Protected Conversations - a useful tool to limit risks in respect of employee exits?

Following the Supreme Court's ruling that the employment tribunal fee regime was unlawful, a rise in the number of claims or complaints made by employees is likely.

As a result, employers will wish to reduce the risk of claims when addressing problems with employees. In many cases an employer will look to:-

1. conduct pre-termination negotiations with an employee; and

2. make a payment to an employee in return for a waiver of claims.

The "protected conversation provisions" provide that evidence relating to pre-termination negotiations and the fact they have taken place will be inadmissible in ordinary unfair dismissal proceedings (but not automatic unfair dismissal proceedings – see below) if key requirements are met.

We have used the "protected conversation provisions" to good effect on behalf of our employer clients and obtained favourable results in response to challenging problems.

As ever, the key to successfully managing an employee exit is to plan ahead and to carefully consider all options, the pitfalls and the prospects of success of each option available before conducting termination discussions with an employee. This is especially important in the area of "protected conversations" as there are limitations, namely:

1. Restricted to "ordinary" unfair dismissal proceedings

The statutory inadmissibility rule for pre-termination negotiations only applies to ordinary unfair dismissal proceedings. Evidence of the pre-termination negotiations, including the fact that the discussions have taken place, will be admissible in automatic unfair dismissal proceedings (e.g. whistleblowing) and other claims such as discrimination and breach of contract unless they are protected by the "without prejudice" rule. If there was no dispute prior to the commencement of the negotiations, it is unlikely that the "without prejudice" rule will apply.

2. The Making of a Settlement Offer

Recent cases suggest that negotiations will not be protected where no settlement offer is made to the employee.

3. Improper Behaviour

The protection of statutory inadmissibility may be lost if there is improper behaviour such as discrimination during the process or a threat that the employee would be dismissed if agreement is not reached. Improper behaviour may also include a failure on the part of the employer to follow the ACAS Code concerning protected conversations (e.g. failing to allow an employee to be accompanied during pre-termination negotiations) or where an employer places an employee under "undue pressure" by not allowing the employee sufficient time (ACAS Code suggests 10 calendar days) to consider the offer made by the employer.

Planning

Employers should conduct negotiations in a manner that protects the business. This will involve opening a formal on the record route such as a performance management process. This provides the employer with a route to proceed along in the event that the negotiations fail and by running the two processes in parallel you can increase the likelihood of success of your protected conversation discussions.

The case of Portnykh v Nomura International Plc clearly shows the problems that can arise where an employer does not have the benefit of a planned and documented open process. In this case, the employer did not set out the reasons for dismissal (misconduct) in open correspondence and only referred to matters in "without prejudice" correspondence/documents. As the without prejudice correspondence/documents were held to be inadmissible the employee was allowed to proceed with his whistleblowing claim.

Settlement

The Settlement Agreement should effectively waive all claims the Employee has. Problems can arise where the employee's employment terminates after the signing of the Settlement Agreement. For example, the employer places the employee on garden leave. In particular:-

1. as the employment will continue after the signing of the Settlement Agreement, new disputes may arise. A well-drawn Settlement Agreement will refer to the waiver of future claims; however the effectiveness of such wording has not been tested in the courts. A practical solution is for the employee to repeat the waiver of claims after termination of employment;

2. if there is a considerable period of time between signing the agreement and the date of termination of employment, HM Revenue & Customs may determine that all payments paid under the terms of the Settlement Agreement are emoluments and therefore taxable.

It is recommended that employers seek legal advice in such situations.

My team and I appreciate that this is a difficult, but essential, area of law for employers to grapple with in the current climate. We are running workshops which focus on the benefits of conducting protected conversations, when and how to use protected conversations, pitfalls to avoid and how to obtain an effective waiver of claims.

Our workshops on this topic will take place at our St Albans & Luton offices on:

- 12.10.2017 (Luton)
- 17.10.2017 (St Albans)
- 31.10.2017 (Luton)
- 09.11.2017 (St Albans)

To book your place register online at www.taylorwalton.com or contact the events team by telephone on 01582 731161 or by email events@taylorwalton.co.uk.

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