SQUIRE SANDERS

UK GOVERNMENT PROVIDES FURTHER DETAILS ON "PROTECTED CONVERSATIONS"

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Last year the Government said it wanted to allow employers to have "frank discussions" with staff about performance or retirement without fear of such exchanges being used against them in subsequent Employment Tribunal proceedings. Since then there has been a great deal of debate about whether such conversations are a good idea, the circumstances in which they will be allowed to take place and what employers will and will not be able to say in the course of them. Finally we have been provided with a bit more detail, as the Government has issued the wording it would like to see introduced to implement its proposals. Sadly those questions remain largely unanswered. Allow us to explain why.

Under the proposed new wording Employment Tribunals will not be allowed to take into account any offers made by an employer or discussions held prior to a dismissal that were aimed at reaching an agreed settlement between the parties. At first glance this all seems quite straightforward, but that is what was said about 2004's 3-step standard disciplinary procedure, and we all know what happened there.

In an ideal world the Government's plans would presumably work as follows: An employer (A) has concerns about the performance of one of its employees, B. It would prefer to avoid going down a lengthy capability procedure so A invites B to attend a meeting with a view to reaching a deal for him to leave the business in return for a sum of money (and signing a settlement agreement). If B accepts the settlement offer made then all well and good - everyone goes away happy and that is the end of the matter. If, however, B does not accept the offer then both parties (and any subsequent Tribunal) will have to effectively pretend that the conversation never took place. This means that A will be required to deal with B's underperformance in the normal way, i.e. by following its normal poor performance procedure. If B subsequently brings an unfair dismissal claim he will not be able to refer to the offer made before the Tribunal, e.g. to suggest that A had already made up his mind and that his dismissal was therefore a foregone conclusion. If he does refer to it, the Tribunal must ignore it.

Needless to say there are a whole host of circumstances in which this general rule will not apply. This is where things have the potential to get very complicated and ultimately to create more rather than less uncertainty for employers.

First, this form of "protected conversation" will only apply to "ordinary" unfair dismissal claims, so it will not cover claims of automatically unfair dismissal, for example if B claims that any subsequent dismissal by A was automatically unfair because he was dismissed for making a protected disclosure or for raising health and safety issues or in relation to TUPE.

Second, as this new rule will only apply to unfair dismissal claims, there will be nothing to stop B referring to such a conversation in a discrimination or breach of contract claim. On the face of it, therefore, if B resigns and brings claims of constructive unfair dismissal, breach of contract and age discrimination he would potentially be able to refer to any "protected conversation" in respect of the last two claims, but not in his unfair dismissal claim. The mind boggles as to how Tribunals are going to deal with the mental gymnastics required to operate this in practice.

Third, and perhaps most worryingly, it seems that this new rule will not apply "in relation to anything said or done which in the Tribunal's opinion was improper, or was connected with improper behaviour" except to the extent the Tribunal thinks it is just. At this stage the Government has not set out what it means by "improper behaviour" – needless to say it is not a term that is familiar in an employment law context. This particular provision has trouble written all over it and it is not difficult to see that if an employee cannot rely on one of the other exceptions outlined above, he will seek to rely on this one to try and open up what has gone before and paint his employer in a poor light. It also begs the question of how a settlement conversation can be only partially taken into account – surely it either is or it is not, as there is little scope to take a fact into account only a bit.

Interestingly, employers will be allowed to refer to such conversations in the context of applications for costs. So, for example, A would not be able to refer to the protected conversation for the purposes of determining the fairness of any dismissal, but if it then makes an application for costs it would be able to refer to the fact that an offer had been turned down by B if its right to do so had been expressly reserved when the offer was made.

When Vince Cable outlined the Government's proposals last week he said he wanted to take away uncertainty for employers and make it easier for them to end employment relationships – in its current form this wording will do less than nothing to achieve either of these aims. One has to hope that it will undergo some substantial redrafting as it works its way through the legislative process. At this rate employers are still going to have to be very careful about what they say, with the consequence that the protected conversation regime is likely to fall into disuse and disrepute very quickly.

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