How to approach pre termination negotiations about a settlement agreement

Introduction

Many employers recognise the appeal of being able to agree a termination settlement with an unsatisfactory employee rather than having to go through a lengthy disciplinary, grievance, redundancy, or performance improvement procedure.

However, employers may be concerned that, by entering into negotiations, they will put themselves at risk of an unfair dismissal claim.

When might an employer want to initiate pre-termination negotiations?

Section 111A of the Employment Rights Act 1996 prevents employment tribunals that are hearing unfair dismissal claims from taking into account offers made or discussions held prior to dismissal *'with a view to the employment being terminated on terms agreed between the employer and the employee'.*

This measure is intended to assist employers that wish to forestall a time-consuming capability or disciplinary process and attempt to negotiate a smooth exit for the employee concerned.

There are a number of reasons why such discussions can be attractive for employers.

- It may be clear to an employer that an employee is not suited to their job and that a formal performance improvement programme will simply delay the inevitable.
- It may be the case that going through a formal procedure will cause inconvenience or embarrassment to the employer, other employees, or clients and customers.
- It is also not uncommon for employers to fail to address performance issues, and subsequently be faced with a difficult and drawn-out process as a result.

In these circumstances, an agreement with the employee that they will simply leave on agreed terms can be an attractive option, with benefits for both the employer and employee.

Provided that the discussions lead to a binding agreement, there is very little that can go wrong.

The parties will enter into a settlement agreement that provides that the employee cannot bring any claims covered by the agreement against the employer. Agreements also usually deal with how the employer will respond to requests for references from potential future employers.

Problems can arise, however, if the employer and employee fail to reach an agreement.

The employer may be vulnerable to allegations of unreasonable conduct if it discusses termination terms with the employee rather than going through the correct disciplinary or performance improvement procedure. For example, if the employee brings an unfair dismissal claim and the employment tribunal finds that the employer acted unreasonably, the test for unfair dismissal will be satisfied.

Section 111A is aimed at addressing this risk by protecting the employer from allegations of unreasonable conduct in a subsequent tribunal claim.

The "Without prejudice" principle

It has long been recognised that it is in the interests of those in dispute to engage in frank negotiations in order to reach an agreement.

Such negotiations are generally held to be 'without prejudice', meaning that what is said cannot subsequently be used against one of the parties in any subsequent legal proceedings.

It must be remembered that the without prejudice rule applies only when the parties are attempting to negotiate a settlement to a dispute that already exists and that an employer cannot simply choose to label a conversation 'without prejudice' and assume that what follows will not be taken into account by a tribunal. For example an employee raising a grievance does not automatically create a dispute and therefore this cannot be relied upon to invoke a justified 'without prejudice' conversation by the employer.

Inadmissibility of negotiations under s.111A

Section 111A is not equivalent to the without prejudice principle, but it does seek to operate in a similar way. It is limited to unfair dismissal cases and removes the need for the parties to be negotiating a settlement to a pre-existing dispute.

The effect of this is that an employer can make an offer to an employee, usually one that agrees that the employee will leave with a payment, without the fact or terms of the offer being relied on by the employee in an unfair dismissal claim.

Section 111A also works in relation to offers made by employees and an employee can approach their employer and offer to leave in return for an agreed sum. If the offer is refused and the employee is subsequently dismissed and as a result claims unfair dismissal the employer will not be able to argue that the offer from the employee showed a lack of commitment, or an acceptance that there were problems with their performance.

Limitations to the applicability of s.111A

The important difference between the without prejudice principle and s.111A is that, for the latter, evidence of pre-termination discussions is excluded from unfair dismissal cases. For all other tribunal claims, including discrimination and breach of contract, s.111A does not apply and discussions not otherwise covered by the without prejudice rule will be admissible in evidence.

Furthermore, s.111A does not apply to all unfair dismissal claims. Section 111A(3) provides that the exclusion will not apply where a dismissal is alleged to be automatically unfair.

Improper behaviour

The scope of protected conversations is further limited, as s.111A(4) contains an exception where an employment tribunal finds that anything said or done was 'improper or was connected with improper behaviour'. In these circumstances it may consider evidence of a pre-termination negotiation to such extent as it considers just.

To provide guidance on the effect of s.111A, Acas has produced a 'Code of practice on settlement agreements' and non-statutory 'Guidance on settlement agreements.' Employment tribunals will always take the code of practice into account when deciding cases.

The code is particularly important in the context of deciding whether negotiations are being conducted in an improper way. The code lists some examples of improper behaviour:

- all forms of harassment, bullying and intimidation, including through the use of offensive words or aggressive behaviour.
- physical assault or the threat of physical assault or other criminal behaviour.
- all forms of victimisation and discrimination.
- putting undue pressure on a party, for example:
    - not giving the reasonable time set out in the code for consideration of the proposed agreement (the code suggests a minimum of 10 days); or
    - saying before any form of disciplinary process has begun that if a settlement proposal is rejected the employee will be dismissed.

The code of practice states that telling an employee before any disciplinary process has begun that if the offer is rejected, they will be dismissed will be improper. There are though a number of ways in which this message can be delivered without the employer being quite so specific. It is though difficult to predict where tribunals will draw the line between proper and improper.

How to approach a conversation about potential settlement

Employers should be cautious about approaching pre-termination negotiations on the assumption that what is said will be excluded from evidence in an unfair dismissal claim.

That said, the fact that an employer has offered to negotiate an exit with an employee does not necessarily mean that the employee can resign and claim constructive dismissal or that an eventual dismissal will be unfair. There are two pitfalls that employers need to avoid.

- The first is conducting the discussion in a way that indicates that the employer has no confidence in the employee's ability to do the job.
- The second is the employer giving the impression that it has already made up its mind and that any performance management or disciplinary procedure will be a sham.

One option for employers is to begin the performance management, disciplinary or redundancy procedure before initiating a conversation about potentially reaching a settlement agreement.

The employer could then suggest an agreed exit package as an alternative to continuing with the procedure. The employee would already be aware that termination is a potential outcome of the procedure and may therefore be more inclined to pursue a settlement.

Beginning a formal procedure before holding the conversation about settlement may make it more likely that the conversation would be covered by the without prejudice principle, as the employer could argue that there was a pre-existing dispute with the employee.

The employer may decide that it would be preferable to avoid any formal procedure and go straight to a discussion with the employee.

Either way, the key for employers is to conduct the conversation in a way that keeps all options open but that allows the conversation to move towards an agreed termination, if the employee is open to that possibility.

The opening of such a conversation in a performance case could emphasise the employer's commitment to making the relationship work and confidence that by using appropriate procedures and processes this can be achieved. The employer could ask the employee if they are similarly committed and prepared to engage with the employer to improve the situation.

At this point, the employer could raise the possibility of an agreed termination as one option the employee could consider and take the conversation from there if the employee seems receptive

If the issue relates to discipline, the employer could raise a more general point with the employee about their attitude to the organisation and whether they see a way forward.

Again, the possibility of a settlement could be raised as one option to explore, without any suggestion that dismissal is the likely outcome of the disciplinary process.

The employer should state that the conversation is on a without prejudice basis, and that it is covered by s.111A, and should explain what that means, asking the employee to agree that the negotiations will be kept confidential, other than from specified people.

Conversations of this nature are probably best conducted by HR professionals rather than line managers and they should not involve an individual who is likely to be directly involved in the potential disciplinary or performance improvement procedure.

There is no right to be accompanied at a pre-termination negotiation, although the Acas code recommends allowing a companion as good practice. Where a representative is already involved in the process it would make sense for the employer to include them in any discussions. Furthermore, the individual carrying out the negotiation may be inclined to take more care over their choice of words if there is a companion or representative present, which could help to avoid any suggestion of improper behaviour.

Once a discussion has begun, it would be wise for the employer to set out the basis of its offer in writing. This will allow the employee to take appropriate advice and also give the employer an opportunity to emphasise that no decision has been taken at that stage.

The Acas code suggests that, as a general rule, the employer should give the employee a minimum of 10 calendar days to consider the formal terms of a settlement agreement and obtain advice.

The appropriate length of time will vary according to the nature of the negotiations taking place and the timetable for any approaching disciplinary hearing or performance review. Written communications should be headed ‘without prejudice’ and ‘subject to s.111A of the Employment Rights Act 1996’.