

# RadcliffesLeBasseur



## Employment Briefing - Case of the Month

July 2010

Settling disputes is usually in everyone's interest. The "without prejudice" rule is there to help. It is a rule, which makes inadmissible any evidence of communications made in negotiations held with the intention of trying to settle existing negotiations. The policy behind the rule is the obvious point that the parties should not fear that anything they say in the negotiations would be used against them if the discussions fail to resolve the dispute. There are two important requirements for the rule to apply. First, when the negotiations begin, there has to be an existing dispute to resolve. Secondly the rule will not be allowed to cover up perjury, blackmail or other "unambiguous impropriety". The first of these rules often catches out incautious employers who initiate discussions intending them to be without prejudice before a dispute has arisen. This will not work as was made very clear in the discrimination case of **BNP Paribas v Mezzotero [2004] IRLR 508**.

It was the other exception, about the meaning of unambiguous impropriety, which was the subject the decision of the Employment Appeal Tribunal (EAT) in **Woodward v Santander UK PLC [2010] UKEAT/0250/09**. The claimant wanted to rely on evidence that her former employers had flatly refused to offer her a reference. She put evidence of that refusal in her witness statement even though the statement had been made in a without prejudice meeting attended by her solicitor. In argument she relied on some hints in **Mezzotero** that in discrimination cases, because of the need to combat the "very great evil" of such conduct, the bar should be lowered.

In that case the judge indicated that a suggestion that an employee leave and be made redundant after she had raised a grievance about her treatment after returning from maternity leave was within the exception.

**Employment Briefing - July 2010**

The decision left many wondering whether the without prejudice rule was being eroded in discrimination cases.

The emphatic answer to this question appears to be "no". In its decision in **Woodard** the EAT stressed the importance of the policy behind the rule and that the exception should only be allowed in the very clearest of cases. There should, it decided, be no special rule for discrimination cases.

Accordingly the claimant lost her argument and the evidence was excluded. "Unambiguous" really does now appear to mean something and if this decision represents the current judicial view employers should be relieved.

**First published in The Grapevine Magazine  
July 2010**

### Further Information

If you would like further information or to comment in general regarding this case, please contact



**Stephen Levinson**

[stephen.levinson@rlb-law.com](mailto:stephen.levinson@rlb-law.com)

020 7227 6714

[www.rlb-law.com](http://www.rlb-law.com)

### Disclaimer

This briefing is for guidance purposes only. RadcliffesLeBasseur accepts no responsibility or liability whatsoever for any action taken or not taken in relation to this note and recommends that appropriate legal advice be taken having regard to a clients own particular circumstances.

**RadcliffesLeBasseur**