

PROTECTED CONVERSATIONS EXPLAINED

INTRODUCTION

Through their Enterprise and Regulatory Reform Bill, the UK Government is planning to introduce a number of changes to Compromise Agreements. These are legally binding contracts used to end an employment relationship, on terms agreed between both parties. By signing these agreements, an individual waives their right to make a claim to an Employment Tribunal on issues covered by the agreement.

Under the proposed legislation, these will be renamed Settlement Agreements and a number of changes will be made to their admissibility as evidence in any future action taken by either party.

MAIN CHANGES

Under these proposals, in an unfair dismissal claim, in general the Employment Tribunal shall not be able to take account of any discussions had or offers made, between the parties with a view to termination of the employment. These will be considered 'protected conversations'.

However, there are a number of exceptions to this general rule. This rule of confidentiality will not apply in the case of automatic unfair dismissal, such as whistle blowing. In these circumstances, evidence of the protected conversations will be allowed.

Protected conversations will be admissible at an Employment Tribunal for something other than unfair dismissal. For example, in claims under discrimination legislation and breach of contract, the information contained in an otherwise protected conversation can be used as evidence.

If the behaviour of the employer during the attempted negotiations before termination of employment is deemed to have been improper, this will render the content of protected conversations admissible at an Employment Tribunal.

It is not yet established what is meant by 'improper', and that is likely to be for a tribunal to decide on a case by case basis.

KEY POINTS:

- Employment Rights are under attack by the UK Government
- A number of changes are being made to Compromise Agreements.
- In general, in unfair dismissal cases, communications with a view to termination are protected
- There are exceptions to this rule.
- UNISON has a number of problems with this legislation.



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UNISON's RESPONSE

UNISON believes that this is an unwarranted attack on employment rights and has potential to create confusion among employers and trade union representatives about what the provisions actually mean.

There is concern over the meaning of improper behavior. UNISON believes the list given in the draft Code to be incomplete and therefore it must be broadened.

However, UNISON also believes it would be wrong to include examples of proper behaviour in the Code, as this may create a danger of this being considered a fixed list.

Agreeing with the Trade Union Congress in its response, UNISON has serious concerns that the wording of the code, as currently expressed, could encourage employers to offer a settlement agreement irrespective of whether the employer has good reasons to dismiss employees. This is not conducive to good workplace management.

Action for Branches

- Stewards should be aware of these provisions, and note that although they are not currently in force, they are likely to be in the near future.
- Recognise the dangers of members participating in protected conversations given the content of these new provisions.
- Help raise awareness of these provisions and what they mean for members in terms of their discussions with employers.
- Stress that UNISON consider meetings of this type to attract the right to be accompanied by a Trade Union Representative.

Further Information:

ACAS Draft Code
<http://www.acas.org.uk/index.aspx?articleid=4158>

Thomson's Response
<http://www.thompsonstradeunionlaw.co.uk/information-and-resources/pdf/thompsons-response-acas-settlement-agreements-april2013.pdf>

Daniel Barnett's Commentary:
<http://danielbarnettemploymentlaw.blogspot.co.uk/2012/06/protected-conversations.html>



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