Un-compromising changes

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Libby Payne
SENIOR ASSOCIATE | UK

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On 29 July 2013 two further developments will come into force, affecting the process for settling actual and potential employment claims.

Settlement agreements

'Compromise agreements' and 'compromise contracts' will be renamed 'settlement agreements', a term that is felt to more accurately reflect the content and purpose of the agreement. References to compromise agreements and compromise contracts in the relevant employment legislation will be amended accordingly.

Any agreements entered into on or after 29 July should ideally reflect the new wording. It is doubtful that an agreement will be invalid simply because it does not call itself a 'settlement agreement', as long as the statutory rules for settlement agreements are followed (these are the same as the existing rules that apply to compromise agreements and deal with the need for the agreement to be in writing and for the employee to receive independent legal advice etc). However employers will probably not want to have any doubt about the validity of an agreement, particularly if a significant sum is being paid to a departing employee, so it would be advisable to update all agreements entered into on or after 29 July to reflect the new wording.

Pre-termination negotiations

A further development coming into effect on 29 July is that employees will not be able to rely on evidence of 'pre-termination negotiations' (for example, an offer to make a termination payment to avoid a disciplinary procedure) to support ordinary unfair dismissal claims. This effectively extends the 'without prejudice' rule to cover certain conversations where there may not be an existing dispute between the parties and the well established 'without prejudice' rule would therefore not apply.

Where there are accompanying claims for discrimination or breach of contract, or where the employee is automatically unfairly dismissed for whistleblowing etc, the new regime will not apply. Nor will the rule apply where there has been 'improper behaviour' on the part of the employer (see below).

ACAS Code of Practice

ACAS has produced a statutory Code of Practice on Settlement Agreements gives general guidance on offers of settlement that are intended to attract the new 'pre-termination negotiation' protection from disclosure. The Code requires that to benefit from the protection, employees are given a minimum of ten calendar days to consider an offer of a settlement agreement (unless both employer and employee agree, this will not prevent a shorter period for consideration where employers are making a 'without prejudice' offer (e.g. where there is already a dispute).

When the proposals were initially discussed, 'guideline tariffs' for pre-termination settlement offers were suggested and ACAS produced a set of template documents. The new Code contains neither of these, although later this month ACAS is due to produce Guidance to supplement the Code which is expected to include template letters.

There are a number of concerns about the new rules on pre-termination negotiations. Firstly, the exemption only applies to 'ordinary' unfair dismissal claims. Where an employee later brings another type of claim, the negotiations could potentially be used in evidence to support that claim (unlike a 'without prejudice' conversation which ordinarily could not be used).

Secondly, where a tribunal finds that the employer's behaviour is 'improper', the employer will not be able to rely on the new provisions and the negotiations will be admissible in a tribunal. What amounts to 'improper behaviour' will be determined only by case law and so its exact scope is not yet known. However, the Code confirms that 'improper behaviour' will be wider than the current 'unambiguous impropriety' test applied when determining whether 'without prejudice' conversations are admissible. The examples set out in the Code include under pressure (including giving less than ten calendar days to consider the proposal) bullying, harassment or intimidation (including aggressive behaviour), discrimination and threatening immediate dismissal if the proposal is rejected.

Given the level of uncertainty around the use of these new statutory provisions it is expected that many employers will prefer to continue relying on the 'without prejudice' rule when making settlement offers. However, it is possible that this change in the law will highlight the fact that certain conversations which are said to be 'without prejudice', are in fact not within the scope of the rule. As such, more employees may challenge the

‘without prejudice’ status of conversations by seeking to have their content disclosed during tribunal proceedings. Employers should take care to ensure that there is a genuine dispute supporting the conversation, taking advice where necessary.

Authors

Libby Payne

SENIOR ASSOCIATE | LONDON

Employment

 +44 20 7597 6608

 libby.payne@withersworldwide.com