

How (not) to lose an employment tribunal - Q&A

We have listed the questions received prior to and during our webinar hosted on 5 November 2020. Please see our responses below.

- **What happens if an employee refuses to accept either a without prejudice or pre-termination negotiation?**

If an employee refuses to engage in without prejudice or pre-termination negotiations then anything the employer says thereafter will be disclosable in subsequent proceedings. Typically, it results in any conversation around reaching an agreement being abandoned, or in some instances the employer continues, but modifies its approach so that it is content for anything it says to be disclosed in subsequent proceedings.

- **If the employer states it's a WP conversation and the employee agrees, the employer will make a note of the meeting - should they provide a copy of the notes to the employee as proof that the employee agreed to it to safeguard the employer?**

Typically an employer would carefully and securely retain its own careful note of the discussion, including the employee's agreement to have the WP discussion. It would be unusual for it to share those notes with the employee, not least because that increases the risk of the material being disseminated more widely. If without prejudice discussions are ongoing, an employer might refer to the employee's agreement to have such a discussion in the previous meeting, within any written without prejudice proposal that the employer might send to the employee thereafter.

- **Would a TUPE transfer be considered a dispute? Part of our reason to outsource a service is down to poor performance - not terrible but not great. We need a complete change of approach.**

A TUPE transfer would not amount to a dispute, in and of itself. It is possible that a disagreement over matters to which TUPE might apply could amount to a relevant dispute, but this is a fact-sensitive matter. The poor performance of an employee could also amount to a relevant dispute, but there would need to be a clear disagreement between employer and employee over the issue to such a degree that litigation over the matter can be reasonably contemplated.

- **With remote interview, recording may occur with or without your knowledge or permission. Should we just agree to record?**

You can agree to record the video call or you can say that the discussion is taking place on the basis that neither party will record it. Either way, it's important to ensure that the matter is addressed and that the employee acknowledges and agrees to it. This will ensure that you have the employee's consent to record the discussion, if it is to be recorded, or that you can point to a breach of agreement/conduct issue on the part of the employee, if it was not to be recorded but they record it anyway.

- **When using settlement agreements as a result of giving enhanced redundancy payments (having gone through the usual formal process) is there a benefit/disadvantage to saying that the settlement agreement is subject to s.111A ERA 96?**

If initial discussions offering the settlement agreement have resulted from a protected conversation under s111A ERA any such documents e.g. the letter subsequently including the settlement agreement, can refer to s111A or to the fact that a protected conversation, which was agreed by the employee, has taken place.



This will confirm that discussions are taking place within the scope of a protected conversation and weaken any later admissibility challenges.

- **In the context of an in-house environment, who is the 'client'?**

This will depend on who is authorised to make and engage in privileged communications with the lawyer (external or in-house lawyer). Those individuals who are involved with seeking and receiving legal advice would be covered as being part of the “client” grouping but not a wider group of employees who for no legitimate reason had been provided with the legal advice documents.

- **Would an ACAS employee led EC referral trigger litigation privilege?**

Yes, if the employee was legally represented or represented by another third party, as at this stage it would be clear that litigation was pending by the commencement of Early Claim Conciliation. ACAS settlement discussions would not be admissible in the tribunal.



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RUSTOM TATA

Chairman & Head of Employment
0207 822 1590
Rustom.Tata@dmhstallard.com



SIMON BELLM

Partner, Employment
01293 558511
Simon.Bellm@dmhstallard.com



GREG BURGESS

Partner, Employment
01293 558547
Greg.Burgess@dmhstallard.com



STEPHEN TEN HOVE

Partner, Employment
0207 822 1518
Stephen.TenHove@dmhstallard.com



REBECCA THORNLEY-GIBSON

Partner, Employment
0207 822 1582
Rebecca.Thornley-Gibson@dmhstallard.com



WILL WALSH

Partner, Employment

01293 558540

Will.Walsh@dmhstallard.com



ADAM WILLIAMS

Partner, Employment

01483 467413

Adam.Williams@dmhstallard.com



ABIGAIL MAINO

Senior Associate, Employment

01483 467412

Abigail.Maino@dmhstallard.com



PHIL VALLON

Senior Associate, Employment

01293 558557

Phillip.Vallon@dmhstallard.com