

Pre-termination negotiations

The Government has introduced new provisions regarding conversations concerning the termination of an employment relationship with a view to addressing employer concerns about when such discussions will be protected from admissibility in court. Since 29 July 2013 employers and employees have been able to enter into confidential negotiations with a view to reaching agreed terms on ending the employment relationship. This rule is intended to extend the Without Prejudice protection to situations where there is no existing dispute and encourage employers and employees to engage in frank discussions.

Under the new arrangements an Employment Tribunal will be precluded from taking into account any pre-dismissal offer made to terminate employment in ordinary unfair dismissal claims.

However, there are some significant limitations to when this rule will apply. It will not apply where an employee brings proceedings for automatically unfair dismissal or claims such as discrimination or whistle blowing. A further limitation is that if either party engages in “improper behaviour” in the pre-termination negotiations, these can be relied upon.

The accompanying Acas Code gives the following examples of what will constitute improper behaviour and remove protection:

- not giving a reasonable time for consideration of a settlement agreement as set out in the Code (10 days); or
- an employer saying before any form of disciplinary process has begun that if a settlement proposal is rejected, the employee will be dismissed.

The Code goes on to say these examples do not prevent an employer setting out in a neutral manner the reasons that have led to the proposed settlement agreement or factually stating the likely alternatives if an agreement is not reached, including the possibility of starting a disciplinary process.

The Code also states that employees should be offered the option to be accompanied during termination negotiations.

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