

Employment Updates

Court of Appeal Guidance on Misconduct Procedures

In a case involving the dismissal of two nurses, the Court has found that where a dismissal for misconduct is likely to affect the individual's career, the investigation, disciplinary and appeal process must be particularly thorough and fair with clear evidence of the misconduct. The Court added that suspension should not be a "knee-jerk" reaction and should only be invoked after careful consideration.

Choosing the Correct Redundancy Pool

When selecting staff for redundancy, it is for the employer to decide what the correct pool is. A pool of one can be the correct pool, but the courts would carefully scrutinise an arrangement where the number of people in a pool is the same as the number of redundancies to be made.

Proving Solicitation

The fact that a "tidal wave" of clients had moved from one business to another where a former employee was now employed was insufficient to prove a breach of the non-solicitation clause in their old employment contracts. The old employer was unable to show that there was an element of persuasion, request or encouragement to the clients by the former employees.

Reaching a Compromise

With recent economic problems, more and more employers are considering restructuring their business. This can often lead to a reduction in staff and concern on the part of the employer that he will be faced with employment tribunal claims.

Of course, it is possible to manage redundancies fairly and avoid litigation, but there is always the chance that something will go awry or that an employee may try to pursue a claim in any event. A compromise agreement can provide peace of mind and a sound economic solution to an employer looking to negotiate an employee's exit from the company. They can be an effective way of managing a reducing headcount whilst minimising the risk of litigation.

A compromise agreement is effectively a contract between the employer and employee under which the employee agrees, usually in exchange for a sum of money above the amounts he is entitled to, not to pursue any claims against his former employer.

The agreement must be in writing and generally includes a certificate from a qualified adviser (usually a Solicitor or Legal Executive) confirming that the employee has received legal advice and that an indemnity policy is in place in respect of any claims the employee may have regarding the advice. Usually, the employer makes a contribution towards the employee's legal fees and this is generally around £250 - £500.

The agreement must settle specific claims; for example, unfair dismissal, although most agreements will include a clause whereby the employee agrees that the sums paid are in settlement of all and any claims the employee may have



against his employer.

Agreements can also be used to settle proceedings that have already been issued, provided the proceedings are referred to and briefly described in the agreement.

A compromise agreement can also be a useful way for an employer to impose additional obligations on the employee. For an additional payment the employer can include, for example, post-termination restrictions or a clause preventing the employee from making derogatory statements about the employer.

Most agreements will also contain a confidentiality clause forbidding the employee from discussing even the existence of the agreement (although this will often include an obvious exception for his immediate family). This avoids gossip between employees in similar situations and more opportunity to the employer for individual negotiation.

Discussions surrounding compromise agreements are conducted on a without prejudice basis and cannot be used in evidence should negotiations fail. An agreement is a useful way to conclude an employment relationship in a positive way; the employee is satisfied that he has been treated as fairly as possible in the circumstances and the employer can concentrate on moving his business forward without the distraction of legal proceedings.



Julie Shannon

Julie is our employment law specialist. She has several years' experience in representing and assisting companies (both large and small) as well as individual employees.

Julie can assist you with employment documentation, tribunal representation and advice and assistance on employment procedures including disciplinaries, redundancies and TUPE transfers.

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“Without Prejudice and Subject to Contract”

All compromise agreements begin with the phrase “Without Prejudice” or contain a clause stating that the agreement is “Without Prejudice and Subject to Contract”, but what does this mean?

Without Prejudice means exactly what it says. It is a form of protection for both parties that allows frank and honest negotiations between them. If discussions are genuine attempts to settle a dispute, they cannot later be used in evidence by one party against the other should the negotiations subsequently break down. In short, they allow both parties to have an open exchange, putting forward their own points of view without “prejudicing” their position should legal proceedings later result.

Written communications that are attempts to settle a dispute should be clearly marked “Without Prejudice” and any oral communications should also begin with a clear statement that the conversation is being conducted on a Without Prejudice basis. However, simply applying a “Without Prejudice” label is no guarantee of protection if the discussions are not genuine attempts to negotiate.



Equally, there have been instances in the past where the Courts have ruled unmarked correspondence which is an obvious attempt to negotiate settlement to be protected by the Without Prejudice rule.

“Subject to Contract” means that the agreement will not be binding until it is signed by one or both parties. Until then, it remains purely an instrument of negotiation and can be withdrawn at any time. Once the agreement has been signed, it becomes an open and binding contract and can be produced as evidence in subsequent court proceedings if necessary.

It is important therefore to ensure that compromise agreements and the surrounding discussions are clearly labelled as being without prejudice and subject to contract.

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