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Protected and without prejudice conversations

Inside

Introduction

Employers may want to have "off the record" conversations with employees, especially in relation to a potential ending of employment. It is important to remember that "off the record" is not a legal term. Such conversations will only be protected from disclosure in future legal proceedings in certain specific circumstances.

This Inbrief looks at how employers can keep these types of conversations confidential by having a "without prejudice" discussion or a "pre-termination negotiation".

Basic concepts

Without prejudice

Where there is an existing dispute between the parties, the "without prejudice" rule can prevent statements or discussions made in a genuine attempt to settle a dispute from being used as evidence in a court or tribunal. This is not limited to situations where the parties are discussing a termination of employment and covers all types of legal claim.

Pre-termination negotiations

The rules on pre-termination negotiations (PTNs) apply to settlement offers and discussions that relate to the termination of employment. PTNs can be used where there is no existing dispute between the parties at the time that the settlement offer and discussions take place. The content of a PTN cannot be referred to in a claim for "ordinary" unfair dismissal (i.e. not one of the categories of dismissal that is automatically unfair).

When might employers or employees want conversations to be protected?

Employers may want to propose a termination of employment on mutually agreed terms rather than go through a disciplinary, capability or redundancy procedure. The employer may wish to move swiftly and avoid protracted internal proceedings, or prefer to reach an agreement because the employment relationship is not working but there are insufficient grounds for a formal process. Employees may also want to initiate confidential discussions, particularly if they are facing a formal process and would prefer to arrange an agreed departure from their employment.

Both parties are likely to want to ensure that these types of discussions are confidential and protected from disclosure during any future legal proceedings - particularly where the employee is senior or sensitive matters are concerned.

An employer should ask the employee at the outset of any conversation to confirm that they are happy to speak on a without prejudice or protected basis and explain to them what this means (as set out further below). If the employee does not agree to this, the employer should be prepared to speak on an "open" basis or rearrange the meeting.

Without prejudice

"Without prejudice" means that statements made in the course of negotiations, whether in writing or verbally, cannot be used in evidence against the party that made them in any court or tribunal proceedings.

The without prejudice rule is intended to encourage parties to settle their disputes, by providing reassurance that anything said during such negotiations will not be used against them in subsequent legal proceedings. The parties are more likely to speak freely if they know that what they say in settlement discussions will remain private if the discussions fail.

The rule applies to discussions which are a genuine attempt to resolve an existing dispute between the parties.

Existing dispute

There must have been a dispute in existence at the time when the statements were made for without prejudice to apply. Earlier discussions cannot be protected by raising a dispute later.

The question of whether there was a dispute at the time of the relevant discussions will depend on the circumstances of the case. The simple fact that an employee has raised a grievance will not necessary be an existing dispute.

There will be an existing dispute where the employment relationship has already ended and the employee has brought an Employment Tribunal (ET) claim against the employer. There can also be an existing dispute where employment is ongoing and a settlement agreement is offered before any claim has been brought. This can apply if an employee has told the employer they are considering bringing a claim related to their employment.

Another situation in which there may be an existing dispute is where an employer has proposed dismissing an employee for a particular reason but then negotiates with them about an agreed departure instead. There can be an existing dispute even where negotiations are amicable.

Where an employer offers an employee a settlement agreement to end the employment relationship out of the blue, and the employee was not previously aware of any employment issues, it is unlikely that there would have been an existing dispute between the parties when the offer was made. In this situation, the

without prejudice rule is unlikely to apply, although it may be protected as a PTN instead (see below).

Genuine attempt to settle

The without prejudice rule only applies to statements made during discussions which take place in a genuine attempt to settle an existing dispute. It does not apply to statements that are not part of a settlement discussion, such as someone putting forward their own case or complaining about the other party's behaviour.

Genuine settlement negotiations can take place before a claim has been issued or even formulated. The without prejudice rule can also apply whether or not the parties succeed in settling: the key issue is whether the discussion was a genuine attempt to settle at the time.

Exceptions

There are various exceptions to the without prejudice rule.

The most important of these is where there is evidence of behaviour which means it would not be right to allow a party to keep matters confidential. A without prejudice discussion cannot be used to hide highly inappropriate behaviour towards the other party. This is often referred to as "unambiguous impropriety".

Unambiguous impropriety would include very serious behaviour such as blackmail or perjury (lying in court). It is also likely to cover clear evidence of unlawful discrimination or other illegal behaviour that takes place during the discussions themselves, or the use of threats or intimidation when making an offer. Evidence of this behaviour can then be used against the party involved, even if it happened during a genuine without prejudice discussion.

What constitutes unambiguous impropriety is decided on the facts of each case. It is quite rare for this exception to apply, with the courts have said that it should only be used in the clearest cases of abuse of the without prejudice rule. Unambiguous impropriety is narrower than "improper behaviour" in relation to PTNs (see below).

Separately, evidence of without prejudice discussions can be used to show that to show that an agreement which the parties appear to have been reached should be set aside because of misrepresentation, fraud or undue influence when the agreement was made. Again, this exception is rare in practice.

Labelling discussions "without prejudice"

Simply labelling a document "without prejudice" or asking an employee to have a discussion on that basis is not enough to ensure the rule applies. The document or discussion must still be a communication that was made in a genuine attempt to settle an existing dispute. Equally, the absence of the "without prejudice" label does not prevent the rule from applying.

Where it is not clear whether communications are without prejudice or open, the court or tribunal will look at the parties' intentions. This means it is important in practice to state that a document or discussion is "without prejudice". Using those words shows that the party intended their communications to be on this basis and so help to show that the rule applies.

It is quite common for parties to correspond on both a without prejudice and an open basis at the same time. For example, there may simultaneously be open letters about a proposed redundancy dismissal and negotiations about an agreed settlement. It is important to label correspondence appropriately in these circumstances. A party might initially agree that some communications are without prejudice but allege that, during the negotiation, the correspondence shifted to an open basis. Clear labelling of correspondence as without prejudice will help to show the parties' intentions at the time.

Waiving without prejudice

The protection provided by without prejudice belongs to the parties to the relevant communications. This means that it can only be set aside or "waived" with the consent of all parties.

If one party tries to use without prejudice communications in evidence, the other party can choose whether to insist on the without prejudice rule being applied to keep the communications confidential or treat this as a waiver so that the material can be seen by the court or tribunal.

Importantly you cannot pick and choose which parts of a without prejudice communication can be seen by the court. If part of a without prejudice document is referred to, the whole document loses the protection of the rule. Employers should therefore be careful about referring to any part of without prejudice discussions in open correspondence or as part of a legal claim, as this may mean that the ole discussion loses protection.

Settlement agreements

Communications about settlement terms between an employer and employee will usually be covered by the without prejudice rule. However, the final settlement agreement will not be covered once it is signed and binding on both parties.

Employers should therefore be careful about what is included or referred to in a settlement agreement. Where possible, negotiation documents should be kept separate from the resulting agreement, as combining the two can lead to loss of without privilege protection for the negotiations. It is better to include any final details in the settlement agreement itself rather than cross-referring to negotiation documents.

Pre-termination negotiations

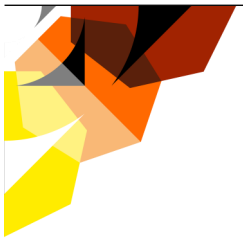
PTNs were introduced in 2013 to allow greater flexibility in the use of confidential discussions as a means of ending the employment relationship. The rules governing PTNs are set out in section s111A of the Employment Rights Act 1996.

By holding a PTN, employers and employees can have discussions about terminating the employment relationship on agreed terms without what is said being admissible in most subsequent unfair dismissal proceedings.

PTNs apply only to settlement discussions about termination of employment and not conversations about other employment issues. If the parties meet the criteria for a PTN, the content of the settlement discussions cannot be referred to in an ET claim for ordinary unfair dismissal.

No need for an existing dispute

With a PTN there is no need for there to be an existing dispute between the parties, so it extends further than the protection provided by the without prejudice rule.



Discussions held during a PTN can be treated as confidential even where there is no current employment dispute, or where one or more of the parties is unaware that there is an employment problem. This provides more certainty than the without prejudice rule as to when settlement offers and discussions may and may not be used as evidence.

PTNs can also apply to offers of a settlement agreement on termination of employment against the background of an existing dispute. In many cases, both the PTN rules and the without prejudice rule can apply to the same communications.

Unfair dismissal claims only

PTNs provide protection only in relation to ordinary unfair dismissal claims in the ET (including claims of unfair constructive dismissal).

This means that the fact and content of a PTN can be referred to in claims of automatically unfair dismissal (such as dismissal for whistleblowing). A PTN can also be referred to in all types of discrimination claims and in breach of contract claims. This is very different from the without prejudice rule, which protects discussions in relation to all types of claim.

The limits of the PTN rules mean they should be used with caution. If an employee may bring a discrimination or other type of claim in addition to an unfair dismissal claim, the ET will only disregard the content of the PTN for the purposes of the unfair dismissal claim. Where the employer is concerned that the content of settlement discussions may be used as the basis for claims other than ordinary unfair dismissal, it is better either to ensure that the without prejudice rule applies, or to limit settlement discussions to issues that the employer would not be concerned about revealing to the ET.

Pre-termination offers only

PTNs do not apply where employment has already terminated. The rules only apply to any offers made or discussions held before the termination of the employment, with a view to it being terminated on agreed terms. In contrast, the without prejudice rule can apply to settlement discussions which take place after employment has ended. It is also necessary for the employer to have made some settlement offer or proposals during the discussion—simply holding a conversation about ending employment without discussing agreed terms will not fall within the PTN rules.

Improper behaviour

A PTN may not protect communications if there has been "improper behaviour". If anything said or done during negotiations is improper, or connected with improper behaviour, then evidence of the fact and content of the PTN will be inadmissible only to the extent that the ET considers "just".

There is no guidance in the legislation as to the meaning of "improper" or "improper behaviour" and it is a matter for the ET to determine on the facts of each case. However, improper behaviour will include (but is not limited to) behaviour that would be regarded as "unambiguous impropriety" under the without prejudice rule (see above). It would therefore cover, for example, unlawful discrimination against an employee during settlement discussions.

The Acas Code of Practice on settlement agreements (Acas Code) contains examples of improper behaviour, which include harassment, bullying and intimidation. Another example is putting undue pressure on a party, such as by not giving them reasonable time for consideration of a settlement offer or saying before any form of disciplinary process has begun that the employee will be dismissed if the offer is rejected.

Adopting a negotiating tactic that the amount offered reduces progressively while the employee is considering the offer could be considered as applying undue pressure on the individual to rush their decision. An employer has also been found to have acted improperly by announcing that an employee's employment was over and giving the employee no other option. Employees may show improper behaviour too, such as by threatening to undermine the employer's public reputation if they do not sign the agreement.

The Acas Code in addition provides some examples of what would not usually be considered improper behaviour. These include factually stating the alternatives if agreement cannot be reached, including reference to the possibility of disciplinary action if relevant, or setting out in a neutral manner the reasons that have led to the proposed settlement agreement.

As the concept of improper behaviour is so broad, employers should ensure that they follow the guidance in the Acas Code and do not put pressure on an employee during a PTN – whether through deliberate tactics or simply by trying to conclude matters as swiftly as possible.

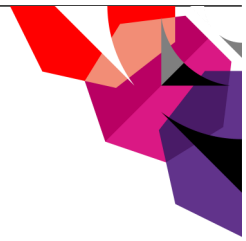
Process and documentation

While there is no legal right for employees to be accompanied during a PTN, the Acas Code recommends that employers should allow an employee to be accompanied by a work colleague or trade union official/representative. The employer will need to decide whether to offer this option or whether it would be better to keep discussions more informal. The risk of not allowing an employee to be accompanied is that this is seen as putting undue pressure on them, so amounting to improper behaviour – particularly if they ask to be accompanied and this is refused.

The Acas Code also says that parties should have a "reasonable" period to consider a proposed settlement, suggesting a minimum period of ten calendar days. Again, this is not a legal requirement and what is reasonable will depend on the circumstances. Nonetheless, giving an employee a significantly shorter period may be regarded as undue pressure and so improper behaviour, especially if the employee asks for more time and this is refused.

Although not a legal requirement, it is recommended that a letter is sent to the employee following the PTN. This should record what was discussed and provide a clear record of the terms that the employer is willing to offer. Acas has published guidance containing templates that employers can use.

When drafting the letter, remember that the ET could see it in any claims other than unfair dismissal, or where the ET is satisfied that there has been improper behaviour. The employer may choose to state that the offer is made in accordance with section 111A of the Employment Rights Act 1996 and explain the consequences, but this may not be appropriate in all cases and is not required for the PTN rules to apply.



It will normally be helpful to provide a draft settlement agreement with the letter so the employee can take legal advice. Some employees may, however, interpret the production of a settlement agreement at this point in the process as suggesting that the employer is determined to proceed with dismissal. As an alternative the letter could set out the headline terms that the employer is willing to offer, stating that a draft settlement agreement will be provided if the employee expresses an interest in going down this route.

Effective date of termination

It can be important to identify the date that employment ends for the purposes of an unfair dismissal claim, known as the effective date of termination (EDT). For example, there may be a dispute about whether the employee has sufficient service to bring a claim for unfair dismissal.

If there is a dispute about the EDT after a PTN had occurred, the content of the discussions may be admissible as evidence to help determine the EDT in subsequent unfair dismissal proceedings. To reduce the risk of a dispute arising in relation to the EDT, employers should ensure clear and unambiguous wording is used in any correspondence relating to termination of employment.

Grievances

An employee may raise a grievance as a negotiating tactic, with a view to prompting settlement discussions or gaining additional leverage in existing discussions. Even if without prejudice discussions or PTNs are underway, it will generally be best practice to follow the grievance procedure in parallel with the other discussions, to protect the employer's position should negotiations break down and an ET claim follows.

Refusing to hear the grievance in this situation raises various risks. In the context of a PTN, the employee could allege improper behaviour if the employer refuses to deal with a grievance while negotiations are taking place. As the PTN only protects communications in relation to unfair dismissal claims, the employee could make other claims connected with their grievance in any event (for example, discrimination). There would also be the possibility of an uplift in any compensation awarded by the ET, based on unreasonable failure to follow the Acas Code of Practice on disciplinary and grievance procedures.

If only part of the grievance relates to the PTN discussions, it may be possible to agree with the employee that the grievance will be dealt with in two parts. That would mean the part relating to the PTN could be kept confidential in any future unfair dismissal proceedings, if required.

For further information on this subject please contact:

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