JUDGMENT : MR JUSTICE KNOX: Employment Appeals Tribunal. 26th June 1992.

1. Independent Research Services Ltd, which I will call "***the Company***" appeals from an interlocutory decision of the Chairman of the Industrial Tribunal sitting at Reading on the 20th February 1992. The decision was sent to the parties on the 16th March of that year. The relevant decision was that, certain ***"without prejudice"*** correspondence should not be admitted by way of discovery. The issue before us has been whether or not that ***"without prejudice"*** correspondence should, in the circumstances of this case, be admitted before the Industrial Tribunal when it comes to hear the Originating Application which is made by Mr Catterall, the Respondent before us today, for unfair dismissal by the Company.

2. One point can be conveniently cleared out of the way at once and that is the nature of the inadmissibility of "without prejudice" correspondence and the extent to which considerations of those sorts apply in industrial tribunals. It is common ground that industrial tribunals as a result of Rule 8 of their Rules of Procedure are not bound to apply the strict rules of evidence as they apply in Court. Equally it is common ground that that does not mean that they may not apply the rules of evidence. The "without prejudice" privilege, if it is correctly so described, is one that is founded on a very clear public policy that it is desirable that parties should be free to try to settle their differences without the fear of everything that they say in the course of negotiations being used in evidence thereafter. That seems to us to be something which applies just as much, if not more, to the proceedings under the Employment Protection (Consolidation) Act 1978 before industrial tribunals regarding unfair dismissals and similar matters, as it does to proceedings in Court. We see no reason in principle why an industrial tribunal should adopt a different attitude with regard to the admissibility of "without prejudice" material from the proper attitude to be adopted by a Court.

3. The issues in the Originating Application concern the claims that Mr Catterall makes that the relationship of trust and confidence that ought to subsist between his employer, the Company, and him had been undermined by the way in which the Company and its other officers than Mr Catterall had behaved towards him. Those, obviously, are matters that will have to be investigated when the Originating Application is heard, but it is only necessary for present purposes to record that there were complaints which were made in open correspondence down to, and including a letter of the 23rd April 1991 about various shortcomings in the way in which Mr Catterall claimed that he had been treated. The details do not matter, but his summary of his position at the end of the letter of the 23rd April 1991, which finds its way, verbatim, into his Originating Application, is as follows: *"In the light of the circumstances discussed here it seems to me that we both may have to accept that the Company has undermined irreparably (and continues so to undermine) the relationship of trust and confidence which must exist between employer and employee. It will be clear from this that I consider the Company to be in repudiatory breach of my Contract of Employment and I reserve my rights in respect of such breach."*

4. There then passed some correspondence, the bulk of which was without prejudice, it is only necessary, we think, to say of the contents of that that it included as the most single important letter for present purposes, a letter which Mr Catterall wrote, headed "Without Prejudice" in which he put forward an offer, which involved his remaining as a full-time employee of the Company, with a financial consideration for his cessation to act as a Director. I say "a financial consideration"; there was more than one item, but the precise details do not matter. That as a matter of commerce was not acceptable, and was not accepted, and on the 13th May, again in an open letter, Mr Catterall effectively repeated the complaints that he had made in his earlier letter, that I have read an extract from on the 23rd April with one addition, namely that he had not been told of a notice that had been served on the Company by another company which was the owner of a copyright which the Company, which employed Mr Catterall, had a licence to exploit. Again, the details of that do not matter.

5. In that context it was submitted to the Chairman of the Industrial Tribunal who had power to deal with this interlocutory matter by himself, that the "without prejudice" correspondence should be admissible in evidence, partly on the basis that industrial tribunals are entitled to take a more liberal approach to the admissibility of evidence because of Rule 8(1) of the Industrial Tribunals (Rules of Procedure) Regulations 1985, that is a point that I have already dealt with and see no particular force

in that by itself. More importantly, it was submitted that the "without prejudice" rule was not an absolute one and that it should be elastic enough to embrace the particular circumstances of this case, and in the alternative that there were relevant established exceptions to this rule. The text book that was cited in support of the argument, namely "The Law and Practice of Compromise" (third edition) by Mr David Foskett, at paragraph 9-22 reads: "*The precise limits of the principle that will permit the reception of `without prejudice' material are not wholly clear. Unfortunately the issue that fell for determination in* **Rush & Tomkins v. GLC** *did not demand consideration of such principle. Doubtless a court presented with an apparently novel problem will adopt a pragmatic approach balancing the primary consideration of ensuring protection for parties involved in settlement negotiations against the need to ensure that the privilege is not abused."*

6. The guiding factor is whether the negotiations are genuine. The submission that has been made to us, and, we understand, was made to the Industrial Tribunal, is that there is in the present "without prejudice" correspondence, evidence which is totally inconsistent with the continued assertion by Mr Catterall that his trust and confidence in the Company had been destroyed by the time he wrote his letter accepting what he claimed to be a repudiation on the 13th May 1991, because the offer to continue to serve as an employee in return for increased financial benefits, is not compatible with, and would involve an untruth as compared with, the assertion that his trust and confidence in the Company was destroyed.

7. The Chairman of the Industrial Tribunal dealt with this matter extremely succinctly and one ground of appeal before us was that there had been a failure to give adequate reasons for the Industrial Tribunal's decision. We have to say that we see the force of that submission. The Reserved Reasons describe the "without prejudice" rule, quite properly, and refer to a leading authority of ***Cutts v. Head*** [1984] 1 All ER 597 CA, and the purpose of the rule is accurately stated. The Chairman then went on to say that there were a number of exceptions that were helpfully outlined by citations from the textbook that I have already referred to, Mr Foskett's *"**Law and Practice of Compromise***" and the Industrial Tribunal goes on to say this: *"the Tribunal quotes only from the headings; no dispute (which does not merit further discussion here), threats, abuse of rule and lack of good faith. The Tribunal does not consider these to be relevant in the present case."*

8. In the next paragraph he deals with another exception to the recognised rule, headed *"**Admission of Independent Fact**"* and states the exception as propounded in Mr Foskett's book, and in relation to that the Reserved Reasons say: *"Suffice it to say that the Tribunal does not consider that that ground of exclusion applies in the present case. Having read the correspondence in question, the Tribunal sees no reason to exclude it from the protection normally afforded to without prejudice correspondence."*

9. Then, very properly, there has been a direction that that particular Chairman should not sit on the hearing of the main issues because obviously he had seen that which he would not have seen had he been deprived of the "***without prejudice***" correspondence.

10. That is a judgment which, in our view, contains assertions rather than reasons and just as the principle upon which this Tribunal should operate in relation to appeals from interlocutory decisions is the same as the principle which we ought to apply in hearing appeals from final decisions, so it seems to us, the parties are entitled to be told why they have won or lost in an interlocutory decision as much as in a final one. True it is that in an interlocutory decision one would not seek for any great detail, but we do think that something rather more explicit is called for, more especially where as here, there has been a skilful and helpful argument adduced on a point that is both interesting and difficult. We therefore think it right to look at the substance of the matter and see whether we agree with the results that the Chairman arrived at, which was of course that the "without prejudice" correspondence should not be admitted in evidence.

11. That there is a general rule is not challenged. That it is founded on reason is not challenged and that there are exceptions is not challenged. Two exceptions were suggested to us on behalf of the Company to be applicable if we were not satisfied that the general flexibility of the principle covered this particular state of affairs and the first of the two exceptions is that, to quote the skeleton argument that we were supplied with on behalf of the Company, the evidence in question falls within those

exceptions because, it demonstrates that Mr Catterall is not telling the truth about an issue of fact in the case, namely whether or not his trust in the Company, as employer, had already been destroyed by the 23rd April 1992 (that is a misprint, I think, for 1991, but nothing much turns on that). The second exception that was sought to be relied on is, that the *"**without prejudice**"* material goes to establish an independent fact, namely that on the 2nd May 1991 Mr Catterall was still perfectly happy, in principle, to go on working for the Company. That fact is germane to the present proceedings, but was independent of the matters about which the parties were in dispute at that date.

12. In our view, this case stands or falls according to whether it comes within that first exception. It clearly, in our view, does not fall within the independent fact exemption because the nature of the "without prejudice" correspondence seems to us to be at the heart of the dispute and Mr Giffin's ingenious attempts to disentangle the two, seems to us doomed to failure, because one could not properly have regard to the "without prejudice" material without entrenching upon the principal issue which, for present purposes, is whether Mr Catterall's faith and trust had been destroyed. Equally we are not satisfied that the doctrine is so flexible as to accommodate this case if it does not, in fact, fall within the recognised exception that *"**without prejudice**"* material should not be used in cases that are connected together in Mr Foskett's book under the heading *"**Threats, Abusive Rule and Lack of Good Faith**".* In our view, this is a case where the point is whether or not there would be an abuse of the rule if it was applied to exclude this "without prejudice" correspondence. As often happens in difficult cases two well established and valuable legal principles collide, one is that it is desirable that courts and tribunals should have all the available material before them with which to arrive at a just conclusion in accordance with law. The other is that it is desirable that parties should be in a position freely to negotiate a compromise of their disputes without having what they say in the course of those negotiations revealed subsequently and used against them in litigation or proceedings before a tribunal. There is inevitably going to be a contradiction or conflict between an admission which is made, or a statement of present intention which conflicts with the parties pleaded case and we quite see that in the present circumstances there is going to be a difficult conflict between the proposition that Mr Catterall's trust and confidence was destroyed in late April 1991 and remained destroyed to the 13th May and on the other hand his willingness to continue as an employee if certain financial inducements were forthcoming. But the existence of the conflict is not of itself, in our view, sufficient to warrant our giving priority to the first of the two principles, namely, that courts should have all available material before them, over the other protection "without prejudice" correspondence. It seems to us particularly having regard to the authorities that are collected in Mr Foskett's book, that the yardstick that should be applied in this category of cases is whether the "without prejudice" material involves, if it is suppressed something amounting to a dishonest case being prosecuted if the pleaded case continues. The nearest example amongst the quoted cases in Mr Foskett's book, to which we were referred in that book, is a decision reported in "The Times" newspaper on the 11th March 1988 of Mr Anthony May QC, as he then was, called ***Hollick Jersey International Ltd v. Kaplan*** and the account given of it is this: *"P claimed a repayment of a loan to D of £10,000 made by means of a cheque. D denied the transaction was a loan because he had supplied £10,000 cash. D secretly tape recorded a "without prejudice" meeting at which a) P did not dispute and indeed accepted D's repeated assertions that the transaction was not a loan but one involving an exchange for £10,000 in cash and b) P expressly or impliedly said that the proceedings were brought to persuade D to reach a fairer settlement or to settle other differences."* and Mr May, sitting as a Deputy Judge of the Queen's Bench Division held that P was threatening to persist with dishonest proceedings and accordingly that "without prejudice" privilege did not apply to the discussion. Other more extreme examples are given of threats in the nature of blackmail and other wholly undesirable and indeed, criminal activities which cannot be indulged in cloaked under the privilege of "without prejudice".

13. We have therefore looked to see whether we are of the view that the exclusion of the "without prejudice" material and persistence in Mr Catterall's case as pleaded in his Originating Application involves something in the nature of dishonest conduct on his part. Tested by that test we conclude that the material should remain hidden from the Industrial Tribunal because we do not think that there is dishonesty involved in such an attitude.

14. In the circumstances we do not feel that further elaboration of that proposition is called for. It is essentially a value judgment that this Tribunal, in the absence as we see it of reasons given below, has felt is the appropriate subject matter of the decision. But it is not a judgment which is susceptible of great elaboration. In those circumstances we feel that the "without prejudice" privilege should remain. But there is one thing that does need clarifying because it appears perhaps not to have been entirely clear below, and that is that the existence of the "without prejudice" negotiations is not cloaked by the privilege and it would be entirely proper, in our view, for the Industrial Tribunal to be made aware of the existence, as opposed to the terms, of the "without prejudice" correspondence between the critical dates of the 25th April and the 13th May 1991.

15. Subject to those matters this appeal will be dismissed.

For the Appellants MR N GIFFIN (Of Counsel) Henmans 116 St Aldates Oxford OX1 1HA
For the Respondent MR A GLENNIE (Of Counsel) Hewitson Becke & Shaw Shakespeare House 42 Newmarket Road Cambridge CB5 8EP