

"Mind if we have an off the record chat?"

The without prejudice rule in ET litigation
and the role of "protected conversations"

Sam Healy & Amy Stroud

What we will look at.

- (1) Scope of the 'without prejudice' rule
- (2) Protected conversations under s111A Employment Rights Act 1996
- (3) Case law on protected conversations, including what is and is not likely to amount to 'improper behaviour' that renders the contents of the conversation disclosable and Gallagher v. McKinnon Auto Tyres Ltd. [2024] EAT 174
- (4) Practical tips on how to maximise the benefit of protected conversations with staff
- (5) Questions

Settlement of disputes and the role of protected conversations

<https://www.acas.org.uk/about-us/service-statistics/early-conciliation/early-conciliation-and-employment-tribunal-cases-data-2024-to-2025/october-to-december-2024>



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The 'without prejudice' rule

- Prevents any statements being used in subsequent ET proceedings.
- Must be an actual, pre-existing dispute.
- Scope strictly marshalled. . . .:
 - *Mezzoterro v BNP Paribas* [2004] IRLR 508 EAT
 - *Hudson v Oxford University* UKEAT/0488/05/DM
 - *Garrod v Riverstone Management Ltd* [2023] IRLR 191

Section 111A Confidentiality of negotiations before termination of employment

- (1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111. This is subject to subsections (3) to (5).
- (2) In subsection (1) " 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.
- (3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.
- (4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.
- (5) Subsection (1) does not affect the admissibility, on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved

What are 'pre-termination negotiations'?

- Does not need to involve offer of money but does need some 'discussion/negotiation'
- Parties do not need to reach agreement
- No need for extant dispute



Three important points to note

- 1 – s111A only applies to Unfair Dismissal complaints, see s111A(1) and *Faithorn Farrell Timms LLP v. Bailey* [2016] ICR 1054. So not complaints or discrimination, victimisation, breach of contract etc.
- 2 – complaints of automatic unfair dismissal are excluded
- 3 – only pre-termination discussions are caught and so if a dispute about the date of the EDT that will need resolving first

What is 'improper behaviour' under s111A (4)?

- It is broader than the 'unambiguous impropriety' test under the without prejudice rule.
- There is a two-stage test:
 - (1) Was there some improper behaviour in the course of the discussions?
 - (2) If so, is it 'just' that the confidentiality of the discussions be preserved?

ACAS Cop on Settlement Agreements (under s111A of ERA 1996)
<https://www.legislation.gov.uk/ukpga/1996/18/section/111A>

Gallagher v. McKinnon's Auto & Tyres Ltd. [2024] EAT 174

- Redundancy case
 - 48 hours to consider original proposal
 - Pre-termination discussions inadmissible
- EAT:
- No improper behaviour and the test is not unfairness
 - Not clear that C would be dismissed
 - Significant that matters would be followed up formally

How to maximise chances of s111A working....

- 1 – Do the groundwork for the matters intended to be raised
- 2 – Have a note taker present
- 3 - Be clear that discussions are held under s111A and 'without prejudice'
- 4 – Consider inviting employee to have work colleague/TU present
- 5 – Deliver neutral and fact-based information without any agenda
- 6 – Follow up the proposals given at the meeting in writing

Questions