The New Law – Too Good to be True?

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As of 29 July, employers can enter into confidential negotiations with an employee with the aim of terminating their employment. In other words, evidence of those conversations will be inadmissible in a Court or Tribunal in a similar way to the common law "without prejudice" principle, but without the need for a pre-existing dispute. Conversely, employees are also afforded the same protection if they choose to start the conversation (although that is a lot less common).

This sounds like a liberating new right. It should mean that you can have a frank and honest discussion with any employee you no longer wish to employ without worrying about these discussions tainting any formal disciplinary/grievance process or being used as evidence against you in future litigation. However, as with most things that look too good to be true - it is. There are limitations with the new protection that mean, broadly speaking, you should still approach these discussions in the same manner as you have up until now.

The limitations

The provisions only apply to unfair dismissal claims.

Automatically unfair dismissal claims (eg dismissals for "whistleblowing" or dismissals for asserting rights to do with pregnancy, maternity, or health and safety), discrimination claims and breach of contract claims (other than constructive dismissal) are not covered. This means that if a settlement agreement (the new name for a compromise agreement) is not reached as a result of the negotiations and the employee asserts claims other than straightforward unfair dismissal (which is often the case), then the discussions are admissible evidence in respect of these claims.

The provisions do not apply if there has been some "improper behaviour" in anything said or done in relation to the settlement negotiations.

What constitutes improper behaviour is ultimately a matter for a tribunal to decide with regard to the facts of each case. It includes for example: putting undue pressure on a party to agree to the settlement proposal or an employer saying before any form of disciplinary process has begun that if a settlement proposal is rejected then the employee will be dismissed (it would not be improper behaviour if they were told they may be dismissed).

The ACAS Code of Practice on Settlement Agreements (taken into account by Tribunals as the benchmark of good practice) recommends that an employee is given a reasonable period of time (and as a general rule a minimum of 10 days) to consider any settlement agreement and take independent legal advice. To insist that an employee agrees a settlement agreement within a shorter time frame would amount to improper behaviour. This therefore means that unless terms can be agreed in a shorter period between the parties, employers should ensure such offers are left open for at least 10 days.

The Code also recommends that employees are given advance warning of any meeting to discuss a settlement agreement and are given the right to be accompanied – this cuts across the concept of having a frank pre-termination discussion with an employee.

The selling point

The main plus point of the new protection for pre-termination negotiations is that it provides the employer with an added layer of protection where it wants to enter into good faith discussions with, for example, a poor performer or employee with conduct issues. That is only the case where there has been no pre-existing dispute (ie the concerns have never been raised and disputed previously) and there is no underlying risk of a discrimination claim. If so, the employer can rely on the new protection rather than just hoping in the traditional way that a label of "without prejudice" will stick. Often the employer would know that, if challenged, the without prejudice label will not stick.

However, if settlement is not reached and the employee alleges discrimination in connection with the discussions themselves or claims constructive dismissal on the grounds of discrimination (whether or not such allegations are made in good faith) that evidence will be admissible in respect of that claim. That is a very real risk, particularly where discrimination claims attract unlimited compensation, without any qualifying service requirement and the unfair dismissal compensation limit has been further capped. It remains to be seen whether a tribunal, faced, for example, with an unfair dismissal claim as well as a discrimination claim, will be swayed in its decision on the unfair dismissal by evidence relating to the negotiations heard on the discrimination claim (if it splits its consideration of the issues in that way).

Overlap with "without-prejudice" principles

Where there is a pre-existing dispute the employer should continue primarily to seek to rely on the principle of without prejudice as it is afforded to all forms of claims and its limitation of 'unambiguous impropriety' (i.e. without prejudice will not apply when there is unambiguous propriety) is a narrower test than that of improper behaviour.

Where there is no pre-existing dispute the employer may rely on the new protection in respect of any "ordinary" unfair dismissal, but in the knowledge that there are risks associated with entering into such pre-termination negotiations with employees who may have or threaten other claims lurking in the background

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