



White Paper Conference

# Protected Conversations

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# Protected Conversations

- ▶ How do you **mitigate** the **risks** of using **protected** conversations for problem employees when the working **relationship** has **broken down**, even though the employee **may not recognize** this, supported by **practical examples**?

# What does section 111A say?

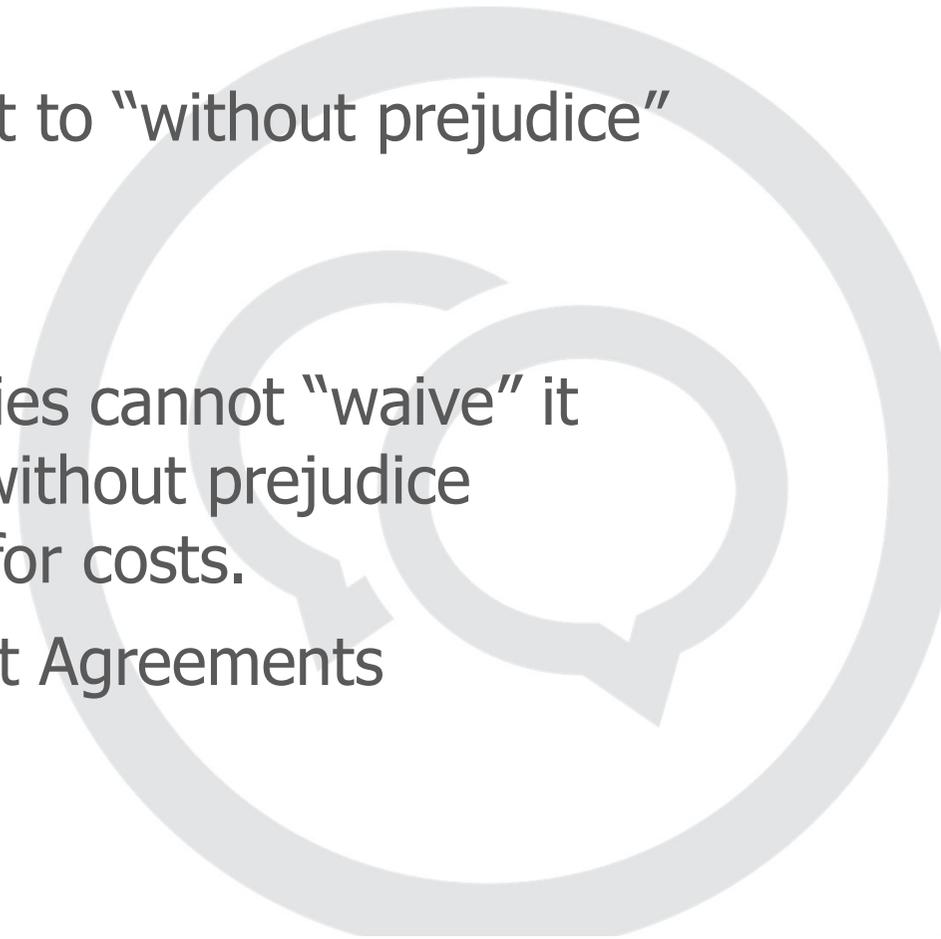


- ▶ Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111.
- ▶ “Pre-termination negotiations” means any **offers made** or **discussions held**, before the termination of employment in question, with a view to it being terminated in terms agreed between the employer and the employee.



# Protected Conversations

- ▶ Protected conversations are different to “without prejudice” discussions.
- ▶ No need to be in a dispute.
- ▶ If section 111A is engaged, the parties cannot “waive” it applying unlike the ability to waive without prejudice discussions, unless said will rely on for costs.
- ▶ ACAS Code of Practice on Settlement Agreements



# What are the risks?



Employee refuses to engage



Worsens the situation



Employee raises a grievance.



Employee goes on long-term sickness absence



Fact of offer itself leads to fundamental breakdown



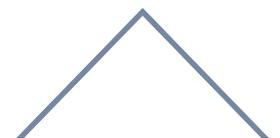
Claims are not just unfair dismissal



Create precedent of bypassing internal procedures

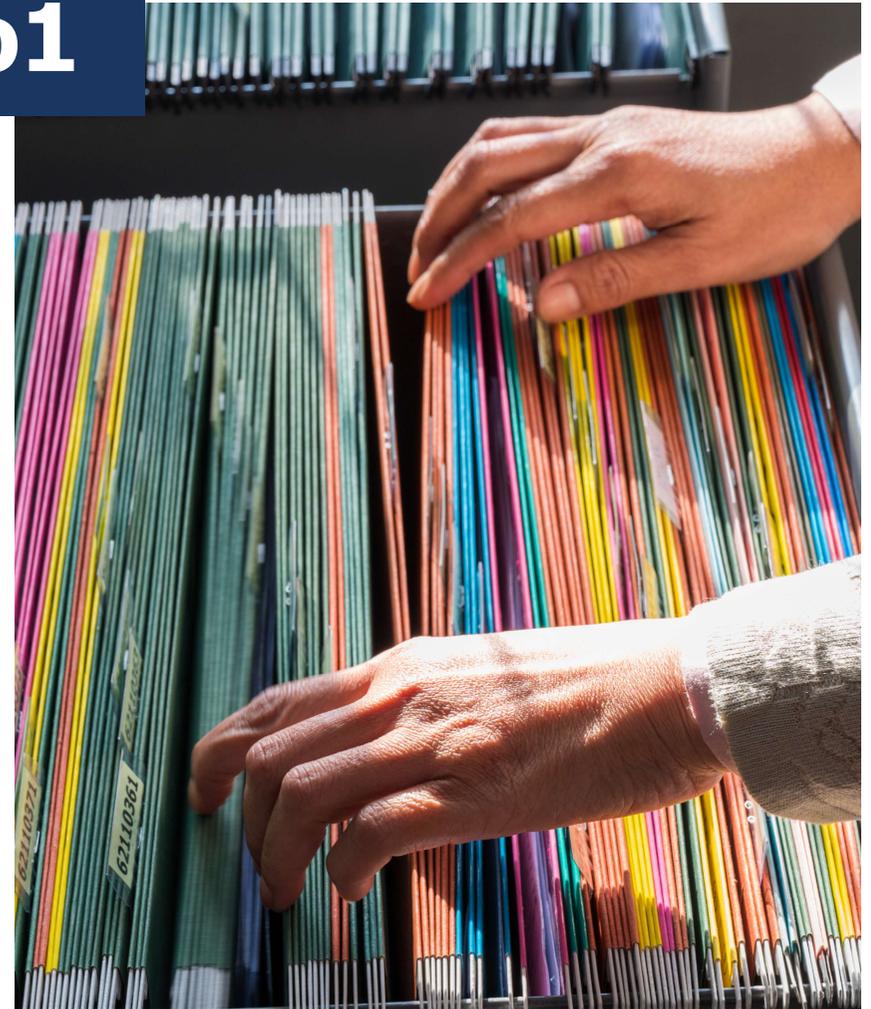


# Mitigation Strategies

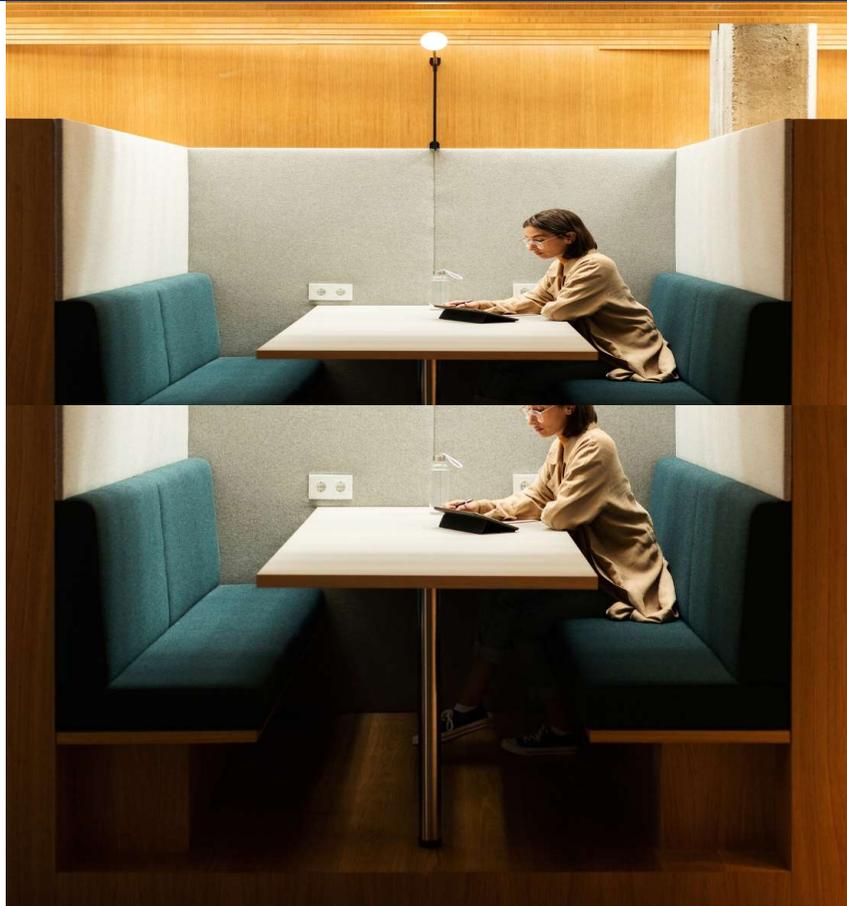


# Mitigation Strategies No1

- ▶ Categorise the Reasons:
  - ▶ Complaint of sexual orientation harassment
  - ▶ Grievance by A leads to disciplinary warning to B
  - ▶ B refuses to engage with A and goes off sick
  - ▶ Complains A's grievance itself is motivated by A's religious beliefs
  - ▶ **Red Flags** – any claims may not be restricted to unfair dismissal



# Mitigation Strategies No2

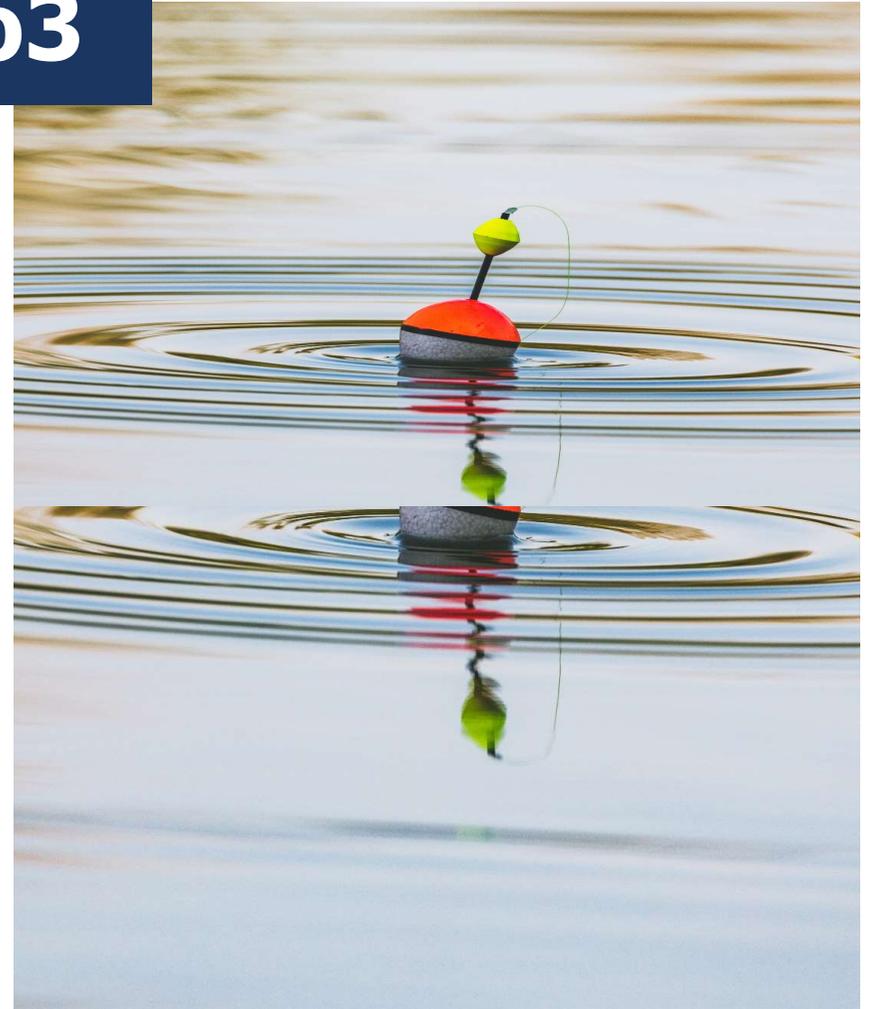


- ▶ Has the relationship actually broken down?
- ▶ Perceptions of same situation will differ
- ▶ What is the background?
- ▶ What processes have been followed?



# Mitigation Strategies No3

- ▶ Have a hook and seek agreement to have the conversation
  - ▶ Perceptions of same situation will differ
  - ▶ What is the background?
  - ▶ What processes have been followed?
  - ▶ Have a hook on which to base the conversation?



# Mitigation Strategies No4

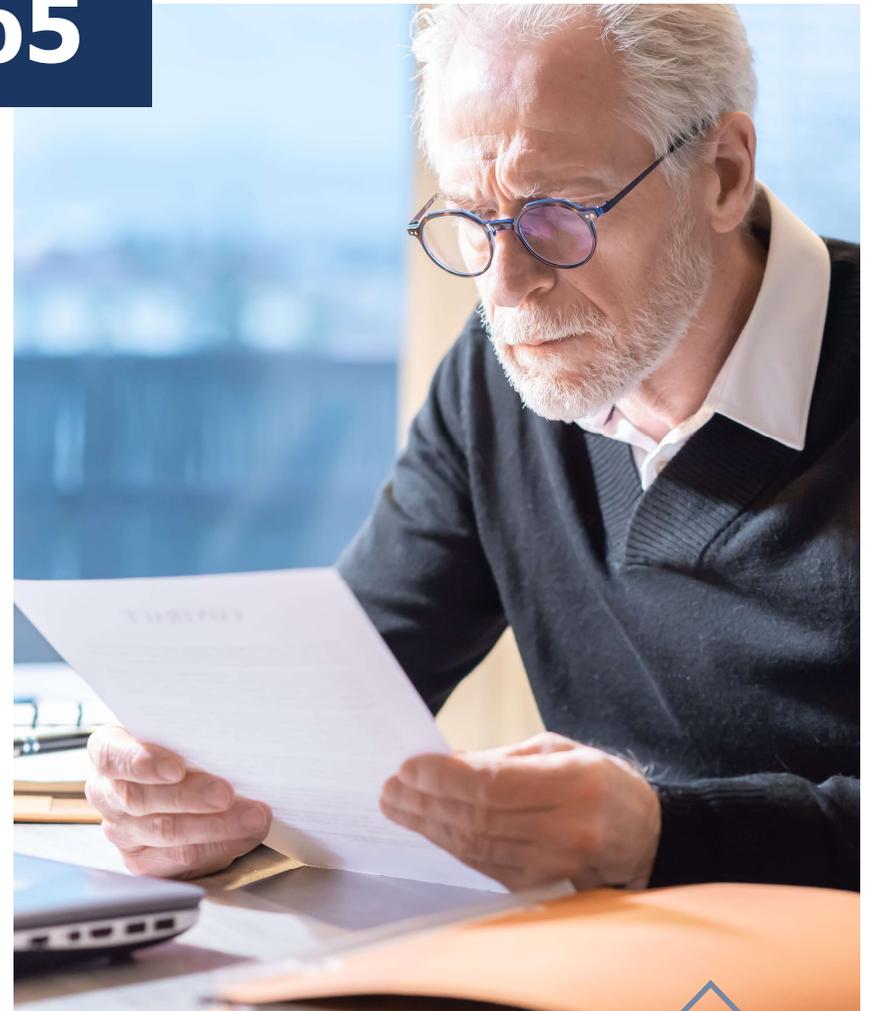


- ▶ Have a Plan A, B, C....
  - ▶ Goes back to having a hook
  - ▶ What if employee does not engage in negotiations/refuses offer?
  - ▶ What alternative discussions or processes are appropriate to the particular circumstances.



# Mitigation Strategies No5

- ▶ Scope out the conversation
  - ▶ Prepare what you will say
  - ▶ Avoid any undue pressure
  - ▶ Ensure sufficient time is given to the employee (ACAS recommends 10 days)
  - ▶ Consider carefully the language and tone you use





# Cases

- ▶ Stolk v Hunts Food Service Limited
- ▶ Lenlyn UK Ltd v Kular
- ▶ Fairthorn Farrell Timms LLP v Bailey



# Questions?



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