Settlement Agreements – a risk informed approach

Michael Doyle, Partner

3 December 2024

A&L Goodbody

Settlement Discussions

*Can you have "**without prejudice**" or "**off the record**" conversations with your employees?*

- *The UK recognises "**protected conversations**" under statute. In Ireland, this concept is not recognised.*
- *The **"without prejudice"** principle derives from case law and is recognised in both jurisdictions.*

The UK Position – “Protected Conversations” v “Without Prejudice” Rule

Protected Conversations

- Distinct from *“without prejudice”* conversations and do not require a dispute in being.
- Section 111A of the Employment Rights Act (ERA) 1996 provides that evidence of *“pre-termination”* negotiations are inadmissible in any proceedings pursued under s.111.
- **Exceptions** to statutory protection - claims relating to an automatically unfair reason for dismissal will not be covered by s.111A e.g. an employee dismissed for whistleblowing.

1

The Without Prejudice Rule

- To encourage parties to speak openly during settlement discussions without fear of disclosure.
- Does not apply unless there is a dispute in being.
- A common law extension of the statutory ***“protected conversations”*** provision.
- Prevents written or oral statements made in a genuine attempt to settle an existing workplace dispute from being put before a court or tribunal as evidence.

2

The Without Prejudice Principle – Ireland

- Statements made either in a document or verbally on a ***"without prejudice"*** basis where there is a genuine dispute in being, will not generally be admissible in court as evidence against the person who made the statement.

Pre-conditions to be satisfied to establish the principle:

a) A bona fide or genuine attempt to settle a dispute between the parties; and

b) A shared intention that should the negotiations fail, the communication cannot be disclosed without the consent of both parties.

Exceptions to the rule, including:

- Where a question arises as to whether negotiations have resulted in a concluded agreement.
- In circumstances where a question arises as to whether the negotiations have given rise to an estoppel.
- To explain a delay or acquiescence or to ascertain whether a party in settling a claim acted reasonably to mitigate loss.
- To show an agreement should be set aside on grounds of misrepresentation, fraud or undue influence.

Case Law in Ireland

A&L Goodbody

Employee V Employer **UD273/2010** (2014)

- Allegations of sexual harassment and of bullying were made against an employee.
- HR manager of the Company launched an investigation on 14 July 2009. On 15 July 2009, the employee was suspended on full pay pending the outcome of the investigation. On 6 October 2009, the Company's HR manager issued the investigation findings.
- On 13 October 2009 a disciplinary hearing was held. On the same day, one of the directors of the employer met with the employee and discussed the idea of talking "walk away" money.
- The employee was dismissed and subsequently brought an unfair dismissal claim – he claimed the outcome of the disciplinary hearing was predetermined, as evidenced by the separate conversation he had with a company director who, it emerged, had conversations with the disciplinary hearing manager after the disciplinary meeting but prior to the decision being communicated.
- The Company maintained at the hearing that the conversations with the director were *"off the record"* and not admissible in evidence.

Employee V Employer **UD273/2010** (2014) continued

- The EAT stated:

> *"irrespective of any agreement between the parties to engage in without prejudice conversations, the content of those conversations* ***may be admitted into evidence*** *and considered by the Tribunal in reaching its conclusion where that content of the conversation is* ***not covered by a form of privilege*** *known to law"*

- The EAT was not satisfied the without prejudice rule applied on the particular facts and instead concluded that the content of the conversation was admissible evidence. The EAT determined that the conversation evidenced an intention to manage potential liability for sexual harassment of an employee by way of (unfairly) dismissing the alleged perpetrator.

A chef/demonstrator v A merchandising Company **ADJ-00015256** (2018)

- A claim under the Redundancy Payments Acts involved a dispute about a "*without prejudice*" discussion.
- In advance of her redundancy the complainant employee was sent a mail by her manager in which the manager requested a meeting and explained, *"this will be a without prejudice conversation and that (sic) it is a confidential conversation. Hopefully, it will be in your best interests."*
- At the meeting, the complainant said that her manager offered her an amount that was well short of her statutory redundancy entitlement so she rejected the offer.
- The WRC accepted the content of the *"without prejudice"* conversation was admissible in evidence in circumstances where there was no dispute in being at the time the conversation took place.

Cormac O'Neill v Eui Private Wealth Limited **ADJ-00047190** (2024)

- A recent unfair dismissals case involving *"an off the record, without prejudice"* discussion.
- The Complainant was employed as Head of Risk and Compliance by the Respondent from 1 December 2021.
- The Complainant contended that he was dismissed at a meeting with the Respondent's managing director on 11 May 2023.
- He was told at that meeting the Board had lost confidence in him, and he understood from this statement that he could not continue in the role as a result. He resigned following that meeting.
- The Complainant provided evidence in relation to the meeting and said that the parties had *"without prejudice"* discussions in the course of an otherwise *"on the record"* meeting.
- The WRC accepted that the *"without prejudice"* aspect of the meeting could be adduced in evidence – it seems the employer did not object to this as this evidence actually aided the employer's defence that the employee had not been constructively dismissed.
- The employer ultimately succeeded as the employee had failed to lodge a grievance before resigning.

Key Takeaways for Employers

1. Exercise caution if you intend having a *"without prejudice"* conversation
2. Only have the conversation where there is a dispute in being e.g. claim
3. Simply labelling the conversation *"without prejudice"* is not enough – ensure the employee understands what that means in advance
4. Hold *"without prejudice"* conversations separately to *"on the record"* meetings
5. Document your conversation in case you need to subsequently give evidence on what was discussed

“Deployment” of settlement agreements in practice

- PIP or Package
- An alternative to a disciplinary process
- Time pressurised management restructuring

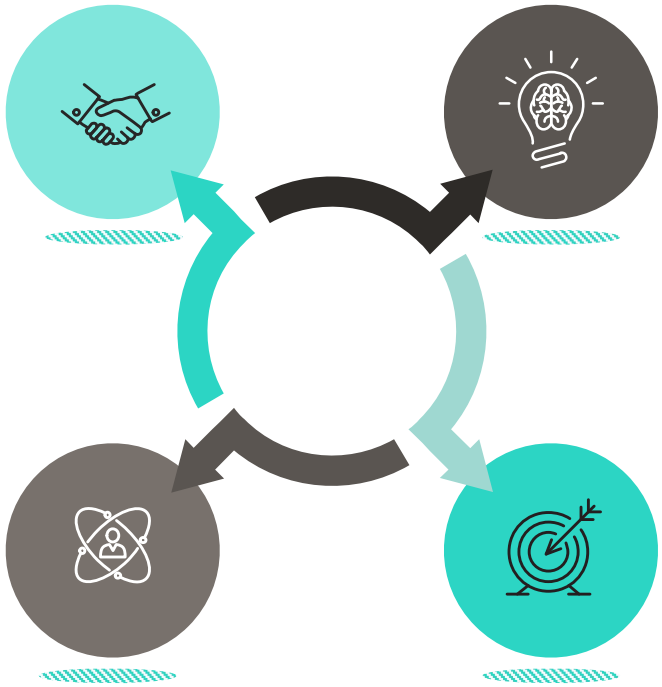
Factors to Consider

01 Type of workplace

- Unionised or non-unionised
- Culture

02 Who is going to be involved?

- Who will have the conversation
- Where and when
- With whom – employee, union rep, solicitor?



03 What has triggered the conversation?

- Redundancy, conduct, performance?
- What does the *"on the record"* position look like for the employee
- Identify your leverage and theirs

04 Scene setting

- Important the employee is not caught on the hop and understands what *"without prejudice"* means
- Always plan for two meetings – the offer meeting and the follow up

Practical advice when having the “conversation”

Plan

Consider what is going to be said at the meeting, conduct a dry-run, utilise a script.

Who?

Is the employee’s manager best placed to engage in discussions with the employee/employee representative. Selecting the right person to have the initial discussion is crucial.

Detailed Notes

Ensure contemporaneous notes are kept and be conscious of an employee’s right to request access to their personal data (DSAR).

Agreement

If agreement is reached – don’t rush to conclude. Very important informed consent is provided to any settlement agreement entered into – for it to be enforceable!

Conclusion / Q&A

A&L Goodbody