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Discrimination Without Prejudice: Woodward v Santander UK Plc

by

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1. The Basis for the Without Prejudice Rule

The without prejudice rule is a rule of evidence which allows for the confidentiality of things said or written "without prejudice" to be maintained[1] because:

> "if converting offers of compromise into admissions … prejudicial to the person making them were to be permitted, no attempt to compromise a dispute could ever be made."[2]

As Oliver L.J. observed:

> "parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations … may be used to their prejudice in the course of the proceedings."[3]

The analysis of the earlier cases by Robert Walker L.J.[4] was that they "make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties".[5] Parker L.J. in *South Shropshire DC v Amos*[6] said that the formulation of the without prejudice rule in *Cutts v Head* was important for two reasons:

> "First, it shows that the rule depends partly on public policy, namely the need to facilitate compromise, and partly on implied agreement [between the parties]. Secondly, it shows that the rule covers not only documents which constitute offers but also documents which form part of discussions on offers, i.e. negotiations."[7]

One of the results of the "agreement of the parties" aspect of the without prejudice rule and the fact that it covers all discussions and negotiations is that the parties to a without prejudice negotiation can waive the privilege for all that is covered by the rule. See, for example, *Seventh Earl of Malmesbury v Strutt & Parker*,[8] where the parties agreed that offers made at a mediation could be disclosed to Jack J. when considering costs. As a result of this disclosure a significant costs award was made against the claimant for so exaggerating his claim as to make the mediation ineffective. But even so, for there to be a waiver of privilege there must be an "unequivocal act on the part of the [waiving party] expressly or impliedly

[1] It should be noted that this article looks at the without prejudice rule as it is applied in England and Wales; in Scotland it is, to some degree, different.
[2] *Jones v Foxall* (1852) 15 Beav. 388 Ch at 396, 51 E.R. 588 at 591 per Sir John Romilly M.R.
[3] *Cutts v Head* [1984] Ch. 290 CA at 306.
[4] In *Unilever Plc v Procter & Gamble Co* [2001] 1 All E.R. 783 CA.
[5] *Unilever Plc v Procter & Gamble Co* [2001] 1 All E.R. 783 at 796.
[6] *South Shropshire DC v Amos* [1986] 1 W.L.R. 1271 CA.
[7] *South Shropshire DC v Amos* [1986] 1 W.L.R. 1271 at 1277.
[8] *Seventh Earl of Malmesbury v Strutt & Parker sub nom. Carleton v Strutt & Parker* [2008] EWHC 616 (QB).

waiving privilege".[9] Thus, in *Woodward v Santander* there was no waiver of privilege when the employers had allowed the claimant, in her witness statement in an earlier case in which she had given evidence, to refer to the without prejudice information.[10]

2. Cases to which the "Without Prejudice" Rule does not Apply

Despite the wide application of the without prejudice rule there are certain circumstances to which the rule has been held not to apply at all. In *Daintrey Ex p. Holt, Re*[11] a debtor sent one of his creditors a letter headed "without prejudice". The letter was to the effect that the debtor was suspending payment of his debts. Vaughan Williams J., who gave the judgment of the court, said of the "without prejudice" letter:

> "We think that the document was admissible in evidence. … In our opinion the rule which excludes documents marked 'without prejudice' has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which alone the rule applies, exist.
>
> The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer the rule has no application."[12]

So unless there is a dispute or negotiation which parties are involved in then, according to *Daintrey*, the without prejudice rule does not apply. In *Daintrey* there was no dispute between the debtor and his creditors at the time when the letter was sent and therefore the without prejudice rule was held not to apply.

3. Discrimination and the Without Prejudice Rule

In *BNP Paribas v Mezzotero*[13] the Employment Appeal Tribunal (EAT) was faced with a sex discrimination claim. The claimant had been absent on maternity leave. Two weeks after returning from maternity leave she brought a grievance claiming that she had been discriminated against on grounds of her sex. Her allegations of sex discrimination concerned her return to work after maternity leave. The claimant alleged that: (a) she had been discouraged from returning to work after her maternity leave; (b) she had not been allowed to return to her old job; and (c) she had been brought back on less favourable conditions than she would have had if she had not gone on maternity leave. When she lodged her grievance, she was initially told to stay at home whilst it was being dealt with and was later invited to attend a meeting to discuss her position at work. At the outset of the meeting the employers said that the meeting was "without prejudice". They went on to say that her job had gone and to offer her a "redundancy payment" if she would leave their employment. This, the employers said, would not affect the position regarding the employee's grievance, which they, the employers, took seriously and would follow through even if she accepted the offer to leave their employment on terms.

Needless to say the claimant rejected the offer. She brought a sex discrimination claim alleging that she had been subjected to discriminatory treatment on her return from maternity leave. As part of her claim she relied on what had happened at the "without prejudice"

[9] *Woodward v Santander UK Plc (formerly Abbey National Plc)* [2010] I.R.L.R. 834; (2010) 154(25) S.J.L.B. 41 EAT at [68].

[10] In the earlier case she had been a witness rather than a party. If both she and the employers had been parties to the earlier case then, of course, privilege would have been waived.

[11] *Daintrey Ex p. Holt, Re* [1893] 2 Q.B. 116 (QB Div. Ct).

[12] *Daintrey Ex p. Holt, Re* [1893] 2 Q.B. 116 at 119–120.

[13] *BNP Paribas v Mezzotero* [2004] I.R.L.R. 508; (2004) 148 S.J.L.B. 666 EAT.

meeting with her employers. Her employers objected to this material being put before the tribunal on the grounds that the discussion with the employee had been designated as being "without prejudice" from the outset.

The EAT rejected the employer's claim for what had been said at the without prejudice meeting to be excluded. The tribunal's reasons were twofold. Primarily, basing themselves on *Daintrey*, the EAT held that there was no dispute between the parties to which the "without prejudice" meeting applied. It was to deal with an offer by the employers to terminate the claimant's employment. Her grievance was about the terms on which she had been allowed to return to work; it was not about the termination of her employment. And her grievance was expressly left unaffected by the meeting since the employers said that they would deal with the claimant's grievance whether she accepted their offer or not. So, the EAT held, there was no live dispute between the parties which could attract the protection of the without prejudice rule.

4. Excluding the Without Prejudice Rule

Even where the without prejudice rule does prima facie apply, there are situations where the court can go behind without prejudice negotiations. Robert Walker L.J. held in *Unilever*[14] that there are at least seven types of case in which the court will look at without prejudice communications[15]: (1) where it is necessary to establish whether they have resulted in a concluded compromise agreement; (2) where it is alleged that an agreement concluded during them should be set aside on the ground of misrepresentation, fraud or undue influence; (3) where in the absence of a concluded settlement something said by one party and acted on by the other is alleged to give rise to an estoppel; (4) where the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety"; (5) where evidence of negotiations is needed to explain apparent delay or acquiescence; (6) where a third party claims that the negotiating party failed to mitigate its loss; and (7) where the negotiations were expressed to be "without prejudice save as to costs" and the material is being looked at in relation to costs.[16]

David Altaras looked at the without prejudice rule recently in an excellent article in *Arbitration*, and I do not intend to revisit the general area in depth in this note.[17] However, one of the exceptions set out by Robert Walker L.J. in *Unilever*[18] was the subject of an alternative finding by the EAT in *BNP Paribas v Mezzotero*[19]; one which the EAT has considered again in a more recent discrimination case. This is the "perjury, blackmail or other unambiguous impropriety" exception.

In *Daintrey*,[20] the Divisional Court's primary finding was that, as there was no dispute between the debtor who sent his creditors a "without prejudice" letter saying that he was ceasing payment of his debts (a clear act of bankruptcy on the debtor's part), the without prejudice rule did not apply to protect the letter. An alternative finding was:

> "We think that the [without prejudice] rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed. It may be that the words 'without prejudice' are intended to mean without prejudice to the writer if the

[14] *Unilever Plc v Procter & Gamble Co* [2001] 1 All E.R. 783.

[15] In fact, Robert Walker L.J. propounded eight types of case, the eighth being in family matters, where without prejudice communications are dealt with on the basis that they are virtually sacrosanct—subject only to issues of safety, particularly of children.

[16] *Unilever plc v Procter & Gamble Co* [2001] 1 All E.R. 783 at 792–793. To these can be added an additional category: rectification of the agreement: see *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] EWCA Civ 79; [2010] 1 W.L.R. 1803; [2010] 3 All E.R. 282, where the Court of Appeal accepted that this was an allowable ground for going behind without prejudice negotiations in an appropriate case.

[17] D. Altaras, "The Without-Prejudice Rule in England" (2010) 76 *Arbitration* 474.

[18] *Unilever plc v Procter & Gamble Co* [2001] 1 All E.R. 783.

[19] *BNP Paribas v Mezzotero* [2004] I.R.L.R. 508.

[20] *Daintrey Ex p. Holt, Re* [1893] 2 Q.B. 116. See also section 2, above.

> offer is rejected; but, in our opinion, the writer is not entitled to make this reservation in respect of a document which, from its character, may prejudice the person to whom it is addressed if he should reject the offer."[21]

Robert Walker L.J. in *Unilever* held that "the last sentence [of the above passage from *Daintrey*] … may contain the germ of the notion of abuse of a privileged occasion which has developed in later cases",[22] in other words, the seeds of the "unambiguous impropriety" exception to the without prejudice rule.

Returning to *BNP Paribas v Mezzotero*,[23] we see that the EAT's primary decision was sufficient to dispose of the appeal. That was the decision that there was no live dispute concerning the termination of the claimant's employment which the without prejudice rule could protect at the time of the meeting between the claimant and her employers. That being the case, she was entitled to rely in evidence in her subsequent discrimination case on what had been said at the meeting with her employers. The EAT also considered the alternative submissions on her behalf, which centred on the "unambiguous impropriety" exception to the without prejudice rule, and considered that exception to be an alternative reason for lifting the without prejudice veil on her behalf. The "unambiguous impropriety" argument was based on the seeds sown by the dictum of the Divisional Court in *Daintrey*. The Socratic dialogue at the end of the EAT's decision runs along the following lines.

If the without prejudice rule protected discussions of this type at a without prejudice meeting, an employer could say to an employee: "We don't want you here because you are black" and then seek to exclude this from evidence at the tribunal by saying that the meeting was without prejudice. The response to this, the dialogue continues, would be that such a remark would "obviously fall under the umbrella of 'unambiguous impropriety'".[24] However, the dialogue concludes that in a less clear case the employer would be faced with having to attach different levels of impropriety to:

> "fact sensitive allegations of discrimination, in order to submit that the [relevant] remarks do not fall under the same umbrella. I do not regard that as a permissible approach. I would regard the employer's conduct, as alleged in the circumstances of the present case, as falling within that umbrella and as an exception to the 'without prejudice' rule within the abuse principle."[25]

It is not clear whether the EAT's decision in this case was suggesting that this was a new extension to the "unambiguous impropriety" exception for discrimination cases or whether it was simply finding that in this particular case the situation fell within the existing "unambiguous impropriety" exception.

5. Perjury, Blackmail or other Unambiguous Impropriety Exceptions to the Without Prejudice Rule

Whilst the Divisional Court in *Daintrey* may have sown the seeds of the "unambiguous impropriety" exception, Hoffmann L.J. was the first to adopt the phrase "unambiguous impropriety", in *Forster v Friedland*.[26]

Examples of cases where the without prejudice cloak has been lifted because of "unambiguous impropriety" include *Greenwood v Fitts*.[27] In that case the defendant said at a without prejudice meeting that if the case went to trial he would perjure himself, bribe other witnesses to perjure themselves and leave Canada if the case went against him. (This

[21] *Daintrey Ex p. Holt, Re* [1893] 2 Q.B. 116 at 119–120.
[22] *Unilever Plc v Procter & Gamble Co* [2001] 1 All E.R. 783 at 795.
[23] *BNP Paribas v Mezzotero* [2004] I.R.L.R. 508.
[24] *BNP Paribas v Mezzotero* [2004] I.R.L.R. 508 at [38].
[25] *BNP Paribas v Mezzotero* [2004] I.R.L.R. 508 at [38].
[26] *Forster v Friedland* Unreported November 10, 1992 CA.
[27] *Greenwood v Fitts* (1961) 29 D.L.R. (2d) 260.

was a Canadian case so this was a real threat!) In *Hawick Jersey International Ltd v Caplan*[28] the plaintiff admitted during the course of negotiations that his claim for money lent was bogus and had been brought purely to blackmail the defendant into settling other issues between them. When the defendant said, "You are not going to force my hand by blackmailing me", the plaintiff replied, "But I have to. What would you do if you had been me?" In both cases, the threats, despite having been made in without prejudice discussions, were held to be admissible.

In *Underwood v Cox*,[29] the plaintiff was contesting his father's will. He wrote to his sister "without prejudice" threatening to reveal embarrassing personal secrets. The sister succumbed to the threat and agreed to their father's property being split in a way which was considerably to the plaintiff's advantage. It was held on appeal that the agreement to split the father's property in this manner, disadvantageous to the daughter, was unenforceable since it had been obtained by threats. The letter containing the threats was admitted because:

> "[The 'without prejudice'] … rule, [is] founded on public policy, [and] cannot be used as a cloak to cover and protect a communication such as the letter in question, which contains no offer of compromise, but a dishonourable threat."[30]

However, the courts have severely limited the circumstances in which they will allow without prejudice negotiations to be investigated on the grounds of "unambiguous impropriety". In *Savings & Investment Bank Ltd v Fincken*[31] the defendant owed the claimant, SIB, money which the claimant, now in liquidation, was seeking to recover. In December 1991 and in December 2002 the defendant had attended without prejudice meetings with SIB. At the later meeting he suggested that he was beneficially entitled to certain shares. In an earlier affidavit of means, which pre-dated the first without prejudice meeting, there had been no reference to these shares amongst the defendant's assets, and at the 1991 meeting he had said that someone else held the shares. SIB sought to give evidence of the without prejudice meetings on the basis that these alleged lies amounted to perjury or "unambiguous impropriety". It was argued on behalf of SIB that the "unambiguous impropriety" exception should be widely interpreted and that the public interest in protecting without prejudice negotiations should give way to the public interest in the honest administration of justice. Rix L.J. gave the judgment of the court and, having reviewed the earlier cases, held that:

> "It is not an abuse of the privilege to tell the truth, even where the truth is contrary to one's case. That, after all, is what the without prejudice rule is all about, to encourage parties to speak frankly … in aid of reaching a settlement: and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances … In the tension between two powerful public interests, it seems to me that that in favour of the protection of the privilege of without prejudice discussions holds sway—unless the privilege is itself abused on the occasion of its exercise."[32]

In *Williams v Hull*,[33] too, there was an attempt to rely on "unambiguous impropriety" to pull away the without prejudice veil. It was said that there was a risk that the defendant "would commit perjury by giving evidence contrary to the statements contained" in a without prejudice letter which made admissions that were inconsistent with his pleaded case. But

[28] *Hawick Jersey International Ltd v Caplan*, The Times, March 11, 1988.
[29] *Underwood v Cox* (1912) 4 D.L.R. 66.
[30] *Underwood v Cox* (1912) 4 D.L.R. 66 at 82 per Middleton J.
[31] *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2003] EWCA Civ 1630; [2004] 1 W.L.R. 667.
[32] *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2004] 1 W.L.R. 667 at [57] and [62].
[33] *Williams v Hull* [2009] EWHC 2844 (Ch); [2009] N.P.C. 132.

it was held that the "unambiguous impropriety" exception still did not apply; since the inconsistent statements in his letter did not involve the abuse of a privileged occasion—which was the sending of the "without prejudice" letter.[34]

Ormrod J. said in 1969 that:

> "where … letters are … headed 'without prejudice' … the court should be very slow to lift the umbrella unless the case for doing so is absolutely plain."[35]

In *Alizadeh v Nikbin*[36] Simon Brown L.J. said:

> "There are in my judgment powerful policy reasons for admitting in evidence as exceptions to the without prejudice rule only the very clearest cases. Unless this highly beneficial rule is most scrupulously and jealously protected, it will all too readily become eroded."

So where the claimant appeared to admit during the course of without prejudice negotiations that a disputed payment of £10,000 had, in fact, been made to him, it was again held that the "unambiguous impropriety" exception did not apply to "a mere inconsistency".[37]

6. Did Mezzotero Extend the "Unambiguous Impropriety" Exception?

In *Woodward v Santander UK Plc*[38] the EAT had to consider whether *BNP Paribas v Mezzotero*[39] had added a new category of exception to the without prejudice rule for discrimination cases. Richardson J. first observed that the ratio of *Mezzotero* was that there was no dispute between the parties which could give rise to the protection of the without prejudice rule in respect of what had been said at the meeting between the claimant and her employers in that case.[40] In considering whether or not *Mezzotero* had extended the exceptions to the without prejudice rule in discrimination cases, he examined the authorities on the question of whether or not the exceptions to the without prejudice rule could be extended.

7. Can the Exceptions to the Without Prejudice Rule Be Extended?

In *Ofulue v Bossert*[41] the House of Lords was being asked to hold that evidence was admissible of an acknowledgment which had been made in without prejudice negotiations, because, it was argued, an acknowledgment, as opposed to an admission, was outside the scope of the protection of the "without prejudice" rule. Lord Hope said:

> "The essence of [the public policy justification of the without prejudice rule] lies in the nature of the protection that is given to parties when they are attempting to negotiate a compromise. It is the ability to speak freely that indicates where the limits of the rule

[34] *Williams v Hull* [2009] EWHC 2844 (Ch) at [53] and [54].
[35] *Tomlin v Standard Telephones & Cables Ltd* [1969] 1 W.L.R. 1378 at 1384.
[36] *Alizadeh v Nikbin*, The Times, March 19, 1993 CA.
[37] *Alizadeh v Nikbin*, The Times, March 19, 1993.
[38] *Woodward v Santander UK Plc (formerly Abbey National Plc)* [2010] I.R.L.R. 834.
[39] *BNP Paribas v Mezzotero* [2004] I.R.L.R. 508.
[40] See also *Barnetson v Framlington Group Ltd* [2007] EWCA Civ 502; [2007] 3 All E.R. 1054, where it was held that there need not be litigation concerning a dispute before the protection of the "without prejudice" rule comes into effect. The emphasis on early settlement of disputes meant that as a matter of public policy, as Auld L.J. put it at [34]: "However, the claim to privilege cannot, in my view, turn on purely temporal considerations. The critical feature of proximity for this purpose, it seems to me, is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so, they could avoid the need to go to court over the very same dispute? On that approach, which I would commend, the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree."
[41] *Ofulue v Bossert* [2009] UKHL 16: [2009] 1 A.C. 990.

> should lie. Far from being mechanistic, the rule is generous in its application. It recognises that unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement. It is not to be defeated by other considerations of public policy which may emerge later, such as those suggested in this case, that would deny them that protection."[42]

In principle Lord Neuberger agreed with Lord Rodger of Earlsferry that it was open to the House of Lords:

> "to create further exceptions to the [without prejudice] rule, and in particular [for] the sort of admission identified by Lord Hoffmann in *Rashid*[43] and by Lord Scott in this case."[44]

Lord Neuberger went on, however:

> "also [to] agree with [Lord Rodger of Earlsferry], and indeed with Lord Hope and Lord Walker, that it would be inappropriate to do so, for reasons of legal and practical certainty."[45]

Other than Lord Scott, who dissented, the remainder of their Lordships agreed with Lord Neuberger's opinion. Three of the other members of the House of Lords in this case, Lord Rodger of Earlsferry, Lord Hope of Craighead and Lord Walker of Gestingthorpe, also expressly suggested that it would be inappropriate further to extend the exceptions to the without prejudice rule (or, at its narrowest, it would be inappropriate to make an exception for an "acknowledgement of title" of the type which was in dispute in this case).

It was in the clear, and relatively recent, light of *Ofulue* that the EAT came to reconsider the application of the without prejudice rule to cases of discrimination in employment, namely in *Woodward v Santander UK Plc (formerly Abbey National Plc)*.[46] In *Woodward* one of the issues on appeal was whether or not the claimant, under the "unambiguous impropriety" exception to the without prejudice rule, could rely on evidence of without prejudice negotiations between the employers and the claimant. It was argued on behalf of the claimant that the employers' absolute refusal to provide an agreed reference as part of a settlement package amounted to unambiguous impropriety on the part of the employers and showed their intention to discriminate by providing a poor reference for the employee. It was in this context that the EAT had to consider whether there was a wider exception to the without prejudice rule in cases where unlawful discrimination is alleged.

The tribunal concluded that there was not. Richardson J., giving judgment, observed that:

> "discrimination claims often place heavy emotional and financial burdens on claimants and respondents alike. It is important that parties should be able to settle their differences (whether by negotiation or mediation) in conditions where they can speak freely."[47]

Having observed that parties are not necessarily "calm and dispassionate" when participating in negotiations and mediation, he went on to say that the parties should be able during negotiations and mediations:

[42] *Ofulue v Bossert* [2009] 1 A.C. 990 at 12.
[43] *Bradford & Bingley Plc v Rashid* [2006] UKHL 37; [2006] 1 W.L.R. 2066 at 13.
[44] *Ofulue v Bossert* [2009] 1 A.C. 990 at 98.
[45] *Ofulue v Bossert* [2009] 1 A.C. 990 at 98.
[46] *Woodward v Santander UK Plc (formerly Abbey National Plc)* [2010] I.R.L.R. 834.
[47] *Woodward v Santander UK Plc* [2010] I.R.L.R. 834 at [61].

> "within limits, to argue their case and speak their mind. What are the limits? To our mind they are best stated in terms of the existing exception for impropriety. This exception … applies only to a case where the Tribunal is satisfied that the impropriety alleged is unambiguous. It applies only in the very clearest of cases."[48]

He concluded:

> "We do not think that [a wider exception to the without prejudice rule where discrimination is alleged] is consistent with the policy behind the rule. We cannot see any workable basis for applying such an exception while preserving the parties' freedom to speak freely in conducting negotiations."[49]

8. Conclusion

It seems therefore that the exceptions to the without prejudice rule are no different in discrimination cases from those in any other type of case. It is notable that the EAT's reasoning in *Woodward*,[50] which led it to this conclusion, is not dissimilar, in terms of the concerns expressed, to that of Rix L.J. in *Savings & Investment Bank Ltd v Fincken*[51] where he considered the case of the honest litigant who made statements which were prejudicial to his cause in a without prejudice meeting and compared it to the alternative:

> "Alternatively, the less scrupulous who make no admissions [would be] better served by the very rules which are designed to encourage frank exchanges than … the more candid. Moreover, the well-advised litigant will be told that if he makes his admission in a hypothetical form, contingent upon settlement, then … the privilege cannot be lost. This is a recipe for legalism and has the danger of turning the without prejudice meeting into a potential trap and one which may moreover be exploited by litigants who do not enter into such discussions altogether in good faith."[52]

As has become increasingly apparent, the public policy in favour of promoting settlements by way of without prejudice negotiations and mediation can now only be trumped by the need to go behind those privileged communications and meetings in wholly exceptional circumstances.

[48] *Woodward v Santander UK Plc* [2010] I.R.L.R. 834 at [61]-[62].
[49] *Woodward v Santander UK Plc* [2010] I.R.L.R. 834 at [64]. It should be noted that in *Woodward* itself the EAT did not consider that the employers' refusal to give a reference as part of a without prejudice negotiation amounted to "unambiguous impropriety".
[50] *Woodward v Santander UK Plc* [2010] I.R.L.R. 834.
[51] *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2004] 1 W.L.R. 667.
[52] *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2004] 1 W.L.R. 667 at [59].