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Attwaters' Employment Update

"Without prejudice" is a phrase that is used on a regular basis by employers who are about to drop a bombshell on employees believing that by couching their next comment with those immortal words anything can be said without repercussion. This is not the case. The without prejudice rule is only able to be relied upon when there is a genuine dispute and the discussions are a genuine attempt to settle the dispute. The principle behind the without prejudice rule is to allow parties to enter negotiations, to encourage settlement and to protect the content of those discussions. For example an employer who produces a compromise agreement at a meeting with an employee and suggests that they leave the business but receive an ex-gratia payment is unlikely to be protected. This is because at that stage there is no genuine dispute. When the compromise agreement is produced the employee has a potential claim and therefore the parties are in "dispute".

The recent case of Woodward v Santander UK plc raised questions as to whether discrimination claims were given greater scope under the without prejudice rule. The EAT said that any form of blatant discrimination would not be protected. The exceptions to the rule are detailed in Unilever Plc v Proctor & Gamble Co. which states that the without prejudice rule will only protect genuine settlement discussions and is not to be used as a "cloak for perjury, blackmail or other unambiguous impropriety".

Employers should be cautious in labeling discussions without prejudice without making sure that the requirements of the rule are met. Even if you are unsure as to whether the rule covers the discussions it is wise to mark correspondence and highlight discussions as without prejudice as this may protect subsequent negotiation. Be aware that reference to without prejudice conversation in open discussions may result in those protected negotiations losing their protection.

Should you wish any further information concerning this article or any other employment matters please contact Tim Carter by clicking on the button below.

[Contact Tim Carter](#)



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Harlow Office
Rothwell House
Harlow
Essex CM20 1LQ

tel. 01279 638888
fax. 01279 639970
www.attwaters.co.uk

Loughton Office
147 High Road
Loughton
Essex IG10 4LY

tel. 020 8508 2111
fax. 020 8508 8879
www.attwaters.co.uk

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