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Protected conversations on the way

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Protected conversations on the way

But will they be any improvement on existing "without prejudice" arrangements?

The Government has confirmed that it wants to introduce the concept of "protected conversations" in to law. The idea is to allow employers to have frank ‘off the record' conversations with employees, without employees then being able to rely on that discussion to form part of an unfair dismissal claim.

But will this bring anything new to the table and, if it does, is it at all helpful?

In the past employers have used the "without prejudice" rule to get rid of troublesome employees more quickly and cost efficiently. Rather than go through a lengthy - and uncertain - disciplinary or performance management processes, they have instead made offers to terminate the employment, on agreed terms, on a "without prejudice" basis. The problem with the rule is that employers are often uncertain as to its application.

For the "without prejudice" rule to apply there has to be an attempt to settle a pre-existing dispute - a fact which is frequently overlooked - and the rule can not be used to hide matters such as blackmail or other impropriety.

The leading employment case on this is BNP Paribas v Mezzotero (2004 IRLR 508 EAT). In this case Mezzotero raised a grievance about her treatment before and after her maternity leave. She was invited to a meeting to discuss the grievance and told by her employer that the meeting would be "without prejudice". At the meeting, she was told her position was untenable and that they would offer her a redundancy package.

The EAT held that the conversation was not "without prejudice", because there was no existing dispute to which the rule could attach. The fact that a grievance has been raised does not necessarily mean that there is a dispute; the employer may or may not agree with the employee's complaints or the employee may accept that the employer dismisses the grievance, for good reason. Discriminatory comments had been made in the course of the conversation and these were admissible because the

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employer had broken the rules. The rule cannot apply if excluding the evidence would hide an act of "unambiguous impropriety".

The Mezzotero case was considered the high watermark for the application of the "without prejudice" rule in employment cases and, for a while, the use of the rule fell out of fashion. However, most employment law practitioners will tell you that hundreds of employees exit every year following a "without prejudice" conversation and a compromise agreement, and only in a small faction of these cases is there ever an issue for an employer. In many cases the technical niceties of the rule may not in fact be observed, but employees are not stupid. If the writing is on the wall, and there is a reasonable deal to be done, they tend to take it.

The introduction of "protected conversations" is being justified on the basis that employers are stuck with underperforming employees because they are afraid to speak to them. If proper performance management is carried out, then there is no reason why employees should not improve, or have their contracts terminated fairly.

So what will "protected conversations" add? It cannot be the case that it is intended that they will protect an employer who is using it as shield to cover unambiguous impropriety, such as discrimination. If it did, then it would make a mockery of employment law. If "protected conversations" can be used with immunity, will it not simply encourage poor employee management and possibly bullying? More to the point, while it is all very well to introduce a "protected conversation" as a statutory concept, there is a fair chance that tribunals will spend the next few years testing where the limits to the rule lie, as they have with "without prejudice" conversations. The idea may sound good in principle but whether or not it will achieve anything in practice is a very different matter.

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http://www.peoplemanagement.co.uk/pm/articles/2011/11/protected-conversations-on-the-way.htm