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The trouble with protected conversations - where and why do they go wrong?

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International Firm in the Americas
International Tax Review 2018

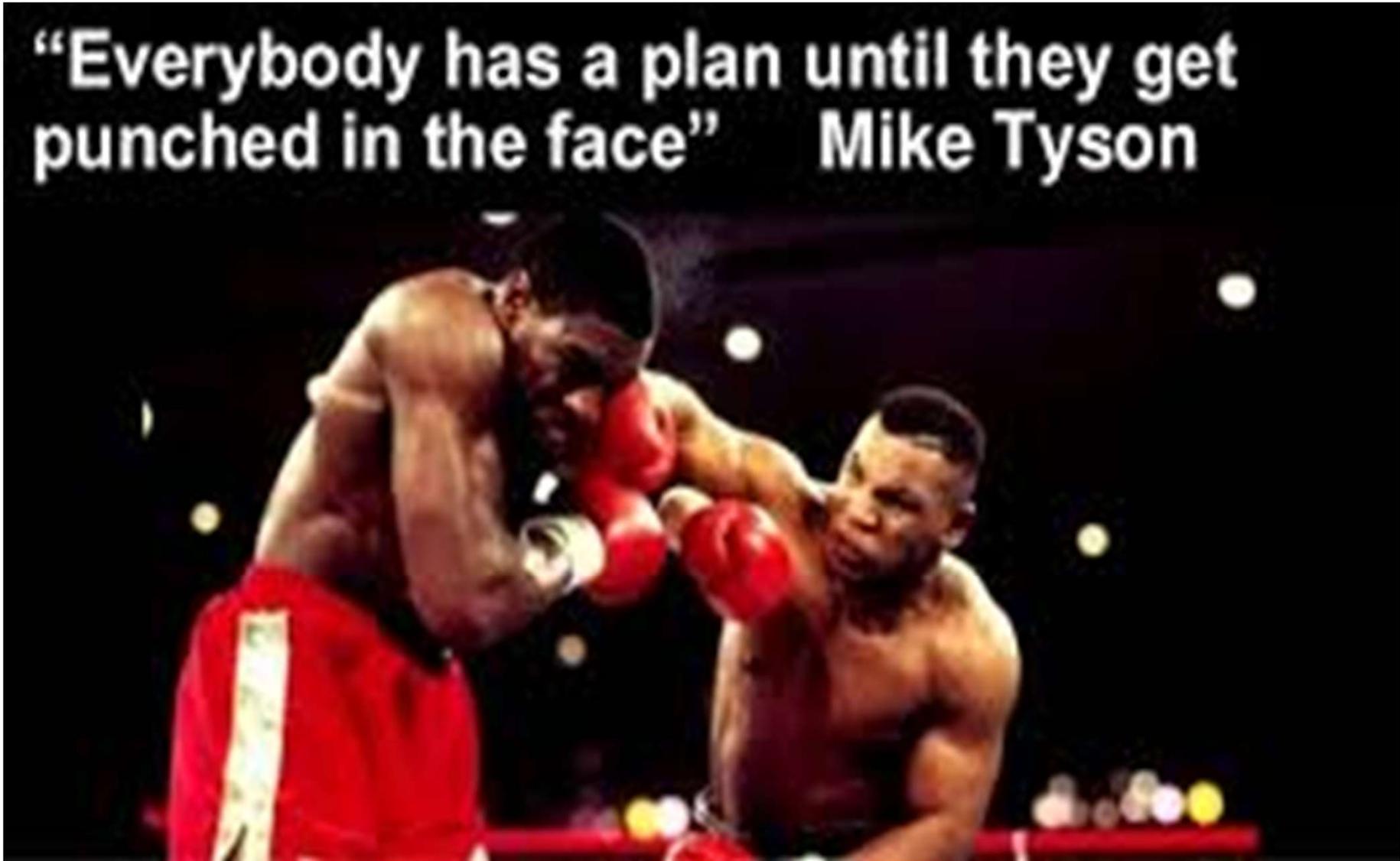
Ireland Transfer Pricing Firm of the Year
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Mergermarket European M&A Awards 2017

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Financial Times Innovative Lawyers Report 2017

“Everybody has a plan until they get punched in the face” Mike Tyson



What is the root cause of the trouble?

- “**Off the record**” – no legal meaning
- The “**without prejudice**” rule – prevents parties to a dispute from disclosing previous negotiations, made either verbally or in writing, in legal proceedings
- **Dispute** must be in existence or contemplated
- Genuine attempt to settle a dispute

**WITHOUT
PREJUDICE**

“On the Record”?

- Informed consent – must agree in advance and understand
- Employment context - not in a position of equal bargaining power

- **Case Example: Moorview Developments [2009] ILRM 262**
 - Details of without prejudice negotiations may be admitted
 - Where it could be shown that greater damage to justice would be effected by the non-admission



UK – “Protected Conversations”



- *“A boss and an employee could feel able to sit down together and have a frank conversation at either’s request”* – David Cameron
- Since July 2013 in the UK
- Not admissible as evidence in any subsequent claim for “**routine**” unfair dismissal
- Provided no “**improper behaviour**” – undue pressure
- Excludes automatic unfair dismissals (e.g. discriminatory ground)
- Does **not** apply in Ireland

**“Sorry, it’s not
working out... let’s
speak off the
record”**



“I thought the memo was quite clear.
What part didn't you understand?”

Where and why do they go wrong?

➤ Employee reaction:

- Resign
- Grievance
- Sick leave
- Bullying / harassment
- Undermine formal process
- Decision pre-determined

➤ Rely on conversation to support employment claim:



An Coimisiún um Chaidreamh san Áit Oibre
Workplace Relations Commission

Potential employment claims...



Unfair Dismissals Acts 1977 – 2015

- All dismissals presumed to be unfair – burden of proof on employer
- Statutory right to challenge fairness of dismissal
- **Fair reason** -
 - ✓ capability, competence or qualifications
 - ✓ conduct
 - ✓ redundancy
 - ✓ other substantial grounds
- **Fair procedure**
- Employee must have 12 months' continuous service (some exceptions)

Case Example: Employee v Employer - UD273/2010

- Employee dismissed for gross misconduct
- **“Off the record”** meetings:
 - take “walk money” and go
 - you are “f**ked”
- *“irrespective of any agreement between the parties to engage in without prejudice conversations, **the content of those conversations may be admitted into evidence.** .. not covered by a form of privilege known to law”*
- **Awarded re-instatement** – damage to reputation



Employment Equality Acts 1998 – 2015

- **Prohibit discrimination and harassment** on nine grounds
- No continuous service requirement
- **Grounds**
 - ✓ Gender
 - ✓ Civil status
 - ✓ Disability
 - ✓ Race / colour / nationality / ethnic background
 - ✓ Membership of the Traveller Community
 - ✓ Religion
 - ✓ Sexual orientation
 - ✓ Age
 - ✓ Family status

Case Example: BNP Paribas v Mezzotero [2004] IRLR 509, EAT (UK)

- Employee grievance
- Treatment prior to and on her return from maternity leave.
- “**Without prejudice**” meeting:
 - job was no longer viable
 - mutually agreed termination would be best for all
- **Held** – **not** in the public interest to allow employers to use the veil of the “without prejudice” rule to exclude evidence of discriminatory conduct



Protected Disclosures Act 2014

- Disclosure - “**relevant wrongdoing**”
 - Criminal offence; failure to comply with legal obligations; endangering the health & safety; damaging the environment; miscarriage of justice; misuse of public funds; and oppressive, discriminatory, grossly negligent or grossly mismanaged acts or omissions by a public body
- No minimum service requirement
- 5 years’ compensation
- Circuit Court interim relief
- Investigate!



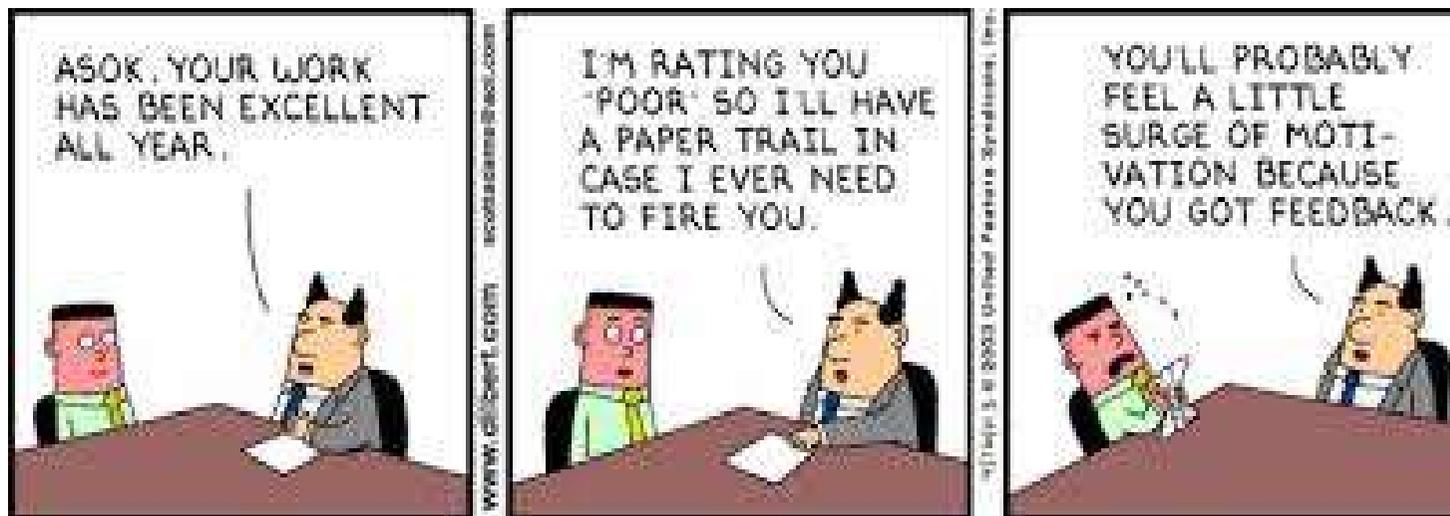
Breach of Contract / Employment Injunction

- Injunction - **Restrain** dismissal / disciplinary process
- Pending determination of breach of contract claim
- Potential challenge – fairness of procedures adopted
- Reputational issues at stake



Initiating an “off the record” conversation

- Understand context
- Assess risk
- Plan
- Provoke a conversation



Top tips!



1. **Put your best foot forward** - Start the official process
2. **Test the water** - Willing to explore alternatives?
3. **Exercise caution**– Assess employee reaction
4. **“Without prejudice” / “Off the record”** – Clear understanding
5. **When in doubt** - Enquire if the employee has a solicitor and offer them the opportunity to consult with one
6. **Conditional** - Subject to a compromise agreement (i.e. waiver of claims)

Any questions????

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