CA on appeal from EAT before Longmore LJ; Smith LJ; Sire Paul Kennedy.. 22nd May 2007.

Lady Justice Smith : This is the judgment of the court.

Introduction

1. This is an appeal by the Brunel University and Professor Steven Schwartz, its Vice-Chancellor, against the decision of the Employment Appeal Tribunal (EAT) dismissing the appellants' appeal against the decision of an employment tribunal (ET) sitting at Watford. The court is also seized of a cross-appeal by the respondents, Professor Vaseghi and Ms Gurdish Webster. The appeal arises from the order made on the appellant's preliminary application to exclude, as inadmissible, various items of evidence from the hearing of the respondents' claims that they had been victimised. The ground of the claimed exclusion was that the evidential material was covered by 'without prejudice' privilege.

Factual Background

2. Professor Vaseghi and Ms Webster are employees of Brunel University. In 2003, each made a complaint of racial discrimination against the University. Their claims were supported by their trade union, the Association of University Teachers (the AUT). In each case, there was a claim for injury to feelings but no claim for any specific financial loss. Each claim went to a tribunal hearing and both sides were represented by counsel. In each case, there were 'without prejudice' settlement discussions before the hearing began. These did not succeed and the hearings proceeded. In each case, the University won. Ms Webster appealed successfully to the EAT but lost in the Court of Appeal. Her case resulted in failure. Professor Vaseghi also appealed successfully to the EAT. The University appealed to the Court of Appeal and we understand that his case was remitted to the ET and, at the present time, remains undetermined.

3. In September 2004, at a time when both claims had failed at first instance but must have been under appeal, the Vice-Chancellor wrote an article in the University's quarterly newsletter. He observed that the defence of ET cases was expensive and was resulting in the diversion of resources which could have been used for more constructive purposes. He expressed the hope that the AUT would adopt a more constructive approach which would 'allow issues to be resolved sensibly and unmeritorious cases to be eliminated'.

4. In January 2005, the AUT published an account of Ms Webster's claim in its magazine and identified her.

5. In the University newsletter of March 2005, the Vice-Chancellor returned to his earlier theme. He made specific reference to the cost of defending two particular claims. The cost had exceeded £60,000. He observed that this money could have been used for teaching and research. He expressed the hope that the AUT would not in future use their members' funds to support futile litigation against the University. He concluded: *"It is our intention to ensure that Brunel will always be a place where all may live, study and work without encountering prejudice or discrimination because of their gender, race, disability, sexual orientation, religion or belief. Any form of unlawful discrimination is unacceptable to Brunel. Should instances of it arise, they will be investigated in the most robust way possible. At the same time, the university will defend its reputation against unfounded allegations, especially when they are accompanied by unwarranted demands for money, as in both the AUT cases."*

6. Professor Vaseghi and Ms Webster took the view that this passage clearly referred to them and, in effect, accused them of having made unwarranted demands for money. They considered that this amounted to victimisation on account of having brought their earlier race discrimination claims. Under sections 29 and 32 and Schedule 2 of the Employment Act 2002, they could not commence ET claims alleging victimisation unless and until they had lodged grievances with their employers. The purpose of these statutory provisions is to encourage parties to attempt to resolve grievances without recourse to proceedings. In April and May 2005 respectively, Professor Vaseghi and Ms Webster lodged grievances. Their grievance letters took a number of points but, for present purposes, can be summed up as follows. They had not made unwarranted demands for money; all they had done was to lodge bona fide claims of racial discrimination. The assessment of any compensation to which they might be entitled was a matter for the tribunal. Far from making any demands for money, it was the University's counsel who had initiated settlement discussions about money. This was a clear reference to the 'without prejudice' discussions which had taken place before the hearings.

7. The University appointed a panel comprising members of its Council to hear and determine both grievances. The hearings, which were formal in nature, were held in July 2005. Professor Vaseghi and Ms Webster were represented by the AUT. The University's case was presented by Mr Paul Bowler, the Managing Director of the University. Each employee gave oral evidence. In each case, there was discussion about what had been said in the settlement negotiations before the tribunal hearings. Ms Webster said that she had asked for £1000 compensation which was to cover her out of pocket expenses. The University had declined to make any offer of money, although it had offered to agree to a number of adjustments to her working conditions. Professor Vaseghi gave evidence that he had been offered £40,000 in settlement of his discrimination claim, provided that he left the University. The panel called for evidence from Professor Sahardi who had led the University's team at the tribunal. He said that no money had been offered during the settlement discussions. On each occasion, the panel reserved its decision and reported to the Council in September 2005. The reports included findings of fact in relation to what had been said about money in the settlement discussions. The panel also drew inferences from these findings of fact. The reports considered whether the employees had been treated 'less favourably' as a result of the publication of the article; they held that they had not been and that there had been no victimisation. They recommended dismissal of the grievances. The panel's view was that the Vice-Chancellor had had both a

right and a duty to write as he had. The University adopted those recommendations and the decisions of the University and the panel's reports were sent to the two employees.

The Victimisation Proceedings – Pre-Hearing

8. On 23rd August 2005 – that is before receiving the grievance decisions - Professor Vaseghi and Ms Webster lodged victimisation claims. Attached to their ET1s, each set out lengthy grounds of complaint. Each complained that s/he had been accused of making unwarranted demands for money because s/he had brought a racial discrimination claim. Included in each statement was an account of what had been said during the pre-tribunal settlement discussions. The University's responses admitted the content of the article but denied that the employees had suffered any detriment or had been victimised. The responses included references to the grievance hearings, which were said to have taken place before 'an independent panel'. It was said that the Vice-Chancellor had given evidence at the grievance hearings and had apologised for any anxiety or stress that might have been caused. Annexed to each response was the grievance panel's report, some of the contents of which we have already described.

9. In accordance with directions, a joint bundle of documents was prepared by Eversheds, the solicitors to the University. It contained several documents containing references to the settlement discussions. Witness statements were exchanged. The University disclosed a statement of Mr Jack Fallow, who had been the Chairman of the grievance panel. He described the grievance proceedings and produced the panel's reports. In response, Thompsons, the solicitors for Professor Vaseghi, disclosed a statement of Ms Vadagama, the solicitor who had attended the tribunal hearing; she related her understanding of the settlement discussions. She asserted that Professor Vaseghi had been offered £40,000 in settlement of his claim on the understanding that he would leave the University.

10. The hearing had been fixed for three days starting on 3rd April 2006. On 30th March 2006, Eversheds wrote to Thompsons about two matters germane to this appeal. First, they indicated that they would object to the evidence of Ms Vadagama because it referred to 'without prejudice' discussions. Second, the letter indicated that the University had not yet decided whether to call Mr Fallow. They asked that his statement should not be sent to the Tribunal.

The Hearing

11. The first day of the hearing was lost because there was a request that one member of the panel should recuse himself. Eventually, that request was accepted and the hearing could not be resumed until the following day.

12. On the morning of the second day, Mr Stafford QC for the University objected to the introduction of certain parts of the evidence on the ground that it would breach the 'without prejudice' rule. It appears that, shortly before the hearing, Mr Pirani (who represented the employees) had pointed out to Mr Stafford that, if Ms Vadagama's evidence breached that rule, so did several other parts of the evidence submitted; for example, parts of the statements of Professor Vaseghi and Ms Webster and parts of the grievance panel's reports. Mr Stafford, who had intended only to object to Ms Vadagama, extended his objection to cover those other parts of the evidence. However, he did not seek to amend the University's response to the claims. He said nothing about other references to the settlement discussions which were, as Mr Pirani said to us, 'peppered' throughout the bundle of documents.

13. The ET observed that the application had been made without warning and at a late stage. No written arguments had been provided. The ET ruled that the references to the settlement discussions contained in the statements of Professor Vaseghi and Ms Vadagama were inadmissible but held that the references within the grievance panel's reports were admissible because the University had waived privilege by hearing evidence about the discussions and putting the findings into the reports. The ET observed that, if the University had wished to retain privilege, it should have made its position clear at the grievance stage. The ET went on to hold that, if it were wrong in its ruling about waiver, it would admit the material in the grievance reports as an exception to the 'without prejudice' rule because, unless such an exception were allowed, the applicants would be unable to get their cases off the ground. The ET based this supposed exception to the usual rule on the *obiter dicta* of Cox J in the EAT case of *PNB Paribas v Mezzotoro* [2004] IRLR 508.

14. The University then persuaded the ET to adjourn the substantive hearing pending an appeal to the EAT on this preliminary ruling. The whole three day slot had been lost.

The Appeal to the EAT

15. In fact, neither side was content with the ET's ruling. Both sides agreed that the ET's solution was illogical and unworkable. Before the EAT, the parties agreed that the settlement discussions had been covered by 'without prejudice' privilege. They also agreed that, if any reference to the discussions were to be made at the victimisation hearing, both sides should be allowed to call what evidence they wished. It must be all or nothing. Mr Stafford argued that there should be no reference at all to the settlement negotiations, whether at first or second hand. The ET had been wrong to hold that the University had waived privilege; also it had been wrong to admit the grievance reports as an exception to the 'without prejudice' rule. Mr Pirani argued that the ET had been right on waiver and on the exception. All the evidence should be admitted. In a cross-appeal, Mr Pirani also sought to argue that the University had waived privilege in its conduct of the victimisation proceedings, by annexing the grievance reports to its responses and by including in the bundle many documents containing references to the settlement discussions. Mr Stafford argued that Mr Pirani should not be allowed to argue the cross-appeal because he had not taken the point before the ET.

16. On waiver, Mr Stafford submitted to the EAT that the University had not waived privilege merely by discussing the earlier settlement negotiations at the grievance hearings. The University had been obliged to consider the employees' grievances and had to hold grievance meetings or hearings; if the employees made tribunal complaints and no grievance meeting had been held, the University could be penalised. He argued that no outside parties were involved in the grievance hearings. Although the Vice-Chancellor had not been directly privy to the settlement discussions, he was involved by reason of his position. Everyone involved in the grievance hearings was within what Mr Stafford called *'the magic circle'*. We shall refer to it as the privileged circle.

17. Mr Stafford also observed that there had been no express agreement to waive privilege. Mr Pirani submitted that waiver could be express or implied. Where implied waiver was relied on, as here, it was necessary to take an objective view of what had been said and done. In the present case, all the circumstances pointed to waiver by both parties. He observed that the 'without prejudice' discussions had been revealed to an independent panel. The University had called oral evidence to contradict Professor Vaseghi's claim that an offer had been made. This had led to the panel making specific determinations about what had been said during the settlement discussions. The parties must have realised that what was said at the grievance hearings was likely to be revealed in future Tribunal proceedings. The ET had been right to conclude that privilege had been waived at the grievance hearing stage.

18. The EAT accepted Mr Pirani's submissions. It observed that the conduct of both parties at the grievance hearings 'took matters far beyond' what had taken place in the settlement discussions. It considered that the panel 'had taken upon itself to conduct secondary litigation in the form of a mini-trial to decide what was not said in the course of negotiations'. The conduct of both parties throughout the grievance hearings was 'totally inconsistent' with the maintenance of 'without prejudice' privilege. The EAT held that there had been waiver of privilege in respect of all references to the settlement discussions, not only those contained in the grievance reports.

19. The EAT also considered the ET's alternative ground under *PNB Paribas* and, although its reasoning differed significantly from that of the ET, it held that the contested material should be admitted as an exception to the usual 'without prejudice' rule. The EAT did not consider the additional ground argued by Mr Pirani on the cross-appeal, although it did not expressly rule on Mr Stafford's objection.

The Appeal to the Court of Appeal

20. Mr Stafford's skeleton argument for this court contained a helpful summary of the law relating to *'without prejudice'* privilege. Much of it was not contentious and it is helpful to state the basic principles here, as set out by Mr Stafford.

    The *'without prejudice'* rule is a rule of evidence. Where it applies, it operates to prevent a party from adducing evidence of negotiations genuinely aimed at settlement between him and his adversary. The privilege attaches to communications between parties to a dispute which have as their object the resolution of a dispute.

    The privilege is a doctrine of high importance, as is made plain by the decision of the Court of Appeal in ***Savings & Investment Bank Ltd (in liquidation) v Fincken*** [2004] 1 WLR 667. Indeed, as that case shows, the public policy underpinning the 'without prejudice' rule is so powerful that it 'trumps' the due administration of justice when the two come into conflict As Rix LJ put it: *"It is of course distasteful for this or any court to avert its eye from an admission which, subject to any point about value, appears to incriminate Mr Fincken in lying in a sworn document. However, in the tension between two powerful public interests, it seems to me that that in favour of protection of the privilege of 'without prejudice' discussions holds sway – unless the privilege is itself abused in the occasion of its exercise."*

    Nor is it necessary for documents or discussions to be headed 'without prejudice' in order to engage the principle. If there is a dialogue with a view to the compromise of a dispute, then the privilege arises irrespective of the presence or absence of a heading (see ***Chocoladefabriken Lindt v Nestle*** [1978] RPC 287).

    The privilege is not, however, engaged where there is no dispute between the parties. The absence of a dispute was the basis upon which the EAT in ***BNP Paribas v Mezzotero*** [2004] IRLR 508 had ruled that no privilege attached to discussions of the terms upon which an employee might leave employment.

    Once the privilege has been engaged, it protects disclosure even after the proceedings have come to a conclusion. The principle is illustrated by the decision of the House of Lords in ***Rush & Tomkins v GLC*** [1989] AC 1280. In that case, proceedings between a claimant and the first defendant had come to an end by means of a settlement, and the claimant was pursuing remedies against the second defendant. The House of Lords ruled that *'without prejudice'* communications between the claimant and the first defendant were not disclosible in the course of the proceedings between the claimant and the second defendant.

    It is not enough for one party to seek to open up the privileged communications. Waiver must be consensual. If one party seeks to adduce evidence of the privileged discussions the other party may agree to this course of conduct or may object.

21. It was common ground before us that the settlement discussions which took place before the race discrimination hearings fell within the ambit of *'without prejudice'* privilege. No one had suggested that those discussions had been conducted otherwise than in good faith. It was also common ground that nothing turned on the fact that the grievance hearings and reports were not explicitly labelled as being 'without prejudice'. Mr Stafford submitted that the ET and EAT had wrongly attached significance to this feature. Both sides agreed that the privilege

continued after the conclusion of the race discrimination hearings. Mr Stafford submitted that it could only be terminated by bilateral waiver. Mr Pirani argued that, in addition to bilateral waiver, privilege could be lost by operation of law, through the application of an exception based either upon the severe prejudice which would be suffered by a party or alternatively upon the abuse of privilege by a party.

22. In oral argument before this court, Mr Stafford argued that the ET and EAT had been wrong to hold that the University had waived privilege at the grievance hearings. He submitted that a grievance hearing is an internal meeting between employer and employee at which it is hoped that the grievance will be resolved. In this case, the grievance hearings had taken place within the groups of people already privy to the settlement discussions. Although the Vice-Chancellor had not been personally involved in those discussions, anyone who was part of the University, as he was, was privy to them. The panel members, as members of the University Council were also part of the privileged circle. Any discussion of the settlement discussions within that circle did not entail a waiver of privilege.

23. Initially, we found Mr Stafford's submissions attractive. We accept that later discussions between the same group of people as were privy to previous negotiations do not amount to a waiver of privilege in respect of the previous occasion. We would also accept his submission that a privileged group or circle might well be extended to include others who had not been directly involved in the original discussions. For example, we would accept that including the Vice-Chancellor in discussions about the earlier negotiations would not entail waiver of privilege. His position and interest would entitle him to inclusion in the circle of privilege. We also accept Mr Stafford's submission that, where, as is usual, a grievance meeting consists of an internal (employer and employee) discussion about the grievance, the fact that previous 'without prejudice' negotiations are mentioned will not entail waiver of privilege in respect of those negotiations. If the grievance meetings in these two cases had been confined to a discussion of the issues only by those within the privileged circle, we do not think that it could be said that there had been any waiver of privilege.

24. However, in this case, the University set up something quite different from the usual employer and employee grievance meeting. The Council members were brought in to form a supposedly independent panel. They were selected because they knew nothing about the dispute or the people involved in it. We do not think it could be said that they were within the privileged circle, even though they were members of the University Council. Their function at the hearings was not to discuss and attempt resolution of the grievances. Instead, the panel's function was to act as independent adjudicators. The proceedings were formal and adversarial. Evidence was called. Findings of fact were made; inferences were drawn and conclusions reached. The EAT was entitled to describe the proceedings as a mini-trial within subordinate litigation. It does not seem to us that the University can claim on the one hand that the panel was independent and, on the other, that it was part of the internal privileged circle. Nor does it seem to me that the University can claim that the proceedings were just a grievance meeting such as it was obliged by statute to conduct when the reality was that they were a mini-trial, leading, in effect, to judgment.

25. The facts of this case are most unusual. In our judgment, on the particular facts of this case, the EAT's observations and its conclusion were justified. In most cases, where a grievance meeting takes place in the usual way, internally, there will be no question of waiver if the parties mention matters covered by 'without prejudice' privilege. But in the particular and unusual circumstances of this case, where the proceedings were in effect a trial of the victimisation issues by an independent panel and where both parties gave or called evidence of the previous negotiations, the EAT was entitled to conclude that privilege had been bilaterally waived.

26. We appreciate that the EAT's expressed reasoning was different from that of the ET. In holding that there had been waiver, the ET focussed on what the University could have done to avoid waiver and failed to explain why it held that there had been waiver. That was not entirely satisfactory. However, we have much sympathy for the ET. This preliminary application to exclude 'without prejudice' material was sprung upon it without warning. There were no written arguments. It may be that the ET was not familiar with the rules relating to 'without privilege' discussions. No doubt it was anxious to get on with the substantive hearing. It is clear that it did not realise that its decision to admit some parts of the contested evidence and exclude others was illogical and unworkable. However, it has not been suggested that the EAT was not in a position to substitute its own finding on waiver. It plainly was. There was no dispute about the basic facts on which the decision as to waiver was to be based.

27. We cannot accept Mr Stafford's criticism that the EAT attached importance to the fact that the grievance hearings had not been labelled 'without prejudice'. In our view, it is clear that the EAT took an objective view of whether, by their conduct in respect of the grievance hearings, both parties had waived privilege.

28. Our conclusion is that the EAT was justified in concluding that there had been a bilateral waiver of privilege in respect of the 'without prejudice' negotiations. On that ground, we would dismiss the appeal.

Arguments about Exceptions to the Rule

29. Strictly speaking, that is sufficient to dispose of this case. However, parts of the decisions of the ET and EAT and much of the argument before us related to the question of whether there exists a particular exception to the rule relating to *'without prejudice'* privilege which applies only in discrimination and victimisation cases. The ET held that there was such an exception, based on the severe prejudice which applicants might suffer if they were unable to refer to matters discussed during grievance meetings. Before the EAT, there was extensive reference to authority, including ***Savings & Investment Bank Ltd (in liquidation) v Fincken*** [2004]1 WLR 667, from which derived the

principle that the protection of 'without prejudice' privilege would be lost if a party used the privileged occasion to perpetrate some *'unambiguous impropriety'*. Examples of such abuse might be a threat of violence or blackmail.

30. In its judgment, the EAT accepted Mr Pirani's submission that, in discrimination cases, the need to get to the truth of what had occurred for the purpose of eradicating discrimination might 'tip the scales' against the need to protect 'without prejudice' privilege. The EAT considered that the employees in the present case would be in difficulties unless they could rely on what had been said in the settlement negotiations. The EAT also observed that it had been the University that had made the public allegation that the employees had made unwarranted demands for money. It had been content to rely on the 'without prejudice' negotiations when making its case before the grievance panels. It would, said the EAT, be an abuse of a privileged occasion not to allow the employees to refer to the discussions to support their claim of victimisation.

31. Mr Stafford attacked these aspects of the EAT's decision as plainly wrong. He submitted that there is no principle known to law which exempts discrimination proceedings from the general rules relating to 'without prejudice' privilege. He submitted further that reliance on the exception of 'unambiguous impropriety' must be limited to actions that are unambiguously improper. Moreover, the actions must relate to the privileged occasion itself. Here the settlement negotiations themselves were conducted in good faith and with complete propriety. The exception could not apply. The impropriety or abuse identified by the EAT was the University's refusal to agree to the employees using the 'without prejudice' material to advance their tribunal claims. That fell far outside the kind of situation envisaged in ***Fincken's*** case.

32. We do not propose to lengthen this judgment by a discussion of the authorities or the rival submissions advanced before us on these issues. Our decision to allow the appeal is based on waiver. Anything we might say on the subject of potential exceptions to the usual rules on *'without prejudice'* privilege would be *obiter*. This is not, in particular, the occasion to determine the correctness of the remarks of the EAT in ***BNP Paribas v Mezzotero*** in relation to the suitability of the application of the unambiguous impropriety principle in unlawful discrimination and victimisation cases. We can understand a possible submission that it may sometimes be difficult to prove victimisation if the general rule (that remarks made in the course of 'without prejudice' discussions cannot be referred to) applies in its full width. In the present case, however, it is not at all surprising that the University in defending itself against the allegations should have felt the need to adopt the claimants' approach that the *'without prejudice'* discussions needed to be referred to. That must be a very common position for parties to victimisation claims to find themselves in and analysis in this court of the dicta in *Mezzotero* should only take place in a case where one of the parties has made it clear at an appropriate early stage that it seeks to exclude any reference to 'without prejudice' discussions.

The Cross Appeal

33. In the light of our decision to dismiss the appeal on the ground of waiver, it is not strictly necessary to say anything about the cross-appeal. However, we do so because it provides an additional route to the conclusion we have already reached.

34. Mr Pirani's argument was that, even if the University had not waived privilege by its conduct of the grievance hearings, it had done so when, in response to the victimisation claim, it had relied on the grievance proceedings and had appended the reports to its responses. He also contended that privilege had been waived by compiling the bundle of documents so as to include 'without prejudice' material and by disclosing the statement of Mr Fallow who referred to and relied on the grievance hearings and their outcome. However, it seems to us that, if the point is good in relation to appending the reports to the response, nothing is added by the other actions.

35. Mr Pirani agreed with Mr Stafford's submission that, to be effective, waiver of 'without prejudice' privilege must be bilateral. He submitted that the employees had indicated their wish to waive privilege by referring to the settlement negotiations in the statements attached to their forms ET1. The University had indicated its agreement to that course by appending the reports to its pleading. Waiver was then complete.

36. Mr Stafford argued first, that we ought not to consider the cross-appeal because Mr Pirani had not advanced it before the ET. We would reject that submission. Although we accept that this court will not usually consider arguments not raised below, the rule is not absolute. If, as here, the new point depends on basic facts that are either found or not disputed, the court may, in its discretion, allow it to be argued. Here, the question of 'without prejudice' privilege was raised before the ET almost without warning. No written arguments were submitted. Mr Pirani did not have much opportunity to consider his responses, let alone time to ponder upon or research arguments additional to the ones which immediately occurred to him. During argument, it was pointed out that the ET had not mentioned Mr Stafford's 'Magic Circle' argument in its reasons. Mr Stafford was sure that he had argued the point. Mr Pirani thought that he had not. Mr Stafford found his notebook which showed that he had made the point, (apparently in reply) that the grievance hearings were 'internal'. It did not appear to us that this point was at the forefront of Mr Stafford's arguments until he reached the EAT. Mr Pirani's new argument was not raised at the ET but was fully pleaded before the EAT. It is not clear whether the EAT refused to consider it because it upheld Mr Stafford's objection or whether it felt that there was no point in doing so as the employees had succeeded in any event. During the hearing, we indicated that we intended to hear the cross-appeal.

37. On the merits, Mr Stafford argued that there had been no waiver by the University. The University could only be said to have waived privilege if it had actually put the disputed material before the tribunal in support of its defence to the complaint of victimisation. He had made his objection to the use of 'without prejudice' material

before this had happened. All that had happened so far was the exchange of 'pleadings' and the disclosure of documents and witness statements. He had made his objection in time. In the course of argument, it was put to Mr Stafford that, if he had wished to prevent the use of any unintentionally disclosed 'without prejudice' material, he should have applied to amend the University's response, so as to delete any reference to or reliance upon the privileged material in the reports of the grievance panels. This he had not done. His response was that, if the present appeal succeeded, he would apply to amend before the reconvened hearing. If permission to amend was granted, all references to the 'without prejudice' discussions could be filleted out of the papers.

38. Mr Pirani submitted that, in employment tribunal proceedings, an ET1 and an ET3 are more than mere pleadings; they are statements of the facts and often the evidence on which the party relies. He contrasted this with the particulars of claim in a civil action where pleadings are only statements of the basis of the case and there is no commitment to them in the way that there is in tribunal cases. It is unrealistic to think that a party can set out its case and its evidence in an ET3 and then seek to withdraw a major part of it at the hearing.

39. We are not convinced that there is, in this respect, any distinction of substance between proceedings in an employment tribunal and a county court. Nowadays, in both types of proceedings, the parties are expected to set out their cases in some detail. In the county court, the party has to attach a statement that he believes the content of his pleading to be true. That does not, of course, mean that he cannot apply to amend it. In the ET, parties are enjoined to ensure that the information they give is as accurate as possible but that does not mean that there cannot be an application to amend.

40. In our view, it is clear that, by referring to the *'without prejudice'* discussions in their ET1s and witness statements, the employees made it plain that they intended, unless prevented, to waive their privilege. By pleading their responses as they did and by attaching the grievance panel's reports to the ET3s, the University made it plain that it too intended to waive privilege. In our view, bilateral waiver had taken place at the time the ET3s were lodged with the Tribunal office. Considering the nature of the issues, this was an entirely sensible and understandable position for both sides to take. However, we would accept that the die was not yet irrevocably cast in that either side could have applied to amend its pleading so as to remove all reference to the 'without prejudice' material. If the University had sought that permission and if permission had been granted, it would have been possible for the waiver to be withdrawn. Of course, the grant of such an amendment would be discretionary. The time at which the application was made would be highly relevant. If made shortly after the ET3 had been filed, it might have had a good chance of success. So also would the extent of the consequential amendment of the case be significant. If the 'without prejudice' material were peripheral to the case, the amendment might be allowed more readily than where the effects of amendment were to be radical. But where as here, an application to amend has not even yet been made and where the application to withdraw reference to the 'without prejudice' discussions would have a radical effect on the proceedings, we have no hesitation in saying that it is now far too late for the University to retrieve the position. The waiver, clearly communicated by its ET3 response, must now stand.

41. Accordingly we would allow the cross-appeal. This produces the same result as dismissing the appeal.

Andrew Stafford QC (instructed by Eversheds LLP) for the Appellants
Rohan Pirani (instructed by Thompsons) for the 1st Respondent and (instructed by Webster Dixon) for the 2nd Respondent