LEXOLOGY

UK: 'without prejudice' protection may apply to exit discussions in response to a grievance

Blog Employment notes

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The EAT ruling in *Garrod v Riverstone Management Ltd* provides welcome reassurance that an employer can initiate 'without prejudice' discussions offering a possible consensual termination where an employee has raised a grievance clearly indicating potential legal claims.

'Without prejudice' protection can only apply to communications which are a genuine attempt to settle an 'existing dispute'. It had been suggested that the earlier case of *Mezzoterro* established a rule of law that a grievance by itself cannot amount to an 'existing dispute'. The EAT in *Garrod* clearly rejected this contention. It clarified that a grievance can be evidence of a dispute, although it will not always be – this will depend on the facts.

In *Garrod*, the employee's grievance was that she had been discriminated against for a number of years including after her return from maternity leave, and in discussing her grievance she had clearly referred to alleged infringement of legal rights and the possibility of going to Acas for Early Conciliation. Particularly as the employee was legally trained, it was reasonable for the tribunal to conclude that these were clear and genuine signposts to the possibility of litigation if the grievance couldn't be resolved. Therefore there was an 'existing dispute' at the time of the termination discussions and this was the same dispute as became the subject of the claim.

The grievance in *Mezzoterro* also concerned alleged discrimination in treatment following return from maternity leave, but the claim made was that the employer's proposal to terminate the employment was itself unlawful sex discrimination and victimisation. The EAT there held that it was open to the tribunal on the facts to conclude that no dispute had arisen prior to the termination proposal. In contrast, the employee in *Garrod* was not claiming that the employer's proposal was itself an unlawful act; the alleged facts forming the claim had clearly been included in the grievance raised before the proposal was made. Rather the employee seemed to want to refer to the termination proposal to suggest that the employer thought it had a weak defence to the claims made in the grievance.

The EAT went on to consider the exception to 'without prejudice' protection where there has been perjury, blackmail or other 'unambiguous impropriety'. It rejected the employee's argument that it was unambiguous impropriety to tell her she had no future at the company when she had indicated she wanted to stay. This case was very different from the facts in *Mezzoterro*, where the allegedly unlawful conduct that founded the tribunal case was said to have occurred at the allegedly privileged meeting such that, if the evidence could not be admitted, the claim could not be pursued. The exception will only apply in "the very clearest of cases" or "truly exceptional and needy circumstances", and the tribunal was entitled to find that this was not the case in *Garrod*. Making a settlement offer which could, on one view, suggest that the employer held discriminatory attitudes fell far below the threshold for the exception to apply.

Although the ruling is helpful in clarifying the scope of *Mezzoterro*, employers should not assume that every grievance will automatically amount to a dispute: not every grievance will so clearly indicate the potential legal claims. There also remains a risk that an employee claims that the termination offer or what happened in the meeting was itself discriminatory and this prevents the employer from relying on the 'without prejudice' protection. Employers should therefore continue to carefully consider when and how to initiate without prejudice settlement conversations and what to say, given the risk that this could later be admissible in tribunal.

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