Line Manager Guide

PROTECTED CONVERSATIONS – DETAILED (2)

Introduction

Many employers recognise the appeal of being able to agree a termination settlement with an unsatisfactory employee rather than having to go through a lengthy disciplinary, grievance, redundancy, or performance improvement procedure. However, employers may and should be concerned and mindful that, by entering into negotiations, they will put themselves at risk of an unfair dismissal claim at the outset.

In this guide, we will explain the legal context and effect of s.111A of the Employment Rights Act 1996, which aims to exclude evidence of "pre-termination negotiations" from unfair dismissal claims.

We look at some of the difficulties employers may face when relying too heavily on the provisions in s.111A and consider the extent to which pre-termination negotiations can be conducted in a reasonable way without the need to invoke the provisions.

When might an employer want to initiate pre-termination negotiations?

Section 111A of the Employment Rights Act 1996 prevents employment tribunals that are hearing unfair dismissal claims from considering offers made or discussions held prior to dismissal "with a view to the employment being terminated on terms agreed between employer and the employee".

This measure is intended to assist employers that wish to forestall a time-consuming capability or disciplinary process and attempt to negotiate a smooth exit for the employee concerned.

There are a number of reasons why offers and discussions of this nature can be an attractive option for employers. It may be clear to an employer that an employee is not suited to their job and that a formal performance improvement programme will simply delay the inevitable. It may be the case that going through a formal process will cause inconvenience or embarrassment to the employer, other employees, or clients and customers. It is also not uncommon for employers to fail to address performance issues, and subsequently be faced with a difficult and lengthy process as a result.

In these circumstances, an agreement with the employee that they will simply leave on agreed terms can be an attractive option, with benefits for both sides. The employer deals with the problem promptly and the employee can leave without the upset and ignominy of being dismissed for poor performance or misconduct and with a financial cushion allowing them to search for a new job.

Provided that the discussions lead to a binding agreement, there is very little that can go wrong. The parties will enter into a settlement agreement that provides that the employee cannot bring any claims covered by the agreement against the employer. Agreements also usually deal with how the employer will respond to requests for references from potential future employers.
Problems can arise, however, if the employer and employee fail to reach an agreement as the employer may be vulnerable to allegations of unreasonable conduct if it discusses termination terms with the employee rather than going through the correct disciplinary or performance improvement procedure. If the employee brings an unfair dismissal claim and the employment tribunal finds that the employer did act unreasonably, the test for unfair dismissal will be satisfied. Section 111A is aimed at addressing this risk by protecting the employer from allegations of unreasonable conduct in a subsequent tribunal claim.

"Without prejudice" principle

It has long been recognised that it is in the interests of justice for the parties to a dispute to engage in frank negotiations in order to reach an agreement. Such negotiations are generally held to be "without prejudice" meaning that what is said cannot subsequently be used against one of the parties in any subsequent legal proceedings.

For example, in the course of trying to settle an unfair dismissal claim, an employer might accept that the procedure adopted was flawed, while asserting that dismissal was inevitable given the clear evidence of the employee's misconduct.

In these circumstances it would not be open to the employee to argue that the employer had conceded that the dismissal was procedurally unfair. The employer's admission would not be allowed to prejudice its case or prevent it from arguing in the tribunal that the procedure was fair.

However, the without prejudice rule applies only when the parties are attempting to negotiate a settlement to a dispute that already exists. An employer cannot choose to label a conversation "without prejudice" and assume that what follows will not be taken into account by a tribunal.

Inadmissibility of negotiations under Section 111A

Section 111A is not equivalent to the without prejudice principle, but it does seek to operate in a similar way (although it is limited to unfair dismissal cases), without the need for the parties to be negotiating a settlement to a pre-existing dispute. It provides that evidence of "pre-termination negotiations" is inadmissible in any proceedings on a complaint of unfair dismissal.

Important to note is that there is no need for the employer and employee to agree to enter into negotiations; it is sufficient that the purpose of any offer made, or any discussion that takes place, is the ending of the employment on agreed terms.

The effect of this is that an employer can make an offer to an employee (usually that they agree to leave with a payment) without the fact or terms of the offer being relied on by the employee in an unfair dismissal claim.

This means that a dismissal that would otherwise be held to be unfair (because the employer had prejudged the issue, for example) could be found to be fair because evidence of the employer's unreasonable conduct will be inadmissible. Confusing? A little bit.

Section 111A also works in relation to offers made by employees. An employee could approach their employer and offer to leave in return for an agreed sum. If the offer is refused and the employee is subsequently dismissed and claims unfair dismissal, the employer will not be able to argue that the offer from the employee showed a lack of commitment or an acceptance that there were problems with their performance.

Limitations to the applicability of Section 111A

The most important difference between the without prejudice principle and Section 111A is that, for the latter, evidence of pre-termination discussions is excluded from unfair dismissal cases only.

For all other tribunal claims, including discrimination and breach of contract, Section 111A does not apply and discussions not otherwise covered by the without prejudice rule will be admissible in evidence.

This is likely to cause difficulties for tribunals where employees are bringing more than one claim. An employee who believes that their dismissal was discriminatory will probably bring both an unfair dismissal claim, and a claim for discrimination. Normally, both claims would be considered at the same hearing, but, if the employee invites the tribunal to draw inferences of discrimination from a pre-termination negotiation, the discrimination claim may need to be heard first. If it succeeds, it can be presumed that the unfair dismissal claim would succeed also. However, if the discrimination claim fails, the employee will still be able to argue that the dismissal was unfair in general terms and in that case the pre-termination negotiation will be inadmissible, and a separate hearing before a differently constituted tribunal may be necessary.

Further, Section 111A does not apply to all unfair dismissal claims. Section 111A (3) provides that the exclusion will not apply where a dismissal is alleged to be automatically unfair. An employee who claims that they were dismissed for an automatically unfair reason, for example asserting a statutory right or in connection with a TUPE transfer, will be able to rely on any discussion not covered by the without prejudice rule. Whether or not the claim that the dismissal was automatically unfair is subsequently successful is irrelevant, as Section 111A(3) disapplies the rule completely whenever "according to the complainant's case" the dismissal was automatically unfair.

Improper behaviour

The scope of protected conversations is further limited, as Section 111A (4) contains an exception where the employment tribunal finds that anything said or done was "improper or was connected with improper behaviour". In these circumstances it may consider evidence of a pre-termination negotiation to such extent as it considers just.

This is similar to the "unambiguous impropriety" exception to the without prejudice rule. It is well established that the without prejudice rule cannot be used to hide conduct that involves clear and unambiguous impropriety. If the contents of a discussion show that one party was guilty of serious wrongdoing, that party will not be allowed to hide behind the without prejudice rule to exclude evidence of that fact.

To provide guidance on the effect of Section 111A, ACAS has produced a Code of Practice on Settlement Agreements and non-statutory guidance on settlement agreements. Employment tribunals will take the code of practice into account when deciding cases.

The code is particularly important in the context of deciding whether negotiations are being conducted in an improper way.

The code takes the view that Section 111A (4) is a wider exception than that covering without prejudice discussions. The code lists what it considers to be some examples of improper behaviour.

These include:

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 or other criminal behaviour.
3. All forms of victimisation and discrimination.
4. Putting undue pressure on a party by for example not giving the reasonable time set out in the code for consideration of the proposed agreement; or saying before any form of disciplinary process has begun that if a settlement proposal is rejected the employee will be dismissed.

Some of these examples of improper behaviour are straightforward. Nobody would or could reasonably suggest that the use of physical violence to try to force an employee to agree to leave was anything other than improper.

More difficult is the concept of undue pressure. All negotiations involve pressure of some sort. When this crosses the line to become "improper" is a matter for debate. The vulnerability of the employee could also impact on whether they have been the victim of undue pressure.

The ACAS code of practice states that telling an employee before any disciplinary process has begun that if the offer is rejected they will be dismissed will be improper. That may be so, but there are plenty of ways in which this message can be delivered without the employer being quite so specific. Will a strong hint that dismissal is inevitable, or highly likely, also be improper? It is difficult to predict where tribunals will draw the line.

Employers should be aware of the limitations of Section 111A. Not only are there many claims that can be brought where the rule simply does not apply, but in many cases it will be at least arguable that the employer's methods of negotiation or subsequent behaviour amount to improper conduct.

Until a body of case law develops on the tribunals' approach to the ACAS code of practice, there will be a great deal of doubt as to what evidence will and will not be admissible.

How to approach a conversation about potential settlement

Employers should be cautious about approaching pre-termination negotiations on the assumption that what is said will be excluded from evidence in an unfair dismissal claim.

Fortunately, there is no reason why discussions of this nature need to be conducted in a way that could prejudice a future tribunal hearing and the fact that an employer has offered to negotiate an exit with an employee does not automatically mean that the employee can resign and claim constructive dismissal, or that an eventual dismissal will be unfair.

There are essentially two pitfalls that employers need to avoid:

The first is conducting the discussion in a way that indicates that the employer has no confidence in the employee's ability to do the job.

The second is the employer giving the impression that it has already made up its mind and that any performance management or disciplinary procedure will be a sham.

One option for employers is to begin the performance management, disciplinary or redundancy procedure before initiating a conversation about potentially reaching a settlement agreement.

The employer could then suggest an agreed exit package as an alternative to continuing with the procedure. The employee would already be aware that termination is a potential outcome of the procedure and may be more inclined to pursue a settlement.

Beginning a formal procedure before holding the conversation about settlement may make it more likely that the conversation would be covered by the without prejudice principle, as the employer could argue that there was a pre-existing dispute with the employee.

The employer may decide that it would be preferable to avoid any formal procedure and go straight to a discussion with the employee. Either way, the key for employers is to conduct the conversation in a way that keeps all options open but that allows the conversation to move towards an agreed termination if the employee is open to that possibility.

The opening of such a conversation in a performance case could stress the employer's commitment to making the relationship work and confidence that the appropriate procedures and processes can achieve just that. The employer could ask the employee if they are similarly committed and prepared to engage with the employer to improve the situation. At this point, the employer could raise the possibility of an agreed termination as an option for the employee to consider and take the conversation from there - if the employee seems receptive to the idea.

If the issue relates to discipline, the employer could raise a more general point with the employee about their attitude to the organisation and whether they see a way forward. Again, the possibility of a settlement could be raised as one option to explore, without any suggestion that dismissal is the likely outcome of the disciplinary process.

The employer should state that the conversation is on a without prejudice basis, and that it is covered by Section 111A, and should explain what that means. It should ask the employee to agree that the negotiations will be kept confidential, other than from specified people, for example their legal advisers and close family.

Conversations of this nature are probably best conducted by HR professionals rather than line managers. In particular, they should not involve an individual who is likely to be directly involved in the potential disciplinary or performance improvement procedure.

There is no right to be accompanied at a pre-termination negotiation, although the ACAS code recommends allowing a companion as good practice. Where a representative is already involved in the process it would make sense for the employer to include them in any discussions. Further, the individual carrying out the negotiation may be inclined to take more care over their choice of words if there is a companion or representative present, which could help to avoid any suggestion of improper behaviour.

Once a discussion has begun, it would be wise for the employer to set out the basis of its offer in writing. This will allow the employee to take appropriate advice and also give the employer an opportunity to emphasise that no decision has been taken at that stage. The ACAS code suggests that, as a general rule, the employer should give the employee a minimum of 10 calendar days to consider the formal terms of a settlement agreement and obtain advice. The appropriate length of time will vary according to the nature of the negotiations taking place and the timetable for any approaching disciplinary hearing or performance review. Written communications should be headed "Without Prejudice" and "subject to Section 111A of the Employment Rights Act 1996".

Following the negotiations

If the employee does not accept the offer, the employer should continue with its formal disciplinary, performance improvement or redundancy procedure, ensuring that it follows a fair procedure regardless of what has been discussed during the negotiations.

The employer may want to utilise Section 111A and argue that its pre-termination negotiations are inadmissible. However, if it adopts the approach set out above, even if the negotiations are admissible, it should at least be in a position to defend an unfair dismissal claim founded on those negotiations, on the basis that it acted reasonably. More importantly, this approach should give the employer confidence that, if the conversation were to be used in evidence in a discrimination, breach of contract or automatically unfair dismissal claim, this would not damage its case.

If the employee does accept the offer, the employer should enter into the settlement agreement with the employee, ensuring that they have obtained independent advice on its terms.