SUMMARY : Practice and Procedure - Disclosure

Allegations that Claimants had made unwarranted demands in original tribunal proceedings said to be victimisation.

Grievance procedure heard evidence relating to without prejudice discussions to show who was making demands.

Tribunal correct in allowing reference to discussions in grievance report on the basis of waiver or abuse of privileged occasion. They should also have allowed evidence of original discussions.

JUDGMENT HIS HONOUR JUDGE ANSELL EAT. 16th October 2006

1. This is an appeal and cross appeal from a decision of an Employment Tribunal sitting at Watford on 4 April 2006 who in a judgment on a preliminary point of evidence sent to the parties on 11 April 2006 determined that evidence in respect of the 'without prejudice' settlement discussions at the Respondents' respective initial hearing of their claims against the Appellants for race discrimination were inadmissible but that the written reports of the First Appellant's Grievance Panel including such evidence were admissible. In this appeal the Appellants contend that the relevant parts of the Grievance Panel report should be also excluded and by way of cross appeal the Respondents contend that both the report and the original discussions should be admitted in evidence.

2. By way of background facts both the Respondents are employees of the Appellant University whose Vice Chancellor at the relevant time was the Second Appellant. In 2003 the Respondents made separate complaints of race discrimination (which did not involve the Second Appellant) and were represented by their Union AUT. In each of the original proceedings there had been a claim for compensation advanced by each of the Respondents and in each case there had been settlement discussions between the parties through their representatives immediately prior to the Tribunal hearing in March 2004. In neither case did those discussions lead to a settlement and it is accepted that those discussions would normally be protected by the 'without prejudice' privilege. Mrs Webster lost her Tribunal hearing, was successful in this Court but again lost in the Court of Appeal. Professor Vaseghi similarly lost the Tribunal hearing was successful in this Court and has an appeal pending to the Court of Appeal.

3. The second Appellant issued quarterly reports in the form of a newsletter which discussed issues of concern to the Vice Chancellor and which had a wide circulation. In September 2004 he had addressed the issue of the cost of litigation and contended that the defence of Employment Tribunal cases had resulted in resources being diverted which could have been used 'for more constructive purposes'. He expressed the hope that the Union would adopt a more constructive approach which would 'allow issues to be resolved sensibly and unmeritorious cases to be eliminated' and made it clear that 'the University will defend Employment Tribunal claims that it considers to be unfounded and it will not make settlement payments merely to avoid going to Court'. The next newsletter in March 2005 took up the same issue and made reference to the costs of the defence in the two Tribunal cases exceeding £60,000. The article also contained the following passages 'this is money that could have been used for teaching and research. I express the hope that, in future, the AUT would allow issues to be resolved sensibly and unmeritorious cases to be eliminated, rather than to use AUT members' funds to support futile litigation against the University, to the detriment of everyone concerned.' Later in the same article he continued as follows:

   "It is my 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 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 these are accompanied by unwarranted demands for money, as in both the AUT cases."

   It is the use of the phrase 'unwanted demands for money' that is very much the focus of this appeal.

4. This article led to letters of complaint from the Union and also a report in the Times Higher Education Supplement. On 26 April 2005 Professor Vaseghi lodged a grievance concerning in the article, alleging it was an act of victimisation. In his grievance letter he contended that he had neither directly or through the Union or his solicitors made any demands for money and contended that it was the University who had initiated discussions over money within the settlement negotiations. A similar grievance letter was sent by Ms Webster on 3 May 2005. The grievances were heard by an independent committee of members of the Council of the University who had no prior knowledge of either grievance or of the parties. Within their deliberations the Committee considered the use of the phrase 'unwanted demands for money' and heard oral evidence about discussions regarding the possibility of a settlement immediately prior to the original Tribunal hearing. The committee asked Professor Sahardi to join the hearing as he had led the Brunel team at the Tribunal and questioned him about a claim by Professor Vaseghi that his barrister had been offered £40,000 to settle before the Employment Tribunal; this was denied by Professor Sahardi. That section of the Committee's report concluded as follows:

   "The committed concluded from Professor Vaseghi's oral evidence that he had turned down an offer which he had believed to be £40,000 and wished to carry on with the tribunal. Given that his case was for compensation, and that he believed that he had already down £40,000 the committee found it difficult to conclude that he did not have in mind a significant financial settlement."

   Overall, the Grievance Committee did not find that the grounds for the grievance were established.

5. Similarly in the Webster hearing the Committee heard oral evidence about discussions regarding a possibility of a settlement immediately prior to the Tribunal and noted that Ms Webster had had a list of demands. The report continued as follows:

"Both sides agreed that, in discussions immediately before the Employment Tribunal, the University had already agreed all of the non-financial points raised by Gurdish Webster's barrister. The final demand was for money. Her representative withdrew from the discussion when no compensation was offered.

In her oral evidence, Gurdish Webster said that she had felt that a sum of not less than £1,000 was reasonable since she had incurred expenses as a result of, for example, photocopying and travelling to meetings with the AUT and her solicitor.

Therefore, it seemed clear to the Committee that the entire tribunal hearing was pursued with the sole remaining objective of winning her final demand, which was for money."

Her grievance was also rejected by the Committee.

6. The Webster grievance hearing had taken place on 18 July 2005 and the Vaseghi Panel on 22 July 2005. Both the Respondents initiated claims for victimisation and direct discrimination on 23 August 2005, although the discrimination claims were later withdrawn. In Professor Vaseghi's ET1 his grounds of complaint contained the following: *"At no point, did I, or my legal representatives, put forward any financial proposal to settle my claim."*

Ms Webster's complaint included the following: *"It was the Respondent who, through my barrister just prior to the start of the Tribunal Hearing, attempted to initiate discussions about settlement."*

7. The Grievance Panel decision and report was sent to Professor Vaseghi on 16 September 2005 and to Ms Webster on 19 September and the Appellant's response ET3 was sent on 30 September. In both cases the Response made reference to the Grievance Panel and its report and a copy of the Panel's report was appended to the Grounds of Resistance.

8. In due course a final hearing was fixed for the week of 3 April 2006 and witness statements were exchanged towards the end of March 2006 with the Appellants preparing the trial bundle. One of the Respondents witness statements was from Anita Vadagama, an Employment Solicitor at Thompsons Solicitors who acted for Professor Vaseghi in the original discrimination proceedings. Paragraph 4 of her statement read as follows:

"On the first day of the Tribunal hearing, held between 22 March 2004 and 26 March 2004, Stuart Brittenden (Counsel for Professor Vaseghi) approached Mr Neil Vickery (Counsel for the Respondent) to ascertain whether the University was interested in conciliation. It is my recollection that Stuart told Professor Vaseghi and myself that Neil Vickery (Counsel for the Respondent) had suggested a financial settlement of around £40,000 on the proviso that Professor Vaseghi's employment was terminated.

Professor Vaseghi rejected this offer, as he was not interested in such a financial settlement."

There was also a statement in the bundle filed by the Appellants from Jack Fallow who was at the time a Council member of the University and who chaired the Grievance Committee. He gave a full summary of the Committee's work and under the section that dealt with the allegations concerning 'unwarranted demands for money' he said this: *"With regard to the word "demand", the Committee considered the facts in relation to settlement both in the Tribunal documentation and also in discussions prior to the hearing of the Tribunal."*

9. On 30 May 2006 Eversheds, Solicitors acting on behalf of the Appellants wrote to the Respondents solicitors about a number of matters of evidence and in relation to Ms Vadagama's statement said this: *"At the same time, we do not accept the witness evidence of Anita Vadagama as it contains neither relevant nor admissible evidence. The first section of Ms Vadagama's Witness Statement is an expression of opinion and the second part is clearly without prejudice and plainly inadmissible. Accordingly, we put you on notice that we intend to object to the evidence of this witness."*

The letter also indicated that they had not decided whether or not it was necessary to call Jack Fallow to give evidence at the hearing.

10. Mr Pirani who appears before us and who appeared below on behalf of the Respondents told us that in discussions with Mr Andrew Stafford QC on behalf of the Appellants he pointed out that the Appellants' objection to the 'without prejudice' discussions being referred to by Ms Vadagama could also affect the admissibility of parts of the grievance report where they had discussed what had taken place at the Regional Tribunal hearing. It could also affect those parts of the Respondents' witness statements that dealt with the negotiations. The issue of admissibility was not dealt with until the second morning of the Tribunal hearing since there were other procedural difficulties that occupied the Tribunal's deliberations on the first day. The Tribunal noted that they had not had any prior warning of the admissibility argument and indeed there were no written submissions before the Tribunal dealing with this issue although they acknowledged that they had had detailed oral submissions from both parties as well as reference to two cases ***Savings and Investment Bank Ltd (in liquidation) v Fincken*** [2004] 1 WLR 667 and ***PNB Paribas v Mezzotero*** [2004] IRLR 508.

11. The Tribunal's conclusions were set out in paragraphs 5 and 6 as follows:

> *"5. The submissions of the Respondent with which the Tribunal agreed is that all communications and discussions which took place at the initial Employment Tribunal Hearings of the Claimants' respective claims are subject to the 'without prejudice' rule and therefore inadmissible and that there is no reason and no point of law which required the Tribunal to make an exception. Therefore we rule that the oral evidence of the solicitor witness (Ms Vadagama) that we have referred to is inadmissible as is the relevant paragraph in Professor Vaseghi's statement.*

5.1 So far as the respective Reports of the Grievance Panel (which appear in the bundle at page 141 in respect of the First Claimant and page 154 in respect of the Second Claimant) are concerned, the Tribunal considers that there has in fact been a waiver by the First and Second Respondent in respect of the matters set out in the respective Grievance Reports.

5.2 We find this to be the case on the basis that, if the Respondents had wished to take the point, the Grievance Panel dealing with those grievances (which of course are a statutory requirement under the Employment Act 2002 before a victimisation claim can be made) they should have taken the point that these discussions at the Tribunal were in fact "without prejudice" and therefore should not be referred to in their determination. However, quite the reverse occurred.

5.3 there was considerable oral evidence placed before the Grievance Panel as to what had in fact occurred in the 'without prejudice' discussions in both cases and determinations were made by the Grievance Panel in that respect.

5.4 So the view of the Tribunal is that there was a waiver of any entitlement to treat those discussions as "without prejudice".

*6. Even if we are wrong about that, we have also formed the view (on the basis of the tpart of Mrs Justice Cox's judgment in **BNP Paribas v Mezzotero** which appears at paragraphs 34 onwards) that since the employer's findings under their grievance procedure are an essential element put forward by the Claimants to establish their claims of victimisation, albeit occurring after the event of victimisation, and because the Claimants would be severely prejudiced, indeed disadvantaged almost to the point where their claims would not even get off the ground at all if that evidence was excluded, the "without prejudice" rule should be held not to apply in these particular circumstances to that evidence. However, admissibility should not be extended to include the "without prejudice" discussions that took place at the respective Hearings because the protection of privilege should hold sway in that regard. Further, it is unlikely that any witness kept any note of what was said by whom and when. So the Tribunal would have an almost impossible task in determining from which side a particular suggestion first came, how the discussion on that particular suggestion then developed, what suggestions or offers were made, what counter-suggestions and counter-offers were made prior to no concluded settlement being arrived at."*

12. Mr Stafford on behalf of the Appellants sought to attack the Tribunal's decision under both grounds relied upon namely 'severe prejudice' and 'waiver'. Before dealing with his arguments we should record the fact that at the outset of the case both parties agreed that if we were to uphold the Tribunal's decision as regards the admissibility of the relevant sections of the grievance report then it would be illogical to seek to exclude the original 'without prejudice' discussions since the same reasons the Tribunal gave for permitting evidence relating to the grievance reports must also apply to the 'without prejudice' discussions i.e. waiver or severe prejudice. In our view Mr Pirani correctly argued that there could not be a partial waiver which would permit the negotiations to be referred to in an indirect or as Mr Stafford called it, back door form through the grievance reports and yet not allow direct evidence from those actually involved in the negotiations. This seems to us to be particularly relevant since the Grievance Panel did not hear from either the barristers or solicitors who were actually involved in the discussions. Mr Stafford also made the valid point that the effect of the Tribunal's ruling as is presently stands would be to prevent the Appellants from explaining what happened during the settlement discussions whilst permitting the Respondents to explain what they had understood from those settlement discussions by means of their comments in the Panel's report.

13. We move on to consider the Tribunal's decision based on their understanding of the two exceptions to the 'without prejudice' rule namely serious prejudice and waiver.

Serious Prejudice

14. Mr Stafford began his submissions by helpfully reminding us of important general principles in relation to 'without prejudice' discussions. Firstly, the important public policy underpinning the rule sought to encourage unfettered and hopeful fruitful negotiations between parties to a dispute. Secondly, the rule that it is not necessary for documents or discussions to be actually headed 'without prejudice' in order to engage the principle; one has to look at the dialogue between the parties to ascertain whether it has taken place with a view to a compromise of a dispute in which case the privilege will arise irrespective of the presence or absence of a heading. In ***Chocoladefabriken Lindt v Nestle*** [1978] RPC 287 Megarry, V-C put the matter thus at page 288: *"…The mere failure to use the expression "without prejudice" does not conclude the matter. The question is whether there is an attempt to compromise actual or impending litigation, and whether from the circumstances the court can infer that the attempt was in fact to be covered by the "without prejudice" doctrine."*

There is no doubt in this case that the original Tribunal proceedings constitute a dispute and the settlement discussions that preceded the hearing attracted the 'without prejudice' privilege. The third principle is that once the privilege has been engaged it protects disclosure even after the proceedings have come to a conclusion. Mr Stafford took us to 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 disclosable in the course of the proceedings between the claimant and the second defendant.

15. Lastly, Mr Stafford submitted that the 'without prejudice' doctrine was one of such high importance and the public policy underpinning was so powerful that it "trumps the due administration of justice when the two come into conflict" and that the privilege can only be lost when one party is shown to have abused the privileged occasion to use it as an opportunity for 'unambiguous impropriety' eg to threaten blackmail or violence within the negotiations would be such an example. He argues that privilege was not lost by saying one thing on the privileged occasion and the saying something completely different on an open occasion. In ***Savings & Investment Bank Ltd (in liquidation) v Fincken*** [2004] 1WRL 667 the plaintiff company brought proceedings against the defendant for recovery of a debt. In the course of that litigation three successive, formal settlements of the claim were made and the third settlement deed contained a contractual warranty that all of the defendant's assets worth £5,000 or more had been disclosed in an affidavit of means. The plaintiff subsequently brought an action against the defendant to set aside that third settlement deed on the ground that the defendant had fraudulently or negligently misrepresented his assets in an affidavit of means. In a 'without prejudice' meeting the defendant admitted owning shares in a company which he had not disclosed in his affidavit and the plaintiff applied to amend his statement of claim to include that admission on the grounds that it was an unambiguous impropriety and accordingly an exception to the doctrine of 'without prejudice' privilege. The defendant did not give evidence in rebuttal. The judge held that the admission fell within the exception and exercised his discretion to allow the subject matter of the admission to be pleaded but the Court of Appeal in allowing the appeal held that although cases of unambiguous impropriety were an exception to the general rule that exception was not to be applied too readily in view of the public interest in encouraging parties to speak frankly to one another in aid of a settlement. The court held that it was not the mere inconsistency between an admission and a pleaded or stated position with the possibility that it persisted it might lead to perjury that led to the admitting party losing the protection of privilege rather it was a fact that the privilege was itself abused. In paragraph 46 Rix LJ cited with approval Hoffman LJ in an unreported case of ***Forster v Friedland*** (unreported) 10 November 1992, Court of Appeal: *"These are clear cases of improper threats, but the value of the without prejudice rule would be seriously impaired if its protection could be removed from anything less than unambiguous impropriety. The rule is designed to encourage parties to express themselves freely and without inhibition. I think it is quite wrong for the tape recorded words of a layman, who has used colourful or even exaggerated language, to be picked over in order to support an argument that he intends to raise defences which he does not really believe to be true."*

He then went on to cite with approval Simon Brown LJ in another unreported decision of ***Fazil-Alizadeh v Nikbin*** (unreported) 25 February 1993; Court of Appeal (Civil Division) Transcript No 205 of 1993: *"I add only this. There are in my judgment powerful policy reasons for admitting in evidence as exceptions to the without prejudice rule only the very clearest of cases. Unless this highly beneficial rule is most scrupulously and jealously protected, it will all too readily become eroded. Not least requiring of rigorous scrutiny will be claims for admissibility of evidence advanced by those (such as the first defendant here) who have procured their evidence by clandestine methods and who are likes to have participated in discussions with half a mind at least to their litigious rather than their settlement advantages. That distorted approach to negotiation to my mind is itself to be discouraged, militating, as inevitable it must, against the prospect of successful settlement"*

Later at paragraph 62 Rix LJ said this:

> *"62 It is of course distasteful for this or any court to avert its eyes 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 the protection of the privilege of without prejudice discussions holds sway – unless the privilege is itself abused on the occasion of its exercise."*

16. Mr Stafford submitted that in this case there was nothing in any way improper concerning the original negotiations. There was no impropriety or even as in the ***Fincken*** case an allegation that lies had been told within the discussions.

17. Finally, on this aspect of the case Mr Stafford took us to the recent EAT decision of ***BNP Paribas v Mezzotero*** [2004] IRLR 508 (Cox J presiding). In that case Miss Mezzotero had two weeks after returning to work on maternity leave raised a grievance relating to the way she had been treated prior to on her return from maternity leave. After invoking the grievance procedure she was asked to attend a meeting to discuss her position. At the start of the meeting the employer said that they wanted to discussions to be 'without prejudice' and then explained that it was not viable for her to return to her old job. There was no other available alternative position for her and suggested that it would be best for the business and for her if she terminated her employment with the bank in which case she would be paid standard redundancy package of almost £100,000. She subsequently presented an application to the Employment Tribunal alleging direct sex discrimination and victimisation in seeking to terminate her employment after she had raised a grievance. The employers sought to exclude the evidence relating to the meeting on the grounds that it was without prejudice and therefore subject to legal privilege. The EAT supported the Employment Tribunal Chairman's ruling that the evidence could be adduced since there was no extant dispute between the parties as to the termination of her employment as the act of raising a grievance did not by itself mean that the parties to the employment relationship were necessary in dispute. However, towards the end of the EAT judgment the Court went on to consider alternative findings by the Chairman namely that the Applicant would have been prejudiced in the proceedings if she were unable to refer to the acts and statements of her own employers at the meeting; alternatively that it would have been an abuse of the rule to permit the employers in the circumstances of the case to maintain the use of privilege to prevent references to the fact that they sought to terminate the Applicant's employment. The employers had

argued that there had to be a very clear case of abuse of a privileged occasion amounting to an unambiguous impropriety before the 'without prejudice' privilege could be lost or overridden in the public interests. Mrs Justice Cox continued her judgment as follows:

"34 Mr Galbraith-Marten makes essentially two submissions in response:

*(1) He relies on the dicta in **re Daintrey** that the rule has no application to a communication which in its nature may prejudice the person to whom it is addressed. These dicta, he contends, apply generally and are not restricted to the special factual circumstances of bankruptcy; and **Daintrey** remains good law on the authorities. In the present case, since the employer's statements found, in part, the Applicant's cause of action under the Sex Discrimination Act 1975 she would be severely prejudiced and disadvantaged if she could not refer to them. The rule should therefore be held not to apply.*

*(2) In the alternative, if, as Robert Walker LJ observed in the **Unilever** case, these dicta are now to be seen as somewhat obscure, but yet may contain the germ of the notion of abuse of a privileged occasion which has developed in later cases, he relies on the employer's conduct as falling within the concept of unambiguous impropriety, in the context of a genuine and legitimate complaint of sex discrimination, and thus as amounting to an exception to the rule.*

*35 In my judgment, Mr Galbraith-Marten's submissions are the more persuasive. What lies at the heart of the issue in this case is that this Applicant alleges direct sex discrimination and victimisation against her employers in seeking to terminate her employment after she had raised a grievance concerning discriminatory treatment following maternity leave. The sex and race discrimination legislation seeks to eradicate what the Court of Appeal have referred to as the "very great evil" of discrimination - see **Jones -v Tower Boot** [1997] IRLR 168, and I consider that it is very much in the public interest that allegations of unlawful discrimination in the workplace are heard and properly determined by the Employment Tribunal to whom complaint is made, as the appropriate forum under the legislation. Further, it is widely recognised that cases involving allegations of sex and race discrimination are peculiarly fact-sensitive and can only properly be determined after full consideration of all the facts - see **Anyanwu -v- South Bank Students Union and South Bank University** [2001] IRLR 305, and in particular the speeches of Lord Hope and Lord Steyn.*

36 It is also widely recognised that proving direct discrimination is not an easy task for any complainant. Before the recent changes to the Sex Discrimination Act, following the EC Burden of Proof Directive, the case law had established that a complainant had to prove primary facts showing less favourable treatment, from which Employment Tribunals could, if they considered it appropriate, and without any, or any adequate explanation being advanced by the Respondent, infer that the less favourable treatment was on grounds of sex. The primary facts from which inferences of unlawful discrimination could be drawn were therefore a vital part of any complaint of direct discrimination before an Employment Tribunal. In my judgment, they remain equally important under the Act as amended, where section 63A(2) now provides:

'Where on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent -

(a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part 2,

…….

the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act'

37 In the present case, as Mr Galbraith-Marten points out, the logical result of Mr Davies' submission is that an employer in dispute with a black employee could say during discussions aimed at settlement in a meeting expressed to be being held without prejudice, "we do not want you here because you are black" and could then seek to argue that the discussions should be excluded from consideration by a Tribunal hearing a complaint of race discrimination.

*38 Mr Davies immediately says that such a remark would obviously fall under the umbrella of unambiguous impropriety. I agree. However, Mr Davies is then faced with the unattractive task of attaching different levels of impropriety to fact-sensitive allegations of discrimination, in order to submit that the present 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, rather than it was as previously described, in terms of prejudice in the case of **re Daintrey**.*

39 I do not regard this case as creating an impermissible extension to the categories of the rule, exceptions which will always fall to be considered within the particular factual context of the case and which, in the present case concerns discriminatory conduct by employers towards one of their employees. For all these reasons this appeal must be dismissed."

18. Mr Stafford argued that although in the ***Paribas*** case the employee's Counsel was suggesting that there were two possible exceptions to the 'without prejudice' rule namely severe prejudice and disadvantage or unambiguous impropriety Mrs Justice Cox's conclusions in paragraph 38 appeared to favour the latter which she described as

'within the abuse principle' and she had referred to dicta of Robert Walker LJ in the Unilever case. The authority is ***Unilever Plc v Procter and Gamble*** [2001] WLR page 2436 where at 2447 Robert Walker LJ said this:

*"In the **re Daintrey** [1893] 2 Q.B. 116 a creditor had presented a bankruptcy petition based solely on a letter from his debtor (against whom he had taken proceedings but not yet obtained judgment). The letter was headed "without prejudice" and made an offer to compound for the debt. But it also stated that the debtor could not pay his debts and would suspend payment unless the composition was accepted. The issue for the court was whether this was an act of bankruptcy, and the Brighton County court accepted the debtor's argument that it was not. On appeal the creditor's counsel argued that the without prejudice rule had not application, and that a debtor could not evade the bankruptcy law by putting a "without prejudice" label on an act of bankruptcy. The debtor's counsel argued that the rule was very wide, citing **Hoghton v Houghton** and **Walker v Wilsher**. This court (in a single reserved judgment) allowed the appeal. It said, a pp. 119-120.*

"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. It seems to us that the judge must be entitled to look at the document to determine whether the document does contain an offer of terms. Moreover, we think the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed."

*Apart from the last sentence, this passage spells out the uncontroversial point that "without prejudice" is not a label which can be used indiscriminately so as to immunise an act from its normal legal consequences, where there is no genuine dispute or negotiation. The obscurity of the last sentence has been commented on by Professor Vaver which has developed in later cases. In **re Daintrey** was not cited below and "without prejudice" veil so as to expose wrongdoing. But the real point of the decision was that the veil was never there in the first place.*

***Murtz v Spence and Skinner & Co v Shew & Co.,** on the other hand, were cited and very fully discussed before the judge, who devoted separate sections of his judgment ([1999] 1 W.L.R. 1630, 1643-1646, paras. 40-42 and paras. 43-46) to these cases. As to **Kurtz v Spence** the judge concluded (para. 42) that it was essentially a decision on the construction of section 32 of the Act of 1983 and not on the exclusionary effect of the evidential rule. He stated that even the case been more relevant"*

19. It seems to us that paragraph 38 of the ***Paribas*** decision Mrs Justice Cox has rejecting the notion of unambiguous impropriety because of the difficulty of as she described it as 'unattractive task' of attaching different levels of impropriety to fact-sensitive allegations of discrimination preferring the label of abuse of a privileged occasion so as not to prevent the Tribunal conducting their proper determination 'after full consideration of all the facts'.

20. In response Mr Pirani on behalf of the Respondents took us firstly to the passage of the speech of Lord Griffiths in the ***Rush & Tomkins*** case where at page 13..A he said this: *"I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation."*

21. In ***Muller & Muller v Linsley & Mortimer*** (unreported) Court of Appeal 30 November 1994 Mullers had issued proceedings for negligence against their former solicitors and one of the issues in the case was whether the conduct and settlement of an earlier action was a reasonable mitigation of damage. Hoffman LJ referred to the speech of Lord Griffiths in ***Rush & Tomkins*** where Lord Griffiths has cited with approval a passage by Oliver LJ in ***Cutts v Head*** [1984] Ch 90 where at page 306 he said this: *"The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."*

Lord Griffiths then later went on to say in the same case: *"they all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to reach a settlement."*

22. Mr Pirani submitted that the facts of this case can be distinguished in that:
(1) This was not an admission case;
(2) This case was subsequent to the case where the negotiations took place; and
(3) It was the Appellants who raised the issue in the offending article and therefore as a matter of public policy they should not be able to hide behind the clock of 'without prejudice' privilege.

23. He went on to argue that whilst as in the ***Paribas*** case the 'without prejudice' discussions themselves here alleged to amount to discrete acts of direct sex discrimination or victimisation, yet he contended this case also fell within the 'abuse' exception because:
(1) The combination of alleging that the Respondents made 'unwanted demands for money' with the contrast of what in fact occurred during the 'without prejudice' conversations where those supposed demands took place render this unambiguous impropriety and/or abuse of the doctrine of privilege;
(2) As in the ***Paribas*** case the Respondents would be hindered in their victimisation claim and severely prejudiced and disadvantaged if they could not refer to the conversations that occurred so as to highlight the impropriety of Professor Schwartz's statements;

(3) Policy considerations for shielding 'without prejudice' discussions from disclosure in litigation should not apply to the facts of this case than set against the public policy requirement to root out victimisation and to protect the victims of such acts.

24. We agree with Mr Pirani's submissions. It seems to us that in discrimination cases the necessity of getting to the truth of what occurred and if necessary eradicating the evil of discrimination may tip the scales as against the necessity of protecting the 'without prejudice' privilege. It is clear that the Respondents would be severely hampered if they could not refer to what occurred within the discussions outside the original Tribunal to support their case that they were not making unwarranted or unreasonable demands for money. It was the Appellants who through the article had placed the issue within the public arena and they did not seek to hide behind the cloak of privilege when seeking to justify their position before the Grievance Committee, even to the extent of calling oral evidence from Professor Sahardi. In our view it would be a clear abuse of a privileged occasion not to allow the Respondents to refer to the discussions to support their claim of victimisation. To deny them that opportunity would severely affect their ability to establish their case of victimisation.

Waiver

25. The Tribunal determined that privilege had been waived by the Appellants in respect of the matters set out in the respective grievance reports. Before us Mr Pirani seeks to argue that further acts on the part of the Appellants in their conduct of a litigation also amounted to waiver of the privilege namely (1) the reference and attachment of the grievance reports to their ET3; (2) their preparation of the bundle of documents which contained numerous references to the 'without prejudice' discussions and inclusion of the bundle of the statement of Jack Fallow making reference to the Committee considering the discussions that took place 'prior to the hearing of the Tribunal'. In response Mr Stafford argued that to suggest that these further acts amounted to waiver raised fresh matters of law that were not relied on before the Tribunal. He submitted that in accordance with the principles that the EAT had set down, which have been approved by the Court of Appeal in ***Wilson v Boston Deep Sea Fisheries Ltd*** [1987] IRLR 232, namely that in the absence of special exceptional circumstances the Respondents to an appeal could not be permitted to raise a new point of law in order to retain a judgment in their favour unless it was clear that no new evidence was necessary or that no further relevant evidence or investigation of the evidence given would have been produced or carried out if a new point had been pleaded. He argued that these new alleged acts of waiver might require a determination of evidence in relation to whether both parties' conduct has sufficient to indicate an actual or implied agreement to waive a privilege. Mr Pirani suggested that there has no issue of evidence to be determined, the Respondents having throughout indicated that it was their desire to refer to the discussions and the Appellants having agreed with that course of action throughout these proceedings up to the door of the Court. Whilst we can see the force of Mr Pirani's arguments we have decided that we should restrict out conclusions on this aspect of the case to the issue of waiver dealt with by the Tribunal namely the reference to the discussions within the grievance report.

26. Mr Stafford made the following points in relation to waiver:
(1) Effective waiver requires both parties to agree by words or conduct to the opening up of their otherwise privileged discussions;
(2) The grievance procedure involved the same two parties merely reviewing what had been previously discussed within the negotiations before the Tribunal;
(3) There were no outside parties involved although Professor Shwartz was not a party to the Regional Tribunal's proceedings. He was clearly only involved as a result of his employment with the University as Mr Stafford put it the discussions before the Grievance Panel had not gone outside the 'magic circle' who were parties to the original discussions;
(4) There was no specific agreement to waive privilege;
(5) The University were bound by statute to hold a grievance hearing and that therefore no inference of waiver should be drawn from the fact to the University were only carrying out what the legislation required them to do.

27. In response Mr Pirani firstly took us to general principles set out in Phipson on Evidence 16th Edition paragraphs 26-13 headed 'Waiver as an objective doctrine' states the position thus: *"… It matters not whether a party intends to waive privilege in a particular document. What matters is an objective analysis of what the party has done."*

And later in the same paragraph: *"Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect."*

He argued that it has clear from all the circumstances surrounding the Grievance Committee that there is no intention on the part of either party to seek to hide behind the protection of the privilege of the discussions. He pointed out that those discussions had been revealed to an independent committee and the Appellants chose not merely to refer to the discussions but to call further oral evidence to support their contention that no offer had been made by those representing the University. This led to a separate determination being made by the Panel and contained in a report which by reason of its statutory nature would be likely to the knowledge of both parties to be revealed in any future Tribunal proceedings.

28. Again we agree with Mr Pirani's submissions. It seems to us that the conduct of both parties before the Grievance Committee took matters far beyond what had taken place before the original Tribunal. The Committee had in fact taken upon themselves to conduct secondary litigation in the form of a mini trial to decide or what was not said in

the course of the negotiations. At no point during the grievance hearing did the Appellants submit that the Panel's final determination had report should not refer to this evidence and it seems to us that the conduct of both parties throughout the Grievance Committee hearing was totally inconsistent with the maintenance of confidentiality which the privilege was intended was intended to protect and as a result the Tribunal were correct in implying waiver into such conduct. Further as we have already indicated, once the parties here entitled to refer to the discussions either under the principle of waiver or abuse, it seems to us that no distinction should be drawn between the ability to refer to the original discussions and their reference within the grievance reports. The fact that there may or may not be a dispute as to what was said and the difficulties over determining such issues of fact is not in our view a reason to exclude that evidence. Accordingly we would dismiss the appeal and allow the cross-appeal.

MR ANDREW STAFFORD QC Instructed by Eversheds LLP Solicitors For the Appellants
MR ROHAN PIRANI (Of Counsel) Instructed by: Messrs Webster Dixon LLP
MR ROHAN PIRANI (Of Counsel) Instructed by Messrs Thompsons Solicitors For the 2nd Respondent