

Dispute Resolution Factsheets

How to use 'without prejudice' to protect your interests

To rely on the 'without prejudice' rule:

- there must be a dispute underway;
- what you say must be part of a genuine attempt at settling the dispute;
- you must not reveal the content of 'without prejudice' negotiations, or you can forfeit your right to confidentiality.

If you have a potential dispute with an employee or a customer, just using the words 'without prejudice' in a discussion or on correspondence does not automatically make it confidential. Your words could still be made public in court or the employment tribunal - they are not 'without prejudice' at all - unless you satisfy certain conditions.

First, for the words to protect you a dispute actually has to be underway. The courts have said that:

- a 'dispute' means "a matter capable of compromise and one in respect of which, if not resolved, the parties could reasonably contemplate litigation" (which includes discussions about how to avoid a dispute becoming a legal claim); and
- it does not matter that negotiations took place along time before a matter became a legal claim, as long as it was foreseeable that it might at the time.

This means 'dispute' has a wide meaning, and the period during which 'without prejudice' can protect businesses can be lengthy, giving them plenty of latitude when attempting to settle disputes without going to court or tribunal.

Be very careful, however. If a customer has complained, and you want to make an offer of compensation, to appease them, you can mark it 'without prejudice'. But you must still ask "Is there a dispute yet?". If the court decides the matter hadn't escalated into a dispute, your offer could come out into the open later and be treated as an admission of fault - in the absence of a dispute, you cannot say your offer was really made 'without prejudice'. Or it might not be a genuine attempt to settle the dispute - if it is not, it can be referred to in court.

Also, attempts to negotiate with employees during disciplinary and grievance procedures remain fraught with difficulty. For example, you might want to sack an employee, and decide to have a 'without prejudice' chat to see if she'll go quietly. Legally, however, there may not be a 'dispute' yet - even if she has lodged a grievance. So what you say in your 'without prejudice' chat - and the fact you had a chat at all - may turn out not to be confidential if she later sues you for discrimination.

If you suggest she might leave her job during your chat (even if you offer to make it worth her while) it's likely to be a constructive dismissal. By making it clear you want her to go you've destroyed the relationship of trust and confidence which should exist between you.

Even if there's a dispute, 'without prejudice' only makes your admissions confidential, not your assertions - so don't make discriminatory comments during 'without prejudice' discussions, even if a dispute is actually underway, because they won't be protected even if you have used 'without prejudice'.

Keeping quiet

Once you have reached a 'without prejudice' agreement, keep it confidential. In one case an employer later went public with certain details of 'without prejudice' negotiations and settlement reached with an employee during an internal grievance. These were then held to be admissible in discrimination claims brought by the employee, because the remarks made publicly were evidence of discrimination.

Action points

- Only use 'without prejudice' if there is an existing dispute underway.

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While great care is taken when compiling these materials, no responsibility is accepted for their content or accuracy. They are for general guidelines only and action should not be taken without obtaining specific advice.

- Use 'without prejudice' only if you're making a genuine attempt to settle the dispute.
- Don't make assertions, and expect them to be protected by the 'without prejudice' rule.
- If communications are, in fact, without prejudice, it helps to mark them as such.
- Ensure no public reference is made to the content of without prejudice negotiations or settlements.
- Do not use 'without prejudice' negotiations in the course of employees' disciplinary and grievance procedures without legal advice.
- Keep a written record of exactly what is said during any 'without prejudice' discussions.

If in any doubt at all, **take legal advice.**