

**Thank you...** for all the kind words about our first edition. We aim to keep up the good work. All editions will be archived here:

<http://www.solicitorscroydon.com/page/Employmentbusiness.html>



**Can you do better?** Suggest a name for our newsletter and, if we prefer it, we'll use it for all editions from 1 March 2012, plug your organisation and give you a thank you gift! We have had some good suggestions already – **Focus PR** (who are obviously brilliant at this sort of thing) has provided lots, including

"Verdict". **Prospects** (a fantastic charity supporting those with learning disabilities) suggest "Human writes". **Kings Church International**, Windsor has come up with "Employment matters".

Keep them coming!

If you have a suggestion or if there's anything you'd like us to cover in a future edition, let us know. Contact us at [OTR@ormerods.co.uk](mailto:OTR@ormerods.co.uk).

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### Extreme Prejudice

There are times when you may want to talk to an employee candidly, but you don't want your candour to bite you on the backside! The "without prejudice" rule attaches confidentiality to certain communications, e.g. so an employee can't show them to a Tribunal as evidence of their claim.

#### **Speak "without prejudice"**

Legally speaking, adding "without prejudice" does not change the confidentiality of a communication. In order to be without prejudice, those words don't need to be used, but it is helpful to add the words (to avoid ambiguity). In order to be genuinely "without prejudice", these are our three golden rules:

#### **Rule 1) Admissions of fact:**

It is appropriate to tell an employee that, if they agree resignation terms, a disciplinary process that could result in their dismissal will stop. However, if you say they will be dismissed unless they agree, that would be an admission of fact – showing no intention of a fair hearing - and not covered by the rule. Similarly an employee who admits wrongdoing cannot hide behind it being in a "without prejudice" communication.

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#### Key Dates Calendar

06.03.12	Consultation on Introduction of Tribunal fees ends
06.04.12	Extension of normal qualifying period for unfair dismissal to 2 years
06.04.12	Abolition of contracting out from additional state pension
09.04.12	SMP, Paternity, Additional Paternity, Adoption Pay and Maternity Allowance increase to £135.45. SSP increases to £85.85
04.06.12	Bank holiday moved from 28 May to 4 June
05.06.12	Additional bank holiday
31.08.12 to Aug 2016	Various final dates for employers to send NEST auto-enrolment pension information to staff ( <a href="http://www.legislation.gov.uk/ukSI/2010/4/regulation/4/made">www.legislation.gov.uk/ukSI/2010/4/regulation/4/made</a> )
Mar 2013	Parental leave increases from 3 months to 18 weeks
Dec 2013	Proposed introduction of Tribunal fees
2013	Compulsory eye tests for commercial drivers
2015	Introduction of flexible maternity/paternity
2015	Extension of flexible working to all employees

**Rule 2) Unambiguous impropriety:**

It is appropriate to make an offer to someone saying that they are a disruptive influence. If you say that you don't want them as you believe they are disabled, that clear evidence of impropriety would not be covered by the rule.

**Rule 3) Genuine attempt to settle an existing dispute:**

The discussion must be a genuine attempt to settle an existing dispute. So communications should be in the context of an existing dispute if possible). An offer out of the blue (albeit causing a dispute!) may not be covered by the rule.

**Shhh!**

Be aware! An employee may still be able refer to a without prejudice communication taking place, even if they can't mention the content. For example, to show constructive dismissal they may reveal they were called into a "without prejudice" meeting and made a resignation offer.

Similarly an employer could defend a constructive dismissal claim on the basis that the employee did not resign because of any breach of contract but because the employer did not accede to their without prejudice demand for compensation.

**What should I do?** Our top tips are:

- **Demarcation.** Try to keep without prejudice communications separate to "open" ones. Where there is a parallel process, e.g. a disciplinary, your disciplining officer should not be the person having the "without prejudice" conversations.
- **Clarity.** Make sure the employee is aware that communications are intended to be "without prejudice" and what this means.
- **Respond, rather than make firm offers.** A sensible tactic is to explain that the organisation may be willing to explore settlement if that is what the employee wants (but making no firm proposal). There will almost invariably be sufficient curiosity to ask what is on the table. Because any subsequent exploration is in response to the employee's request, many of the risks outlined above are reduced.

**Where next?**

The government has announced that it is intending to consult on the introduction of 'protected conversations' - being similar to but wider than "without prejudice" discussions. We expect this consultation will lead to little change, but we'll let you know when and if it does happen.

At the moment, just make sure you use the current rule wisely!

*Jemma Thurlow*

**This document is guidance and cannot replace specific legal advice on individual circumstances.**

**About the author**

**Jemma Thurlow** is a solicitor in Ormerods' team of user-friendly employment law specialists.

