Protected conversations

The root cause of the trouble with protected conversations
Why do they go wrong and how can you put them right?

Introduction

Trying to have an "honest chat off the record" with an employee about how they may be better off pursuing the next stage of their career outside of the employer can, if that member of staff is receptive, be the best way to bring about their departure from the employer. However, if the employee is not willing to engage, or has unrealistic expectations, then it carries with it legal dangers and complexity.

In practice, most of these conversations end up going in the direction the employer hopes that they will. However, when they do not, the biggest fear is that the employee will resign and claim constructive dismissal, or even if they do not and the employer carries out performance management, the conversation ends before the ET and it causes the employer to lose the case. This might happen because in the expectation of the conversation being "protected" the employer has intimated that the result of a performance improvement process, for example, is a foregone conclusion or it may be simply if the ET discovers that the employer has made a generous offer it assumes it has done so because it knows it is at risk of being found liable e.g. for unfair dismissal.

These risks arise from the fact that there are just too many loopholes in the regime to mean that you can ever be sure that the conversation will be off the record.

However, whilst the risks can never be eliminated, they can be minimised by taking care, and ultimately the benefit of having the right kinds of protected conversations significantly outweigh the risks.

To support this proposition, I use the following structure:

1. The background to Protected Conversations – the Without Prejudice Rule
2. The "Protected Conversations" regime
3. The trouble with the "Protected Conversations" regime
4. How to have good protected conversations
5. The dangers of not having the "honest chat"

The background to Protected Conversations

The Without Prejudice Rule

Whilst the rule of law is the hallmark of a civilised society, litigation, whilst a necessary backstop to enforce the rule of law, is often time consuming, energy sapping, expensive, slow, backward looking, and divisive.

The existence of a public policy of encouraging parties to settle their disputes out of court is therefore unsurprising, and it has long been a feature not just of employment law, but the law generally, that genuine discussions about settling cases should be privileged from disclosure to

the Courts and Tribunals. This, it is believed, frees parties to discuss their differences candidly, admit to weaknesses in their cases, and to make offers to settle without fear that what they have said will be used against them in the event that settlement discussions are unsuccessful.

This is not only a policy rule but also said to arise out of a contractual agreement between the parties that non disclosure should apply.

These discussions are often described as "off the record" but that is not quite correct; there is no such thing as "off the record". There is, however, privilege from disclosure in certain fora for certain material in certain circumstances – i.e. typically from disclosure to the Court in respect of the dispute to which the discussions relate. This privilege extends not just to the contents of meetings and offers included in writing, but to discussions within the employer about any such offers. WP privilege does not, however, extend to disputes about whether a settlement has been reached, whether such agreement has been procured by misrepresentation, fraud or undue influence, or about the interpretation of the settlement agreement.

Without prejudice privilege can be waived by unequivocal (albeit sometimes implied) agreement of both parties. Subject to the above, the fact that such discussions have taken place is not privileged, but the contents are.

Requirements for the Without Prejudice Rule

The necessity for there to be a dispute

There cannot be a without prejudice discussion about settling a dispute when there is no dispute or prospect of a dispute in the first place.

In the employment context, concern about this imprecise pre-requisite has popped up routinely, and particularly since the EAT case of *Mezzoterro v BNP Paribas [2004] IRLR 508 (EAT).*

Briefly, the facts were as follows: Ms Mezzoterro had taken maternity leave and raised a grievance that she had been prevented from returning to her old job. A meeting was organised with the stated purpose of resolving Ms Mezzoterro's grievance. In that meeting, the Bank proposed to terminate Ms Mezzoterro's employment and offer her a settlement package. Significantly, the Bank said that this would not stop her continuing to seek a resolution of her grievance. Ms Mezzoterro refused the offer and brought a claim of discrimination. She sought to refer to the contents of the meeting at the Employment Tribunal. The Bank claimed that the offer was made "without prejudice" and was therefore privileged.

Ms Mezzoterro succeeded in bringing the material before the Tribunal on the basis that there can only be WP conversations about a dispute. Cox J said that the grievance had not yet turned into a dispute. That might have happened had the grievance been heard and rejected, though not necessarily. However, in any event, the settlement proposed by the Bank did not relate to her grievance about not being permitted to return to her old job but her leaving the Bank. There could not, the EAT said, have been a dispute between the parties about Ms Mezzoterro's termination at the time the so called WP meeting took place as she had no idea it was even being contemplated, nor could the settlement package relate to a grievance if that would be allowed to continue to run after the settlement had been entered into.

Genuine attempt to settle a dispute

The existence of a dispute and a conversation or correspondence stated to be for the purposes of settling that dispute are not enough. There must also be a genuine attempt to settle that dispute. In *Hudson v Oxford University UKEAT/0488/05/DM* the employee was appealing against his

dismissal. The University wrote to him "without prejudice" stating that whilst it would clearly be desirable to reach a solution, it would not be possible unless and until the employee accepted it was unrealistic and unworkable for him to return to work. Given that the dispute at that time concerned whether or not the employee should return to work and all the University had done "without prejudice" was hold its ground, the EAT held that the WP doctrine did not apply. There was no evidence of a genuine attempt to settle the dispute and therefore the letter was admissible even though it was labelled "without prejudice".

Unambiguous Impropriety

It has been a long-standing rule that parties may not use the "without prejudice" doctrine to cloak perjury, blackmail or other unambiguous impropriety but "*only in the clearest cases of abuse*" (*Unilever PLC v The Procter & Gamble Co [1999] EWCA Civ 3027*).

Back to *Mezzoterro,* and Cox J in the EAT not only held that there was no dispute but that, in any case, the content of the conversation in which Ms Mezzoterro was offered a settlement demonstrated a clear act of sex discrimination. Given the great evil that discrimination is and how hard it is to prove, she said it should be treated as unambiguous impropriety. So, in the circumstances, BNP Paribas would not have been able to benefit from the WP 'cloak' even if there had been a dispute in play.

Cases since Mezzoterro

Mezzoterro is "the high watermark" of the limitations on the WP rule, and it runs contrary to the tenor of many of the decisions of more senior Courts that both pre-date and post-date the ruling.

For example, in *Portnykh v Nomura UKEAT/0448/13* the employer proposed to dismiss the employee for misconduct. An amicable negotiation took place resulting in the employee being offered a settlement agreement and enabling him to keep his deferred remuneration (which was in the form of restricted stock). The employee claimed this was admissible in evidence as there had been no dispute in contemplation at the time. The EAT disagreed – the settlement discussions were amicable but a potential dispute was still within contemplation.

In *Woodward v Santander UK Plc UKEAT/0250/09* the EAT "clarified" that discrimination was not a free standing form of unambiguous impropriety and that there was no rule that because a cause of action like discrimination was hard to prove, the WP rule should be narrowed for those claims unless the discrimination was blatant.

Protected Conversations

The emergence of s111A and Protected Conversations

Despite the cases that followed, *Mezzoterro* generated apprehension and a great deal more caution about the use of settlement offers in employee relations.

This caused the lobbying of Government for an extension of the WP rule in employment situations (which ultimately resulted in what became s111A of the Employment Rights Act 1996 ("protected conversations")). From 29 July 2013, the "protected conversation" regime came into force.

Crucially, and in clear contrast to the WP rule, there is no need for the parties to be in dispute, or in prospect of a dispute, in order for the inadmissibility of "protected conversations" to apply.

S111A states that "*Evidence of pre-termination negotiations is inadmissible in [ordinary unfair dismissal] proceedings]"."Pre-termination negotiations" is defined to mean 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*" are inadmissible in ordinary unfair dismissal proceedings unless there has been "*improper behaviour*", in which case the Tribunal can admit the material relating to that improper behaviour if it considers it just to do so.

In June 2013, ACAS published a Code of Practice on Settlement Agreements under s199 TUL(C)RA 1992 which was designed to aid the understanding of the implications of s111A and, in particular, the admissibility provisions. It states that 'improper behaviour' includes all aspects of unambiguous impropriety but is wider than that and extends to such other behaviour as the ET may regard as improper. This view has been considered by the EAT in *Fairthorn Farrell Timms v Bailey* and received its support. The Guidance also gives some (albeit limited) guidance on how to conduct negotiations, including:

1. It may be helpful if any reasons for the proposal are given when the proposal is made.

2. Employees should be given a reasonable time to consider a settlement proposal. As a general rule, a minimum period of 10 calendar days should be allowed to consider the proposed formal written terms and to receive independent legal advice.

3. Allowing employees to be accompanied to WP meetings is good practice though not a legal requirement.

The trouble with Protected Conversations

On the one hand, the s111A regime frees the employer from stressing about whether or not a dispute has arisen. However, in two key respects, it is more limited than the WP rule, which means that unwitting employers could end up with their conversations not being protected by s111A or by WP:

1. It only applies to ordinary unfair dismissal claims. It does *not* apply to discrimination, whistleblowing, personal injury, prevention from harassment, breach of contract (including wrongful dismissal), automatic unfair dismissal (for example, for whistleblowing), or any of the other multiple causes of action that may be open to employees wishing to sue their employer.

2. If there has been anything improper said or done during negotiations, the discussions may be admissible. The exception for "improper behaviour" is broader than the rule regarding unambiguous impropriety which applies to the WP doctrine.

3. Unlike "without prejudice" privilege, according to the EAT in Bailey the inadmissibility cannot be waived even by consent of both parties. Moreover, the inadmissibility extends not just to the contents of the discussions but the very fact of them.

It only applies to ordinary unfair dismissal

The s111A regime was promoted as the answer to the clear limitations of the WP rule, which requires that there be an existing dispute. Much has been made of this benefit.

However, significantly less publicity has been given to the fact that the inadmissibility of the fact and content of the "protected conversation" will only apply to a claim for ordinary unfair dismissal. The employer's discussions will be admissible when, for example, a discrimination claim is being considered (even if alongside an unfair dismissal case) unless the WP rule applies. Many employers are unaware of this important distinction.

It is, of course, not unusual for employees to allege more than ordinary unfair dismissal (for example, ordinary unfair dismissal and discrimination), and employers will often not know what claims an employee will bring. Indeed, employees may even decide to add a claim so as to circumvent s111A and to rely on the content of the discussion.

Additionally, by using s111A in the first place, it is less likely that there is an existing dispute which enables the WP rule to apply to the other claims not covered by s111A or, indeed, act as a safety net in the event that s111A does not apply to the ordinary unfair dismissal either. For example, if it is alleged that there has been "improper behaviour".

For these reasons, many employers are opting not to utilise s111A, unless in the most straightforward cases where it is considered unlikely that the employee has any other claim, or where the settlement package is sufficiently generous that the employee is unlikely to turn it down.

"Improper behaviour" is broad

As the legislation does not provide guidance on the meaning of "improper", it is ultimately up to the Tribunal to decide on the facts of the case. At present, there is very little case law which casts light on this subject.

The Acas Code on Settlement Agreements gives non-exhaustive examples of improper behaviour, including:

- all forms of harassment, bullying and intimidation;
- all forms of victimisation;
- discrimination because of a protected characteristic; and
- putting undue pressure on the other party, including (i) not giving reasonable time for consideration of a settlement offer, (ii) an employer saying before any form of disciplinary investigation has begun that if the offer is rejected then the employee will be dismissed, and (iii) an employee threatening to undermine an organisation's public reputation if the organisation does not sign the agreement.

Failing to allow an employee enough time to consider an offer would never amount to unambiguous impropriety under the WP rule, but may mean that the conversation is no longer protected under s111A.

In *Crespigny v Information Security Forum Ltd ET/2300316/14* in response to an employee declining to resign, the employer said that staff had lost confidence in him and that the employer wanted to end his employment in a constructive way. The employee was told that he would not have a job on Monday. As no settlement offer was made to the employee and there was no discussion about ending his employment on agreed terms, it was held that there was no "protected conversation" under s111A. Further, even if the meeting had been capable of being a "protected conversation", the employer had acted improperly by failing to give the employee choices and had put undue pressure on him by setting a very short timescale. The WP rule also did not apply.

Employers could, therefore, find themselves in a situation where they have initiated s111A discussions and:

- the employee has additional claims for which the s111A protection does not apply;
- the s111A does not apply in respect of the ordinary unfair dismissal claim because the discussion did not comply with s111A or because there has been improper behaviour; and/or
- the WP rule does not apply.

What could happen if there is no protection?

Employees may be able to use the conversation as evidence of:

- discrimination, victimisation, (particularly if they have previously complained about discrimination) or whistleblowing detriment;
- a foregone conclusion to dismiss – the employer has already made up its mind and so any dismissal was unfair, discriminatory etc.; and/or
- a breach of contract, including a breach of the implied term of trust and confidence, giving rise to a constructive unfair dismissal claim.

How to have good protected conversations

Much energy can be spent analysing and worrying about whether the WP rule or protected conversations regime apply and employers can torture themselves trying to shoehorn a conversation into either one or both of the regimes.

Other things being equal, you would prefer to be inside both rules. However, as can be seen, the legal position is too intricate to feel certain that this is achievable in every case. There are, however, ways of minimising the risks by the careful handling of these conversations.

Whilst there is no one size fits all script for a protected conversation, the simple guidelines below are likely to reduce the risk of admissibility, or even having a claim being issued, significantly:

1. Where possible and not too unconstructive, try to get your open position on the record first, whether in writing or by having a discussion beforehand – this should help get you inside the wider WP rule;

2. Given that even the fact that you are having protected conversations cannot be disclosed, even by consent, it is imperative to ensure that you can explain by other means any delay or other acts or omissions by reference to other material. In other words, you need to keep the 'open' base covered at all times;

3. If practicable, allow the employee to be accompanied to the meeting;

4. Have a manager or HR person at the meeting to take notes, so that any argument of improper behaviour can be refuted;

5. Do explain that the conversation is being conducted pursuant to S111A Employment Rights Act and on a Without Prejudice basis, and explain what that means. Ask the employee to confirm that they understand and agree to this;

6. Frame the conversation in a way that if it ended up before a Tribunal, you would not be embarrassed. Explain your concerns in a neutral way, giving enough information that the

employee has a clear understanding of the risks of staying in employment, but making sure to avoid any suggestion that, for example, any performance management process is a foregone conclusion or that the employee does not have options;

7. Test the waters first. Ask the employee if they would be willing to explore settlement discussions, but don't provide a pre-prepared settlement agreement or even a figure just yet. Only once the employee confirms that they are receptive would you follow up with the formal proposal;

8. Treat the employee with dignity and respect and give them time (ideally no less than 10 working days) to reflect on their options;

9. Make sure correspondence is clearly marked as pursuant to S111A Employment Rights Act and on a Without Prejudice Subject to Contract basis.

If you do the above, not only would the conversation not be harmful to you if you got to the ET and it was not protected, much more importantly, you are far less likely to end up in the Tribunal at all.

The dangers of not having the "honest chat"

We have so far focused on the trouble with "protected conversations" and why they go wrong, but the better question is: is it higher risk to try or not to try to have a protected conversation?

I would suggest that in most cases the risks are far more profound and more likely to occur if you have no honest chat than the risks of the consequences of a failed protected conversation.

1. It keeps unwanted employees in the business longer, upsetting customers, demoralising staff and absorbing management time that can be better spent. High performing workplaces get these employees out of the door ASAP.

2. It deprives employees of the chance to leave with dignity and employers to handle these matters with compassion.

3. Without the option of an amicable severance, employees are left with a binary choice. They either swallow being fired or fight, which leaves many employees with rather more to gain than lose by going through the Tribunal process.

4. Maybe, by not having the honest chat you have increased your chances of winning at a Tribunal marginally, but you also have significantly increased your chances of having to endure the process at all. Win or lose: a claim is still a defeat for the business. There is significant irrecoverable cost, wastage of management time and energy and a publicity risk.

In any event, let's get real:

1. If the offer is good enough, most employees will take the deal;

2. If the Tribunal had not heard about the conversation it may well have found the dismissal to have been unfair anyway;

3. Many employees mitigate their losses by the time of the hearing so the claim will often have little value; and

4. Even if a dismissal is unfair, there is the possibility of a *Polkey* reduction or a reduction for contributory fault.

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