Settlement offer alleged to be an act of victimisation was without prejudice and not unambiguously improper

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In Garrod v Riverstone Management Ltd the EAT has held that a settlement offer made to an employee after she had complained about discrimination, but before she had started legal proceedings, was genuinely without prejudice and not unambiguously improper. As a result, the employee was unable to refer to the settlement offer in her legal claim.

What happened in this case?

Ms Garrod was employed by Riverstone Management Ltd as its Company Secretary. She returned from maternity leave on 15 July 2019 and three months later, on 17 October 2019, she told her manager that she was pregnant with her second child. On 30 October 2019 she raised a grievance complaining of mistreatment, pregnancy and maternity discrimination and of bullying and harassment by her manager for almost five years.

A week later she was invited to attend a meeting with, Mr Sherrard, an HR and employment law adviser, for a “preliminary discussion”. Riverstone offered to pay £500 plus VAT towards the cost of a legal adviser to attend the meeting if Ms Garrod wished. This was declined. In the end, Ms Garrod attended the meeting with her husband. Both Ms Garrod and her husband had degrees in law. Ms Garrod had undertaken some further training to become a solicitor and her husband had a PhD in law.

The meeting took place on 8 November 2019. After a general discussion about her grievance, Mr Sherrard said he would like to have a “without prejudice” discussion. It was later found that Ms Garrod understood what this term meant, even though it

was not explained to her. Mr Garrod went on to describe the employment relationship as "fractured" and "problematic" and said the company wished to make an offer to terminate her employment and he put forward the figure of £80,000. Ms Garrod felt ambushed by this part of the meeting and began to cry.

No agreement was reached. Instead, the grievance hearing went ahead on 3 December 2019. On 16 January 2020, the grievance was rejected in its entirety. Her grievance appeal was also rejected and on 16 March 2020, Ms Garrod resigned and later alleged that she had been constructively unfairly dismissed. In her claim before the Employment Tribunal, Ms Garrod made reference to the without prejudice meeting with Mr Sherrard. Riverstone applied to the Tribunal to have those references removed on the basis that this was a privileged meeting.

The Employment Tribunal Judge agreed that the "without prejudice" rule had been engaged because there was an existing dispute between the parties and the communications made at the meeting were part of a genuine attempt to settle that dispute. Even though litigation had not started by this point, the Judge agreed that the parties had (or might reasonably have) contemplated that litigation would follow if there was no settlement. Finally, the Judge did not accept that the rule should be disapplied on the basis of any "unambiguous impropriety". Therefore, the Judge allowed the application and ordered that the references to the meeting should be removed from Ms Garrod's claim. Ms Garrod appealed.

What was decided?

Ms Garrod argued that the Employment Tribunal Judge had been wrong to find that there was an existing dispute between the parties which engaged the without prejudice rule. She relied on the earlier decision in BNP Paribas v Mezzoterro, where it was held that the fact an employee has raised a grievance did not necessarily mean that that the parties were in "dispute".

The EAT rejected this ground of appeal. Firstly, the Mezzoterro decision did not mean that an employee who had raised a grievance could never be in dispute with their employer, rather, it was not necessarily the case. In this case, the Tribunal Judge was entitled to conclude that the dispute was already in existence at the time she raised her grievance and at the time of the meeting. In Mezzoterro the without prejudice meeting was at the very heart of her claim i.e. her sex discrimination and victimisation claims were based on the allegation that her employer sought to terminate her employment after she had raised a grievance about discriminatory treatment. By contrast, Ms Garrod did not rely on the without prejudice meeting as an unlawful act giving rise to a separate claim. Instead, the reference to the meeting was "part of the narrative making that the point that Ms Garrod's grievance was not dealt with to her satisfaction".

Ms Garrod also argued, that even if the parties were in dispute, it did not necessarily mean that litigation was in prospect. The EAT also rejected this, noting that the references made in the grievance to the infringement of legal rights and Acas Early Conciliation were "clear signposts to the possibility of litigation". That Ms Garrod had had legal training was a relevant factor as it meant it was reasonable to conclude that she meant what she said.

The EAT also held that the Employment Tribunal Judge was entitled to conclude that the proposal made at the meeting was genuinely aimed at settlement of the dispute, noting that there was nothing unusual about an employment dispute being settled by an agreement to terminate the employment on financial terms. This was the case even though Ms Garrod had wanted to remain in her job.

Finally, Ms Garrod argued that Employment Tribunal Judge was wrong not to have found that there was unambiguous impropriety. She argued that responding to the grievance by

proposing termination was an act of victimisation (although, ultimately, she was not permitted to amend her claim to argue this). The EAT rejected this ground of appeal, noting that the without prejudice rule should be disapplied only in the very clearest of cases of very serious wrongdoing. The Tribunal Judge was right to conclude that this was not such a case. The EAT concluded that making a settlement offer which could, on one view, provide a clue to a party's discriminatory attitudes fell far below the threshold needed to disapply the without prejudice rule.

What are the learning points for employers?

This is a useful decision for employers as it highlights that parties may be in a dispute once a grievance has been brought, meaning that a without prejudice discussion may be possible. After the Mezzoterro decision, there was some concern that the raising of a grievance would not be sufficient to engage the without prejudice rule.

However, employers should be careful not to assume that a grievance always means you are in dispute. It will depend on the specific facts. Here, the fact that the grievance outlined the legal claims and referred to Acas Early Conciliation all tended towards there being a dispute that would end up in litigation. Further the fact that Ms Garrod was a sophisticated claimant with legal knowledge meant that it was fair to assume she meant what she said in her grievance.

The decision also highlights that, once engaged, the without prejudice rule will only be disapplied in limited circumstances. An allegation that a settlement offer betrays an employer's discriminatory attitudes is not enough. However, it is worth remembering that Ms Garrod's attempt to add a victimisation claim based on the settlement meeting itself was refused by the Employment Tribunal. This meant that her references to the meeting were merely part of the

general “narrative” of her claim and she was not harmed by having to remove references to it. In a different case, a claimant’s claim may be rest more squarely on what happened at a settlement meeting (as was the case in Mezzoterro) and there would be a greater risk of the rule being disapplied.

A helpful decision overall, but employers should still take care when seeking to have early settlement discussions before litigation is in clearly in prospect. Although there is the ability to have “pre-termination settlement discussions” under section 111A of the Employment Rights Act 1996, such discussions are inadmissible in ordinary unfair dismissal claims only. Therefore, it is better to ensure that the without prejudice label will stick wherever possible, since this will protect the communications from disclosure in any proceedings. We would recommend seeking legal advice where you are unsure whether the rule will be engaged.

Garrod v Riverstone Management Ltd

Brahams Dutt Badrick French LLP are a leading specialist employment law firm based at Bank in the City. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

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