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PROTECTED CONVERSATIONS

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The Question(s)

When does a conversation with a poorly performing employee (and/or union rep) need to be protected and when can it just be an honest discussion?

How and when do you start the conversation, frame it, record it (or not), follow it up and avoid a claim of constructive dismissal?

The Essential Issues...

(1) What is a protected conversation?

(2) When is it required?

(3) How do you go about it?

1. What is a Protected Conversation?

Reason for Existence

- Concern felt by the government that an employer was unable to have a frank discussion as regards performance without facing a potential claim for constructive dismissal
- Cannot rely on “without prejudice” rule as often no dispute thus the privilege does not attach
BNP-v-Mezzotero [2004] IRLR 508

The Statutory Response

- s111A of the Employment Rights Act 1996
- Supported by Statutory Code of Practice

S111A ERA

(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111. This is subject to subsections (3) to (5).

(2) In subsection (1) “ pre-termination negotiations ” means 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.

(3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.

(4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.

Remember “Without Prejudice”

- s111A ERA is a “bolt-on” to the Common law
- Always need to consider additionally if WP privilege applies

Conditions

- Must be “*pre-termination negotiations*” as defined
- Only covered if “*with a view to [employment] being terminated*”
- Need not actually reach agreement nor need a specific sum be offered –NB “*discussions*”. Can also come from the employee. No need for existence of a dispute
- Must not involve “improper behaviour”

Limitations

- Only applies to “ordinary” unfair dismissal claims i.e not automatically unfair, breach of contract or discrimination/detriment claims
- If “mixed” claim then Employment Tribunal can consider as regards other claims but not the fairness of the dismissal

Procedural Requirements

- In fact there are none
- Suggested steps in the Code (e.g. that allow 10 days to consider offer and failure may be undue pressure –see later-)
- Yet none are requirements

Improper Behaviour

- s111A(4) imports a 2 stage test
- Is the behaviour improper?
- To what extent is it just to protect confidentiality?
- Examples found in Code

Problem (1)

What is Improper Behaviour?

- (1) Harassment, bullying and intimidation including offensive language/threatening behaviour
- (2) Criminal Behaviour
- (3) Victimization and discrimination
- (4) Placing undue pressure on a party (e.g. stating that a failure of discussion will lead to dismissal, reducing settlement sum on a daily basis or employee stating that will undermine public reputation if not agreed).

Problem 1 (Cont).

What is not Improper Behaviour?

- (1) Setting out in a neutral manner the reasons for the offer
- (2) Informing that a refusal shall lead to disciplinary proceedings which may lead to dismissal
- (3) Not using template letters or refusing a reference
- (4) Not paying a lawyer's fee for advice

Problem 1 (Cont)

What about the Middle?

- Extremes are easy and Code provides only examples in any event
- What about the uncertain middle ground?

Problem 2 “Just to protect”

- Matter for Employment Tribunal and consequences vary
- May lead to complete loss of privilege
- Or may be partial

Problem 2 – How do you Predict?

- Reality is that you cannot
- Therefore exercise caution

Jurisprudential Guidance

- 1 decision as regards Protected Conversations
- ***Faithorn Farrell Timms-v-Bailey*** [2016] IRLR 839
- HHJ Eady QC
- Agrees Employment Tribunal may be required to admit evidence for some purposes but not others

Scope

“

Section 111A renders inadmissible evidence of any offer made or discussions held with a view to terminating the employment on agreed terms and that must extend to the fact of the discussions, not simply to their content...Further, the application of s.111A is not limited to the evidence of the negotiations from those who were directly involved...the focus has to be on the subject matter of the evidence in question. If it is properly to be characterised as evidence of an offer or discussions held for the required purpose then (unless rendered admissible by any of the exemptions) it is inadmissible in any claim of unfair dismissal.

”

Waiver?

“

Section 111A confidentiality cannot be waived. The section cannot be read so as to permit agreement to the admission of evidence otherwise rendered inadmissible by the provision. Parliament apparently chose not to allow for an exception where the parties so agree (although it has provided for other exceptions). It could have imported the without prejudice rule into s.111A; instead it chose to create an express provision relating to the admissibility of evidence in quite specific circumstances.

”

2. When Needed?

Reminder of the Question

When does a conversation with a poorly performing employee (and/or union rep) need to be protected and when can it just be an honest discussion?

Answer

- No need to protect if it is a discussion with no envisaged dismissal consequence
- But remember to be cautious as if not protected no basis to exclude from evidence
- Discussion with union official different. All they need to do is assert anything said is a TU detriment and s111A is automatically disapplied

3. How do you go about it?

Reminder of the Question

How and when do you start the conversation, frame it, record it (or not), follow it up and avoid a claim of constructive dismissal?

Answer

- No procedural requirements
- But remember the human element and the more reasonable an employer's approach the more likely that the purpose of the discussion shall bear fruit. Touchstone is reasonableness
- Also renders a claim less likely

The Evidential Question

- Remember that the S111A privilege is “flimsy” and susceptible to challenge in a way WP privilege is not
- Good idea that record discussions so that if the veil is pierced you can evidence what was in fact said

Are Protected Conversations a Good Idea?

- They can be
- But use with caution

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If after this session you have any questions
please do not hesitate to contact:

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