Line Manager Guide

PROTECTED CONVERSATIONS – A SUMMARY (1)

What is a 'protected conversation'

'Protected conversations' are relatively new, introduced in July 2013.

A 'protected conversation' allows an employer to have a conversation with an employee with a view to terminating his or her employment under a settlement agreement, without the employee being able to rely on the details of the conversation as evidence in an unfair dismissal claim.

This is different to the previous position in that such protection only applied where a formal dispute had already arisen, such as a prior performance improvement plan, or disciplinary proceedings.

The provision is limited to standard unfair dismissal claims only and it does not apply for example to discrimination cases. No protection will be afforded where the reason for the proposed termination is one of the deemed automatically unfair reasons, for example relating to trade union activities, pregnancy, or assertion of statutory rights. Furthermore, any discriminatory conduct will not be protected under these rules. Therefore, if discrimination is present, evidence of the previous protected conversation can and most likely will be used in future litigation.

How it differs from a 'without prejudice conversation'

Previously conversations held with an employee who for example is underperforming about an agreed exit would have been open to allegations of breaching trust and confidence which in turn open the employer up to allegations of constructive dismissal - or the dangerous suggestion that there was pre-judgment of future disciplinary action.

Whilst these conversations could be covered by the 'without prejudice' rules (meaning that the conversation would be inadmissible in future litigation) it would be subject to their being a pre-existing dispute between the parties.

The scenario where this causes difficulty in practice is when an employer has valid concerns regarding an employee's performance but has not formally raised them (i.e., there is no live or on-going dispute in play).

In this situation, this would not trigger the 'without prejudice' protection. So, when an employer then decides to dismiss the employee, the employee will be in a position to raise an unfair dismissal claim stating that the dismissal was predetermined.

Criteria for a 'protected conversation'

For conversations to be 'protected' and to retain their confidentiality and inadmissibility in an Employment Tribunal there must not be any 'improper behaviour' in the negotiating process.

What constitutes improper behaviour is essentially for an Employment Tribunal to decide based on the facts and circumstances of each case. However, 'improper behaviour' will include behaviour that would be regarded as 'unambiguous impropriety' under the without prejudice rule (e.g., fraud, perjury, or blackmail). The Acas Code of Practice – Settlement Agreements (Code) provides a non-exhaustive list of improper conduct, which includes:

1. Any and all forms of harassment, bullying and intimidation, including through the use of offensive words or aggressive behaviour.
2. Physical assault or the threat of physical assault and other criminal behaviour.

3. Any and all forms of victimisation.

4. Discrimination because of age, sex, race, disability, sexual orientation, religion or belief, transgender, pregnancy and maternity and marriage or civil partnership.
5. Putting undue pressure on a party (e.g., an employer saying before any form of disciplinary process has begun that if a settlement proposal is rejected then the employee will be dismissed).

Where there is improper behaviour by an employer, anything said or done in pre-termination negotiations will normally be admissible as evidence.

Protection can be lost

The conversation still has to be entered into with a view to negotiating a settlement. The employee can't simply be told to resign or be dismissed, or for that matter 'enter into a settlement agreement or be dismissed.' Such behaviour is in every way 'improper' and the conversation will lose its protection and may be relied upon to bring an unfair dismissal claim.

In addition, if the employee feels that they are being subject to unwarranted criticism as part of a 'protected conversation' they can still bring a grievance, which the employer will have to address or risk a constructive unfair dismissal claim.

If the grievance isn't upheld and the employee subsequently resigns and makes a claim for constructive unfair dismissal it is not clear whether the tribunal will be prohibited from considering the background to why the grievance was brought in the first place.

How to conduct the meeting

Step 1:

Prior to meeting the employee, prepare what you are going to say and the reasons for the meeting and proposed termination. The explanation given to the employee should be as neutral and factual as possible, for example in a redundancy situation you could state to the employee that it is proposed to make the employee's role redundant and prior to commencing formal consultation you wish to offer an alternative by way of a negotiated exit under a settlement agreement. In a performance case, you may set out that it is proposed to take formal disciplinary action against the employee for their unsatisfactory performance (explaining the basis for the dissatisfaction with the employee's performance) but that as an alternative you are offering an agreed exit under a settlement agreement, to avoid an uncomfortable process.

Step 2:

Prepare a letter and settlement agreement before the meeting, ready to hand this to the employee at the meeting. The employee must know at the time of the offer what the offer is.

Step 3:

Meet with the employee. No prior notice need be given to the employee and there is no right for the employee to be accompanied. It would be advisable to have a witness present *on behalf of the employee* to take notes on what is being said, if possible and if practicable. Don't overload with senior management. You should explain to the employee that the purpose of the meeting is to discuss, on a confidential basis, their employment. Explain the reasons for the concerns as you have prepared in Step 1. You can state that before commencing a formal process, you wish to offer an alternative option which would involve the termination of their employment through a settlement agreement. You can explain the offer made if you wish, although this will not be necessary if you are providing the offer in writing at the meeting.

The employee should be informed that any termination would be conditional upon his or her acceptance of the settlement agreement, and, if the offer is rejected, the formal process (e.g., disciplinary procedure or redundancy procedure) would commence. The employee should be informed that they have ten calendar days (or longer if you wish, but please no less) to consider the offer made. They should be advised that if they wish to accept the offer, they will need to arrange to take legal advice on the settlement agreement terms.

Importantly it remains a legal requirement for any settlement agreement, under which an employee waives rights to pursue employment related claims, to be entered into following legal advice provided to the employee. As with all settlement agreements the employer will be expected to contribute towards the employee's costs in taking that advice.

Step 4:
Allow the employee ten calendar days (as a minimum) to consider the offer. Make it clear in the letter and the settlement agreement that the offer is conditional upon acceptance and completion of the settlement agreement within a reasonable amount of time after the 10 day period.

Step 5:
If the employee accepts the offer, their employment will terminate under the terms set out in the settlement agreement. If the employee rejects the offer, and a negotiated compromise is not possible, then the offer is withdrawn and you should proceed with the formal procedures relating to the issue (e.g., disciplinary, performance management or redundancy.) The fact of the previous discussions and offer made should not be recorded in any future notes of meetings and will be protected (provided the rules are followed and no improper behaviour is alleged) from disclosure in future litigation.

What you should never do
You should not:

1. Fail to give an employee a reasonable period of time to consider an offer. A minimum of ten calendar days should be provided to the employee to consider the proposed formal written terms of a settlement agreement unless the parties agree otherwise. It could (and likely would) be considered undue pressure for an employer to reduce the amount of the offer progressively while the employee is still considering it (although this may not be the case if an offer is reduced or withdrawn because of factors outside the employer's control, such as a significant change in the employer's financial position.)
2. Say before any form of disciplinary or capability process has begun that if the offer is rejected the employee will be dismissed.