

“Without Prejudice” conversations with employees

White Paper Conference
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Welcome

How do you control - and overcome - the risks of approaching an individual through a without prejudice conversation? What can you say and insinuate about the individual's prospects?

AGENDA

- A What is privilege and when is privilege claimed
- B Different types of privilege
 - Legal advice privilege
 - Litigation privilege
 - Without Prejudice Privilege
- C Difference between “off the record” and “without prejudice”
- D “Protected conversations” (UK)
- E Settlement discussions with employees
- F Broaching severance... and/or making insinuations

A. WHAT IS PRIVILEGE?

- Privilege entitles a party to refuse to share communications with a third party (including the other side in legal proceedings) or a court in certain circumstances.
- In the context of “without prejudice” conversations, privilege operates to prevent parties to a dispute from disclosing previous negotiations (both written and oral) in subsequent legal proceedings, for example in an unfair dismissal claim before an Adjudication Officer.
- Communications have to be confidential to be privileged. However, just because something is confidential or commercially sensitive does not automatically make it privileged.

A. When is privilege claimed

- Discovery in WRC or civil courts
- During WRC or civil court hearings
- Data Access / Subject Access Requests under Data Protection Acts

B. TYPES OF PRIVILEGE

B(a) Legal Advice Privilege

- Covers confidential communications between a lawyer and client for the dominant purpose of seeking or giving legal advice.
- Not dependent on the existence of any potential litigation.
- “Lawyer” includes qualified solicitors and barristers (not trainees, paralegals or legal executives, unless supervised by a qualified lawyer).
- Communication must be made to the client and not to a third party (unless the third party is client’s agent engaged in a professional capacity).

B. TYPES OF PRIVILEGE

B(a) Legal Advice Privilege (cont'd)

- Communication must be for purposes of giving or receiving legal advice. Business or personal advice is not covered by legal advice privilege.
- Legal assistance in respect of administrative and transactional matters are unlikely to attract privilege if no actual advice is given.

B. TYPES OF PRIVILEGE

B(b) Litigation Privilege

- Where the dominant purpose of a communication is to prepare for actual or apprehended litigation, then litigation privilege may be claimed. It also exists for confidential documents created for the dominant purpose of prosecuting or defending litigation.
- The rationale behind litigation privilege is that parties to litigation should be free to prepare their case without being concerned that they will have to disclose their preparatory materials to their opponent.
- “*Litigation*” will include proceedings before WRC, courts and tribunals of inquiry. It may include certain other regulatory proceedings (such as investigations by the ODCE).

B. TYPES OF PRIVILEGE

B(b) Litigation Privilege (cont'd)

- The court must be satisfied that the primary or dominant purpose in creating the specific document was litigation, either pending or threatened / anticipated.
- If the document has another, equal purpose then litigation privilege may not apply (*Dunne v National Maternity Hospital [1989] IR 91* and *Gallagher v Stanley [1998] 2 IR 267*).
- Litigation has to be either in existence or **reasonably apprehended**. A mere possibility is likely not enough to attract privilege, but there does not have to be a probability of litigation.

B. TYPES OF PRIVILEGE

B(c) Without prejudice privilege

- Communications (written or oral) by parties in a dispute with a view to settling the dispute
- Based on public policy that parties are encouraged to settle disputes without recourse to litigation
- Must expressly state that the conversation is on a “without prejudice” basis.
- There must be bona fide attempt to settle the dispute and an intention between the parties that if no settlement, that the communications will be, and remain, private

B. TYPES OF PRIVILEGE

B(c) Without prejudice privilege (cont'd)

- Must be a genuine dispute - proceedings contemplated or in being
- Any person or entity involved in a genuine dispute likely to lead to litigation can correspond with the benefit of without prejudice privilege. Not just reserved for lawyers.
- Any notes from a without prejudice discussion during a meeting or telephone call should be marked “without prejudice”.

B. TYPES OF PRIVILEGE

B(c) Without prejudice privilege (cont'd)

- When without prejudice privilege does not apply (or is **lost**)
 - Where the “without prejudice” label is invalid/improperly used
 - Dispute over settlement terms
 - Fraud, misrepresentation and undue influence (severance agreement)
 - Moorview Developments v First Active Plc [2008 IEHC 274] – “*where it can be clearly shown that greater damage to the interests of justice would be affected by non-admission than by disclosure*” then the evidence may be admitted.

C. Difference between “Off the Record” and “without prejudice”

- Without prejudice communications can be privileged
- “Off the record” has no legal status

D. PROTECTED CONVERSATIONS (UK)

- Since 2013, principle of “protected conversations” applies in Great Britain (but not in Northern Ireland) under the Employment Rights Act
- GB protected conversations different to “without prejudice” conversations, as they do not require a dispute to exist between the parties.
- Protected conversation principle enables employer and employee to have pre-termination negotiations which are inadmissible as evidence before the UK employment tribunal.
- NO such “protected conversations” in Ireland.

E. SETTLEMENT DISCUSSIONS WITH EMPLOYEES

- *How do you control - and overcome - the risks of approaching an individual through a without prejudice conversation? What can you say and insinuate about the individual's prospects?*
- If a claim is threatened or reasonably anticipated, ask employee if they are legally represented and whether you can contact their solicitor. Safest option is lawyer – lawyer discussions.
- If not legally represented, indicate at the outset that the discussion will be “without prejudice”. Explain what this means. Do not commence discussions until the employee has confirmed they understanding “without prejudice” and agree to talk on that basis - informed consent is important.

F. Broaching severance... and/or making insinuations

- Off the record is (arguably) morally binding at best
- Without prejudice only covers settlement of contemplated proceedings
- Is there any scope for a safe (or reduced risk) discussion around possible severance?
- Not without risk.... but yes.

F. Broaching severance... and/or making insinuations

MHCs' recommended process to allow for discussion around possible severance

- Avoid “stand-alone” conversation (walk in the car park) where E/R broaches exit and severance. Any future process which may result in dismissal risks being tainted (UD/employment injunction)
- Is there a basis for a pre-process informal meeting with E/E (PIP, redundancy at risk, disciplinary investigation or meeting, absence management)?
- Don't make insinuations. State the facts. Emphasise process has not formally begun, so no pre-determination.
- Be honest - only say things which will form part of the “open” communications

F. Broaching severance... and/or making insinuations

MHCs' recommended process to allow for discussion around possible severance (Cont'd)

- In our view it is not improper if you ask E/E if they would like to look at other options? **MUST** emphasise process has not even begun, so no pre-determination (again.... no insinuating!)
- **if** yes, then ask if they want to discuss matters on an off the record and without prejudice basis (MHC experience is 100% positive response when asked if E/E wants to explore options)
- Only proceed **if** they say yes. Explain what off the record and without prejudice means, that the E/E is asking the E/R to have a discussion which cannot be referred to or relied on in the future. Ask E/E to confirm that they want to talk on that basis

F. Broaching severance... and/or making insinuations

MHCs' recommended process to allow for discussion around possible severance (Cont'd)

- If yes, outline DRAFT terms.
- You may ask “if off the record means nothing, and without prejudice doesn't apply (absent contemplated proceedings) why do it?”
- Because we have had some success where EAT (now WRC) has upheld privilege and/or decided that such discussions should remain confidential, given that E/E expressly requested them

F. Broaching severance... and/or making insinuations

MHCs' recommended process to allow for discussion around possible severance (Cont'd)

- 2 protections having conversation in this careful way, should E/E seek to rely on, or misrepresent ,E/R's actions:
 - 1) conversation may be deemed inadmissible; or
 - 2) conversation is careful, with notes taken, showing that there is no pre-determination (so the future process embarked upon if no deal is done, is not tainted)
- Take notes of meeting/call and mark this section of the discussion "without prejudice"



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