

What's confidential about pre-termination negotiations?

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Introduction

My Big Idea !



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S.111A provides:

- Evidence of pre-termination negotiations is inadmissible in any proceedings of unfair dismissal
- Pre-termination negotiations means "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 the employee..."

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What about 'without prejudice discussions'?



Without prejudice applies where:

- There is a pre-existing legal dispute; and
- There is a genuine attempt to settle the existing dispute.

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Which claims?



- Only applies to unfair dismissal (including constructive dismissal)
- Does not apply to:
 - Automatic unfair dismissal, eg, TUPE, Trade Union, whistleblowing and asserting a statutory right, etc.
 - Breach of contract
 - Discrimination because of a protected characteristic, ie, age, disability, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sex, sexual orientation
 - Improper conduct

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What is not confidential?



- Anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, to the extent that the Tribunal considers just.
- Does not affect the admissibility on any question as to costs provided the right is expressly reserved.

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Improper conduct



ACAS Code of Practice provides improper conduct includes:

- Harassment, bullying and intimidation
- Physical assault or threat of physical assault or other criminal behaviour
- All forms of victimisation
- Discrimination of a protected characteristic
- Putting undue pressure on a party
 - Not giving reasonable time for consideration of settlement
 - Intimating employee will be dismissed if a settlement proposal is rejected
 - If an employee threatens to undermine an organisation's public reputation and PIDA does not apply

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Risks for the Employer/Employee



Risks for the Employer	Risks for the Employee
Way offer is made may not be protected e.g. pregnant ee on rtw	May make it harder to establish a claim for constructive dismissal
Improper behaviour : e.g. impossible deadlines	May make it harder to identify reason for dismissal
No warning of meeting <i>Sandhu v Jan de Rijk Transport Ltd</i>	Called into meetings 'out of the blue'
Ignoring procedures when no settlement = unfair dismissal	
Grievance from employee in respect of protected characteristic	

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Points to Note



- The discussions are voluntary
- The Code recommends that employers should allow employees to be accompanied by a trade union rep
- Ensure any settlement offer is in writing
- Point out during any settlement negotiations if there is improper behaviour or discriminatory conduct and keep a written record
- Any settlement must comply with the statutory provisions

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Settlement agreements



Settlement agreement – to be binding

- Must relate to a particular complaint or proceedings
- Must be in writing
- Employee must have received relevant independent advice
- Independent Advisor must have a contract of insurance
- Must identify the advisor
- Must state that the applicable statutory conditions on settlement agreements have been satisfied

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Conclusion



- Watch for unscrupulous private sector employers who may seek to call members into a meeting to avoid procedures
- Ensure Trade Union representation at any pre termination confidential negotiation

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