Protected Conversations

On 29th July 2013 the Government introduced a number of changes to employment law and practice. Among these was the introduction of the new concept of a *"protected conversation"*.

For the most part, the law relating to unfair dismissal was not amended. In order for an Employment Tribunal to adjudge a dismissal to be fair, it has to be satisfied of two things.

The first is that the reason for the dismissal was among the list of *"potentially fair"* reasons set out in the legislation. A potentially fair reason is one that relates to the capability or qualifications of the employee or his conduct. A dismissal is also potentially fair if the reason for it is that the employee could not continue to work without breaching some other law. There is a further category of *"some other substantial reason"* which can be quite technical.

The second requirement is that the Tribunal has to be satisfied that the employer acted reasonably in treating that reason as sufficient grounds for dismissal. This has to be determined in accordance with equity and the substantial merits of the case.

To a large extent, the reasonableness or otherwise of the decision to dismiss will depend upon the procedure that the employer has followed. If he has acted reasonably the dismissal will be fair; if not then the dismissal will be unfair.

The Employer's Problem

Sometimes, an employer will conclude that the right decision for the business is that an employee should leave, although he has acquired sufficient service to be protected against unfair dismissal. It is by no means uncommon for an employer to reach this conclusion without having followed any earlier procedure. If an employer seeks to dismiss, say, on the grounds of performance (whether related to capability or conduct) the dismissal is unlikely to be fair unless the employer has followed a procedure involving a series of warnings which give the employee the opportunity to improve. In the absence of extreme circumstances, a decision to dismiss on these grounds without warning is likely to lead to a finding of unfair dismissal. Similarly, a dismissal for redundancy is only likely to be fair if the employer has followed a procedure involving consultation, the establishment of a pool of candidates for redundancy, selection on the basis of objective criteria and the consideration of alternative employment. If he misses out any of these stages then he runs the risk of the procedure being adjudged unreasonable and the dismissal unfair as a consequence.

An employer in the situation described above might be tempted to cut corners and indicate to the employee his dissatisfaction whilst suggesting that matters might be resolved by the employee leaving with a severance package.

Often this approach worked; the employee accepted the deal and left quietly. Problems arose however when the employee declined the offer.

The reason for this is that if, the initial approach having been rejected, what transpired was that the employee was made subject to a performance management or disciplinary procedure which culminated in his dismissal, it would be easy for the employee to allege that the process was unfair. He could point towards the original approach as an indication that the employer did not wish to retain him in any event and that therefore the procedure that followed was flawed and the outcome predetermined.

"Without Prejudice"

Some employers made the mistake of thinking that the discussions and offer of a severance package were confidential and could not be raised in subsequent proceedings. That was wrong. There is a general rule that discussions on a *"without prejudice"* basis cannot be referred to in subsequent litigation. However, discussions may only be considered genuinely *"without prejudice"* if they are held with a view to settling a current dispute. This applies even if one party states that a discussion is *"without prejudice"* or *"off the record"*. In the situation described above there is no dispute. The situation would be different if the parties were seeking to negotiate a settlement after the employee had been dismissed but the rule cannot apply to any discussions which take place before any process has even begun.

There are certain other exceptions to the *"without prejudice"* rule, although these are beyond the scope of this note.

The New Law

With a view to addressing this situation, the Government has added a new Section 111A to the Employment Rights Act 1996.

The Section starts by indicating that evidence of the sort of discussion noted above will now be inadmissible in the context of a regular unfair dismissal claim.

It is important to note that the new rule does not relate to claims of *"automatic"* unfair dismissal. These arise where the reason for the dismissal is one of a number of specified reasons, such as pregnancy/maternity, whistleblowing, asserting legal rights and a number of other similar grounds. Unfair dismissal claims under TUPE are also excluded from the new rule.

The rule also does not apply if the Tribunal takes the view that one of the parties' conduct was *"improper or was connected with improper behaviour"*. In those circumstances, the conduct can be taken into account *"to the extent that the Tribunal considers just"*.

The new legislation also specifies that what is protected is *"any offer 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"*.

The interpretation of this provision might well be ripe for litigation. The safest course is to assume that an *"offer"* must be exhaustive and not merely one of principle subject to the final terms being thrashed out later. The employer should hand the employer a written agreement for his consideration, setting out all the terms of settlement. *"Discussions"* suggest a two-way process rather than simply an employer suggesting that it might be appropriate for the employee to leave.

ACAS Guidance

ACAS has produced both a Code of Practice on what are now called *"Settlement Agreements"* (formerly Compromise Agreements) and a Guide to Settlement Agreements and the discussions that may safely precede them. An Employment Tribunal is likely to have regard to these documents in considering whether or not the employer's conduct was *"improper, or was connected with improper behaviour"*.

It is fair to say that the threshold of impropriety in the ACAS Code is low. Its non-exhaustive list of examples of improper behaviour sets out the following:

a. All forms of harassment, bullying and intimidation, including through the use of offensive words or aggressive behaviour;

b. Physical assault or the threat of physical assault and other criminal behaviour;

c. All forms of victimisation;

d. Discrimination because of age, sex, race, disability, sexual orientation, religion or belief, transgender, pregnancy and maternity and marriage or civil partnership;

e. Putting undue pressure on a party, for instance:

   i. Not giving reasonable time for consideration of the proposed Agreement (it adds that as a general rule a minimum period of 10 calendar days should be allowed for the employee to consider the proposed formal written terms of the Settlement Agreement and to receive independent advice);

   ii. An employer saying before any form of disciplinary process has begun that if a settlement proposal is rejected then the employee will be dismissed;

   iii. An employee threatening to undermine an organisation's public reputation if the organisation does not sign the Agreement, unless the provisions of the whistleblowing legislation apply.

The last point acknowledges that, for the detail of the discussions to be admissible in evidence on an unfair dismissal claim, the impropriety might be on the part of the employee.

ACAS' advice indicates that the following would not usually be considered to be *"improper behaviour"*:

- Setting out in a neutral manner the reasons that have led to the proposed Settlement Agreement;

- Factually stating the likely alternatives if an agreement is not reached, including the possibility of disciplinary action which may lead to dismissal if relevant;

- Factually stating that if an employee refuses a Settlement Agreement and any subsequent disciplinary action results in dismissal then the employee may not be able to leave on the same terms as set out in the proposed Agreement;

- Not agreeing to provide a reference;

- Not agreeing to pay for the employee's independent legal advice on the proposed Agreement;

- Encouraging the employee, in a non-threatening way, to reconsider a refusal of a proposal.

Risk Areas

It is important to remember that the new rule does not apply if the employee brings a claim of discrimination or indeed any other employment law claim (such as breach of contract). In those circumstances, the rule would not prevent the employee bringing evidence of the discussions and offers.

In deciding whether or not to seek to enter into a protected conversation, the employer should satisfy himself that there is little or no chance of the employee being able to allege discrimination and indeed the possibility of all other claims ought to be considered.

Although the legislation does not require it, it is good practice to offer the employee the right to be accompanied at the discussion by a work colleague or trade union official.

Our standard note *"Settlement Agreements"* sets out more information on these Agreements and what they might contain.

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