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## [The without prejudice nature of negotiations leading to compromise agreements](#)

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### [VLADIMIR PORTNYKH v NOMURA INTERNATIONAL PLC \(2013\)](#)

EAT (Judge Hand QC) 05/11/2013

CIVIL EVIDENCE - EMPLOYMENT

Portnykh v Nomura International plc establishes that in the normal course of events, correspondence, marked "without prejudice and subject to contract" passing between an employee and his employer whilst negotiating a compromise agreement, will be inadmissible even though there is no obvious actual dispute at the time and even though its exclusion at a subsequent hearing will cause prejudice to a party.

Before the employment tribunal (ET), at a pre-hearing review, the employer had successfully argued that the correspondence was not subject to the without prejudice exclusionary rule because (1) there was no dispute between the parties and (2) even if there was, the "other unambiguous impropriety" exception applied. The employee successfully appealed and the correspondence was excluded from the evidence to be put before the ET.

The principles to be applied are set out in the judgment of Robert Walker LJ in [Unilever plc v Procter & Gamble Co \(2000\) 1 WLR 2436](#)

, holding that the "without prejudice" exception to the rule that admissions against interest are admissible rests on the public policy of encouraging litigants to settle their differences rather than litigate them to the finish or may rest on an express or implied agreement that the communications should not be admissible if a contested hearing ensues, that the exclusion may not operate where the exclusion would act as a cloak for perjury, blackmail or "other ambiguous impropriety", and finally that the "without prejudice" label cannot be "used indiscriminately so as to immunise an act from its normal legal consequences where there is no genuine dispute or negotiation".

That in determining whether there was a dispute or a potential dispute, the latter being enough to bring the correspondence within the exclusionary rule, a judge had to consider the whole factual matrix and not just the correspondence itself. Effectively, the EAT found that in the normal course of events, wherever parties are negotiating a compromise agreement there is likely to be either a dispute or a potential dispute. That even if there had been no such dispute or potential dispute, the exclusionary rule may still apply if "negotiation" is an alternative to "dispute", based on the express/implied agreement to exclude theory of the origin of the exclusionary rule. However, no ruling was made on this basis and the point was left open.

That for the "other ambiguous impropriety" exception to apply to the usual exclusionary rule, there had to be more than one party being disadvantaged by the exclusion of evidence. Such is the importance of the exclusionary rule that something amounting to dishonest conduct probably needs to be established for the exception to apply.

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