

IS IT REALLY OFF THE RECORD?

The case of Bayliss Shaw & Hansen v McDonald (CRC 23/05 per Judge Couch) raises a very important issue for anyone who may wish to have “*without prejudice*” discussions during an employment process such as a disciplinary investigation or performance management process.

The challenge was non-de novo i.e. limited to questions of law (and not fact). It related to the Authority’s determination that McDonald had been constructively dismissed.

Facts

The not uncommon facts of the case were that Bayliss became dissatisfied with McDonald’s performance, which led to a disciplinary meeting. During the course of that meeting, Bayliss’ representative asked to speak to McDonald’s representative on a “*without prejudice*” basis. Both representatives did so, but took very different understandings of their discussion back to their respective clients: Bayliss understanding that McDonald was to consider its offer of an “*exit package*”; McDonald understanding that a package was agreed. When the parties could not subsequently agree on the terms of that package, McDonald pursued her alleged unjustified dismissal to the Authority, arguing that there was a concluded agreement, or in the alternative that she had been constructively dismissed.

The Authority could not determine whether there was an agreement or not, but found that McDonald had been unjustifiably constructively dismissed. In reaching that conclusion, it took into account the evidence of the representatives’ purported “*without prejudice*” discussion, as well as their follow-up correspondence. In doing so, the Authority concluded that the employment relationship was brought to an end by Bayliss’ inducement of McDonald’s departure, and that when that departure fell apart it was reasonably foreseeable to Bayliss that McDonald would not be prepared to work for it any longer.

Court’s Decision

The Court reviewed the law in respect of “*without prejudice*” communications, saying that:

“The ‘without prejudice’ rule cannot apply in the absence of an existing dispute between the parties to the communication in question... it is clear that in recent years the application of the ‘without prejudice’ rule has been extended by a broader construction of the word which does not limit it to situations in which litigation has either been commenced or threatened. On any view of the matter, however, for a dispute to exist there must be a significance difference between the expressed views of the parties about a matter concerning them both”.

The Court held that as there was no finding of fact by the Authority (it could not make one itself as this was a non-de novo challenge) that McDonald disagreed with the views of Bayliss about her performance, or that those views had even been explained to her, it was unable to infer that there was a dispute. This meant that the “*without prejudice*” rule did not apply to the representatives’ discussion or to their subsequent correspondence.

Interestingly, the Court stated that it would have reached the same conclusion even if there had been a dispute in existence prior to the representatives' discussion. This was because "*there remains a residual jurisdiction to consider evidence of 'without prejudice' communications where the effect of excluding it will be more prejudicial than admitting it*". In this respect, the Court held that Bayliss' proposal of the exit package was a key ingredient of her claim and would therefore not have been protected by "without prejudice" privilege.

How does this case affect you?

The Court sought to limit the applicability of this case by stating that the Authority's conclusion that there was no dispute between the parties, and Bayliss' election to pursue a non-de novo challenge (meaning that the evidence before the Court was solely as concluded by the Authority), meant that the outcome would be unusual.

However, the case raises a serious issue as to the extent to which any such discussions will be truly "without prejudice". In this respect, the Court's decision appears to depart from what most of us would have viewed as being genuine "without prejudice" discussions that occur on a daily basis (as in fact noted in the cases cited by the Court here).

The Court's comments here therefore identify a wider risk given that unless there is truly a "dispute" – as defined in the judgment – such discussions are unlikely to be considered "without prejudice". To be a "dispute", it appears that there does not need to be litigation underway or threatened, but "*a significant difference between the expressed views of the parties about a matter concerning them both*" is still required. To this end, it would appear that unless, for example, the employee (or their representative) has first actively challenged either the employer's process or its substantive basis for commencing that, discussions purportedly "without prejudice" will in fact not attract that privilege. In light of this decision, we suggest that you give serious thought ahead of time to what is to be said where you anticipate the need for such discussions, such that they can properly be "without prejudice".

One potential way around this issue is to have any such discussions in mediation, which as you will be aware is a confidential forum. However, even in mediation the risk remains that what is said or done, if that is not genuinely said or done for the purposes of settling litigation, may not attract the statutory confidentiality we have become accustomed to: Jesudhass v Just Hotel Ltd (WC3/06 per the Full Court¹). An example of this would be the actual or threatened dismissal of an employee at mediation, which would obviously be intended to be effective outside that forum.

As employment specialists, we are happy to advise you further on these issues.

Disclaimer – This newsletter is necessarily brief and general in nature. You should seek professional legal advice before taking any action in relation to any matter dealt with in this newsletter.

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¹ Note that this decision is under appeal, which is likely to be heard in the Court of Appeal in November.