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With or Without Prejudice?

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A recent court decision in Ontario reminds us of the significant implications when communications are characterized as having been made "without prejudice". Such communications are generally precluded from being disclosed or referred to in any subsequent court proceedings. In contrast, no disclosure restrictions are imposed on communications falling outside the without prejudice classification. It is important for parties and their legal advisors to keep the distinction in mind at the time a communication is made.

Ramos v. Hewlett-Packard (Canada) Co., 2017 ONSC 4413 (CanLII), involved a pleadings motion. Hewlett-Packard, the defendant employer, had terminated the plaintiff and Ms. Ramos had commenced an action for wrongful dismissal. In its statement of defence, Hewlett-Packard wanted to make reference to a letter that it wrote to the plaintiff setting out the terms of the separation package it was offering, as well as the plaintiff's rejection of the package. Hewlett-Packard wanted to show that the notice given was appropriate and that the financial terms were reasonable.

The court held that Hewlett-Packard could not make reference to the terms of the separation package or the plaintiff's rejection of the package. The court came to this view on two grounds. First, it found that the severance offer was made without prejudice "to buy peace". Second, it found that the offer was not relevant to the matters in issue in the litigation (Hewlett-Packard was not alleging that Ms. Ramos was dismissed for cause and Ms. Ramos was not making any claim for mental distress or punitive damages). Our focus in this comment will be restricted to the first ground concerning without prejudice communications.

A determination that a communication was made without prejudice has significant consequences in a court proceeding. As noted, such a determination will preclude any reference being made to the without prejudice communication, whether it be a contract dispute, employment matter, or other claim. No reference can be made in court to without prejudice emails, letters, notes, discussions, telephone calls – whatever the form of communication may be. But there may be many occasions when a party wants to be able to disclose its communication with the other side in the pleadings, evidence, and argument of a case. A well thought-out notice, demand, reservation of rights, or other statement of position can form a key piece of a party's strategy in the overall dealings with the other side. However, if the communication is characterized as being without prejudice, such strategic positioning is not available for disclosure in the courtroom.

The reason why courts prohibit any disclosure of without prejudice communications is that such communications are subject to what is called "settlement privilege". As recently discussed by the Supreme Court of Canada in *Sable Off-Shore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37 (CanLII), there is an overriding public interest in favour of parties settling their disputes without the personal and public expense and time involved with litigation that strains our already overburdened court system. The Court held that protecting settlement privilege promotes parties settling their disputes because parties will be more likely to settle if they know from the outset that their negotiations will not be disclosed.

The question then becomes: When will a communication be characterized as "without prejudice" and prohibited from disclosure in court proceedings?

First, there must be a dispute between the parties in the sense of existing or contemplated litigation. *Second*, the purpose of the communication must be to settle a dispute. *Third*, the intent of the communicating party must be expressly or implicitly to exclude the communication from disclosure.

The presence or absence of the words "without prejudice" will be relevant, but not determinative of the required intent. Therefore, a court may characterize a communication as being without prejudice, even if such words do not appear. Conversely, the appearance of the words "without prejudice" will not guarantee that a court will find the communication to be privileged. If the communication qualifies for the settlement privilege, it will not be admitted into evidence unless both parties waive the privilege. The protection is for settlement negotiations, and such negotiations are privileged whether or not a settlement is reached.

There are exceptions to the settlement privilege, and to come within those exceptions the Supreme Court of Canada noted that the party must show that on balance, it would be in the public interest to make disclosure. Such countervailing interests have been found to include threats, fraudulent communications, misrepresentations, efforts to exercise undue influence, or to avoid a plaintiff from being overcompensated.

In the *Ramos v. Hewlett-Packard* case, the court found that the employer's severance package was made without prejudice based on the following:

> The offer with an "enhanced severance package" was contingent on execution by the plaintiff of a Final Release and Indemnity Agreement;
> There was an element of compromise in the separation package because, by its terms, an increased amount of severance would be granted in exchange for the plaintiff's signature;
> The element of compromise was further underscored by a statement that if Ms. Ramos did not accept the offer, Hewlett-Packard reserved its rights to rely on the strict terms of the employment agreement;
> The terms of the proposed Final Release and Indemnity Agreement were integral to the package and the offer was made in an effort to avoid litigation, stating that Hewlett-Packard would be released from "all actions and causes of action" which Ms. Ramos had then or may have in the future; and
> The severance package was to be kept confidential.

So what can a party do when faced with litigation or contemplated litigation if it wishes to communicate in a way that will not be characterized as "without prejudice" so that the communication will be available to be disclosed in court pleadings and admissible in evidence?

While a court in the end will make the determination of whether a communication is part of negotiations undertaken to reach a compromise and, accordingly, protected from disclosure, there are steps that a party may consider taking in an effort to avoid the settlement privilege characterization. These five steps could include the following:

> Parties have been known to mark communications "with prejudice" in an effort to counter any characterization that the communication is being made without prejudice;
> The communicating party can state its position in absolute, unconditional terms, setting out what it is unilaterally doing or intending to do, and without the opposite party having to do anything in return;
> The communication can expressly state that the communicating party's intent is to affect the rights between the parties and that it plans to refer to the terms and statements being conveyed in any court proceeding;
> The communicating party can omit any reference to a release, indemnity, covenant not to sue, or any other suggestion that the purpose of the communication is to avoid litigation; and
> It can be stated that there is no request being made for confidentiality and that, on the contrary, the communication will be available for disclosure in any subsequent legal proceeding or court attendance.

Although the court will make the ultimate determination, what the party and its legal advisors have to be clear about from the outset is whether the intent is to communicate in a way that is capable of being disclosed in any subsequent court proceedings or whether the intent is to have the communications under the umbrella of the settlement privilege and protected from disclosure. The *Ramos v. Hewlett-Packard* case reminds us that any strategy as between without prejudice and with prejudice communications has to be carefully thought out. Once the choice is made, a party or their legal counsel must strive for clarity of position. Communicating a clear and unambiguous position based on the strategy chosen will improve the chances of achieving the desired result.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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