



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Wachtel  
**Respondent:** Savannah Energy PLC  
**Heard at:** East London Hearing Centre  
**On:** 21 February 2022  
**Before:** Employment Judge Jones

## Representation

**Claimant:** Mr Mitchell (Solicitor)  
**Respondent:** Mr Cohen (QC)

# JUDGMENT

1. The reference in paragraph 44(h) of the claimant's ET1 grounds of complaint (detriment 8) to a '*without prejudice*' letter shall be struck out from the claim and these proceedings.
2. The reference in paragraph 44(i) of the claimant's ET1 grounds of complaint (detriment 9) to a letter dated 16 February 2021 from the respondent's solicitor to the claimant's solicitor is protected by absolute privilege and shall be struck out from these proceedings.

# REASONS

1. The Tribunal has made a deposit order in these proceedings, which is set out in a separate document.
2. In this hearing the respondent also applied for a strike out order in respect of two aspects of the claim. In paragraphs 44(h) and 44(i) the claimant refers to without prejudice communication and to a letter written by the respondent's solicitors in response to his pre-action letter and enclosing a draft ET1 claim that he intended to present to the Employment Tribunal.

## Law

3. In the case of *BNP Paribas v Mezzotero* [2004] IRLR 508 the EAT held that in order for the ‘*without prejudice*’ rule to apply, 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. The parties were agreed in this case that the letter referred to at paragraph 44(h) of the Grounds of Claim was a without prejudice letter.

4. I was referred to the case of *Woodward v Santander UK PLC* [2010] IRLR 834, in which the EAT held that *Mezzotero* did not establish any new exceptions to the without prejudice rule and that the policy underlying the rule applied with as much force to cases where discrimination has been alleged as it applies to any other form of dispute.

*“Such an exception is not consistent with the policy behind the rule, and there is no workable basis for applying such an exception while preserving the parties’ freedom to speak really in conducting negotiations.*

*The without prejudice rule is a rule of evidence which (subject to exceptions) makes inadmissible in any subsequent litigation evidence of communications made in negotiations entered into between parties with a view to settling litigation or a dispute of a legal nature. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence..... (Doing so could) 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 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”.*

5. Without prejudice protection is not lost if someone relying on WP communication tells an untruth or does something inconsistent. It must be more serious. The rule cannot, for example, be relied on if the exclusion of evidence of what a party said or wrote in without prejudice negotiations would ‘act as a cloak for perjury, blackmail or other “unambiguous impropriety”’ *Savings and Investment Bank Ltd (in liquidation) v Fincken* [2003] EWCA Civ. 1630.

### *Detriment 8*

6. I am persuaded by the respondent’s submission that it had not waived privilege in respect of the first correspondence by copying it to the managing partner of the claimant’s employer. The claimant is employed by Clyde & Co, who is also his legal representative in this litigation. The managing partner is an agent of the firm as is every member of the firm. Copying a letter to the managing partner is in no way expanding the circle of without prejudice protection beyond the two parties. The firm is also involved in the subject of the litigation in that it is a decision-maker in respect of the terms of the appointment letter and the fee payable to the claimant for his work with the respondent.

7. I was not persuaded that in copying the letter to the senior partner the respondent had cut through the cloak of without prejudice privilege, even if that particular individual had not been personally involved with the dispute between the parties. It was not sent to him in a personal capacity but in his capacity as the managing partner of the firm which was involved and which represents the claimant in these proceedings.

8. It is therefore my judgment that the respondent did not waive privilege and the reference to the letter in paragraph 44(h) of the ET1 grounds of complaint, detriment 8, must be struck out and removed from the claim.

*Detriment 9*

9. I did not agree with the claimant that the statement in the letter that the respondent intends to counterclaim against him if he pursues his threatened litigation, was a threat to ruin his career and therefore took the letter outside of litigation privilege.

10. It is not a requirement that the threat in the letter has to be necessary in order for absolute privilege to apply. It is the occasion that is protected and not the words in the letter. The communication was part of the litigation as the respondent was responding to having been sent a draft of the Employment Tribunal claim.

11. This was pre-action correspondence but I am persuaded that this is included in the concept of absolute privilege. The contents of the letter was directly relevant to the claim that the claimant was threatening to make.

12. It is therefore my judgment that the reference to the letter in paragraph 44(i) of the claimant must be struck out.

13. All references to these two letters are to be struck out from these proceedings as they are part of privileged communication.

**Employment Judge Jones**  
**Date: 10 May 2022**