

## Case report

# Implied waiver of privilege



In May, the Court of Appeal affirmed the EAT's decision to admit evidence of without prejudice talks during a victimisation claim. This unusual step was taken in the case of *Brunel University & Schwartz v Webster & Vaseghi* and was due, not to an abuse of the privilege, but to an implied bilateral waiver of privilege. Tim Brown reports.

The case serves as a useful reminder of certain rules of evidence, particularly in the context of grievance hearings and pleadings in subsequent litigation. Headline points derived from the case are:

- irrespective of whether the label “without prejudice” is applied at the time, settlement negotiations will be privileged if they are genuine discussions that take place with a view to settlement of a dispute
- without prejudice privilege protects disclosure even after the proceedings to which they relate have come to a conclusion
- privilege attaching to without prejudice talks can be expressly waived by bilateral agreement, but bilateral waiver may also be implied from the conduct of both sides
- waiver is an objective doctrine that depends upon an analysis of what each party has done – it is not contingent upon whether a party consciously intends to waive privilege at the time
- in exceptional circumstances, an implied bilateral waiver of privilege will occur when without prejudice talks are divulged to a victimisation grievance hearing.

### The facts of the case

Webster and Vaseghi brought race discrimination claims against Brunel University.

Pre-trial settlement negotiations were not fruitful and at trial in the tribunal both claims were unsuccessful. Post-trial, the university published an article expressing concern that it had recently spent a considerable amount of money to defend unfounded employment claims involving “unwarranted demands for money”. Although they were not named in the article, Vaseghi and Webster considered it referred to them and judged it an act of victimisation. In response, each lodged a grievance with the university prior to bringing claims for victimisation.

The university set up an independent grievance committee that comprised university personnel from the council of the university who had not been involved in either the discrimination claim or the related settlement negotiations. The grievance committee heard detailed evidence from both sides about what was said during settlement talks prior to the tribunal hearing, during which one of the claimants was offered a considerable sum in settlement of the claim. No objection to the admission of this evidence was raised by either side on the grounds of without prejudice privilege or otherwise.

The grievance committee found against the complainants, and the victimisation claims were brought by the employees to the tribunal. Unsurprisingly, the claimants made detailed reference to the evidence heard at the grievance hearings in their ET1s, witness statements and supporting documentation. Similarly, the respondents' ET3s and witness statements were peppered with references to the grievance hearings. At the tribunal, however, objections were soon raised by opposing counsel as to what evidence the tribunal could hear and what was protected by without prejudice privilege. The tribunal chose to admit certain evidence of the settlement talks but not all.

On appeal, the EAT found that the without prejudice settlement negotiations themselves were privileged as they were genuine discussions that had taken place with a view to a compromise of a dispute. These discussions

remained privileged after the conclusion of the race discrimination hearing when the issue of victimisation arose. (One of the race discrimination claims was still awaiting an appeal hearing.)

What was the status, however, of the evidence heard by the victimisation grievance committee that related the content of the without prejudice talks? The Court of Appeal found that the university grievance committee had conducted a mini-trial in which both parties must have understood that the evidence heard would be revealed in future tribunal hearings, and that there was therefore an implied bilateral waiver of the privilege attaching to the without prejudice talks.

At first glance, the implications of the Court of Appeal's decision appear to be broad and to undermine the very notion of without prejudice discussions. The employer is under a statutory duty to hold a grievance hearing to investigate allegations of victimisation. The grievance turns on what was said during settlement talks so the employer must hear evidence of those talks, but in doing so the cloak of privilege is lost and the evidence is made admissible for use in subsequent litigation.

However, the Court of Appeal distinguished the university's grievance committee from normal grievance hearings. The grievance committee hearing consisted of individuals from the university council who were not involved in the race discrimination settlement talks. The committee's function was not to discuss and attempt to resolve the grievance, but was a formal trial that reached an independent adjudication. Reassuringly, the Court of Appeal states:

"In most cases, where a grievance meeting takes place in the usual way, internally, there will be no question of waiver if the parties mention matters covered by without prejudice privilege."

Despite this, one may consider that the line is far from clear, and that grievance hearings often proceed along the lines of a mini-trial where both sides make formal representations to individuals who were not privy to the events that first led to the grievance.

The court emphasised that the case turned on its own specific set of facts, and perhaps the most important fact in the case was that it was the university that

had made the public allegation, via the article published, that the employees had made unwarranted demands for money and this necessarily put the settlement talks into the public domain.

A second point at which an implied bilateral waiver of privilege occurred was when both the claimants and the university included without prejudice material in the pleadings and trial bundle for the victimisation tribunal hearing. Specifically, the waiver had occurred at the time the ET3s were lodged with the tribunal office; the university in response to the victimisation claim had relied on the grievance proceedings and appended the grievance hearing reports to its responses.

A subsequent application could have been made to remove the privileged content, but such an application could only have succeeded had it been made expeditiously and only if the effect of the amendment was peripheral – which was plainly not possible.

Finally, the court did not find that this was a case where privilege was threatened by a party behaving in an "unambiguously improper" fashion that abused the privilege (as discussed in the case of *Savings & Investment Bank Ltd (in liquidation) v Fincken*) attaching to settlement talks.

## Conclusion

Public policy dictates that settlement negotiations must be privileged to facilitate unfettered negotiation between parties. Where an alleged act of victimisation occurs during without prejudice talks there is a clear tension between dealing with the case justly and safeguarding settlement discussions. It has been argued that where this happens an exception should apply to victimisation cases and that privilege should be overridden. In this case, the waiver of privilege meant that the court did not have to decide between these two conflicting interests.

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## Cases referred to:

*Brunel University & Professor Schwartz v Ms G Webster and Professor S Vaseghi* [2007] EWCA Civ 482

*Savings & Investment Bank Ltd (in liquidation) v Fincken* [2004] 1WRL 667