

Protected conversations with problem employees: risk mitigation

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A thorny dismissal question facing employers

How do you de-risk protected conversations with problem employees who are no longer an appropriate fit for the company, even though the employee may not recognise this?

A really difficult question!



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Example scenario

“I’ve had enough, we need to get rid of Employee X, and we need to do it as soon as possible.

I haven’t got time to go through a lengthy process, so I want this closing off without any come back ”

Protected conversation: an option?

- Problem employee identified
- Internal view that employee should leave the business
- Desire to avoid formal disciplinary / capability / redundancy process

OFTEN = SENSIBLE BUSINESS DECISION

Protected conversation: the ideal outcome

- Concerns are raised with employee
- Offer is made to employee during a PC
- Employee accepts, after some negotiation
- Settlement agreement is signed
- Employee leaves, on terms agreed
- No risk of a claim

Protected conversation: the ideal outcome



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Is it possible to “de-risk” things?



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KEY RISK: the protected conversation is not “protected”

- Offer is made to employee
- ~~Employee accepts, after some negotiation~~
- ~~Settlement agreement is signed~~
- ~~Employee leaves, on terms agreed~~
- ~~No risk of a claim~~

KEY RISK: the protected conversation is not “protected”

- Offer is made to employee
- Employee does not accept
- Employment terminates
 - Formal process resulting in dismissal
 - Resignation
- Employee brings claim

KEY RISK: the protected conversation is not “protected”

- Claim is brought in ET
- EJ hears all about a discussion about exit before any process commenced: DISMISSAL INEVITABLE
- EJ hears all about a discussion about exit = BREACH OF MUTUAL TRUST AND CONFIDENCE?

When will a protected conversation be “protected”?

- Evidence of pre-termination negotiations is inadmissible in unfair dismissal proceedings (section 111A(1) ERA 1996):

“any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee”

When will a protected conversation be “protected”?



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What about “without prejudice”?

- Common law principle covering genuine attempt to settle an **existing dispute**
- Settlement agreement out of the blue, where employee not previously aware of an issue placing their continued employment in question = **no existing dispute**

RECOMMENDATION

- Be aware of this risk at the outset
- Do not assume anything said or put in writing will remain “off the record”
- Avoid “improper behaviour”
- Position offer carefully
 - What is the “safe” alternative option?
 - Are you acting with trust and confidence?

RISK: a deal cannot be reached



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RECOMMENDATION

- Present an agreed exit under a settlement agreement as an **option**
- Have a “safe” alternative option
- Avoid a “fait accompli”
- Carefully consider timings of the offer
- Do not delay in progressing the alternative option

RISK: employee resigns in response



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RECOMMENDATION

- Implied duty of mutual trust and confidence
- How is the employee going to feel?
- Is the manager fully prepared?
- Do not pressure employee to accept

OTHER RISKS: employee's response is "disruptive"

- Employee goes off sick in response to the offer
- Employee tells other employees
- Employee is otherwise disruptive (eg IT breach, grievance raised)

Employee goes off sick: considerations

- Can negotiations continue?
- Is it worth pausing negotiations in the short term?
- What if the sickness becomes a long-term issue – does that change course of action?

Employee goes off sick: recommendations

- Does employee need to continue working during negotiation?
- What is their sick pay entitlement?
- Can they have a “neutral” point of contact during negotiations?
- Recognise that there may be a welfare point if this comes “out of the blue”

Employee tells other employees: recommendations

- Be clear about confidentiality
- Be clear about consequence of breach
- Can you limit this risk – when and where will you have the meeting?
- Can you propose an agreed communication in advance?

Employee is otherwise disruptive: recommendations

- Think ahead!
- Work handover?
- What about IT access?
- What is going to be said internally / externally whilst negotiations continue?

Strategy

- Plan, plan, plan – consider risk areas in advance
- Carefully think about logistics
 - When? Where? Who?
 - How will the employee feel?

Strategy

- Have a “safe” alternative option – exit under a settlement agreement should not be the only option:
 - mitigates risk of breach of trust and confidence
 - mitigates risk of “fait accompli” argument
 - gives you a route if negotiations breakdown

Strategy

- Make the offer sufficiently attractive – and any alternative options unattractive
- Follow up in writing – with their solicitor in mind
- Be prepared to negotiate
- Keep processes running in parallel

Further Reading!

- ACAS Code of Practice on Settlement Agreements
- Guide on Settlement Agreements (non-statutory additional guidance)

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