Protected Conversations under S111A Employment Rights Act 1996

A without prejudice (subject to contract) meeting requires there to be a current dispute to be settled but a protected conversation (known as a pre termination negotiation in the employment statute/legislation) does not. And so, the latter is often a very effective way of introducing the possibility of an amicable end to someone's employment.

Protected conversations can take place in parallel with at-risk redundancy meeting or even an actual or anticipated disciplinary hearing. However, in practice they are most effective for (and most relevant to) performance management concerns. And I would go as far as to say I would not advise that they are (with limited exceptions) used for anything else.

Employers should not think they can automatically have an off the record conversation without this being subsequently referred to and coming back to bite them in e.g. an employment tribunal. A fair procedure needs to be followed to maximise the chance of the settlement discussions being accepted by the courts as genuinely "off the record".

This note gives employers guidance as to how to proceed where they wish to offer an employee the chance to enter into a settlement agreement (formerly known as a Compromise Agreement) as an alternative to (in particular) an otherwise drawn-out performance management process. At times it expands the advice into Settlement Agreements generally although this is an area where specific and specialist advice is always desirable.

Advice to Employers

1 Do not ambush an employee by e. g calling them into a meeting without an agenda. If it is a performance management meeting, then say so and anticipate the issue in a prior open communication with the employee. The meeting must not be a surprise.

2 Do not start any meeting with a "protected" discussion. Ensure the relevant correspondence is on record before the meeting takes place and set out the performance concerns first with examples.

3. The ask the employee if they would be willing to explore an alternative to the formal process. If they say no then do not continue.

4 If they say yes have a break first (employees are invariably stressed at this juncture and paying less attention) before that second discussion or better still adjourn to a different day.

5 As soon as the discussions as to a settlement start-up it should be stated that the meeting is being conducted pursuant to S111A Employment Rights Act 1996 and on a Without Prejudice basis. There are different legal tests for both and using both labels gives an employer more protection from criticism.

6 Only at that point hand over a proposed settlement agreement with figures included or enough to know how they might be calculated (e.g. "an amount equivalent to two months' notice pay" or "5 days' accrued holiday pay"). Use square brackets to show information still required/ to be clarified.

7 Bear in mind that employees going through a performance management must be formally warned at least twice and in writing for failing to meet targets before any dismissal has a

chance of being fair on performance grounds. And even then, they are paid notice pay in full (in most cases even if they are then off work though illness and only getting SSP). So the offered level of £ severance needs to reflect this and the benefit of not having a disenfranchised employee on the books if (presumably so) the employer privately thinks months of performance management is undesirable and or the dismissal outcome is likely.

8 The Agreement and any subsequent communication on the proposed settlement should be marked as a draft and headed" Without Prejudice Subject to Contract and Written under S111A Employment Rights Act 1996".

9 Make a full contemporaneous note. Sometimes HR will advise its internal clients how to approach a Protected Conversation but in practice the advice (even if sound) is ignored. A minute of the meeting will tend to keep it on message and be evidence of proper conduct.

10 The settlement proposal must be clearly presented as an alternative to a fair and formal process. This is vital. At no stage should the employer say or suggest that the outcome of the process (if there is no settlement) is, or may be, predetermined.

11 It may be necessary to set out the alternative to a settlement in detail. Targets to be set, timescales for objectives to be measured and how work will be supervised. And the employee should be given a copy (or access to) the employee handbook to highlight the formal warnings appropriate for continued underperformance if the process continues.

12 It is acceptable to offer to the employee a name of an independent legal adviser. Preferably more than one. Provided they are indeed independent and there is no conflict. However, do not press the point as the employee is entitled to choose their own solicitor. And on the assumption that the employer makes a fee contribution (do not forget the employer cannot recover any VAT as they are not the client) ensure this is the same for any adviser chosen by the employee. Not just the (list of) recommended adviser(s).

13 Give the employee adequate opportunity to consider the proposals, at least a week. Obviously, there are time constraints if a settlement cannot be effected but deadlines are undesirable.

14 Do not insist on the employee remaining away from work whilst they consider their position. Offer this an option but only that and any internal announcement to explain the employee's absence should be agreed with them first.

15 If they do go home to consider the proposal it is acceptable to remind the employee of the need to keep the discussions confidential and set out the rules of "garden leave "and even the sanctions for not obeying these. However, unless there is a very good commercial reason to do so, an employer should not block their work email or ask them to hand back any company property. Or take any other steps that might show or tend to show that it is a "done deal" and the employer is only paying lip service to a fair procedure.

16 Reflecting on steps 14 and 15, I believe it is analogous perhaps to a "suspension" for alleged misconduct. Many employers automatically take such a step. But there should be a decision-making process. It is not a neutral act, and neither is barring the employee from the office /work emails etc.

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