THE BAR of NORTHERN IRELAND

Privacy, privilege and Preliminary issues in the Employment Tribunal

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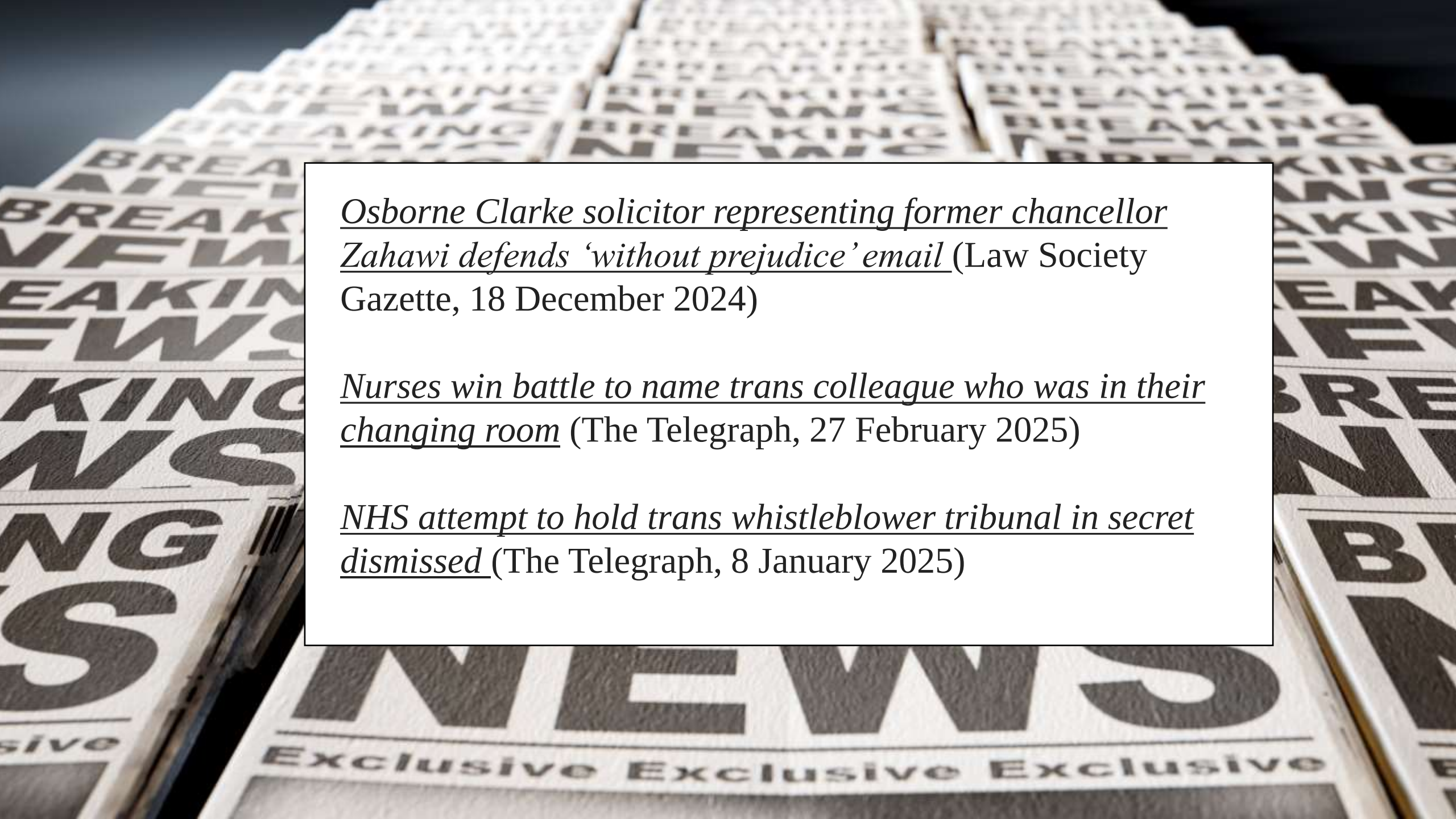

Osborne Clarke solicitor representing former chancellor Zahawi defends 'without prejudice' email (Law Society Gazette, 18 December 2024)

Nurses win battle to name trans colleague who was in their changing room (The Telegraph, 27 February 2025)

NHS attempt to hold trans whistleblower tribunal in secret dismissed (The Telegraph, 8 January 2025)

THE WITHOUT PREJUDICE RULE

General position

- Content of without prejudice (”WP”) communications is not admissible within the same and/or related litigation (concerning the same subject-matter between the same or different parties) as evidence of admissions (or partial admissions) against the interest of the party that made them, should the settlement discussions fail: **Rush & Tomkins v GLV** [1989] AC 1280 (Lord Griffiths at **[p.1302]**)

- Principles apply equally to proceedings in industrial tribunals: **Independent Research Services Ltd v Catterall** [1993] ICR 1 EAT judgment of Knox J at **[p.2]**

- In **Woodward v Santander UK Plc (formerly Abbey National Plc)** Appeal No. UKEAT/0250/09/ZT, the EAT clarified (at **[60]-[61]**) that:

  “The “without prejudice” rule applies with as much force to cases where discrimination has been alleged as it applies to any other form of dispute. Indeed the policy may be said to apply with particular force in those cases where the parties are seeking to settle a discrimination claim.”

THE WITHOUT PREJUDICE RULE

Scope

- The concept of "*admissions*" against a party's interest (which are protected from disclosure) is given a wide meaning: **Unilever plc v Procter & Gamble Co** [2000] 1 W.L.R. 2436 (subsequently approved by the House of Lords in **Bradford & Bingley Plc v Rashid** [2000] 1 W.L.R. 2436 and **Ofulue v Bossert** [2009] 1 A.C. 990).

- Per Lord Hope in **Ofulue v Bossert** (at **p.999H**):

> "*It is the ability to speak freely that indicates where the limits of the rule should lie.* ***Far from being mechanistic, the rule is generous in its application.*** *It recognises that unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement*." (**Emphasis added.**)

THE WITHOUT PREJUDICE RULE

Scope

- This is consistent with the public policy underlying the rule and also the nature of many WP communications. Walker LJ observed at **[p.2443]** in **Unilever**:

> "***I have no doubt that busy practitioners are acting prudently in making the general working assumption that the rule, if not 'sacred' (Hoghton v Hoghton (1852) 15 Beav 278, 321) has a wide and compelling effect.*** *That is particularly true where the 'without prejudice' communications in question consist not of letters or other written documents but a wide-ranging unscripted discussion during a meeting which may have lasted several hours. At a meeting of that sort the discussions between the parties' representatives may contain a mixture of admissions and half admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and statements (which might be characterised as threats or thinking aloud) about future plans and possibilities.*"

THE WITHOUT PREJUDICE RULE

- The scope of WP privilege extends beyond the classic core of positive arguments, offers and concessions made. In **Unilever** Walker LJ held [at **[p.2448]** that:

> "***the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties****, in the words of Lord Griffiths in the Rush & Tompkins case [1989] AC 1280, 1300: 'to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts'. Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders.*" ***(Emphasis added.)***

THE WITHOUT PREJUDICE RULE

- **NB:** discussions and settlement meetings must be considered "*objectively and in the round*" and "*there is no justification for salami slicing*" a meeting into parts that were open and parts that were without prejudice: **Sang Kook Suh v Mace (UK) Limited** [2016] EWCA Civ 4 (Vos LJ at **[24]**).

Reference to fact of W/P discussions, but not content

Briggs v Clay [2019] EWHC 102 (Ch)

- English High Court considered previous authorities in which it was suggested it may be permissible to refer to the fact of WP communications even where the content is protected by the rule

THE WITHOUT PREJUDICE RULE

. It concluded (at **[129]**):

> "*In my judgment,* ***the fact of without prejudice communications can properly be referred to where that fact is relevant to an issue in the case. If irrelevant to the resolution of any issue, the fact is inadmissible for that reason****. In the RWE NPower case, the issue was whether a dispute had crystallised by a particular date; in the Walker case, the issue was whether there had been discussions between the plaintiff and the defendant that provided an explanation for the plaintiff's apparent delay, in the context of a defence of laches. It is obvious why the fact of the communications was relevant in those cases*." (**Emphasis added.**)

- However, "*there can be a fine line between referring to the fact that communications took place and seeking to infer that particular matters were discussed*": **Briggs v Clay** at [**131**].

THE WITHOUT PREJUDICE RULE

Behaviour

- WP privilege also covers how parties behaved during without prejudice discussions.

Wilkinson v West Coast Capital [2005] EWHC 1606 (Ch):

- Petitioner had dissected out identifiable admissions without giving details of the negotiations themselves, and instead, relied on the fact of negotiations and the Respondents reneging on an agreement in principle reached within those negotiations
- English High Court (Mann J) rejected this. At **[15-16]** he held:

  "*Protecting against admission against interest in a narrow sense is not the only thing to be achieved. A more general freedom to negotiate is also part of the same package. It is important that things going beyond technical admissions should be caught by the bars imposed by the without prejudice principles.* ***In my view, that will extend to who it was who broke off negotiations and who decided not to go through with an apparently agreed deal …That seems to me to be all part of the freedom of negotiation under the umbrella****."*

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- **Vestergaard Frandsen A/S v Bestnet Europe Ltd** [2014] EWHC 4047 (Ch)
  - Defendants wished to adduce WP correspondence they said evidenced claimants' intransigent approach to settlement negotiations (in alleged contrast to defendants' genuine attempt to settle matters). It was argued the claimants, by such approach, had lost entitlement to protection of WP privilege (see [**18**]).
  - English High Court dismissed (at **[31]**) that argument as "*totally without merit*" on the basis that:

    "*Once a party has made a without prejudice offer, the recipient of the offer is plainly free to make a without prejudice response. The response may be to make a counter-offer, it may be to ask for more information, or it may be simply to reject the offer outright.* ***He may even choose to ignore the offer completely. All those responses are protected by the privilege***." (**Emphasis added**).

THE WITHOUT PREJUDICE RULE

Failure to negotiate/make an offer

- WP privilege has been held to apply as much to a failure to reply to an offer to settle made in negotiations as it does to the original offer. In **Cutts v Head** [1984] Ch.290 Oliver LJ said at **[306]**:

> "*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 resort 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…*" (**Emphasis added.**)

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- In **Vestergaard** the defendants further argued that even if sections of their witness statement had to be struck out, a single sentence which asserted the claimants had "*never made any offer to settle*" could be preserved as this did not amount to the disclosure of privileged material. The Court also dismissed that argument and held (at **[40]**), that such a statement was either:

> "*... saying no more than is already obvious, namely that the Claimants never made any open or otherwise admissible offer to settle (in which case it is unnecessary),* ***or it is seeking to inform the Court about the attitude taken by the Claimants in without prejudice communications (in which case it is not admissible, if not heretical)***." (**Emphasis added**)

- WP privilege can extend to cover a refusal to mediate or *to engage in* settlement negotiations/meetings, if that refusal is a fact obtained exclusively from WP correspondence and negotiations.

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- **R (on the application of Wildbur) v Ministry of Defence [2016] EWHC 821** (Admin):

  - English High Court (Cranston J) acceded to MOD's application to strike out two paragraphs of claimant's pleading as disclosing content of WP negotiations.
  - He held the principle in **Cutts v Head** was not limited to specific offers for settlement but extended to the fact of an offer *of settlement negotiations*.
  - Ordered that the offending paragraphs be replaced with the simple statement that "*alternative dispute resolution has been attempted, but has been unsuccessful*", as that was all that was properly on the record.

THE WITHOUT PREJUDICE RULE

Waiver

- WP privilege belongs, collectively, to the parties to the relevant WP communication and can therefore only be waived with the consent of all parties: Passmore on Privilege, 4th Edn, at [10-306].

- If one party seeks (deliberately) to disclose and/or adduce evidence of WP communications, this does not itself waive privilege but puts the other party to an election:
  - It can treat the disclosure as a waiver of privilege so that the otherwise WP material becomes admissible (in its entirety) or
  - It can apply to strike out the offending material as an abuse of process.

- WP privilege can be waived, either expressly or impliedly (by conduct).

- By giving evidence: **McTaggart v McTaggart** [1948] 2 All ER 753 *"The privilege, if any, was the privilege of the parties, and they, having given evidence on the point, could not assert the privilege"*.

THE WITHOUT PREJUDICE RULE

- By reference in pleadings etc.: **Brunel University v. Vaseghi** [2007] IRLR 592:

  "In our view, it is clear that, by referring to the 'without prejudice' discussions in their ET1s and witness statements, the employees made it plain that they intended, unless prevented, to waive their privilege. By pleading their responses as they did and by attaching the grievance panel's reports to the ET3s, the university made it plain that it too intended to waive privilege. In our view, bilateral waiver had taken place at the time the ET3s were lodged with the tribunal office. Considering the nature of the issues, this was an entirely sensible and understandable position for both sides to take.

- But can be amended:

  "However, we would accept that the die was not yet irrevocably cast in that either side could have applied to amend its pleading so as to remove all reference to the 'without prejudice' material".

EXCEPTIONS TO THE WITHOUT PREJUDICE RULE

Potential exceptions

- The rule against admissibility of WP correspondence is not absolute.
- Resort may be had to WP material "*for a variety of reasons when the justice of the case requires it*": **Rush & Tompkins**, per Lord Griffiths (at **[p.1300]**).
- Various exceptions to the WP rule: most important summarised by Walker LJ in **Unilever** at **[p.2444-2445]**:
  - Where the issue is whether the WP communications have resulted in a concluded settlement agreement;
  - As evidence of misrepresentation, fraud or undue influence;
  - Where a statement may have given rise to an estoppel;
  - As evidence of perjury, blackmail or other unambiguous impropriety;

EXCEPTIONS TO THE WITHOUT PREJUDICE RULE

- To explain delay or apparent acquiescence (albeit generally limited to the fact letters have been written and the dates on which they are written);
- As evidence about the reasonableness of a settlement;
- On the question of costs when the parties have expressly made offers which are "without prejudice save as to costs"; and
- Where communications are received in confidence with a view to matrimonial conciliation.

Court's approach

- "*Once a communication is covered by without prejudice privilege, the court is slow to lift the cloak of that privilege unless the case for doing so is absolutely plain*": **RWE NPower plc v Alstom Power Ltd** [2009] 12 WLUK 734 (at **[49]**).
- Powerful policy reasons to only allow exceptions to the WP rule in the "*very clearest of cases. Unless this highly beneficial rule is most scrupulously protected, it will all too readily be eroded*." (Per Simon Brown LJ in **Fazil Alizadeh v Nikbin** (unreported, 25 February 1993))

EXCEPTIONS TO THE WITHOUT PREJUDICE RULE

- Quoted with approval by Males LJ in **Motorola Solutions Inc v Hytera Communications Corp Ltd** [2021] EWCA Civ 11, in which he suggested (at **[31]**) that it demonstrated three important points:

  - "*First, the without prejudice rule must be "scrupulously and jealously protected" so that it does not become eroded.*
  - *Second, even in a case where the "improper" interpretation of what was said at a without prejudice meeting is possible, or even probable, that is not sufficient to satisfy the demanding test that there is no ambiguity.*
  - *Third, evidence which is asserted to satisfy this test must be rigorously scrutinised.*"

UNAMBIGUOUS IMPROPRIETY

Basis

- A party may adduce evidence of WP negotiations if the exclusion of the evidence would "*act as a cloak for perjury, blackmail or other 'unambiguous impropriety*"".
- The expression *'unambiguous impropriety*' was first used by Hoffmann LJ in **Forster v Friedland** [1992] CA Transcript 1052 in which he said that *"the value of the without prejudice rule would be seriously impaired if its protection could be removed from anything less than unambiguous impropriety."*
- A high hurdle must be overcome to set aside privilege on this ground.
- This exception is not a "*broad and flexible rule*" (Per Rix LJ in **SIB** Ltd at [63]). See **Berry Trade v Moussavi** [2003] EWCA Civ 715 and **SIB Ltd v Fincken** [2003] EWCA Civ 1630.
- "*The exception should be applied only in the clearest cases of abuse of a privileged occasion*": per Walker LJ in **Unilever** (at **[p.2444]**).

UNAMBIGUOUS IMPROPRIETY

- Cases in which the unambiguous impropriety exception had been recognised were "*truly exceptional*" (per the English Court of Appeal in **Motorola Solutions Inc v Hytera Communications Corp Ltd** [2021] EWCA Civ 11).

- In **Wilkinson v West Coast Capital** Mann J accepted (at [**14**]) that "*Negotiating in bad faith, intending to temporise for some purpose or otherwise mislead the counterparty into thinking that the temporiser was intending to reach a settlement*" would probably fall within this exception, but cautioned that "*strong evidence must be available to support a case where that has happened.*"

UNAMBIGUOUS IMPROPRIETY IN EMPLOYMENT CONTEXT

- **BNP Paribas v Mezzotero** [2004] I.R.L.R. 508
  - EAT held mere raising of a grievance as to discrimination did not put the parties "*in dispute*" at the time of the meeting and so WP privilege did not arise as to what was discussed at that meeting. But went on to say:

> "*…the logical result of [BNP's] submission is that an employer in dispute with a black employee could say during discussions aimed at settlement in a meeting expressed to be being held without prejudice, 'we do not want you here because you are black' and could then seek to argue that the discussions should be excluded from consideration by a Tribunal hearing a complaint of race discrimination.*"

UNAMBIGUOUS IMPROPRIETY IN EMPLOYMENT CONTEXT

- *38. [The applicant]* ***immediately says that such a remark would obviously fall under the umbrella of unambiguous impropriety. I agree. However, [the applicant] is then faced with the unattractive task of attaching different levels of impropriety to fact-sensitive allegations of discrimination, in order to submit that the present remarks do not fall under the same umbrella. I do not regard that as a permissible approach. I would regard the employer's conduct, as alleged in the circumstances of the present case, as falling within that umbrella and as an exception to the 'without prejudice' rule within the abuse principle****, rather than it was as previously described, in terms of prejudice in the case of re Daintrey.*

- *39****. I do not regard this case as creating an impermissible extension to the categories of the rule****, exceptions which will always fall to be considered within the particular factual context of the case and which, in the present case concerns discriminatory conduct by employers towards one of their employees*." (emphasis **added**)

UNAMBIGUOUS IMPROPRIETY IN EMPLOYMENT CONTEXT

- This decision has been heavily criticised (including by Passmore on Privilege).

- BNP sought permission to appeal. Pill LJ, in refusing permission ([2004] EWCA Civ 477 at [23]) did not directly address this issue but adopted "*a general approach*" that, "*against the background of the complaint, to behave as [the bank] did…as assumed, makes it impossible in my judgment to say that the without prejudice principle can be claimed for that part of the discussion which involved a suggestion of termination*".

UNAMBIGUOUS IMPROPRIETY IN EMPLOYMENT CONTEXT

- **Woodward v Santander UK Plc (formerly Abbey National Plc)**
  Appeal No. UKEAT/0250/09/ZT

  - The EAT considered the proper limits of **Mezzotero**.

  - The EAT (at [**58**]) considered that **Mezzotero** did not establish "*any new exception to the without prejudice rule"* and reiterated (at [**62**]) that:

    "*This exception, as we have seen,* ***applies only to a case where the Tribunal is satisfied that the impropriety alleged is unambiguous. It applies only in the very clearest of cases****. A court or Tribunal is therefore required to make a judgment as to whether the evidence which it is sought to adduce meets this test."* [**Emphasis added**]

UNAMBIGUOUS IMPROPRIETY IN EMPLOYMENT CONTEXT

"61. Discrimination claims often place heavy emotional and financial burdens on claimants and respondents alike. It is important that parties should be able to settle their differences (whether by negotiation or mediation) in conditions where they can speak freely. A claimant must be free to concede a point for the purposes of settlement without the fear that if negotiations are unsuccessful he or she will be accused for that reason of pursuing the point dishonestly. ***A respondent must be free to adhere to and explain a position, or to refuse a particular settlement proposal, without the fear that in subsequent litigation this will be taken as evidence of committing or repeating an act of discrimination or victimisation****. And it is idle to suppose that parties, when they participate in negotiation or mediation, will always be calm and dispassionate. They should be able, within limits, to argue their case and speak their mind."* (emphasis **added**)

UNAMBIGUOUS IMPROPRIETY IN EMPLOYMENT CONTEXT

- Continuing generally in relation to the scope of the “unambiguous impropriety” exception in the employment/victimisation context:

> “*63. It may at first sight seem unattractive, given the fact sensitive nature of discrimination cases, to exclude any evidence from which an inference of discrimination could be drawn.* ***But it would have a substantial inhibiting effect on the ability of parties to speak freely in conducting negotiations if subsequently one or other could comb through the content of correspondence or discussions (which may have been lengthy or contentious) in order to point to equivocal words or actions in support of (or for that matter in order to defend) an inference of discrimination****. Parties should be able to approach negotiations free from any concern that they will be used for evidence-gathering, or scrutinised afterwards for that purpose.*

UNAMBIGUOUS IMPROPRIETY IN EMPLOYMENT CONTEXT

Philip McKinstry v Moy Park [2015] NICA 12

- Appeal from a preliminary finding by the Employment Judge that a meeting the employee had with two managers had been "*without prejudice*" and should be excluded from evidence in his tribunal claims for, *inter alia*, disability discrimination:

"*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 within the appellant's conduct within the workplace.***

UNAMBIGUOUS IMPROPRIETY IN EMPLOYMENT CONTEXT

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."***

- Whether the conduct constituted "unambiguous impropriety" did not fall for consideration, as the case concerned the prior question of whether there was an extant "*dispute*" to which WP privilege could ever attach.

- However, the NICA (at **[31-37]**) briefly surveyed the authorities governing this exception, including:

UNAMBIGUOUS IMPROPRIETY IN EMPLOYMENT CONTEXT

- At **[35]**, **Mezzotero**, which the Court described as "*a much discussed authority in the instant appeal*";

- At **[36]**, noting that **Mezzotero** had 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*"; and

- At **[37]**, concluding that it was "*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*".

UNAMBIGUOUS IMPROPRIETY IN EMPLOYMENT CONTEXT

Faithorn Farrell Timms LLP v Bailey [UKEAT/0025/16]

- HH Judge Eady approved and followed the authorities referred to previously; but, interestingly, at paragraphs 35 of her judgment referred to **Mezzotero** as to the "*suggestion that this refusal to permit the excuse of the without prejudice rule might extend to allegedly discriminatory remarks made during the course of such discussions*" and said that **Woodward** held this would only be the case where there was "*blatant discrimination*".

- In NI, see also **Anthony McCullagh v Campbell Catering (NI) Limited t/a Aramark Case Refs 4135/17 & 1733/18** in which Drennan EJ (at para 3.1) set out a useful overview of the law on the Without Prejudice rule.

UNAMBIGUOUS IMPROPRIETY (REVISITED)

Motorola Solutions Inc and another v Hytera Communications Corp Ltd and another [2021] EWCA Civ 11

- Confirmed relevant test for the admissibility of WP material on this ground is, simply, "*whether the evidence establishes unambiguous impropriety*" (at **[66]**).

- Males LJ once again noted that it was a high threshold stating (at **[57])**:

UNAMBIGUOUS IMPROPRIETY

"*I would conclude that the courts have consistently emphasised the importance of allowing parties to speak freely in the course of settlement negotiations, have jealously guarded any incursion into or erosion of the without prejudice rule, and have carefully scrutinised evidence which is asserted to justify an exception to the rule. Although the unambiguous impropriety exception has been recognised,* ***cases in which it has been applied have been truly exceptional, and (leaving aside Dora v Simper) there has been no scope for dispute about what was said, either because the statement was recorded (the admission of a dishonest claim in Hawick Jersey International Ltd v Caplan) or because it was in writing (the e-mail threats in Ferster v Ferster). I would not wish to exclude the possibility that the evidence about what was said at an unrecorded meeting may be so clear that the court is able to reach a firm conclusion about it (nor would I wish to encourage the clandestine recording of settlement meetings), but such cases are likely to be rare*." **(Emphasis added)**

RESOLVING DISPUTE AS TO WITHOUT PREJUDICE

Benefit of a PHPI

- Test well known: **SCA Packaging –v- Boyle**

Need for privacy?

- If publication of details of WP discussions available to the press or other media outlets whilst proceedings ongoing, several possible consequences:
    - Undermine one of the policy principles underpinning the WP privilege rule namely to encourage parties to seek to resolve their differences;
    - Drive a coach and horses through the WP privilege rule before the tribunal has had a chance to determine whether the privilege applied at all or had been waived.

PRIVACY AS TO HEARINGS IN THE EMPLOYMENT TRIBUNAL

Public hearings in the ET

- Rule 47(1)(b) and Rule 50 of the Industrial Tribunals & Fair Employment Tribunal Rules of Procedure 2020 ("the Tribunal Rules") – final hearings and PHPI ordinarily conducted in public.

- But: see Rule 44

> *"44.—(1) A tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings. Such an order may be made in any of the following circumstances—*
>
> ***(a) where the tribunal considers it necessary in the interests of justice;***
> ***(b) in order to protect the convention rights of any person;***

PRIVACY AS TO HEARINGS IN THE EMPLOYMENT TRIBUNAL

(c) for the purpose of hearing evidence from any person ("P") which in the opinion of the tribunal is likely to consist of information which, if disclosed—

(i) would contravene a prohibition imposed by or by virtue of any statutory provision;

(ii) would breach a confidence by virtue of which P has obtained the information;

(iii) would, for reasons other than its effect on negotiations with respect to any of the matters mentioned in Article 96(1) of the Industrial Relations (Northern Ireland) Order 1992, cause substantial injury to any undertaking of P's or in which P works;

……..

(2) In considering whether to make an order under this rule, the tribunal shall give full weight to ***the principle of open justice*** *and to* ***the Convention right to freedom of expression****.*

…….

(6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998."

PRIVACY AS TO HEARINGS IN THE EMPLOYMENT TRIBUNAL

- **<u>Convention rights</u>**

- *ARTICLE 6 - Right to a fair trial*

"....the press and public may be excluded from all or part of the trial or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice"

- *ARTICLE 10 - Freedom of expression*

"….The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in……for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

PRIVACY AS TO HEARINGS IN THE EMPLOYMENT TRIBUNAL

Open justice principle

- Classic exposition in the House of Lords decision in **Scott and another v Scott - [1911-13] All ER Rep 1**.

> *"As a broad principle courts of justice have no power to hear cases in camera even by consent of the parties* ***except in special cases in which a hearing in open court might defeat the ends of justice****. The hearing of a case in public may be, and often is, painful, humiliating, or deterrent, both to parties and witnesses, and in many cases the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured because it is felt that* ***in public trial is to be found on the whole the best security for the pure, impartial, and efficient administration of justice, and the best means of winning for it public confidence and respect."***

PRIVACY AS TO HEARINGS IN THE EMPLOYMENT TRIBUNAL

"Therefore, the power of a court to hear a case in private cannot rest merely on the discretion of the judge or on his individual view that a private hearing is desirable or expedient for the sake of public decency or morality. Any exception to this broad principle that the administration of justice must take place in open court ***must*** *be based on a yet more fundamental principle – that the chief object of courts of justice must be to secure that justice be done. The party who wishes a case to be heard in camera on the ground that the paramount object of securing that justice is done would be rendered doubtful of attainment if the order were not made must make out the ground for his application strictly*."

PRIVACY AS TO HEARINGS IN THE EMPLOYMENT TRIBUNAL

The rights and role of the press were described by the Grand Chamber of the ECtHR in **Axel Springer AG v Germany - (2012) 32 BHRC 493:**

"79.The court has also repeatedly emphasised the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart-- in a manner consistent with its obligations and responsibilities--information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog."

"This duty extends to the reporting and commenting on court proceedings *which, provided that they do not overstep the bounds set out above, contribute to their publicity and are thus consonant with the requirement under art 6(1) of the convention that hearings be public. It is inconceivable that there can be no prior or contemporaneous discussion of the subject matter of trials, be it in specialised journals, in the general press or among the public at large.* ***Not only do the media have the task of imparting such information and ideas; the public also has a right to receive them……..."***

PRIVACY AS TO HEARINGS IN THE EMPLOYMENT TRIBUNAL

Derogations from open justice

- The courts will not prevent the press from reporting the facts of a case simply for fear some members of the public reading those reports might misinterpret them 10 and act inappropriately. **BBC v Roden** [2015] IRLR 627 para. 29, citing the Supreme Court judgment in **In re Guardian News** [2010] 2 AC 697, para. 60

- The appropriate approach is summarised in the **Practice Guidance issued by the Master of the Rolls for England and Wales** [2012] 1 WLR 1003.
  - Approved by Stephens J in ***KL and NN -v- Sunday Newspapers Limited [2015] NIQB 88*** **a**t paragraph [16].

PRIVACY AS TO HEARINGS IN THE EMPLOYMENT TRIBUNAL

It includes:

- The general rule is that hearings are carried out in, and judgments and orders, are public
- Derogations should, where justified, be no more than strictly necessary to achieve their purpose
- The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence
- The court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings
- Interim non-disclosure orders which contain derogations from the principle of open justice cannot be granted by consent of the parties as they affect the Article 10 Convention rights of the public at large. Parties cannot waive or give up the rights of the public.

PRIVACY AS TO HEARINGS IN THE EMPLOYMENT TRIBUNAL

Derogations from open justice in the ET

- Employment Tribunal proceedings are subject to the same common law principle that justice should be administered in public and fully reportable save in certain limited circumstances. **Millicom Services UK v Clifford** [2023] IRLR 295, para. 2

PRIVACY AS TO HEARINGS IN THE EMPLOYMENT TRIBUNAL

The approach of the ET to derogations

- Rule 50(1) in GB identifies certain grounds upon which a derogation from open public justice may be made:

  - First, the interests of justice;
  - Second, the protection of Convention rights;
  - Third, the protection of confidentiality.

PRIVACY AS TO HEARINGS IN THE EMPLOYMENT TRIBUNAL

- In determining whether derogations sought are justified, the ET should begin by asking whether those derogations are justified by the common law 'interests of justice' exceptions to open justice. Usually, the court's concern will be with the requirements of the due administration of justice in the proceedings before it. **Millicom Services**, para. 32.

- Where life and limb are not at risk, the common law requires a balancing process. Factors to be weighed include:
  - The extent to which the derogations would interfere with the principle of open justice;
  - The importance to the case of the information the applicant seeks to protect;
  - The role or status within the litigation of the person whose rights or interests are under consideration. **Millicom Services**, paras. 41-42, citing paragraphs 6 and 8 of the Court of Appeal's decision in **R v Legal Aid Board ex p Kaim Todner** [1999] QB 966.

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- As to a derogation from open justice to protect Convention rights:
    - The first question is whether the relevant conduct would involve an interference with a person's Convention rights;
    - If it would, the second question is whether that interference would be justified as necessary in pursuit of one (or more) of the legitimate aims identified in Article 8(2). **Millicom Services**, para. 54.
- Harvey at Division P1 states at paragraph 932 as regards the GB Rule 50 (the equivalent of our Rule 44):

> *"The power may be used, for example, to exclude from public discussion the content of without prejudice negotiations or to prevent disclosure of trade secrets during the course of a hearing."*

PRIVACY AS TO HEARINGS IN THE EMPLOYMENT TRIBUNAL

Specific examples

Guardian News and Media Limited v 1. Rozanov and 2. EFG Private Bank Limited with the Media Lawyer's Association as intervenors [2022] EAT 12**.**

- HHJ Tayler outlined an overview of open justice principles and the role of the press in open justice, together with Supreme Court and EAT decisions in this area. In particular the journalistic principles engaged in that case were identified (two of which are those set out above).

- ET's conclusion that open justice principle not advanced by the purposes for which the reporter sought the documents was fundamentally flawed because it focused only on the reporter's "public importance" reasons and did not consider his journalistic reasons, which were particularly relevant to the underlying purposes of the open justice principle.

PRIVACY AS TO HEARINGS IN THE EMPLOYMENT TRIBUNAL

- **JR5** [2007] NICA 19

- Concerned the scope of the tribunal's powers to make Privacy Orders under the old pre-2020 Rules.
- The Court of Appeal found in the claimant's favour under European law principles (Equal Treatment Directive)
- Therefore, the arguments put forward by Counsel for the claimant under Human Rights provisions (arts 6 and 8) did not have to be decided upon by the Court of Appeal.

PRIVACY AS TO HEARINGS IN THE EMPLOYMENT TRIBUNAL

- **Eversheds LLP –v- Gray** (UKEAT/0585/11)

  - EAT ordered a pre-hearing review be held in private to determine the admissibility of without prejudice discussions.
  - Clarke J. asked himself a series of four questions which concluded with the following (at paragraph 16).
    - [Is the evidence likely to consist of] information which has been communicated to the witness in confidence or which he has otherwise obtained in consequence of the confidence placed in him by another.
    - If Rule 16(1)(b) is engaged in these circumstances, ought the Employment Judge to exercise her discretion in favour of ordering a public or private hearing?

PRIVACY AS TO HEARINGS IN THE EMPLOYMENT TRIBUNAL

- Concluded the first instance judge had committed an error of law by failing to make any finding as to whether without prejudice material is, by its nature, confidential -true without prejudice discussions are confidential [§20]:

> *"21 ...the public policy in not treating as admissions by a party at trial things said during protected settlement negotiations goes further than giving that protection to parties, it represents a principle that goes to the interests of justice and thus falls squarely within the proviso to Article 6. It is in the interests of justice that parties to civil disputes may enter into negotiations with a view to resolving such disputes in the knowledge that those negotiations will remain private and confidential."*

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- Performed a "*balancing exercise*" (at paragraph 21) as between the importance of public hearings (as set out in ***Storer -v- British Gas [2000] IRLR 495***) and the article 6 right to a fair in public hearing, against the rights comprised in the without prejudice rule:

> "*22. My conclusion, balancing those competing policy interests, is that this PHR be held in private. I am comforted in reaching that conclusion by the fact that if the Claimant is right and the discussions in issue are not covered by without prejudice protection, that will be made clear in the PHR Judgment and that material will be admissible at the full hearing held in public. Conversely, if the Respondent is right, then it is proper that such confidential discussions should remain private.*"

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- NB:
  - The parties had agreed that true without prejudice discussions are covered by WP privilege.
  - Article 10 arguments were not seemingly raised nor considered as a result of the agreed position and it appears the Press were not involved in that hearing.

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POSSIBLE ORDERS

Rule 44(3)

(3) Such orders may include—

(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;

(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the register or otherwise forming part of the public record;

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(c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;

(d) a restricted reporting order within the terms of Article 13 or 14 of the Industrial Tribunals Order;

(e) an order prohibiting the disclosure of specified information in accordance with Article 84(6) of the Fair Employment and Treatment Order.

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Private Hearing Order

- Harvey states in relation to private hearings at paragraph 939 as follows:

> *"[939] Given the importance of the principle of open justice which has been restated on many occasions (see above at para [753]) and the explicit requirement to take that principle, and the right to freedom of expression, into account when making an order under r 50, a private hearing will not be ordered lightly. Indeed, of the various orders permitted by r 50, the Private Hearing Order is arguably the most inimical to the principle of open justice: literally closing the doors on members of the public and the press for all or part of a hearing. The result is that Private Hearing Orders, particularly an order covering the entirety of a final hearing, are likely to be few and far between. The more likely use of a Private Hearing Order will be for a tribunal to consider a particular discrete piece of evidence in private before resuming the public hearing. Examples might include video footage containing minors, documentary evidence of without prejudice negotiations, ..."*

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Anonymity Order

- Where the court is satisfied there is a real public interest in publication of court proceedings, that interest has generally extended to publication of the names, because the anonymised reporting of issues of legitimate public concern are less likely to interest the public and therefore to provoke discussion. **Khuja**, para. 29.
- However a sufficient public interest in reporting the proceedings does not necessarily mean a sufficient public interest in identifying the individuals involved**. Khuja**, para. 30.
- The identity of those involved may be wholly marginal to the public interest engaged, in which case anonymity may be appropriate – see, e.g., **Devine v Secretary of State for Scotland** (1993, unreported) (soldiers involved in ending prison siege were anonymised and allowed to give evidence behind screen) cited in **Khuja** at para. 30.
- Even when the identity of the person involved is more central, anonymity may still be granted in an appropriate case. **A v BBC** [2015] AC 588, cited in **Khuja** at 30.

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- The decision whether to grant a party anonymity is a matter of necessity, not the exercise of a discretion – there will either be a duty to make an anonymity order or a duty not to make one. **AHM v HXW** [2010] EWHC 2457, para. 34.

BBC v Roden [2015] IRLR 627

- EAT (Simler J) held the ET had erred in maintaining an anonymity order after the claimant (who obtained that order earlier in the proceedings) had his claims for unfair and wrongful dismissal dismissed in circumstances where there had been unproven allegations of sexual misconduct by him which had not been determined as part of the case.
- See paras. 23-26, as to proper approach to deciding applications for anonymisation:

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Restricted Reporting Orders

- **Generally**

  - Section 91 of the Judicature (Northern Ireland) Act 1978
  - Section 6 of the Human Rights Act 1998
  - Procedures laid down by the Court in **KL & Anor v Sunday Newspapers Ltd** [2015] NIQB 88

- Third parties (Spycatcher principle):

  "*It is a contempt of Court for any person notified of this Order knowingly to assist in or permit a breach of the Order, any person doing so may be found guilty of contempt of court and may be sent to prison or be fined or have his assets seized*".

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- Public domain

  "*For the avoidance of doubt, nothing in this Order shall prevent any third party served with a copy of this Order from publishing, communicating or disclosing information which is already in the public domain in Northern Ireland other than as a result of breach of this Order*".

- **<u>Availability in Tribunals</u>**

  - Rule 44(3) (d) and Articles 13/14 of the Industrial Tribunals (NI) Order 1996;
  - Allegations of Sexual Misconduct/Certain DDA Claims;
  - Scope for RRO in other cases under Rule 44 per **Fallows**

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Tailored Orders

- At paragraphs 935 to 937 Harvey comments as follows in relation to the tribunal's power to make tailored Orders under the equivalent English rule:

> *"[935]…The fact that r 50(3) describes the four orders as illustrative of the tribunal's powers, rather than exhaustive, shows that there is* ***room for creativity on the part of the tribunal*** *in the use of r 50. It has been held, for example, that the general power within r 50(1) in fact permits a much wider form of RRO to be made than the RRO prescribed by the terms of s 11 or 12 of the ETA 1996 (*Fallows v News Group Newspapers Ltd *[2016] IRLR 827*, EAT*). It may be that a combination of some or all of the four orders are used or that some additional or alternative order is made in pursuance of the aims referred to in r 50(1)."*

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Fallows v News Group News [2016] ICR 801 EAT

- The GB Rule 50(1) (the equivalent of our Rule 44(1)) provided a list of Privacy Orders which was not exhaustive.
- There is no temporal limitation on such Orders.
- If an RRO were made under those provisions then the further provisions which apply to standard RROs (as set out in our Rule 44(5)) would likely apply to any such Order.
- Parliament intended that a tribunal should have the power to make RROs in broad circumstances underpinned by Human Rights considerations.

- Possible Hybrid Order - private hearing; members of the Press attend subject to a RRO.

- The press, as the eyes and ears of the public, can attend to hear the detail so they can understand it and report on it as and when permitted by the tribunal.

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Revocation of Orders

- **Z v Commerzbank AG** [2024] EAT 11
- **McFarland v Morelli Ice Cream Limited**

Anonymity in Transgender cases:

- **Peggie v Fife Health Board**
- **Hutchinson v Durham & Darlington NHS Trust**
- **Newman v Metropolitan Police**

QUESTIONS?