Scope of the “without prejudice” rule

Without prejudice - The Court of Appeal find that the “without prejudice” rule can be engaged before a dispute is underway.

The without prejudice rule allows communications between parties which are genuinely aimed at settling a dispute to remain confidential and prevents their being referred to during any related court proceedings. There are two justifications for this rule: first, public policy dictates that confidentiality is thought to allow parties to make concessions and offers that they would not make in open discussions, facilitating the resolution of a dispute without involving the courts. Secondly, where parties expressly or impliedly agree that the rule should apply, a contract is said to arise between them preventing the disclosure to a third party of any matters discussed.

_Barnetson v Framlington Group Ltd and another_ [2007] EWCA Civ 502

In March 2005, the Framlington Group Ltd (“Framlington”) offered Mr Barnetson a post on orally agreed employment terms. When Mr Barnetson later sought to have his employment terms confirmed in writing, it became clear that he and his employers had very different views of his entitlements. This dispute was never resolved; although Mr Barnetson did sign an employment contract, he made it clear that he was unhappy with its terms. Framlington subsequently informed Mr Barnetson that his employment would be terminated at the end of 2005 and the two parties began to discuss the terms on which Mr Barnetson would leave the company. A number of discussions ensued aimed at agreeing a mutually acceptable leaving package.

Mr Barnetson left Framlington at the end of December 2005. In April 2006 he issued a claim for damages for wrongful dismissal and other breaches of his contract of employment. When witness statements were exchanged, Framlington argued that certain passages contained in Mr Barnetson’s statement should be removed, on the basis that they contained details of discussions that were covered by the without prejudice rule.

The courts were asked to consider the scope and nature of the without prejudice rule and its applicability to negotiations that take place before proceedings have been issued.

The High Court decision

The trial judge held that the conversations were not privileged because they had taken place before legal proceedings had been commenced or threatened. He found that the discussions were simply aimed at agreeing variations to Mr Barnetson’s contract of employment in the hope of terminating it without Mr Barnetson having a grievance against Framlington.

The Court of Appeal decision

The Court of Appeal, overturning the decision of the High Court, considered the circumstances in which the without prejudice rule might apply to discussions that take place before proceedings are issued. The Court of Appeal rejected the High Court’s analysis of the nature of the parties’ discussions in the weeks leading up to Mr Barnetson’s departure from the firm. It found that they were, by this stage, very much at odds as to Mr Barnetson’s contractual entitlements and that their discussions went well beyond an attempt to agree a variation of this terms of employment; there was clearly a dispute.

The Appeal Court found that confining the application of the without prejudice rule to communications between parties once legal proceedings have commenced would increase the incentive for claimants to escalate a dispute by threatening litigation or progressing quickly towards it. The Court also made reference to Part 36 of the Civil Procedure Rules, which insists that courts have regard to both settlement offers made before and after proceedings are
commenced. The important question in terms of proximity was not how close the relevant discussions were to the issue of proceedings, but how close the subject matter of the communication is to the nature of the dispute which is later presented in court. In particular, if either party contemplated, or could reasonably have been expected to contemplate, proceedings if the discussions in question did not result in an agreement, then the ‘without prejudice’ rule should apply. However, it was recognised that courts will have to balance the need to encourage pre-action settlements by allowing discussions at that stage to remain confidential, with the need to ensure that a party to proceedings is able to present its strongest case by relying upon its strongest material. The Court of Appeal noted that the dividing line in this area might not always be clear.

Implications

This is a common sense decision that is consistent with the rationale behind the without prejudice rule. Parties to disputes should be encouraged to settle without resort to court and should not subsequently be embarrassed by any earlier admission made in an attempt to secure an agreement. Prospective parties to litigation can now negotiate with confidence in the hope of avoiding court even if they have not yet issued a letter of claim or proceedings. The trigger for the application of the rule, according to the Court of Appeal, is that the matters discussed may turn litigious not that they already have. The court gave short shrift to Mr Barnetson’s assertion that there was no dispute with his employer, just a discussion as to a contractual variation.

It is important that potential parties to litigation identify those disputes that are likely to result in proceedings should they remain unresolved. It is then helpful to identify the discussions with a potential opponent a party may wish to reserve the right to rely upon and those which they do not. Marking correspondence “without prejudice”, although not determinative, will help to keep a document away from a judge. Similarly agreeing whether or not a conversation is open may also assist, provided that all parties understand the implications of having a “without prejudice” rather than open discussion. It is clearly never too early in a dispute to begin thinking about whether you would want the contents of a particular letter or conversation to come before a court.

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