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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPEAL FROM A DECISION OF THE INDUSTRIAL TRIBUNAL ON A PRE-HEARING REVIEW

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BETWEEN:

PHILIP McKINSTRY

Appellant/Claimant;

-And-

MOY PARK
GARY MAXWELL
BRIAN JOHNSTON

Respondents.

_____

Before: Morgan LCJ, Girvan LJ and Gillen LJ

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GILLEN LJ (giving the judgment of the court)

Introduction

[1] This is an appeal against the finding of an Industrial and Fair Employment Tribunal at a pre-hearing review on 9 June 2014("the review") that a meeting between the parties on 25 June 2013 was "without prejudice" and should be excluded from a claim made against the respondents by the appellant to the Industrial and Fair Employment Tribunal of disability discrimination, detriment for asserting a statutory right, failure to provide written particulars of employment and breach of the Working Time Regulations 1998. Mr Lyttle QC appeared on behalf of the appellant with Marie Claire Campbell and Ms McGrenera QC appeared on behalf of the respondents with Rachel Best. We are grateful to counsel for the skill with which they conducted this appeal.

Background

[2] The appellant was employed by the first respondent on 28 March 1988 as a production planner and is registered as disabled. He has therefore been employed

by that respondent for a period of almost 27 years. His disability is that he suffers from neuropathy in his legs and feet. The second respondent is the general manager of Moy Park and the third respondent is the manager of the breaded section where the appellant was employed.

[3] The appellant asserts that on 25 June 2013 he was summoned by telephone to attend a meeting with two employees of the first respondent, Mr Cromie (the manager of the Human Resources department) and the second respondent. The appellant asserts that he was not aware of the nature of, or the agenda for, the meeting in advance of attending. Prior to the meeting and throughout his significant period of employment with the first respondent the appellant had no disciplinary record with the company, nor was he ever the subject of any disciplinary proceedings, warnings or reprimands. (See paragraph [9] below for an agreed note of what occurred at that meeting).

[4] In September 2013 the appellant lodged an ETI with the Office of the Tribunal complaining as set out in paragraph [1] above. The appellant alleges that the actions of the employer as hereinafter set out in paragraph [13] during the meeting on 25 June 2013 were occasioned because of his disability and for no other good reason.

[5] In the instant case, three employment judges have been involved in case management discussions. In the first, on 13 February 2014, the Vice President directed that a pre-hearing review would be listed to determine "whether or not the discussions, which took place at the meeting on 25 June 2013, should form part of the claim ----- or whether they should be excluded on the basis that the discussions were 'without prejudice'?" The Vice President on that occasion also directed as follows:

> "There is a preliminary issue in relation to a meeting between the parties on 25 June 2013. The claimant argues that the discussion in that meeting should form part of his claim. The respondents argued that this was a 'without prejudice' meeting and that the discussion should therefore be excluded. This appears to be an issue which would be best dealt with at an early stage. If it is not dealt with at an early stage it would be difficult to proceed by way of a witness statement procedure which would necessarily have to deal in full with the discussions on 25 June 2015. The Pre-Hearing Review is therefore listed for 7 April 2014 at 10.00 am to determine:
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> > 'Whether or not the discussions which took place at the meeting on 25 June 2013, should form part of the claim and the response or whether they should be

> excluded on the basis that the discussions were "without prejudice".'

[6] On 7 April 2014, before a second judge, Employment Judge Greene, the parties indicated to him that the agreed factual background, the claim form and the response form and submissions would be used solely by way of evidence. Significantly a notice for particulars of the claim from the respondents and a reply thereto from the appellant dated 21 March 2014 were omitted. At that meeting the parties were not in agreement about other meetings that had taken place prior to 25 June 2013 but indicated that further discussion might result in such an agreement or "at least a delineation of what is agreed and what is not agreed and may require oral evidence". Accordingly, with the consent of the parties, Judge Greene directed that:

> "(i) The parties agree a Statement of Facts insofar as that is possible, before the next hearing.
>
> (ii) In the areas where there was not agreement that the parties should particularise, as far as possible, the nature of the other evidence having regard to dates or issues that were discussed or witnesses that were involved."

[7] He expressed concern that, unless the matter was carefully delineated, the prehearing review had the potential to take on a dimension comparable to the full hearing of this matter, which was not desirable, and similarly that there was a danger that the tribunal might be drawn into making factual findings which might impinge on the full hearing of this matter.

[8] Due to difficulties in reaching agreement on the statement of facts, the Pre-Hearing Review was adjourned until 9 June 2014. Specific areas of dispute focused on what had happened at and/or the nature of various meetings before 25 June 2013 and thereafter including meetings on 5 March 2013, 8 May 2013 and 9 May 2013.

[9] The third Employment Judge, Judge Drennan QC, ("the ET Judge"), to deal with the matter indicated that if the events on 5 March 2013 and 8 and 9 May 2013 were to be relied on in order to determine the preliminary issue, he would not proceed to determine a preliminary issue at the Pre-Hearing Review. He stated that these disputed factual issues could only be determined at a substantive hearing and the parties were reminded of guidance in SCA Packaging Ltd v Boyle [2009] UKHL 37.

[10] The ET Judge recorded as follows:

> "12. The parties were of the view that it would not be possible to reach agreement on that today but that

> further discussion might result in an agreement in relation to the statement of agreed facts or at least the delineation of what is agreed and what is not agreed and may require oral evidence.
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> 13. Accordingly, with the consent of the parties, I directed:
>
> (1) That the parties agree a statement of facts insofar as that is possible, before the next hearing.
>
> (2) That in areas where there was not agreement that the parties should particularise, as far as possible, the nature of the other evidence having regard to dates or issues that were discussed or witnesses that were involved.
>
> (3) I express my concern that unless the matter was carefully delineated that the Pre-Hearing Review had the potential to take on a dimension comparable to the full hearing of this matter which was not desirable and similarly that there was a danger that the Tribunal might be drawn into making factual findings which might impinge on the full hearing of this matter."

[11] In his "decision on a pre-hearing review" dated 4 August 2014, Judge Drennan recorded, inter alia, as follows:

> "1.4 It was apparent that the representatives despite their continuing disagreement in relation to the factual issues relating to the meetings of 5 March 2013, 8 and 9 May 2013 had prepared and were in agreement in relation to a Statement of Facts relating to the meeting on 25 June 2013. I could well see the merits of holding the pre-hearing review as directed by the Vice President and which the representatives had agreed, provided to do so did not conflict with the guidance in SCA Packaging Ltd. However, I made it clear to the representatives that I was only prepared to proceed to commence the pre-hearing to determine the said preliminary issue on the basis of the agreed Statement of Facts relating to the meeting on 25 June 2013, together with the oral and written

> submissions of the representatives, which had been the agreed way to determine the preliminary issue, as set out in the records of proceedings of the previous hearings. I also made it clear that if, during the course of the said submissions, it became clear to me that the said preliminary issue could not be determined at a pre-hearing review, in accordance with the guidance set out in SCA Packaging Ltd and that the disputed facts would require to be determined in order to determine the said preliminary issue, then I would not proceed to determine the preliminary issue at this pre-hearing review. I fully appreciated that not to determine this issue at the pre-hearing review would add difficulties for the tribunal at the substantive hearing, not least in relation to the contents of the witness statements which would be prepared and exchanged by the parties for this substantive hearing. These would inevitably include references to what took place at the said meeting on 25 June 2013."

[12] Later in his judgment, Judge Drennan said:

> "In the event, as set out below, I was able to resolve and determine the preliminary issue on the basis of the agreed Statement of Facts relating to the meeting on 25 June 2013 and after considering the oral and written submissions of the representatives and their various relevant extracts from the case law/text books to which I was referred by the representatives."

[13] The Pre-Hearing Review was arranged for 9 June 2014. By this date there was still no agreement in relation to the statement of facts save that the parties were in agreement in relation to the statement of facts relating to the meeting on 25 June 2013. The following facts were agreed in relation to that meeting and were taken into account by the Tribunal in the Pre-Hearing Review decision as follows:

> "(i) On 25 June 2013, the claimant was called by the second respondent and invited to attend a meeting with him.
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> (ii) The claimant was not aware of the agenda or nature of the meeting in advance of attending.
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> (iii) The claimant drove to the front office and met Mr Cromie (an employee of Moy Park), he waited with Mr Cromie until the second

respondent arrived. The parties engaged in general conversation.

(iv) In the presence of the second respondent, Mr Cromie explained to the claimant that they sought to engage in a "without prejudice" meeting with him.

(v) Mr Cromie asked the claimant if he understood the meaning of this principle. The claimant sought clarification on the meaning of this term. Mr Cromie explained the meaning of "without prejudice" to the claimant.

(vi) The claimant confirmed his understanding of the principle and agreed to continue.

(vii) The second respondent informed the claimant that he did not see a future for the claimant in the company and alleged that there were issues with the claimant's conduct within the workplace. The second respondent informed the claimant of an example of the claimant's conduct in question.

(viii) The claimant did not accept these allegations and proceeded to brand the second respondent a liar.

(ix) It was outlined to the complainant that as a result of the alleged issues with the claimant's conduct, the respondent would proceed to commence a disciplinary process against the claimant. The respondent also outlined that a possible outcome to the disciplinary process would be dismissal, during the course of the meeting.

(x) As a result of the issues with the claimant's conduct a number of options were discussed between the parties the first of which was the commencement of the disciplinary process which could result in the claimant being dismissed.

(xi) The respondent proceeded to offer the claimant a compromise agreement to terminate his employment with the company. The claimant was given two large brown envelopes which he was informed contained a generous offer for him to leave the company.

(xii) The claimant was informed of the timescales and implications of the agreement and was informed that he should seek independent legal advice in relation to the agreement.

(xiii) Mr Cromie informed the claimant that if the parties failed to reach an agreement and if the offer to terminate his contract of employment was not accepted, then the respondent would commence the disciplinary procedure in relation to the claimant's conduct which could result in the claimant being dismissed.

(xiv) The claimant questioned the respondent's actions on the basis that he had never received any prior warnings or been spoken to about any aspect of his work during his time with the company.

(xv) At the conclusion of the meeting the claimant was placed on paid extended leave effective immediately and was asked if there were any belongings he would like to take from his desk before "leaving" the first respondent's site. At the conclusion of the meeting the claimant was informed that he should not speak to anyone in the company about the nature and contents of the meeting.

(xvi) The claimant did not accept the offer of the compromise agreement. The claimant lodged a grievance and subsequently commenced tribunal proceedings against the respondents, complaining of disability discrimination, detriment for asserting a statutory right, failure to provide written particulars of employment and breach of the Working Time Regulations 1998."

[14] It was made clear to the parties that the determination of the preliminary issue would be on the basis of the agreed statement of facts in relation to the meeting of 25 June 2013 together with the parties' oral and written submissions and, if, during the course of the said submissions, it became clear that the preliminary issue could not be determined at a pre-hearing in accordance with the guidance in SCA Packaging Limited, and the disputed facts required to be determined in order to determine the preliminary issue, then the preliminary issue would not be determined at the pre-hearing review.

[15] It is the respondent's assertion that the parties indicated their agreement to this course of action and the appellant raised no objections.

[16] The ET Judge asserted that he could only determine the preliminary issue at the pre-hearing review on the basis of the agreed statement of facts and not if it involved any determination of the facts in relation to the three other meetings, the details of which were not agreed.

[17] The ET Judge further indicated that he was able to resolve and determine the preliminary issue on the basis of the agreed statement of facts relating to the meeting on 25 June 2013.

The findings of the Tribunal

[18] The Tribunal decision dated 30 June 2014 concluded that the details of the discussions between the parties at the meeting on 25 June 2013 should be redacted/amended and not form part of the claim and response form contained in the trial bundle for use by the Tribunal and the parties at the substantive hearing. Further, it was found that the details of such discussions must be excluded from the witness statements of the parties on the basis the discussions were "without prejudice" and evidence of same must, therefore, be excluded.

[19] Particular findings of the Tribunal included as follows:

(i) That at the outset of the meeting, the respondents had made it clear that the discussions were to be "without prejudice".

(ii) That the meaning of "without prejudice" communications was properly explained to the appellant.

(iii) If it had been necessary to do so, the Tribunal would have concluded that, on the facts, there was an express or implied agreement that the said discussions were to be "without prejudice".

(iv) That whilst the claimant was not aware of the agenda or nature of the meeting in advance of attending, the absence of such notification did not prevent the discussions being "without prejudice", relying on A v

B and C [2013] UKEAT/0092/13 and Fosketh on "Compromise" paragraphs 9-12.

(v) This was a classic case of "parties speaking freely about all issues relevant to an employment dispute in a genuine attempt to seek a compromise" relying on Rush and Thompkins Limited v Greater London council.

(vi) From the outset of the discussions it was apparent that the respondents, for their part, believed that there was a dispute between the parties. If it could not be resolved with these discussions by means of a compromise settlement then under the claimant's contract of employment the disciplinary procedure would have to be invoked and this could result in the claimant being dismissed.

(vii) The claimant did not accept the respondent's allegations about his conduct.

(viii) It was apparent from the details of the discussions that the parties were in dispute and both would have been fully aware of the potential for litigation if the matter could not be resolved.

(ix) There is nothing to suggest in the statement of agreed facts that the discussions were not a genuine attempt at settlement of this employment dispute before the disciplinary procedure was invoked.

The grounds of appeal

[20] There were 13 grounds of appeal which the parties helpfully addressed by grouping them together as follows:

(i) Grounds 6 and 12 questioned whether it was appropriate for the Tribunal to determine the question posed at the pre-hearing review as a preliminary issue or whether a hearing before a fully constituted Tribunal was more appropriate.

(ii) Grounds 2, 5, 9 and 11 questioned whether the Tribunal was entitled to reach its finding of fact and whether there was procedural unfairness by dint of the failure to require documentary and oral evidence. In particular, whether such evidence should have included an explanation given by the respondent company as to what was meant by the term "without prejudice" and whether the said explanation was legally correct.

(iii) Whether the Industrial Tribunal misdirected itself in respect of the law regarding the "without prejudice" principle.

(iv) Whether the Tribunal correctly applied the law to the facts found by it and whether the conclusions reached were perverse.

(v) Whether it is ever possible as a matter of law to have "without prejudice" discussions between an employer and an employee in relation to the instigation of allegations of misconduct and implementation of disciplinary procedures.

"Without prejudice" communications

[21] The "without prejudice" rule stretches back to cases emanating from the late 18th century. It is a crucially important concept in civil litigation.

[22] Communications made between parties to a dispute that are written or made with the aim of genuinely attempting to settle that dispute cannot usually be admitted in evidence nor made the subject of a disclosure order whether in the proceedings (if any) to which the dispute gives rise or in any other litigation in which similar or related issues arise. There is no privilege over the fact that such communications have occurred, rather the privilege is limited to the contents of such communications.

[23] It is fundamental to the operation of the "without prejudice" rule that such communications are made for these purposes, since the courts will not apply this privilege to communications which have a purpose other than settlement of the dispute. Hence in In Re Daintrey, ex parte Holt [1893] 2 QB 116 at 119 Vaughan Williams J said:

> "In our opinion the rule which excludes documents marked 'without prejudice' has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation … The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purposes of arriving at terms of peace and unless there is a dispute or negotiations and an offer this rule has no application."

[24] The basis of the rule has traditionally been seen as lying partly in public policy and partly in the express or implied agreement of the parties to the relevant negotiations.

[25] The public policy aspect was asserted in Rush and Thompkins Ltd v Greater London Council [1989] AC 1280, at 1299 per Lord Griffiths as follows:

> "The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is no more clearly expressed than in the judgment of Oliver LJ in Cutts v Head [1984] Ch. 290, 306:
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> > 'That the rule rests, at least in part, upon public policy is clear from many authorities and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resorting to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in Scott Paper Co v Drayton Paperworks Limited (1927) 44 RPC 155, 156 be encouraged fully and frankly to put their cards on the table … The public policy justification in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for a settlement being brought before the court of trial as admissions on the question of liability'."

[26] That the rule is also apparently based on an implied agreement that enables parties to "without prejudice" negotiations to vary the application of the public policy basis of the rule by extending or limiting its reach is well illustrated in Unilever Plc v The Proctor and Gamble Company [2000] 1 WLR 2436 where Robert Walker LJ said at p 2445:

> "The rule also rests on 'the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence'."

[27] It is pertinent to observe that whatever the form that negotiations may take, genuine negotiations with a view to settlement are protected from disclosure whether or not the "without prejudice" stamp has been applied expressly to the negotiations. Lord Griffiths in Rush and Thompkins at 1299 said:

> "The … rule applies to exclude all negotiations generally aimed at settlement whether oral or in writing from being given in evidence. … However the application of the rule is not dependent upon the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial."

[28] Hence, particularly significant in the context of the instant appeal, unless at the time of the relevant communications there was an extant dispute between the parties, the communications are not covered by the privilege. Foskett, 7th Edition, on "The Law and Practice of Compromise" declares:

> "In one sense this does not in reality form any exception to the without prejudice rule; it represents a manifestation of circumstances in which the rule never truly comes into play. "

[29] Whether or not there was a dispute in this case during the relevant discussions is a matter to which we shall shortly turn in this judgment.

[30] Decisions on the subject of whether correspondence and communications are genuinely sent as part of an on-going dispute are often fact sensitive (see Passmore 3rd Edition on "Privilege" at 10-068). It is a concept that is often difficult to grasp. Privilege is available even though litigation may not follow until sometime after the protected exchanges and the question of how proximate must unsuccessful negotiations in a dispute leading to litigation be to the start of that litigation in order to attract the "without prejudice" rule is rife with judicial difficulty. Auld LJ said in Barnetson v Framlington Group Limited and Another [2007] 1 WLR 2443 at [32]:

> "… The courts are logically driven back … to the public policy interest behind the rule, of encouraging parties to settle their disputes without 'resort' to litigation or without continuing it until the needless and bitter end. If the privilege were confined to settlement communications once litigation had been threatened or shortly before it has begun, there would be an incentive on both sides to escalate their dispute with threats of litigation and/or to move quickly to it

> before they could safely start talking sensibly to each other. …. The critical question for the court in such a case is where to draw the line between serving that interest and wrongly preventing one or other party to litigation when it comes from putting his case at its best. It is undoubtedly a highly case sensitive question, or to put another way, the dividing line may not always be clear."

[31] There is a number of recognised exceptions to the "without prejudice" rule which all serve the underlying purpose of the rule, namely to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement.

[32] The purposes of this appeal and the interests of brevity would not be served by an exhaustive analysis of the exceptions to the "without prejudice" concept. A discussion of these exceptions has spread over pages of the leading text books and spurred scholarly analysis in many instances.

[33] However for the purposes of this case, one aspect of the exceptions to the rule is relevant. In Unilever's case the principal issue raised in the appeal was as to the application of the general rule of evidence on "without prejudice" communications to proceedings peculiar to patent law and some other fields of intellectual property law. Walker LJ adumbrated various occasions on which, despite the existence of "without prejudice" negotiations, the "without prejudice" rule did not prevent the admission into evidence of what one or both of the parties said or wrote. Amongst the most important instances that he set out was the following at p. 792(4):

> "(4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety' (the expression used by Hoffmann LJ in Forster v Friedland [1992] CA Transcript 1052)."

[34] Foskett at paragraph 19-46 declares that there is "a clear trend in the authorities reflecting the desirability of restricting" the occasions when the defence can be raised to "clear cases of unambiguous impropriety". The author adds at 19-55:

> "The court will doubtless have to adopt a pragmatic approach, balancing the primary consideration of ensuring protection for parties involved in true

> settlement negotiations against the need to ensure that the privilege afforded by the rule is not abused."

[35] A much discussed authority in the instant appeal was BNP Paribas v Mezzotero [2004] IRLR 508. At the heart of the employee's complaints in that case was an allegation of direct sex discrimination and victimisation against her employers who had sought to terminate her employment after she had raised a grievance concerning discriminatory treatment in the context of maternity leave. The EAT had held that there was no dispute between the parties at the time of a meeting between them that the employer had wished to conduct on a "without prejudice" basis and to which the employee had seemingly agreed, such that the "without prejudice" privilege did not apply to protect what they discussed on that occasion. The mere raising of a grievance as to discrimination by the employee did not put the parties "in dispute". Cox J also indicated, in obiter dicta, that lest she was in error about that, she accepted the employee's submissions that the employer's conduct in the context of a legitimate discrimination complaint amounted to unambiguous impropriety "and was an exception to the 'without prejudice' rule within the abuse principle".

[36] This case has been subjected to some critical analysis (e.g. Passmore at 10-134-10-136) with the suggestion that there has been some rowing back from the decision in later rulings which have arguably confined it to cases of blatant abuse.

[37] It is unnecessary for this court to join the academic debate about the reach of this case save to note that the issue of whether a dispute exists and the role of the unambiguous impropriety exception are potentially key components of any "without prejudice" debate.

Preliminary issues

[38] The provisions of Regulation 18 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 govern pre-hearing reviews and the conduct of such reviews. At a pre-hearing review the Chairman may carry out a preliminary consideration of the proceedings and he may, inter alia, determine any interim or preliminary matter relating to the proceedings and do anything else which may be done at a case management discussion.

[39] The exercise of that power to deal with issues at a preliminary hearing ,however, does need to be used sparingly, the essential criterion being whether there is a succinct knock-out point capable of being decided after only a relatively short hearing. In SCA Packaging Ltd v Boyle, Lord Hope said at paragraph [9]:

> "It has often been said that the power that tribunals have to deal with issues separately at a preliminary hearing should be exercised with caution and resorted to only sparingly. This is in keeping with the

> overriding aim of the tribunal system. It was set up to take issues away from the ordinary courts so that they could be dealt with by a specialist tribunal as quickly and simply as possible. … There are, however, dangers in taking what looks at first sight to be a short cut but turns out to be productive of more delay and costs than if the dispute had been tried in its entirety … The essential criterion for deciding whether or not to hold a pre-hearing is whether … there is a succinct, knock out point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary issue cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case it is preferable that there should be only one hearing to determine all the matters in dispute."

Discussion

[40] This court has had the benefit of submissions, and indeed concessions, by counsel which were not clearly articulated before this highly experienced Employment Judge. A fresh scrutiny of the issues in this Appeal has allowed us to take an innately retrospective view of what perhaps should have been done in this instance. We have decided to set aside the finding of the ET judge and remit this whole matter back to the Industrial Tribunal, before a different ET judge, due to a strong feeling of unease that fundamental issues were insufficiently explored at the hearing due largely to the parties drawing up agreed facts which glossed over and perhaps unwittingly concealed matters that needed to be addressed in detail. Our reasoning for so concluding is as follows.

[41] First, was there in reality a dispute extant at the meeting of 25 June 2013 to which the "without prejudice" nomenclature can attach? Did that meeting have a purpose other than settlement of a dispute? Has the dividing line as adumbrated by Auld LJ in Barnetson's case been crossed?

[42] It was Mr Lyttle's contention that this meeting constituted no more than a misuse of the "without prejudice" principle and in itself reflected a discriminatory attitude on the part of the respondents towards the appellant. Counsel argued that the respondents merely used this meeting as a ruse to inform the appellant, through the second respondent, that it did not see a future for the appellant in the company and that there were issues with the appellant's conduct within the workplace. He was given an example of the conduct in question but the appellant did not agree that these allegations were true and branded the second respondent a liar. The appellant was then informed that as a result of the alleged issues with the appellant's conduct,

the respondent would proceed to commence a disciplinary process against the claimant.

[43] Mr Lyttle therefore contended that the meeting in question was simply a device to get rid of the appellant and that no genuine attempt was made to engage a dispute or compromise or settle the outstanding issues. Counsel calls in aid of this proposition the fact that it is common case that the appellant was not told in advance the purpose of the meeting before he arrived, there was no agenda and before any explanation of the reason for the meeting was outlined he was asked to agree to it being "without prejudice". It appears to us that if the appellant's case is accepted, and of course we make no comment on that proposition, there is the basis for an argument by the appellant that this was a classic instance of there being no real dispute extant and an instance of 'unambiguous impropriety' which would exclude the "without prejudice" aspect.

[44] Ms McGrenera on behalf of the respondent challenges this assertion, arguing that there was a dispute and that the facts were carefully explained to the appellant at the meeting. However, she has to meet the rejoinder that it is agreed that the appellant did not accept the respondent's allegations about his conduct, branding the author a liar, and that the basis of any extant bona fide dispute is a fundamental point at issue between the parties.

[45] We are not satisfied that this question of whether or not there was an extant dispute was ever fully explored by the ET Judge. We note his conclusion that "there is nothing to suggest in the statement of agreed facts that the discussions were not a genuine attempt at settlement of this employment dispute before the disciplinary procedure was invoked". Our disquiet springs from our concern as to how this issue could be conclusively addressed without hearing oral evidence from the parties. Mr Lyttle contended before us that the appellant had attended the hearing before the ET Judge believing that there would be an oral hearing in which these matters would be explored. It is right to say that the appellant's reply to a Notice for Particulars dated 21 March 2014, which apparently was not before the ET Judge, makes clear that this was the appellant's basic argument for some time prior to the Tribunal determination notwithstanding the contents of the agreed facts.

[46] Consequently, we are of the view that it would be necessary for the Employment Tribunal, before determining the "without prejudice" issue, to reconsider whether there was an extant dispute at the meeting of 25 June 2013 to which "without prejudice" communications could ever attach.

[47] Secondly, we consider that further exploration is required as to whether or not there was in reality any agreement on the part of the appellant, express or implied, to this meeting being "without prejudice" notwithstanding the contents of paragraphs (iv)-(vi) of the agreed facts. Paragraph (iv) declares that in the presence of the second respondent Mr Cromie explained to the appellant that they sought to engage in a "without prejudice" meeting with him. Mr Cromie is a Human

Resources officer with the respondents but apparently without any legal qualifications. Similarly the appellant is without knowledge of the law. As paragraphs [21]-[37] of this judgment illustrate, the concept of "without prejudice" discussion is a complex and challenging one even for lawyers and the judiciary. Whilst the agreed Statement of Facts declared that the concept was explained to the appellant and he confirmed his understanding of the principle and agreed to continue, this begs the questions as to what precisely he did understand and what it was to which he had agreed? What was the explanation given to him of the concept of "without prejudice"? Was it a legally accurate one? Without oral evidence, based purely on the stark statement of the agreed facts and absent some clear evidence that the meaning of "without prejudice" communications was *properly* explained to the appellant, we consider that it was not open to the Tribunal to conclude that there was an express or implied agreement that the said discussions were to be "without prejudice".

[48] Once again we raise the question as to whether some oral evidence on this issue would not have been necessary in order to flesh out precisely whether there had been an express or implied agreement in reality.

[49] We recognise that into this pot pourri of agreed facts must be mixed the recognition that *counsel* on both sides had agreed this Statement of Facts. Mr Lyttle candidly conceded that the parties may well have contributed to this unsatisfactory situation by an agreement which ignored the need to address such fundamental issues. To that extent we have great sympathy with this experienced ET judge who was confronted by such a document, agreed by counsel, notwithstanding its evident frailties. Nonetheless, our sense of disquiet as to what was agreed remains, and demands, to be resolved with a more penetrating analysis than that afforded by the agreed facts. Accordingly the second reason for remitting this matter back to the Employment Tribunal for reconsideration is for determination as to whether or not there was in reality an agreement, implied or expressed, on the part of the appellant to this matter being "without prejudice".

[50] Thirdly, even if there was an extant dispute, can the discussion have been agreed to be "without prejudice" when that agreement was made before the dispute had been outlined or crystallised? Obviously the dispute had not been defined before the appellant arrived at the meeting because he was unaware of the purpose of the meeting. Paragraphs (iv), (v) and (vi) of the agreed facts – confirming the explanation of the "without prejudice" principle and the agreement to continue – appear before the contents of (vii) had emerged, i.e. that the appellant was informed that the second respondent did not see a future for the claimant in the company and the issues with reference to his conduct within the workplace.

[51] Ms McGrenera, as did the ET judge, properly adverted to authority for the proposition that lack of awareness of the agenda or nature of the meeting in advance of attending does not necessarily prevent the discussions being "without prejudice"(see A v B and C [2013] UKEAT/0092/13). However, in the

circumstances of this case where it is agreed that the appellant had no idea whatsoever as to why the meeting was occurring, it seems to us arguably inescapable that an agreement to the "without prejudice" principle made in vacuuo before any attempt was made to outline what the alleged dispute was nullifies any meaningful agreement to discuss an unknown dispute on a "without prejudice" basis. We consider that again this is a matter that requires further exploration if a determination is to be made that the agreed facts genuinely reflected an agreement to discuss the dispute, if there was one, on a "without prejudice" basis.

[52] Fourthly, these matters seem perilously close to the central issue in this case. We question whether this preliminary hearing is going to be a shortcut to resolve an outstanding matter. The essential criterion for deciding whether or not to hold a pre-hearing is whether there is a succinct, knock out point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary issue cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case it is preferable that there should be only one hearing to determine all the matters in dispute. Can the issues we have raised be divorced from the merits of the full case and do they not require substantial evidence and cross examination in order to resolve them? This is a further matter that requires exploration before the Employment Tribunal.

[53] In view of our conclusions it is unnecessary for this court to deal further with the appellant's grounds of appeal in detail. We therefore set aside the finding of the ET judge on this preliminary issue and remit the matter back to the Tribunal for further consideration by a different judge in light of this judgment. We shall hear the parties on costs.