

Protecting your business

Protected conversations & 'without prejudice' discussions

Key contact



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This fact sheet looks at how to protect your business when entering pre-termination discussions.

Off the record discussions

Following the introduction of s.111A of the Employment Rights Act 1996, an employer can hold off the record, pre-termination negotiations with an employee without the concern that those discussions may be referred to in any unfair dismissal proceedings. These discussions are known as 'protected conversations' and are intended to give employers a means by which they can have a 'safe' conversation with an employee with a view to agreeing their employment will end.

During these conversations, an employer will try to achieve an agreed termination by putting forward a proposal to an employee. Although it is most often the case that an employer initiates these discussions, there is nothing stopping an employee from doing so.

What are the criteria?

In order to satisfy the criteria of s.111A, the conversations must relate to the ending of an employment relationship, a settlement offer must be made or negotiations about the termination occur and there must not be improper behaviour. Improper behaviour includes intimidation or putting undue pressure on the employee. This is a fine balance to establish as it is recommended that employers do inform employees, in a neutral

way, of what the alternatives to reaching an agreement are.

The employee should be made aware that the discussions are confidential, they will not have any bearing on future disciplinary or performance management processes and that it is expected that the discussions will be inadmissible in a tribunal.

What guidance is available?

An employer should follow the ACAS [Code of Practice on Settlement Agreements](#) when considering entering into these discussions. The employee should be given a reasonable time to consider any settlement terms.

Employers are advised to permit an employee to be accompanied during these negotiations. This is something for employers to consider managing carefully as it may impact on the employer's ability to have frank discussions.

When does the protection apply?

Importantly, the protection only applies to potential ordinary unfair dismissal claims, i.e. not automatically unfair dismissal or any other proceedings. For example, such discussions could be put before a tribunal in a disability discrimination case. It may be possible to have 'without prejudice' discussions where there is a pre-existing dispute about some other issue including potential discrimination claims.

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"Its 'highly professional and knowledgeable' team is led by the 'thorough and friendly' Catherine Daw."

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'Without prejudice' discussions

'Without prejudice' discussions can only take place when there is already a dispute. They allow parties to genuinely attempt to settle a dispute without these negotiations being able to be used adversely in any court proceedings against the negotiating party. 'Without prejudice' discussions must not be used to cover up 'unambiguous impropriety.' This is of much narrower scope than the caveat of 'improper behaviour' for protected conversations.

It is important to note that if relying on 'without prejudice' discussions, the raising of a grievance is not necessarily considered to be a dispute. What will be a dispute is fact sensitive but it is not necessary for litigation to have started.

Comments

Protected conversations are intended to provide a structured means by which employers and employees can have frank discussions around an employee's exit. They give a means by which an employer can reduce the risks involved in resolving issues in this way, but employers do need to follow the guidance laid down. These discussions can therefore be a useful tool to reaching an amicable settlement or at least opening a discussion about a possible exit.

If agreement is reached then this will normally be concluded by using a formal settlement agreement. If, however, a dispute has arisen, employers may want to start a 'without prejudice' discussion which can offer greater protection.

If you would like any advice on how to approach protected conversations, the drafting of settlement agreements or how to propose a 'without prejudice' discussion please contact a member of the Employment Team.

The information contained in this document provides background information only. The document may be misleading if relied upon as an exhaustive list of the legal issues involved. If any matter referred to in this document is sought to be relied upon, further information should be sought.