# Correspondence including a draft settlement agreement marked “without prejudice” are inadmissible as evidence

[et_pb_section admin_label=”Section” global_module=”136″ fullwidth=”on” specialty=”off” transparent_background=”off” background_color=”#ffffff” allow_player_pause=”off” inner_shadow=”off” parallax=”off” parallax_method=”off” padding_mobile=”off” make_fullwidth=”off” use_custom_width=”off” width_unit=”on” make_equal=”off” use_custom_gutter=”off”][et_pb_fullwidth_code global_parent=”136″ admin_label=”Post Header”][Page_Header_Start] Employment Law News [Page_Header_End][/et_pb_fullwidth_code][/et_pb_section][et_pb_section admin_label=”section”][et_pb_row admin_label=”row”][et_pb_column type=”3_4″][et_pb_text admin_label=”Text” background_layout=”light” text_orientation=”left” use_border_color=”off” border_color=”#ffffff” border_style=”solid”]

# Correspondence including a draft settlement agreement marked “without prejudice” are inadmissible as evidence

[post_details]

# [Social-Share]

[post_tags]

Where an employee or employer makes a statement (either in writing or orally) which attempts to settle a dispute this will be deemed to be "without prejudice" or as lawyers refer to it – "WP". When a WP statement is made, this ordinarily means that it is off the record and is inadmissible as evidence before a court or tribunal.

In *Portnykh v Nomura plc,* the Employment Tribunal at a pre-hearing review held that even though the settlement agreement and correspondence was marked without prejudice, it was admissible evidence. The Tribunal said that the benchmark had not been satisfied which entitled the documents to benefit from the WP rule, namely: (i) there was no dispute in existence between the parties at that time; and (ii) pursuant to the terms of the settlement agreement the parties had agreed that the reason for dismissal would be redundancy. However, when negotiations broke down, Mr Portnykh subsequently brought a whistleblowing claim. The Employment Tribunal determined that to exclude this correspondence would create a false impression of events at the hearing and would amount to an abuse of the without prejudice rule.

The Employment Appeal Tribunal, however, overturned this decision and stated that the correspondence was without prejudice and therefore was inadmissible as evidence. It is not necessary for actual proceedings to exist in order for the without prejudice rule to apply. Also, without prejudice statements are only admissible in circumstances where the exclusion of it would provide an opportunity for perjury or blackmail. The disapplication of the general WP rule does not apply in situations where a party would simply be placed at a disadvantage.

This case confirms that statements and documents made in

respect of negotiating settlement agreements which are marked “WP” are almost always inadmissible as evidence. Indeed, even if a document is not marked “WP”, in its context it could still benefit from the WP rule. However, it is always sensible to mark all statements “WP” when engaging in negotiations, so as to ensure that the rule applies.

[/et_pb_text][/et_pb_column][et_pb_column type=”1_4″][et_pb_sidebar admin_label=”Sidebar” orientation=”right” area=”sidebar-1″ background_layout=”light” remove_border=”off”]
[/et_pb_sidebar][/et_pb_column][/et_pb_row][/et_pb_section]