

June 2004

The risks of a “without prejudice” dismissal

When an employment relationship is not “working out,” employers often want to find a quick, amicable way to “part company” on agreed and often generous terms. However, it may be difficult to put a finger on exactly why it is not working. Furthermore, the prospect of having to go through a cumbersome, stressful and polarising disciplinary process may be unattractive and counter-productive. Sometimes, an employer knows that it cannot really justify the dismissal, but is willing to pay what it hopes is enough to enable the employee to go quietly.

In such situations employers often decide to call an employee into a meeting to tell them the meeting is off the record or *without prejudice* (ie that the discussions cannot be acted upon or quoted in any employment tribunal action), that they want them to leave and to describe the terms on offer if the employee signs a compromise agreement. If the employee accepts the proposal there is no problem. But what are the risks if no agreement is reached?

In light of two recent cases; *Billington v Michael Hunter & Sons* and *BNP Paribas v Mezzotero* the employer may not be able to rely on the statement that the meeting is off the record. If the meeting is not off the record the employee can disclose what has occurred at the meeting and:

1. claim he has been constructively dismissed unfairly; or
2. if he does not claim to be dismissed, he can claim that any subsequent disciplinary action is an attempt by the employer to find a way to get rid of him unfairly.

These cases have made it clear that employers will not be able to claim the protection of a without prejudice statement if:

- There is no genuine dispute to which the statements relate eg the fact that the employee has raised a grievance will not be a dispute but an appeal against a decision to dismiss may be enough.
- There must be a valid agreement to treat the discussions as “without prejudice” and the employment tribunal will take account of the unequal bargaining position of employer and employee. Telling an employee that the meeting is without prejudice at the beginning of a meeting will not be good enough to show a valid agreement.
- The words “without prejudice” can never be used as a cloak for perjury or blackmail.
- The words “without prejudice” cannot be used to cover an “unambiguous impropriety” such as discrimination. Clearly the words will not protect an employer who makes a clear discriminatory statement (eg “you’re fired because you are black”), but what if an employer makes a concession during the course of a discussion that another employee may have made an offensive discriminatory remark. Will that concession fall within the exception?

Ultimately, the employer will need to make a decision – is it better to try to settle a potential problem amicably or to provoke or let the matter escalate into an acrimonious but genuine dispute which may be harder to settle? In many cases the risks may no longer outweigh the benefits.

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