Is that letter you wrote covered by WP protection?

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Sarah Garrod v Riverstone Management Ltd [2022] EAT 177

When is there a dispute for the purposes of determining whether subsequent communications about that dispute are "without prejudice"?

Employment practitioners will be familiar with the case of ***BNP Paribas v Mezzotero*** [2004] IRLR 508 EAT, which found that the existence of a dispute is not proved purely by the fact that the employee has raised a grievance. Following that decision, and a lot of cautious communication by employment solicitors to potential claimants who had brought grievances against their employers, we now have an authority that might bring some sighs of relief. In December 2022, the EAT found in ***Garrod v Riverstone Management***, that the Claimant's grievance *did* evidence a dispute for the purpose of determining "without prejudice" protection.

Facts

Ms Sarah Garrod ("SG") was employed by Riverstone Management Ltd ("Riverstone") as Company Secretary. She made serious allegations that she had been subjected to pregnancy and maternity discrimination, including bullying over 5 years and harassment.

SG raised a formal grievance on 30th October 2019.

On 8th November 2019 SG met Riverstone's HR and employment law adviser, Harry Sherrard ("HS") and had been offered £500 to pay for a legal adviser to attend with her. SG attended with her husband ("DG") instead; both had some legal qualifications. They discussed her grievance in outline, she was asked who she considered should hear her grievance, and what outcome she wanted. She said she wanted her reporting line to be changed.

HS said he wanted to have a without prejudice conversation. He assumed SG knew what that meant and she did not ask. The EJ found that SG and DG *did* understand what "without prejudice" meant, contrary to their evidence.

In the meeting, HS described the employment relationship as "*fractured*" and "*problematic*" and said he would like to make an offer to terminate her employment in exchange for £80,000. SG began to cry. The EJ found that the meeting was amicable and professional, rejecting SG's and DG's accounts that HS was overbearing and aggressive.

There was a grievance meeting on 3rd December 2019 and on 16th January 2020, SG was told her grievance had not been upheld.

SG issued her claim in the ET on 2nd March and expressly referred to the meeting stating she had been told "*in no uncertain terms that he did not care about her grievance, and he was there to make an offer to the Claimant to terminate her employment".*

SG resigned on 16th March 2020 and amended her claim to include constructive unfair dismissal.

The ET decision:

On 6th November 2021, EJ Harrington found in the Respondent's favour on the preliminary point that the meeting on 8th November 2019 was covered by "without prejudice" ("WP") protection. EJ Harrington directed herself that:

> *i. the rule applies only if there is an existing dispute between the parties at the time of the communication and if the communication is part of a genuine attempt to settle it;*
> *ii. the rule can apply to communications prior to the commencement of litigation, if in the course of the negotiations the parties contemplated or might reasonably have contemplated that litigation would ensue if they could not agree;*
> *iii. the mere act of an employee raising a grievance does not by itself mean that there is a "dispute", but it is necessary to consider the nature of the grievance and the manner and circumstances in which it is raised (**BNP Paribas v Mezzotero** [2004] IRLR 508 EAT);*
> *iv. the rule cannot be relied upon if the exclusion of the evidence would "act as a cloak for perjury, blackmail or other unambiguous impropriety" (**Unilever PLC v Proctor & Gamble Co** [1999] EWCA Civ 3027); and*
> *v. in claims for unfair dismissal only, section 111A of the ERA provides that evidence of pre-termination negotiations is inadmissible, enabling employers to instigate conversations about the possibility of termination without risk of disclosure, despite the*

existence of a "dispute" which would prevent the "without prejudice" rule from applying, but subsection (iv) disapplies the section to any improper behaviour.

The fact that, in her grievance, SG referred to using the ACAS Early Conciliation process if the matter could not be resolved, persuaded the EJ that there was an existing dispute and that the parties might reasonably have contemplated that litigation would follow if there was no settlement. The EJ also found that HS was genuinely trying to settle that dispute and she ruled that there was no unambiguous impropriety in that meeting to dislodge the protection.

The judgment of the Honourable Mr Justice Bourne in the EAT:

Was the meeting without prejudice?

Bourne J considered ***Mezzotero*** carefully. He found that ***Mezzotero*** was factually distinguishable from SG's case, because (a) the claimant in that case ("M") claimed that she was discriminated against by her employer seeking to terminate her employment, so excluding the evidence about the meeting would prevent the tribunal from considering that claim; (b) there was no dispute before the meeting in question between M and her employer about termination of her employment; (c) M's employer had not been genuinely aiming to settle the discrimination claim at the meeting. As a result of these factual findings, Cox J found that it was open to the tribunal to find there was no WP protection. Cox J did not find that, on the facts of ***Mezzotero***, as a matter of law, there could not have been a dispute.

On the other hand, SG did not rely on the meeting as an unlawful act giving rise to a head of claim, so Bourne J found that SG's tribunal claim was not to any significant extent based on the meeting, it was just part of the narrative. EJ Harrington had also heard live evidence over a 3-day hearing (unlike ***Mezzotero*** where it was decided on the papers) so was "*plainly entitled to conclude that the dispute which was the subject of the ET claim already existed at the time of the grievance*". Bourne J found that the content of the grievance corresponded closely with the content of the claim, reference to ACAS and Early Conciliation were "*clear signposts to the possibility of litigation",* and it was reasonable for the EJ to consider that, given SG's legal training, she meant what she said. Mention of all of these factors indicated that the EJ had not simply considered that the existence of a grievance meant, of itself, that there was an extant dispute at the time. Therefore the EAT upheld the tribunal decision on the basis that it was not inconsistent with ***Mezzotero.***

Was there unambiguous impropriety which removed the protection?

Bourne J found that the tribunal decision was correct in saying that the removal of protection on the basis of unambiguous impropriety was exceptional (citing ***Mezzotero*** and per Rix LJ in

Savings & Investment Bank Ltd v Fincken [2004] 1 WLR 667 at [57]). The EAT found that any criticism of HS and Riverstone fell far short of the sort of unambiguous impropriety of which perjury and blackmail are examples. Even if it was right that evidence of a termination offer could provide support for the claim, by showing that the Respondent wanted to be rid of SG, Bourne J found (para.65) that it did not follow that it should be admitted:

> "*The point of the rule is that the policy aim of encouraging settlement of disputes outweighs the competing aim of allowing all relevant material to be placed before courts and tribunals. That is why the rule can be displaced only by very clear and very serious wrongdoing. Making a settlement offer which could, on one view, provide a clue to a party's discriminatory attitudes falls far below that threshold.*"

Consideration of costs

The original judge, EJ Harrington found that SG had acted unreasonably by making an unfounded contention that she had not understood the meaning of "without prejudice" and by making unfounded allegations against HS of trickery, perjury and dishonesty. A different tribunal judge (EJ Jones QC) considered the question of costs and found that it was unreasonable conduct on the part of SG to run a knowingly untruthful case which "very substantially complicated" the issue, requiring extra evidence and submissions. A costs award of £3,400 was ordered against SG.

Although the EAT judgment acknowledges that untruthful evidence in itself is not a sufficient basis for a costs order (according to ***Kapoor v Governing Body of Barnhill Community High School*** [2013] UKEAT/0352/13/RN), it was apparent that EJ Jones QC had considered the necessary factors of the nature, gravity and effect of the relevant untruthful evidence, together with the relevant circumstances before deciding on the order.
The costs order was also upheld on that basis.

Comment

There is a considerable public policy objective of encouraging settlement before the parties litigate. Many practitioners were understandably nervous that, after a grievance but before litigation, communications aimed at settling with termination would not have WP protection post-***Mezzotero***. The EAT have now made clear that the existence of a grievance can, in some circumstances, indicate that there was an extant grievance at the time of the communication in question and therefore genuine attempts to settle that dispute are protected where that dispute is then issued as a claim, unless the high threshold for unambiguous impropriety is met.

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