

Without Prejudice – Engaging in Negotiations With Confidence

Harminder Sandhu, managing director and head of Dispute Resolution at Hawkins Hatton provides some practical tips on use of without prejudice privilege.

Without Prejudice is a form of privilege which means that communications between parties on a “without prejudice” basis cannot be used in court proceedings if the matter turns litigious. However, simply using the words “without prejudice” does not automatically render communications confidential and privileged from disclosure in court proceedings, to rely on the rule the communications must be:

- In the context of a dispute;
- Part of a genuine attempt to settle the dispute

A dispute is widely defined as a matter which is capable of compromise but one where if not resolved litigation could ensue. Unless there is a genuine dispute statements made which are marked “without prejudice” could be treated as an admission of responsibility. Further, unless the communication is a genuine attempt to settle it could later be referred to in Court.

Conversely, even if a communication is not marked “without prejudice” it may have the protection of the rule if the intention of the parties was clearly a sincere effort to resolve a dispute.

The public policy basis for the without prejudice rule is to encourage parties to seek to settle a dispute without recourse to litigation. The fear that statements made during the course of negotiations could be used against them if the matter proceeds to court may deter parties from being open. The rule enables parties to be frank and open which can only serve to increase the prospect of resolving a dispute and save court time and money.

Where negotiations are clearly intended to be without prejudice at the outset they will continue on this basis whether they are marked without prejudice or not. It is important the party who changes the basis of such negotiations spells out the change with clarity.

Without prejudice communications have privileged status for both parties and both parties need to waive their rights to non-disclosure. However, if you reveal the content of without prejudice communications then you can lose the right to confidentiality.

It is useful to maintain a written record of all without prejudice discussions. Once a settlement is reached the terms can be recorded in a legally binding agreement.

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