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Pre-termination negotiation

Negotiation: common scenarios

Protected conversations

The 'without prejudice' rule

Scenarios within Care when employers may benefit from use of pre-termination negotiation



Negotiation: common scenarios

Where employment and active duties continue (e.g. ongoing performance concerns or Grievance)

Where employment continues but the employee is not actively carry out duties (e.g. long term sick leave)

Where employment continues but employee is sent home (e.g. employee suspended pending an Investigation and/or a Disciplinary)



Protected conversations

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” - (s 111A (2), ERA 1996)

Must be a settlement offer made to employee

Must be negotiation with a view to employment being terminated on agreed terms

Secure employee’s agreement at the outset of a protected conversation

Only applies to ordinary unfair dismissal cases. Not protect employer from other types of employment claim, such as discrimination, whistleblowing (PIDA) etc.



The 'without prejudice' rule

However, protection under the 'without prejudice' rule

Where an existing dispute, discussions may be inadmissible in relation to all parts of claim

The 'without prejudice' rule will generally prevent statements made in a genuine attempt to settle a dispute, whether made in writing or orally, from being put to the Employment Tribunal as evidence

Not apply where parties not yet in dispute, only applies to genuine attempts to settle an employment dispute

So let's look at some scenarios relevant to Care...



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