



□ DMH Stallard

How (not) to lose an employment tribunal claim

Part One: Protected Negotiations,
Without Prejudice Discussions and
Disclosure Issues

Content

01 'Protected' conversations

- Different types
- Without Prejudice
- Pre-termination Negotiations

Confidential and privileged documents

02

- What are they?
- How and when do they apply?
- Why are they important?
- Managing information flow

Have you had a pre-termination negotiation meeting in the last six months?

Poll



□ DMH Stallard

‘Protected’ conversations

What's the difference between...

- ...an off the record conversation?
- ...a without prejudice conversation?
- ...a pre-termination negotiation?

“Off the record”

- Common parlance – unofficial understanding that conversation is not to be recorded or disclosed
- Confers no legal protection
- Anything said can later be used in litigation, unless it also qualifies as a PTN or WP

Without prejudice

- Common law principle
- Designed to encourage settlement of disputes outside of Court
- Prevents statements made in a genuine attempt to settle an **existing dispute** being put before a Court

Without prejudice (2)

- But what if no dispute? Just a poor performer, breakdown in relationship etc.
- Whether there is a dispute is fact-specific:
 - Grievance – may be no dispute as it may be upheld
 - Disciplinary – may be no sanction imposed
 - Relationship breakdown – employee may not be aware of poor state of relationship with colleagues
- Protection can be lost if unambiguous impropriety and/or no genuine attempt to settle
- Take care in language used – just exploring options; this is one option; others are available

Pre-termination negotiations

- Statutory framework introduced in July 2013 (s.111A ERA 1996)
- No need for an existing dispute
- Fact and content of discussion not admissible in or disclosable in **certain** employment tribunal claims
- ACAS Code of Practice on Settlement Agreements
- ACAS Guide to Settlement Agreements

Pre-termination negotiations (2)

- Initiating the discussion – who blinks first
- Give the PTN as one option, or force them into PTN?
- Right to be accompanied (ACAS Code)
- 10 days to consider offer

Pre-termination negotiations (3)

- PTNs can be used in cases of misconduct, capability or redundancy. Probably also in SOSR dismissal cases

- PTN protection can be lost where:
 - Discrimination or whistleblowing cases

 - There is “improper behaviour”:
 - Harassment
 - Bullying or intimidation
 - Undue pressure

Case studies

Off the record

- Informal and easy to agree
- No legal effect
- Can be disclosed in proceedings
- Time limited due to transition

Without Prejudice

- Pre-existing dispute
- Broad application
- Genuine intent to settle
- No unambiguous impropriety

Pre-termination Negotiation

- Can be had at any time
- Protection limited to UD claims
- Very prescriptive
- Protection lost if fail to follow Code of behave inappropriately



Claims

□ DMH Stallard

Confidential and privileged
documents

Confidential or privileged – does it matter?

- Absolutely if you want to keep a document away from the eyes of the tribunal
- Marking a document “confidential” will not on its own grant the document “privileged” status
- A “confidential” document will merely show the intention that it was not be to disclosed to unauthorised third parties but this does not extend to disclosure to the tribunal
- The freedom to have open and frank discussions about resolving issues will not be granted by simply marking a document “confidential”
- Legal advice privilege or litigation privilege documents?
- Tribunals can be won and lost on the basis of “unhelpful” documents

What has to be disclosed to the tribunal?

- Unless privileged, anything you pass internally before litigation is contemplated, will potentially be disclosable
 - Early drafts of documents e.g. redundancy projections, termination letters
 - Internal emails – including those to and from HR

Privilege in communications

- Once privilege is established written or oral evidence can be withheld from production to a third party or the tribunal
- The fact that a privileged document e.g. an email, may be relevant is of no consequence
- In the tribunal, the entitlement is to withhold inspection of privileged documents, although the obligation to include the documents in the list of documents remains

Legal Advice Privilege

- To enable a client to place unrestricted confidence in their lawyer
- Legal advice privilege applies to confidential communications:
 - which pass between a client and the client's lawyer and
 - which have come into existence for the purpose of giving or receiving legal advice about what should prudently and sensibly be done in the relevant legal context
- Such communications are privileged at all times unless privilege is waived or inadvertently lost

Legal Advice Privilege (2)

- Legal advice privilege cannot be claimed unless the evidence in question is confidential
- Documents prepared by the client as a preparatory step to obtaining legal advice may not be privileged if there was never any intention of communicating them to the lawyer
- It will only attach to communications between a client and their lawyer – not third parties
- Take care when sending on legal advice internally

Litigation Privilege

- For litigation privilege to apply, the documents must
 - Be a communication between the lawyer (acting in a professional capacity) and the client, or between either of them and a third party (or be a document created by or on behalf of the client or the client's lawyer)
 - Be made for the dominant purpose of litigation
 - Relate to litigation which is pending, reasonably contemplated or existing
 - (In most and arguably all cases) be confidential

Tips to maintain privilege

- Keep your legal adviser copied to maintain privilege
- Restrict privileged documents on a strictly need-to-know basis and instruct recipients not to forward them without checking with you first
- Think carefully about who is cc'd when circulating privileged material
- Before forwarding an email chain, check whether it contains privileged information. If it does, start a new email
- Remind recipients of privileged information that it is confidential and privileged, and that they should not forward it or commit oral information to writing

Tips to avoid disclosure issues

- Consider the damage of disclosure in not only tribunal proceedings but also in DSARs so ALWAYS be careful
- Keep written correspondence to a minimum, where possible, where potential issues are contemplated
- Limit recipients only to those who need to know
- Avoid lengthy email chains
- Start from the position that you won't put into writing anything you would not want a judge, or the employee, to read

Have you received notification
of the ACAS Early Claim
Conciliation being commenced
by one of your employees in
the last six months?

Poll



Speakers



Adam Williams

Partner, Employment

01483 467413

Adam.Williams@dmhstallard.com



Rebecca Thornley-Gibson

Partner, Employment

020 7822 1582

Rebecca.Thornley-Gibson@dmhstallard.com

For further information:

Please email

marketing@dmhstallard.com