Oops, I shouldn't have said that! When can and can't managers have frank conversations at work?

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The Government would have us believe that employers live in constant fear that comments made in the course of frank discussions at work may become the hook for future litigation.

The Government's proposed solution is to introduce the 'protected conversation' – a forum in which employers may 'raise workplace issues in an open way, free from the worry it will be used as evidence in …Tribunal'. However, while we await the Government's consultation document and details of their proposals, it is worth reviewing whether the current position is really as much of a minefield as the Government suggests.

Can an open conversation be frank?

In many ways, the existing law and current best practise already encourage employers to be frank with employees. For example:

- performance management is best dealt with by raising concerns at an early stage, providing honest feedback, giving clarity in relation to areas for improvement, time in which employees can address concerns and transparency as to the possible repercussions of failure; and
- conduct issues, while requiring an impartial investigation before any fair outcome is reached, also call for a frank assessment of the potential sanctions for the employee at an early stage. Indeed, a dismissal will almost certainly be unfair if the employer has not stated in advance that dismissal is one of the potential sanctions.

So, the main risk from the employer's point of view comes not so much from the frankness of the information provided to the employee about the concerns they have and the potential consequences – rather, it comes from using language that could be interpreted as having pre-determined the outcome of an investigation, a performance improvement process, a misconduct hearing or indeed a redundancy consultation.

This is why choice of language is so important. For example, the following implies a pre-determination of the allegation and therefore undermines the prospect of a fair decision: '*Your unauthorised absence from work amounts to misconduct so we have decided to commence disciplinary proceedings. If you have no acceptable explanation for your absence, this will result in disciplinary sanctions, which may include dismissal.'* This is very different from_: 'Unauthorised absence from work amounts to misconduct and we have decided to commence disciplinary proceedings to determine whether your absence was unauthorised. If we determine that it was and if you have no acceptable explanation for this, it is likely to amount to a finding of misconduct which may result in disciplinary sanctions, including dismissal'._

The distinction between the two is not that one is any less frank than the other – only that one reveals a very different mindset from the other.

Should a frank conversation be 'without prejudice'?

Occasionally, a business will have formed a clear view that an employee's days are numbered. There may also be reasons why there is no desire to engage in (for example) a lengthy performance improvement process, when the business knows this will be a sham. But the risks summarised above make it very difficult for the business to be open and frank about their desired outcome. Therefore an employer will often seek to discuss the situation with the employee on a 'without prejudice' basis.

However, the 'without prejudice' label is often incorrectly applied.

The 'without prejudice' rule is based on a combination of public policy and agreement (allowing parties to discuss settlement freely). It prevent statements (whether oral or in writing), made in a genuine attempt to settle an existing dispute, from being put as evidence before the court or Tribunal.

However, it will generally not apply either where there is no dispute or where there is no genuine attempt at settlement. This is particularly so if there is no agreement between the parties that their conversation was intended to be 'without prejudice'.

For example, in a classic 'performance improvement process', it will be unusual for there to be an existing dispute between the parties, especially early on in the process. Further, even if an employer says that they are making a proposal on a 'without prejudice' basis, an employee may not have agreed to apply the label and/or may not understand the significance. This could render the label meaningless, so employers must use the label cautiously.

Even where there is a dispute and a genuine attempt at settlement, there are exceptions to the rule. Most notably, the 'without prejudice' label may not be used as a cloak for perjury, blackmail or 'unambiguous impropriety'. As far back as 1988, in a case called *Rush v Tompkins*, Lord Griffiths stated that "*even in situations to which the without prejudice rule undoubtedly applies, the veil imposed by public policy may have to be pulled aside, even so as to disclose admissions, in cases where the protection afforded by the rule has been unequivocally abused.'*

These cases will be rare but, particularly where there is any underlying allegation of discrimination or whistle-blowing, employers should tread very carefully when seeking to rely on without prejudice protection.

Are protected conversations the answer?

We are yet to see the details of the proposals but the idea of a 'protected conversation' will appeal to employers who feel over-burdened by protocol and where they feel that a little more frankness may be beneficial for both parties.

But there are big questions about how things will work in practice. For example, will it be a pre-condition that both parties must agree to hold a protected conversation? Will the rule be open to abuse by unscrupulous employers? Where will the line fall between those aspects of a conversation that are legitimately protected and those that may be considered an abuse? Or, will protected conversations give businesses a false sense of security, resulting in them revealing too much?

In short, there seems scope for unintended and complex satellite litigation unless the rules are very carefully and unambiguously drawn.

Practical tips

While we still have to operate within the current landscape, a few rules will help to reduce the risk of finding your words thrown back at you in the Employment Tribunal:

1. avoid language that suggests that issues have been pre-determined;
2. plan and keep notes of meetings, so you have your own records of what was said;
3. if you want to talk about settlement, ask yourself whether there really is a dispute that you are trying to settle. If there is not, then consider how best to raise the subject – it may be perfectly acceptable to openly acknowledge that you are willing to discuss the possibility of an agreed exit, but on an exploratory basis. Keep your options open; and
4. if in any doubt, seek advice.