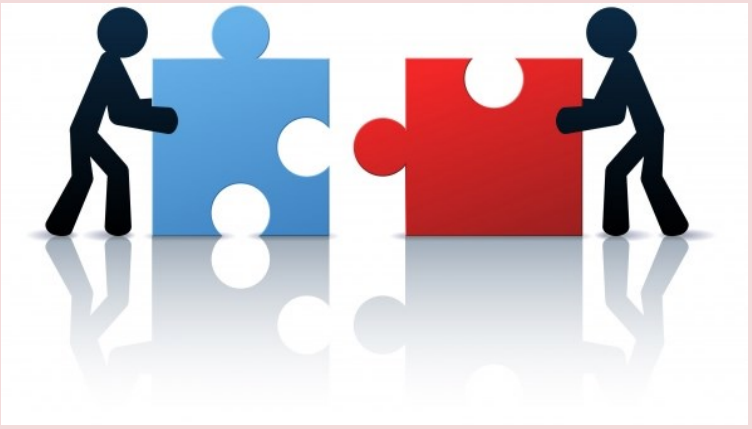
Employment

Protected conversations (pre-termination negotiations)

What are they?



Protected conversations are conversations that an employer can have with employees to try to achieve a termination of employment without the content of such conversations becoming admissible as evidence in any future Tribunal proceedings. That is as long as such proceedings in question relate to an unfair dismissal (including constructive dismissal). Protected conversations became possible under s.111A of the Employment Rights Act 1996 - effective from 29 July 2013.

Note that the protection falls away if the employee brings an additional claim for race discrimination (or any other discrimination claim), alongside unfair dismissal, for example. Then the conversation is not protected and becomes admissible in evidence for those proceedings. The same goes for whistleblowing or any of the automatic unfair dismissal claims or a wrongful dismissal claim or for breach of contract.

Another way in which a conversation purportedly protected by the statutory regime can become admissible in evidence is if the employer has engaged in 'improper behaviour' during the conversation. Examples of such behaviour have been provided by ACAS and include harassment, physical assault, victimisation, discrimination or putting undue pressure on a party such as blackmail. ACAS also recommends that employers should generally allow the employee to be accompanied, that parties be allowed a reasonable period to consider proposals and to receive advice (generally at a minimum of ten days).

Word of caution

Although it will almost always be the employer who has the need or wish to initiate these conversations, the tactical benefit of such conversations lies with employees. If a claim other than an unfair dismissal is brought, the confidential nature of the conversation gets lost, and the fact and content of the conversation becomes admissible in evidence. Any merits or otherwise of such other claims will not be relevant in determining the admissibility. It's very possible that employees will try to take advantage of the improper behaviour exception by, for example, raising a grievance about the conversation itself or arguing in future Tribunal proceedings that attending the meeting without any employee representative was oppressive and/or they were put "under pressure" in such meetings.

Is there a dispute?

If there is an existing dispute between the parties then without prejudice conversations can provide a safer route to dismissal than protected conversations because they are protected from being used as evidence for all types of claims, and the exception of unambiguous impropriety is a much higher bar than improper behaviour accorded to protected conversations.

However, whether there is a dispute or not is a question of fact and law so we highly recommend that you consult with us about this issue. If there is an ongoing grievance, a dispute may be said to have arisen between the parties. If there is a performance review, then it's possible that there is not a dispute (this is a fact-sensitive issue and should be assessed on a case by case basis). Therefore, it is likely to be safer to have a without prejudice conversation if you are sure that there is an existing dispute with the employee in question.

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