SQUIRE SANDERS

CONFIDENTIALITY OF PRE-TERMINATION NEGOTIATIONS

In Force from 29 July 2013

The new rules governing evidence of "pre-termination negotiations" in Tribunal proceedings are to come into force on 29 July 2013 (the same date that Tribunal Fees and the Revised Tribunal Rules of Procedure are implemented). Compromise agreements will be renamed "Settlement Agreements" at the same time.

Under the new provisions, "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 employee" in relation to **unfair dismissal** (including constructive unfair dismissal) will be inadmissible in Tribunal proceedings. This means that the UK Government is effectively extending the concept of "without prejudice" discussions to situations where no formal dispute has actually arisen (the employee may even be unaware that a problem exists) and where, as a result, the normal without prejudice protection would not apply.

The new rule will not affect an employer's ability to have without prejudice conversations once a genuine dispute has arisen or to take a commercial view that it makes sense to offer a compromise/settlement agreement to an employee even though the "without prejudice" label may not strictly apply. This may well be the case in situations where there is an issue of discrimination, as this situation is not covered by new rule on confidentiality of pre-termination negotiations.

It is important to note that new rule will **not** apply to:

- Anything that the Tribunal considers improper or connected with "improper behaviour". This is not defined but examples (including all forms of harassment, bullying and intimidation) are provided in the statutory Acas Code of Practice (currently awaiting parliamentary approval).
- Cases of automatic unfair dismissal (e.g. the employee was dismissed for making a protected disclosure or trade union activities).
- Allegations of discrimination.

Employers will have to comply with the Acas Code which sets out the principles of how employers/employees should make offers of settlement in order to benefit from these changes. Failure to follow the Code will not, in itself, make the employer or the employee concerned liable to proceedings, nor will it lead to an adjustment in any compensation award made by an Employment Tribunal in a successful unfair dismissal claim. Employment Tribunals will, however, be able to take the Code into account when considering relevant cases and whether there is an unfair dismissal.

Acas will also publish more detailed non-statutory guidance to accompany the Code, which will include template letters that may be used by employers when initiating settlement agreement discussions as well as a model settlement agreement with accompanying notes. Use of the template letters and model settlement agreement will not be compulsory.

It remains to be seen whether employers will make use of the new rule, given that there are likely to be a number of drawbacks including:

- If employers do not handle settlement offers in the right way (i.e. they do not follow the new Code) they will still be at risk of an employee resigning and claiming constructive dismissal (although he would still need to show that there had been "improper conduct" for the evidence relating to the settlement offer to be admissible in Tribunal), or of the without prejudice rule being used against them.
- As this new rule will only apply to unfair dismissal claims, there will be nothing to stop an employee referring to such an offer of settlement in the context of a discrimination or breach of contract claim. So, if an employee resigns and brings claims of unfair dismissal, breach of contract and disability discrimination he would potentially be able to refer to any settlement offer in respect of the last two claims, but not in his unfair dismissal claim.
- The concept of "improper behaviour" has the potential to be a legislative minefield with satellite litigation around whether either of the parties' behaviour was improper before even the merits of the case are considered.

Because of the issues identified above and the limited scope of the new rule (i.e. it only applies to unfair dismissal claims), in practice it is still probably going to be safer for employers to have taken some steps to performance manage/discipline the employee using "open" conversations and then seek to rely on the without prejudice rule if necessary should they wish to have a conversation about the employee leaving.

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