

Without Prejudice – what does it mean and how can it be used to your advantage?



Working in our dispute resolution team I often see the words “*without prejudice*” used in correspondence. If used in the right way this term can assist in resolving a dispute, however, if it is used incorrectly it can adversely affect your position at trial.

How to use ‘without prejudice’ correctly

The term “*without prejudice*” is a label, which can be applied to a whole piece of correspondence, or specific statements. Used correctly, it means that the statement(s) can be made freely (see below), without compromising your strict legal rights. It is normally used in two contexts:

- as part of a legal argument. The words “*without prejudice*” can be used to add additional (often contradictory) ‘levels’ to an argument. For example, if it is claimed that a contract was agreed at a meeting and you do not have any recollection of the meeting taking place then you could respond by saying, “*I do not recall the alleged meeting with [Mr Bloggs] on [date] and believe it did not take place for the following reasons... Nevertheless, and without prejudice to the above, it is unlikely I would have agreed to these terms because I always insist on...*”
- in settlement negotiations. If you would like to make an offer to try and settle a dispute then it is best to label this correspondence “*without prejudice save as to costs.*” Both parts of this phrase are important when used in this context as explained below:

“*Without prejudice*” means that the contents of this correspondence should not be used against the writer to



support or compromise their case at trial.

“*Save as to costs*” means the writer may draw this correspondence to the attention of the court (after a final decision) to show that they have attempted to settle this matter. This is done in an attempt to influence what costs (if any) will be awarded by the judge.

Used in the wrong way

The court will look behind the words “without prejudice” and consider what the parties intended at the time it was written. If there is in fact no genuine attempt to settle the dispute then a court may allow the correspondence to be referred to at trial even if it is marked “*without prejudice*.”

I often see the words “*without prejudice*” used where the writer wants to preserve their position prior to seeking legal advice. This can be dangerous because if the correspondence is not made with a genuine attempt to settle the dispute then the contents (that has been written without legal advice) may be referred to at trial.

Conclusion

If used correctly the phrase “*without prejudice*” can be an important tool to help to resolve a dispute. Used in the wrong way, however, it can mean that something you intended to be ‘off the record’ could be shown to a judge and may compromise your position at trial. You should not simply use this phrase as a ‘catch all’ intended to preserve your position and if you have any doubts about how it should be used it is important to seek further advice.

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