned, please?"**

should be admitted into evidence.

9. In May 2012 in the context of the fees charged by his solicitor the Claimant took over the correspondence from his solicitor and Ms Javaid wrote to him directly and he replied to her. It is at this point, submits Mr Martin on behalf of the Respondent, there was another significant statement. Indeed it is suggested that this is, perhaps, the most significant exchange in this entire correspondence. Ms Javaid said in an e-mail dated 11 May 2012:

> **"When you initially approached me about wanting to structure your leaving the firm as a redundancy, you had said you had engaged your friend for advice."**

The e-mail continues by querying the amount of fees charged, which the Claimant was endeavouring to pass on to the Respondent and the Claimant replies:

> **"Honestly, on this occasion i am totally with you. I am a bit surprised that the negotiation turned out to be that costly."**

The Respondent regards this as an acceptance by the Claimant of the proposition that the characterisation of the reason for dismissal as redundancy was at his instigation.

The judgment

10. Employment Judge Lewzey's understanding of the structure of the issue is set out at paragraphs 4, 5 and 7 of her written reasons (see pages 6 and 7 of the bundle) in the following terms:

> **"4. The issue today surrounds the "without prejudice" correspondence concerning an allegation that the Respondent confirmed to the Claimant that they would structure his exit as a redundancy. Mr Tatton-Brown contends that the correspondence shows that:**
>
> **(a) there was an agreement that the Claimant's dismissal would be presented as a redundancy;**
>
> **(b) it was the Claimant (as opposed to the Respondent) who was particularly keen that that be the case; and**
>
> **(c) it was the Claimant (rather than the Respondent) who initially suggested that his dismissal be characterised as redundancy.**
>
> **5. The Respondent's solicitors wrote the Claimant's solicitors on these matters and the Claimant's solicitors responded on 22 July in which effectively they deny all 3 of the propositions put forward.**
>
> **7. Miss Palmer argues that there was a plain dispute between the parties from 13 March and a genuine attempt to settle. She says the Claimant has not waived the "without prejudice" rule and there is no unambiguous impropriety."**

11. Employment Judge Lewzey, having referred herself to the headnote of a report of the judgment of the EAT, Cox J sitting alone, in **PNB Paribas v Mezzotero** [2004] IRLR 508 found there was no dispute on the face of the "without prejudice" correspondence (see paragraph 9 of the judgment at page 7 of the bundle). She then set out some of the e-mail correspondence which I have set out above and, having done so, referred to another passage in the headnote of **PNB Paribas v Mezzotero** and reached this conclusion at paragraph 11 of her judgment:

> **"It is clearly an issue as to whether the Claimant in this case requested that his dismissal should be characterised as redundancy. To exclude the evidence would be an abuse of that privileged position. This is a case which does fall under the categorisation of "unambiguous impropriety". It is clear that at the time of the correspondence the Claimant had been told that he would be dismissed and that the hope was that it would be possible to sign a compromise agreement. The negotiation between the parties is about the terms of that compromise agreement but does not in my view mean, that there was a dispute in existence at that time. I find that the "without prejudice" documents are admissible and therefore they should be before the tribunal."**

12. The paragraph might be easier to understand if the order of some of the sentences were to be reversed. The first three sentences must be taken as an alternative basis for concluding that the material was admissible. The fourth and fifth sentences relate to whether or not there was a dispute in the first place and logically should precede the first three.

Submissions

13. Mr Pilgerstorerf submits that these must be mixed questions of law and fact, that the Employment Judge misdirected herself when, in effect, confining any search for a dispute to the contentious documents themselves (see paragraph 9 of the judgment) and by failing to grasp that the exclusion relates not only to a dispute but to negotiations likely to lead to litigation if they fail, a longstanding context for the "without prejudice" conclusion albeit recently highlighted and clarified by the Court of Appeal in **Framlington Group Ltd v Barnetson** [2007] IRLR 598 to which I will return shortly. If all else fails he submits that the conclusion reached by Employment Judge Lewzey is perverse.

14. Mr Martin's analysis is that whether a document (or for that matter a conversation) is the subject of the "without prejudice" exception and whether something would amount to "unambiguous impropriety" are both questions of fact and therefore not susceptible to challenge on this appeal. Moreover, Ms Palmer's skeleton argument put the matter in this way:

> **"3. C's case in a Nutshell: In summary, C's position is that there was plainly a dispute between the parties at some point from on or around 6 March 2012 but certainly by 12/13**

> **March 2012 and the prospect of litigation being commenced must have been in R's mind by 13 March 2012.**
>
> **(i) In respect of the period of time up to and including 12 March, R does not appear to contend that such discussions are without prejudice or inadmissible. C agrees with that. Although C contends that there was a dispute at that time (or towards the end of that period of time) the parties are at liberty to have open discussions, and R had not made clear that it had intended any such discussions to be without prejudice. Such discussions are therefore admissible.**
>
> **(ii) In respect of the correspondence from 13 March 2012, C's position is that there was plainly a dispute at that stage and such matters were a genuine attempt to settle such a dispute between the parties and is plainly covered. In the alternative such matters are covered by the fact that there was an express agreement between the parties that such matters are without prejudice."**

Then at paragraph 30 of her skeleton argument Mr Martin submits she puts it somewhat differently:

> **"C submits that the matter is clear. Various discussions took place over a period of time in relation to the Claimant's continued employment. The initial discussions were not expressly said to be without prejudice, and C (and R) is entitled to rely upon them. However as of 13 March 2012 it was plainly contemplated between the parties that the outcome of the matter would lead to litigation and that is precisely why R offered C a compromise agreement."**

15. Mr Martin submitted that, at best, this is ambiguous and, at worst, from the Appellant's point of view, it is provides a basis for a factual finding that there was no dispute until 13 March 2012. Although Employment Judge Lewzey does not rely on it expressly, Mr Martin submitted that her conclusion that there was no dispute recognised the difference between what was being discussed in March 2012 and the protected disclosure case ultimately advanced in May. This is part of why Employment Judge Lewzey has found that there was no dispute and, given the way the case was put forward by the Appellant at first instance, either that finding of no dispute cannot be challenged or it is not open to the Appellant to put the case to this Tribunal in the way in which it is put at paragraph 39 of Mr Pilgerstorfer's skeleton argument, namely that there was an extant dispute between the parties arising out of the Claimant's dismissal by the Respondent on 8 March 2012. This constitutes taking a new point on appeal, which had not been raised below. Likewise, the case was never put on the basis of "negotiations"; that too is a new point and I should not permit it to be advanced now.

The law

16. In **Unilever plc v The Procter & Gamble Co** [2000] 1 WLR 2436 at 2441H to 2448G there is, as one might expect of Robert Walker LJ, a thorough analysis of the authorities on "without prejudice" communications leading to a summary of the essential points. The "general approach" in his judgment was described by Lord Hope at paragraph 7 of his judgment in **Ofulue v Brossert** [2009] 1 AC 990 as providing valuable guidance and Lord Neuberger at paragraph 89 of the same case described the judgment as invaluable. Whilst it would be wearisome for the reader to set it out in full a number of points can usefully be made by way of synopsis.

17. Firstly, the concept that "without prejudice" negotiations are not admissible is an exception to the rule that admissions against interest are admissible and the exception rests on the public policy "… of encouraging litigants to settle their differences rather than litigate them to the finish" per Lord Griffiths in **Rush &Tompkins Ltd v Greater London Council** [1989] AC 1280 at 1299. In the same passage Robert Walker LJ quotes from the judgment of Clauson J in **Scott Paper Company v Drayton Paper Works Limited** (1927) 44 RPC 151 at page 156 where he said:

> **"The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."**

18. Secondly, in some circumstances the exception may rest on "the express or implied agreement of the parties themselves that communications in the course of their negotiation should not be admissible in evidence if, despite the negotiations, a contested hearing ensues" (see 2442D). Thirdly, the exclusion may not operate where it might lead to "some more powerful principle… such as the need to prevent a litigant deceiving the court with perjured

evidence" (see 2442E) or where the exclusion would "act as a cloak for perjury, blackmail or "other unambiguous impropriety" (the expression used by Hoffman LJ in *Forster v Friedland*)" (see 2444G). Fourthly, the "rule" has a "wide and compelling effect" (see 2443H to 2444A). Fifthly, in a number of other situations the "without prejudice" label will not be effective to exclude the evidence (see 2444D to 2445H). Sixthly, the "without prejudice" label cannot be "used indiscriminately so as to immunise an act from its normal legal consequences where there is no genuine dispute or negotiation" (2448 B).

19. Robert Walker LJ's conclusion is at 2448H to 2449B:

> **"In those circumstances I consider this court should, in determining this appeal, give effect to the principles stated in the modern cases….Whatever difficulties there are in a complete reconciliation of those cases, they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the *Rush & Tompkins* case… "to speak freely about all issues of the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts." Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting on their shoulders as minders."**

20. The phrase "unambiguous impropriety" appears to have been "coined by Hoffman LJ in *Forster v Friedland*" (unreported; transcript No. 1052 of 1992), according to Rix LJ in **Savings & Investment Bank Limited (in liquidation) v Finken** [2004] 1 WLR 667 (see 669H). But, as the head note makes clear, in that case the Court of Appeal was at pains to point out that this exception should not be applied too readily. At paragraphs 57 to 63 of the judgment of Rix LJ (see pages 684C to 686B) is another relatively long passage, which whilst better studied in full, can be summarised, for the purposes of this judgment, by saying that no matter how important the admission might be for the potential litigation, unless it can be said to arise out of an abuse of the privileged occasion, such as where it is made to utter "a blackmailing threat of perjury"

(see 684E) its significance alone cannot result in the admission being released from the cocoon of the "without prejudice" exclusion and into the glare of the forensic arena.

21. Mr Martin submitted that the most important case for the purpose of his argument was **BNP Paribas v Mezzotero** [2004] IRLR 508. There Cox J, sitting alone as the EAT, concluded that there was no dispute to which the "without prejudice" exclusion could apply in circumstances where an employee, who had raised a grievance about her treatment on return from maternity leave, and then attended a meeting with two managers, which they described as being "without prejudice", meaning, as they explained to the employee, that she could not use what was said, was offered by them, in effect, a termination by mutual consent.

22. At paragraph 24 of her judgment Cox J says:

> **"It is clear that for the rule to have any application at all, there must be a dispute between the parties and the written or oral communications to which the rule is said to attach must be made for the purpose of a genuine attempt to compromise it."**

Cox J concluded that it was open to the Employment Tribunal on the factual material to conclude that the act of raising a grievance meant there was no dispute about the termination of employment between the parties at the time of the meeting. In other words she decided the case on the basis that whether or not there was a dispute raised no question of law on the facts of that case, and that it was open to the Employment Tribunal to decide the case in the way that it had done. The fact that the employment was not terminated but continued after the meeting may have been an influential factor. Also there is at least the hint at paragraph 30 of the judgment that there was no real agreement between the parties as to the meeting being "without prejudice" and concluding that there was no agreement might have provided an alternative basis for deciding the case. Plainly, whatever the basis for deciding the case (and it seems to me that the decision was really made on the basis there was no dispute), that decision made it unnecessary

to consider whether this might be a case where the exclusionary rule might be subject to an exception.

23. Cox J went on, however, to consider the competing arguments on "unambiguous impropriety". The employer had relied on the need for a clear case of "unambiguous impropriety". The employee drew an analogy with the bankruptcy exception to the !without prejudice" exclusion established by **In re Daintrey** [1893] 2 QB 116 and the concept that the statement should not prejudice the other party, as would be the case if an act of bankruptcy were made "without prejudice", so that the creditor could not rely on it.

24. **In re Daintrey** was discussed by Robert Walker LJ in **Unilever**. He quotes at pages 2447G to 2448A the following passage from the judgment of Vaughan Williams J (at pages 119 to 120):

> **"In our opinion the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which alone the rule applies, exist. The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer the rule has no application. It seems to us that the judge must be entitled to look at the document to determine whether the document does contain an offer of terms. Moreover, we think that the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed."**

and then Robert Walker LJ says this at 2448A-C of **Unilever**:

> **"Apart from the last sentence, this passage spells out the uncontroversial point that "without prejudice" is not a label which can be used indiscriminately so as to immunise an act from its normal legal consequences, where there is no genuine dispute or negotiation. The obscurity of the last sentence has been commented upon by Professor Vaver but it may contain the germ of the notion of abuse of a privileged occasion which has developed in later cases. *In re Daintrey* was not cited below and Mr Hobbs relied on it in this court as an example of the court lifting the "without prejudice" veil so as to expose wrongdoing. The real point of the discussion was that the veil was never there in the first place."**

25. Although the first sentence is an undoubtedly correct statement of the law it does not seem to me that **In re Daintrey** can be explained on the basis that there was no dispute in that

case. Nor has Robert Walker LJ overlooked the dispute; he mentions it at page 2447E when summarising the facts. So what I understand him to be saying is that there was never any question of the exclusion applying in the circumstances because, as had been submitted in argument in **In re Daintrey** (see 2447F-G of **Unilever**), you cannot attach a "without prejudice" label to an act of bankruptcy and expect it to be effective so as to exclude reliance upon the act of bankruptcy by a creditor. In other words acts of bankruptcy are an exception to the "without prejudice" rule. So **In re Daintrey** should not be understood as an authority about the impact of prejudice and I think caution should be exercised in respect of the discussion of "without prejudice" reservations being impotent if their effect was to cause prejudice to the other party. This appears at page 120 of the judgment of Vaughan Williams LJ in **In re Daintrey** in the passage, immediately following that quoted by Robert Walker LJ in **Unilever**:

> **"It may be that the words "without prejudice" are intended to mean without prejudice to the writer if the offer is rejected; but, in our opinion, the writer is not entitled to make this reservation in respect of a document which, from its character, may prejudice the person to whom it is addressed if he should reject the offer … ."**

It is, after all, very obvious that the operation of the exclusion is likely to cause a forensic disadvantage to one party or another but the public policy supporting the exclusionary rule is predicated on that disadvantage being overridden by the need to create the most beneficial circumstances so as to encourage and facilitate the settlement of disputes and avoid litigation.

26. At paragraph 34 of the judgment in **BNP Paribas**, where the submission of counsel for the Respondent is summarised, it looks as though the first point made in that paragraph relates to the passage quoted above whereas the alternative point relates to the more orthodox concept of "unambiguous impropriety". At paragraph 35 and 36 Cox J considers what might be termed competing public policy arguments and at paragraphs 37 and 38 she appears to have been prepared to extend the list of exceptions so as to make discrimination cases an exception to the "without prejudice" exclusion, rather than something to be dealt with on a case by case basis,

considering whether on the facts there has been "unambiguous impropriety". This led to another division of the EAT presided over by HHJ David Richardson in **Woodward v Santander UK plc** [2010] IRLR 834 expressly repudiating (at paragraphs 56 to 63 on page 840) any such exception although explaining that was not what Cox J had decided at paragraph 38 of the judgment in **BNP Paribas**. I do not think further consideration of this debate can help me resolve the problem in this case but whether or not Cox J relied on it, or, as I think more likely, did not rely on it, I do not think that **In re Daintrey** should be regarded as authority for anything beyond the proposition that the fact of sending a letter, which amounts to an act of bankruptcy, cannot be excluded by labelling it as "without prejudice"; see paragraph 53 of Lord Walker's opinion in **Ofulue v Bossert** at page 1012G.

27. The case of **Ofulue v Bossert** also addresses the issue of what might be called "the unity of the dispute". Here Mr Martin submits that in the instant case whatever may have been the background to the events in March 2012, nothing said then can be related to the dispute, which emerged in May 2012 when it was asserted that there had been a dismissal by reason of the Appellant having done a protected act. In order to consider the impact of **Ofulue** it is necessary to examine the facts. In 1981 the Defendant and her father went into possession of a house to which the Claimant had the "paper title". In 1987 the Claimant commenced possession proceedings. In 1990 the Defendant's father counterclaimed seeking a declaration that he was entitled to the grant of a long lease, which he alleged the Defendant had promised in return for repairs he had done to the property. In January 1992 the Defendant and her father made a without prejudice offer to buy the property; it was rejected. In 2002 the possession action was struck out. In 2003 the Claimant commenced a new action for possession and the Defendant asserted for the first time that she had acquired the right to the title to the property by adverse possession. She succeeded at first instance and the Claimant appealed to the Court of Appeal on the basis that the 1990 counterclaim constituted an acknowledgement of title pursuant

section 29 of the **Limitation Act 1980**, as did the without prejudice letter offering to buy the property in 1992. The Defendant succeeded again in the Court of Appeal and so the matter went to the House of Lords. There it was argued that the 1992 letter was admissible, despite the "without prejudice" label because there was no longer a dispute, the action having ended in 2002 and the 1992 letter not having been written in the context of the 2003 action. Lord Hope, having pointed out at paragraph 6 of his opinion that **Rush and Tompkins Ltd v Greater London Council** [1989] AC 1280 decides that admissions made to reach a settlement with a different party within the same litigation are excluded from admissibility by the rule, said this at paragraph 8 on page 998:

> **"The argument that the letter cannot be relied on as an acknowledgment faces two difficulties… The first is the product of a change of circumstances. The issue that is being litigated between the parties now is not the issue that was being litigated when the letter was written in January 1992. In fact it was not an issue that was then in dispute between the parties at that time at all. The second is a more subtle aspect of the same point. It is whether the protection that the rule gives in without prejudice negotiations to an admission against interest extends to an acknowledgment of what at the time it was made was an agreed fact."**

His conclusions on these issues are set out at paragraph 9:

> **"This case is unusual because the negotiations did not result in an agreement and the claim did not proceed to judgment. It went to sleep and was then struck out. But I would hold this turn of events did not remove the need for protection. The dispute had not been resolved, so there was still a risk that things said in the letter might be used to the Bosserts' prejudice. The issue which had given rise to the original proceedings had not gone away. Ultimately of course, if the Bosserts remained in possession and no further steps were taken against them, they would acquire a right of ownership under the provisions of the Limitation Act 1980. But so long as the Ofulues remained the owners and the dispute was resolved one way or another there was a risk that things said in the letter might be used against them. The precise way in which they might be used against them is beside the point. The public policy grounds for the rule will be contradicted if the protection were not available in fresh proceedings to replace those which were struck out."**

28. In the present case, of course, the actual litigation did not commence until some time later than the negotiations at issue. But as the Court of Appeal made clear in **Framlington Group Ltd v Barnetson** [2007] IRLR 598 for the "without prejudice" exclusion to be effective there does not need to be extant litigation there only needs to be an extant dispute where the parties

are conscious of the potential for litigation. There is a discussion of this at paragraphs 22 to 34 of the judgment of Auld LJ but I content myself with quoting only paragraph 34, which reads:

> **"However, the claim to privilege cannot, in my view, turn on purely temporal considerations. The critical feature of proximity for this purpose, it seems to me, is one of the subject-matter of the dispute rather than how long before the threat, or start, of litigation it was aired in the negotiations between the parties. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so, they could avoid the need to go to court over the very same dispute? On that approach, which I would commend, the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree. Confining the operation of the rule, as the judge did, to negotiations of a dispute in the course of, or after the threat of litigation on it, or by a reference to some time limit set close before litigation, does not, with respect, fully serve the public policy interest underlying it of discouraging recourse to litigation and encouraging genuine attempt to settle whenever made."**

29. Mr Martin drew attention to the remark made at paragraph 24 of the judgment of Auld LJ that the alternative basis for the "rule", namely that it applies where "the parties agree expressly or impliedly that it should apply", i.e. the "contractual" basis, was "of limited application and doubtful legal respectability". This appears to rest on Auld LJ having embraced a footnote in *Phipson On Evidence* commending Professor Vaver's article " 'Without Prejudice' Communications – Their Admissibility and Effect" [1974] U Br Col LR 85 at pages 97 – 101. This is the same article referred to by Robert Walker LJ in **Unilever** at the start of his discussion of **In re Daintrey** (see 2445H) and it will be observed that knowledge of that professor's views did not deter Robert Walker LJ from formulating the basis of the "without prejudice rule" on the traditional alternative basis of public policy or express or implied agreement (see 2442D). **Framlington** was not cited to the House of Lords in **Ofulue** but Lord Hope's adoption of previous authorities and restatement of the rule at paragraph 2, Lord Scott's rejection on the facts of "implied agreement as a possible basis for applying the without prejudice rule in this case" at paragraph 31, Lord Walker at paragraph 55 and Lord Neuburger at paragraph 85 all recognise the alternative basis for the "without prejudice" exclusion of an express or implied agreement. Only Lord Rodgers appears to reject in principle "a notional agreement between the parties" at paragraph 37 (1008E). Given this weight of authority, which

represents the adoption or repetition of earlier high authority, it seems to me that Auld LJ's remarks in **Framlington**, which are in any event obiter dictum, together with those of Lord Rodgers in **Ofulue**, represent a minority view.

30. Another aspect of the decision of the House of Lords in **Ofulue** relates to "negotiations". At the outset Lord Hope re-states the principle in these terms at paragraph 2:

> **"Where a letter is written "without prejudice" during negotiations with a view to a compromise, the protection that these words claim will be given to it unless the other part can show that there is a good reason for not doing so."**

This describes not only the factual situation at issue in **Ofulue** but also, as it seems to me, the factual matrix that is most likely to be encountered, namely negotiations about a disagreement likely to lead to litigation if not otherwise compromised. Such "negotiations" obviously take place in the context of a "dispute". Some authorities, however, contain the alternative formulation "dispute or negotiation". Vaughan Williams J used the expression in **In re Daintrey** (see page 119), as did Robert Walker LJ in the **Unilever** case (see 2448B). This has encouraged Mr Pilgerstorfer to submit that "negotiation" represents a pure alternative to "dispute" so that even if there is no dispute the "without prejudice" exclusion can apply so long as it arises in the course of a "negotiation". That this is theoretically possible is supported by the fact that the authorities recognise two different explanations of the basis of the concept, namely the public policy of encouraging settlement so as to avoid litigation and an express or implied agreement. "Dispute", in the sense of a potential for litigation, is obviously essential to the public policy explanation but there is no reason why a "dispute" should be necessary if there is a freestanding alternative of express or implied agreement. Whilst many contractual negotiations might be thought to contain, at least, the germ of the possibility of future litigation, it would be stretching things very far to imply a "dispute" in every set of "negotiations". In paragraphs 90 to 92 of his opinion Lord Neuburger in **Ofulue** discusses what he calls at

paragraph 93 “the area of the offer to compromise” and concludes (paragraph 90) that the offer to buy in that case made in the context of the first possession proceedings:

> **“ … must, as I see it, be covered by the without prejudice rule on any view. That sentence, after all, is one which contains the actual offer to settle the earlier proceedings. It appears to me that, even if an admission of title in the letter, could be admissible because it went to a point which was not in issue in the earlier proceedings, a sentence which implies or contains such an admission could not be admissible if that sentence contains the offer to settle those proceedings. After all, there can be nothing in a without prejudice letter or conversation which is more clearly within the scope of the rule than the actual sentence containing the offered to settle the proceedings in question.”**

At paragraphs 91 and 92 he leaves “open the question of whether, and if so to what extent, a statement made in without prejudice negotiations would be admissible if it were “in no way connected” with the issues in the case the subject of the negotiations”. This suggests a need for negotiations to have a connection with a “dispute”, although, I accept, it does not eliminate the possibility that, by agreement, in a factual context unconnected with litigation, the parties may decide that what is said in a conversation or in correspondence cannot be placed before a court were there to be future litigation, even though it is then not within their reasonable contemplation. For reasons which I will explain below I do not think it is necessary for me to go into this very difficult area in order to resolve the issues on this appeal.

Discussion and conclusion

31. At the beginning of any discussion of the issues in this case it seems to me useful to step back sufficiently for an overall picture to emerge and what emerges is, to my mind, a very straightforward and simple story. The employer announces its intention to dismiss the employee for misconduct; the next step is the start of discussions about whether the termination can be framed in a different way, namely by reason of redundancy. There is a controversy, yet to be resolved, as to who instigated that approach. Whoever did, the employer seemed willing to consider it and negotiations as to the terms on which it might be accomplished commenced by correspondence between the employer, the employees’s solicitor and the employee, much of

which was marked "without prejudice". Ultimately the negotiations foundered and the employee commenced proceedings on the basis that he had been dismissed because he had made protected disclosures, something rejected by the employer, which maintained that the dismissal had been by reason of misconduct as asserted at the outset.

32. Employment Judge Lewzey concluded that there was no "dispute" between the parties and, if she was wrong as to that, she concluded the exclusion of statements made after the correspondence was labelled "without prejudice" would lead to "unambiguous impropriety" on the part of the Claimant. Mr Martin submits that I cannot interfere with that; firstly, because both of her findings involve issues of fact not law and are not susceptible to challenge on appeal to this Tribunal; secondly, even if questions of law were at issue, the arguments as to misdirection, which Mr Pilgerstorfer now wishes to make, were not articulated before Employment Judge Lewzey and cannot be taken on appeal.

33. As to the finding that there was no dispute "[o]n the face of the "Without Prejudice" correspondence" (paragraph 9 of the judgment) I have reached the conclusion that this involves two misdirections and was also a conclusion that on the evidence could not be reached by a reasonable tribunal properly directing itself. In my judgment the first misdirection is the excision by Employment Judge Lewzey of the factual matrix immediately preceding the introduction of the label "without prejudice". Mr Martin submits that if all that Employment Judge Lewzey was invited to do was to consider the situation as at 13 March 2012 then she cannot be blamed for that restricted view and any complaint based on it amounts to a new point, not put to her, and which should be rejected by me on that basis.

34. This seems to me a very unnatural, if not unfair, reading of paragraph 3 of Ms Palmer's skeleton argument (set out above at paragraph 3 of this judgment). The approach of

Employment Judge Lewzey lifts the construction of the correspondence out of the factual context which preceded it and against which, in my judgment, it should be construed. That is an artificial and misleading perspective, which has led Employment Judge Lewzey into error. I do not need to go to the extreme of suggesting that in ***every*** case where the parties reach the stage of proffering and considering a Compromise Agreement within the definition provided by section 203(2)(f) and (3) of the Act that axiomatically there is a "dispute" or "potential dispute", although when that stage is reached I think that will very often be so. There is no need to go so far in this case, however, because the earlier factual matrix clearly establishes the "actual dispute" or, at the very least, the "potential dispute". If the employer announces an intention to dismiss the employee for misconduct and there are then discussions around the question of the alternative of the dismissal being for redundancy, no matter how amicable all that might be, it seems to me beyond argument that it either demonstrates a present dispute or contains the potential for a future dispute.

35. If I am wrong about that and the matter should be confined to a construction of the correspondence only, I cannot see how one could arrive at the conclusion that the correspondence does not disclose an "actual dispute" or "potential dispute". Mr Pilgerstorfer submitted that the concept of a "potential dispute" had clearly been raised by paragraph 19a of the Respondent's skeleton argument before the Employment Tribunal. This was structured as a submission that there was no "dispute" but, to my mind, it really amounted to an acceptance of a "potential dispute" of the kind referred to in **Framlington**, something which the Employment Tribunal should have recognised and acted on. I accept Mr Pilgerstorfer's analysis that the issue raises a mixed question of fact and law. The whole purpose of any compromise agreement pursuant to section 203(2) of the Act is to reach a compromise and at the same time prevent the Claimant from having access to a Employment Tribunal in order to litigate about his dismissal. Whilst it may be true that the parties appear to have travelled some distance

along the road towards reaching an agreement, to conclude that there is no "dispute" is to my mind to reject the process of negotiation as a species of dispute and, in effect, to require there to be the existence of proceedings in order to find a "dispute". But the existence of extant proceedings is not a necessary and essential feature of a "dispute" for the purposes of the application of the "without prejudice" exclusion.

36. Mr Martin submitted in his reply that until an allegation of unfair dismissal was made there could be no dispute. I do not accept that the dispute needs to be anything like so sharply defined and his requirement for clarity from the outset sits very uncomfortably with the concept of the potential for a dispute, particularly as identified by the case of **Framlington**. It also follows that I reject Mr Martin's argument that the dispute which eventuates must be precisely the same dispute as is in existence at the time the compromise is proffered. There is no doubt the need for "continuity of dispute" but as **Framlington** illustrates the "potential dispute" or "actual dispute" can rumble on for quite a long time and certainly more than the 6 or 7 weeks, which Mr Martin was disposed to think criticial in the instant case.

37. In any event, were it necessary to do so I would hold that consideration of the travelling draft of the Compromise Agreement amply illustrated the parameter of the dispute that had arisen. It was about money and it was about the reason for termination. It was endeavouring to tie up a lot of loose ends and it covered a wide area but, despite that apparent breadth, it was about the termination of the Claimant's employment. I regard that as sufficiently specific. Moreover, it seems to me that Employment Judge Lewzey must have reached the conclusion that some degree of objection to the course proposed and a degree of hostility to the other party was an essential ingredient for a "dispute". In my judgment that is not necessary for a "dispute" still less is it necessary for a "potential dispute" and constitutes another facet of her self-misdirection.

38. For those two reasons I conclude that Employment Judge Lewzey misdirected herself on the question as to whether there was a dispute or, at least, the potential for a dispute. For the sake of completeness I must address Mr Pilgerstorfer's argument that she also misdirected herself by not considering the concept of "negotiation". This is a less obvious component of Ms Palmer's skeleton argument. It is true that at paragraph 30 (see page she makes express reference to "discussions" but I can see no basis for thinking that she articulated the matter in the way it has been put by Mr Pilgerstorfer. On the other hand, it raises what might be described as a pure question of misdirection on law and it certainly requires no further evidential investigation; after all, none was undertaken in the first place.

39. So I regard it as open for consideration on this appeal. Nevertheless I think it would be very unfortunate if the appeal were to be decided on a basis with which Employment Judge Lewzey had had no opportunity to deal. In the penultimate sentence of paragraph 11 of her judgment Employment Judge Lewzey clearly understood that there had been a "negotiation between the parties" and she cannot be criticised for failing to grasp that it was being suggested that if there was a "negotiation" but no "dispute" then the Claimant's exclusionary submission might still be accepted.

40. In the event, I need not reach any such conclusion on it. Whether or not there is a species of "without prejudice" exclusion that can apply in circumstances where there are "negotiations" but no "dispute" is a difficult question best left to a case in which that issue might be crucial and it is not necessary here for me to consider what might be described as the "outer limits" of the "without prejudice" doctrine. In most cases, and in my judgment this is clearly one of them, the negotiations will be connected to a dispute. In the terminology adopted by Lord Neuburger in **Ofulue** at paragraphs 90 to 92 it cannot be said that the "negotiation" was "wholly

unconnected" or "in no way connected" with the issues. Like most negotiations of its kind the correspondence in this case arose in the context of the dispute. Accordingly this is not a separate point at all and simply takes one back to the points already decided in favour of the Appellant.

41. I turn then to the alternative finding made by Employment Judge Lewzey that the case "does fall under the categorisation of "unambiguous impropriety"" (see paragraph 11 of the judgment). In this context also I have come to the conclusion that the learning judge misdirected herself. It seems to me that she has confused that which might be prejudicial to one of the parties in litigation with the exceptional situation of "unambiguous impropriety". I see from paragraph 14 of the Respondent's skeleton argument for the PHR (see page 149) that Employment Judge Lewzey was referred to **BNP Paribas** and to that part of the judgment of Cox J at paragraph 20 where she quotes extensively from the judgment of Robert Walker LJ in **Unilever** on the subject of the "unambiguous impropriety" exception. I do not know whether she was asked in the course of the PHR to go on to read paragraph 22 of the judgment of Cox J, where part of paragraph 57 of the judgment of Rix LJ in **Finken** is quoted. Even if she did look at it I am afraid that without considering the whole of that passage of his judgment commencing at paragraph 57 and ending at paragraph 63 she risked not appreciating the true nature of the concept of "unambiguous impropriety" and how limited the concept actually is.

42. Indeed, the terms in which she addresses the concept at paragraph 11 of her judgment seem to me the clearest indication that she did not fully appreciate that it means something far more than being disadvantaged by the exclusion of evidence. I accept the submission of Mr Pilgerstorfer that she fails to provide any reasoning to justify her conclusion at paragraph 11 that this case falls within the "unambiguous impropriety" exception. She simply says that "[t]o exclude the evidence would be an abuse of that privileged position"; she fails to explain why

this case amounts to such an abuse and completely fails to engage with the distinction drawn by Rix LJ in **Finken** at paragraph 57 between the exclusion providing an opportunity for perjury, which does not remove the protection provided by the exclusion, on the one hand, and the use of the occasion "to make a blackmailing threat of perjury" (the example given in the cases), on the other hand. In short Employment Judge Lewzey misdirected herself by equating the potential for the Respondent to suffer a forensic disadvantage with an abuse of a privileged occasion. Whilst I entirely accept that the former may be present in the instant case it seems to me that her failure to understand the need for the latter, let alone identify anything in the case that amounted to it, constituted a misdirection.

Disposal

43. Therefore I will allow the appeal and the without prejudice correspondence will be excluded. During the course of argument it was accepted that in principle the exclusion can operate even if a "without prejudice" label has not been attached. I raised the situation so far as the conversations between the Claimant and employees of the Respondent on 8 and 9 March 2012 were concerned and was told that the position remained as outlined at paragraph 3(i) of Ms Palmer's skeleton argument at page 137 of the hearing bundle, namely both parties accept that evidence of what happened on 8 and 9 March 2012 is admissible. This seems to me the correct position. It recognises the relationship between the public policy basis for the exclusion and the express or implied agreement basis for the exclusion. In a developing situation the moment when the parties feel there is now a sufficient dispute for them to agree that what passes between them thereafter will not be admitted in evidence will be best left to them to identify. It seems to me this is what has happened here and although the label may not need to be attached, the attachment of the label represents a convenient watershed, which should not be displaced except in the clearest of circumstances on the clearest of evidence. At the moment I

can see nothing to suggest that any earlier material should be placed within the umbrella of the "without prejudice" exclusion.

44. Finally, the reason the hearing was held in camera was so that these matters could be debated without the risk of the material entering the public domain. In order to maintain that sequestration it seems to me necessary for this judgment to be embargoed at least until the end of the hearing on the merits. Accordingly, only the consequential order made allowing the appeal and directing that the material be admitted into evidence should be made available to the Employment Judge presiding over the Employment Tribunal hearing this claim on its merits and this judgment should not be published until after the promulgation of the decision on the merits.