Employers often confuse 'without prejudice' and 'protected conversations'. Here's how to get the distinction right

Many employers are familiar with the concepts of 'without prejudice' and 'protected conversations' as a means to facilitate exit negotiations with employees. However, both terms are frequently used incorrectly. Without a full appreciation of their advantages and their limitations employers can unwittingly use the wrong terms and leave themselves exposed.

Without prejudice

Put simply, the without prejudice rule prevents anything written or said in a genuine attempt to settle an *existing dispute* from being presented as evidence in any subsequent litigation.

The key limitation is that there needs to be an *existing dispute*. The classic situation of an employer having an 'off the record' conversation with an underperforming employee would not be covered, and the employer could be subject to a claim of constructive unfair dismissal or an argument that any subsequent dismissal was pre-determined and therefore unfair.

An existing dispute doesn't require a formal claim to have been instigated, but the parties do need to have contemplated (or might reasonably contemplate) litigation if they cannot reach agreement.

Many employers assume that the existence of a grievance amounts to a dispute. However, the fact of a grievance doesn't necessarily mean there is a dispute – the employer could uphold the grievance for example. The individual circumstances are very relevant, and therefore it can sometimes be difficult to say with certainty whether the without prejudice rule applies.

Protected conversations

Protected conversations were introduced to enable parties to have 'off the record' discussions even where there is no dispute. In addition to their content, their very existence cannot be disclosed in litigation (enabling internal discussions on the issue to be protected) and the protected nature of such conversations cannot be waived, even if both parties agree.

However, protected conversations also have limitations. They are only inadmissible in *ordinary unfair dismissal proceedings*. Claims of discrimination, automatic unfair dismissal, unlawful detriment, or breach of contract are not protected, creating uncertainty (as employers will not know what claims an employee might later assert). Protected conversations are therefore usually unwise in relation to exits of employees on long-term sickness absence, given the possibility of a subsequent disability discrimination claim. This is where the without prejudice rule has an advantage over protected conversations: if something is without prejudice it is inadmissible in respect of *all* legal claims, not just unfair dismissal.

Any 'improper behaviour' when utilising a protected conversation will lead to the protection being lost (this is similar to a requirement of without prejudice conversations, which cannot be used to disguise perjury, blackmail or 'unambiguous impropriety'). Improper behaviour is not defined, but ACAS suggests that putting undue pressure on the employee would be an example. It goes so far as to recommend employers allow employees 10 days to consider any proposal.

Labels

A common misconception is that labelling a document 'without prejudice' will prevent it from being revealed in litigation. But it is the substance of the document, not its label, that is important. If the document doesn't fit within the rules it will not be protected, notwithstanding its label. The reverse argument applies if a document is clearly a genuine attempt to settle a dispute but is not explicitly labelled without prejudice.

In summary

While protected conversations appear to resolve the limitations of the without prejudice rule, their use is limited to straightforward dismissal and/or unfair dismissal cases. It's important to be aware of the limitations of both regimes when initiating exit discussions. Employers should

consider the situation – and their options – carefully in advance, in particular whether there is a dispute and what potential claims the employee might have.