JULIAN TAYLOR SOLICITORS

Human Resources & Employment Law

BRIEFING

Pre-Termination Negotiations

Employers often want to engage in termination discussions to exit an employee on agreed terms. When conducting these negotiations there is always the background risk that no settlement will be reached and the employee will make a claim in an employment tribunal. It is therefore usually preferable for employers to conduct pre-termination negotiations in a way that means they cannot be referred to later if things do go wrong and litigation is started. HR advisers and employment lawyers sometimes refer to these discussions as *"off the record conversations".*

This note provides an overview of the law regulating this area, and provides some tips on how to conduct pre-termination negotiations.

1. The Without Prejudice Rule

The traditional way of negotiating off the record is by conducting discussions on a "without prejudice" basis. This generally prevents statements that are made in a genuine attempt to settle a dispute from being put before the court as evidence. The rationale for this is the public policy of encouraging parties to settle their disputes out of court, as it is hoped that settlement will be facilitated if parties are able to negotiate freely, without concern that what they say or any admissions which are made to try to settle the dispute, will be used in evidence against them should negotiations fail.

Limitations

- In order for the "without prejudice" regime to apply, the communication must be a genuine attempt to settle an existing dispute. Simply labelling something "without prejudice" will not automatically confer that status. The difficulty with this regime in an employment context is that exploratory conversations with employees about options, including a potential exit, will often crop up before anything as concrete as a dispute has arisen meaning that such discussions would be admissible as evidence. It is sometimes difficult to identify a true "dispute", and case law has shown that the fact that an employee has raised a grievance does not necessarily mean that a dispute has arisen. An employer who, out of the blue, offers a termination payment to, say, an underperforming employee cannot safely do so on a "without prejudice" basis. Employers should therefore exercise caution in commencing a "without prejudice" discussion about a parting of ways. If something is not genuinely "without prejudice" the risk is that an employee can argue that opening such a discussion amounts to a breach of contract (and potentially resign in

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response, and claim constructive dismissal), or argue that any subsequent process (such as a capability or disciplinary process) is a sham in light of that early conversation.

- There are also a number of narrow exceptions to the "without prejudice" rule. Notably the courts have held that the "without prejudice" rule should not operate to cover up misrepresentation, fraud, undue influence, perjury, blackmail or other unambiguous impropriety.

2. Section 111A Employment Rights Act 1996

In 2013 the government introduced an amendment to the Employment Rights Act 1996 to try and make it easier for employers to have protected conversations with employees in circumstances where there is no dispute. This broadens the scope for settlement discussions as in some cases you can start exit discussions before the relationship has deteriorated too far.

Section 111A now provides that as long as there has not been improper behaviour, pre-termination negotiations are not admissible in unfair dismissal proceedings. Pre-termination negotiations are defined as *"any offers made or discussions held before the termination of the employment in question with a view to it being terminated on terms agreed between the employer and the employee".*

Limitations

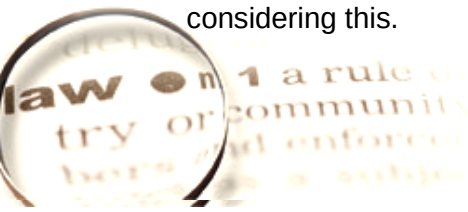
- Under the statutory regime protection only extends to *ordinary* unfair dismissal proceedings. If a claim brought by the employee has any other aspects to it (for example that the dismissal is automatically unfair (e.g. because it is linked to whistleblowing), or involves discrimination or a breach of contract (for example if notice is not given) then protection will not apply and evidence of the discussions will be admissible unless the common law "without prejudice" regime applies. When an employer commences exit discussions they cannot possibly know how an employee will position any potential claim. However, employees will often bring claims with an additional aspect and side step the protection afforded to employers by s111A. This limits the usefulness of s111A.

- If either party engages in "improper behaviour" (which can include undue pressure by the employer, harassment, bullying or intimidation) then any offer and negotiations will not be protected. The ACAS Code of Practice on Settlement Agreements provides a non-exhaustive list of examples of improper behavior.

ACAS Code of Practice and Non-Statutory Guidance

The ACAS Code focuses on the admissibility of pre-termination negotiations rather than settlement agreements generally. A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings or lead to an adjustment in compensation. However, tribunals will take the Code into account when considering relevant cases, and it is likely that the list of examples of "improper behaviour" will commonly be cited before tribunals.

ACAS has published a further, more lengthy, non-statutory guide to settlement agreements which is designed to help employers and employees understand when to use settlement agreements and how they can be negotiated. The guide goes into some detail on the practicalities of proposing and negotiating terminations so is an important read for anyone considering this.



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Links to the Code and guidance can be found here: http://www.acas.org.uk/index.aspx?articleid=4395

3. Subject to Contract and Save as to Costs

Correspondence labelled without prejudice or subject to s111A of the Employment Rights Act 1996 will often also be accompanied by the words "subject to contract" and "save as to costs".

The phrase "subject to contract" will be familiar to anyone who has purchased a property. A contract in English law can be agreed orally or via an exchange of letters. The phrase subject to contract is designed to protect the parties from inadvertently forming a contract and binding legal agreement in the course of their negotiations.

The phrase "save as to costs" means that the party making the statement reserves the right to adduce a statement in evidence when arguing for costs in a court or tribunal. At the end of a case when the judge has decided who has won they may then make a determination on costs. In an employment tribunal it is rare that a costs order is made unless one party has acted unreasonably or in a vexatious manner. Off the record correspondence can be used as evidence of that, if it is labelled save as to costs.

4. Tips on Conducting Exit Discussions

- If you are considering offering a settlement agreement then it will usually be prudent to get some form of process underway (such as redundancy consultation, or disciplinary or capability proceedings, depending upon the context) so that a clear "on the record" position is asserted. This will form a useful backdrop to negotiations and can be progressed if a settlement cannot be agreed.

- Given the limitations of both the without prejudice rule and s111A take care not to make any concessions or statements in negotiations that you wouldn't be prepared to say and justify openly before a tribunal.

- Make clear in oral and written correspondence that you are speaking on a without prejudice basis or in accordance with section s111A and label any correspondence appropriately at the top in bold.

- Make appropriate, ideally contemporaneous notes of conversations conducted on a without prejudice basis or in accordance with s111A. It should be made clear in the notes that the conversation was conducted on that basis. If an employee later refers to it on the record you can produce the note to demonstrate that the conversation was off the record.

We frequently advise employers on conducting settlement discussions and will be happy to advise on specific situations.

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