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Effective settlement agreements, Part 2 – DSARs and disputes (UK)

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Here are brief answers to two more of the questions raised at this week's webinar on Effective Settlement Agreements.

Can we make it a term of a Settlement Agreement that an employee will not make a DSAR after he leaves?

Yes and no. Yes, in that he can sign up to such a term. No, in that it won't bind him (nor would it in a COT3). In fact, your trying to pre-empt that right is most likely to lead your employee to question more persistently why you would be coy about the data on him which you hold, so we would not recommend even asking for this. It will rarely end well.

The ICO's new guidance allows an employer to reject a DSAR as "*manifestly unfounded*" where the request is "*malicious in intent and is being used to harass an organisation with no real purpose other than to cause disruption*". Surely that would cover someone who expressly agreed not to make a DSAR but then did so anyway? Attractive though that proposition is for employers, it is unlikely to hold water. This is particularly the case if any material time elapses between the promise and the DSAR and/or your now ex-employee says he has any grounds (more or less however spurious) to believe that the data held on him may have changed or been improperly processed. For more detail on this, please see here.

However, if the employee is willing, you can and should certainly get him to agree in the settlement agreement that you need not finish off a DSAR submitted before he left, or (as part of a general drop-hands on any live grievance) that he will make no complaint to the ICO about alleged shortcomings in a DSAR you have already responded to. There is probably some technical legal question mark over the strict enforceability of these terms too, since the right to complain to the ICO is as much part of the protective framework of the GDPR and the DPA 2018 as the right to submit a DSAR in the first place. However, the entering of a settlement agreement waiving the employer's alleged breaches in that respect would almost certainly be accepted by the ICO as good grounds for its not having responded in a timely manner or addressed the employee's concerns to date, even if it nonetheless ordered the employer to do so going forward.

What counts as a "dispute" enough to allow a without prejudice approach to my employee?

The issue behind this question is that a without prejudice proposal to resolve a dispute won't be without prejudice if there is no dispute. Approaching an employee out of the blue with a proposal that he should leave on terms will not therefore be without prejudice but could stand a more than reasonable chance of amounting to a constructive dismissal.

"Dispute" does not require actual or threatened litigation, but certainly some level of real (not merely apprehended) disagreement or confrontation. A general announcement of redundancies across the company certainly won't be enough, not even a redundancy proposal to a specific individual, since by itself that is not yet a dispute. The employee may recognise the proposal to be well-founded and so not contest it. The same may apply at the very start of disciplinary or absence management procedures – it is not a dispute until the employee pushes back on it and that may not be until well after the formal procedure has begun. In a redundancy situation, for example, it may be where the employee directly challenges the criteria used, the existence of a redundancy situation or the impartiality of the selecting manager. It is not merely his asking what alternative roles might exist or seeking a better understanding of the employer's thought-processes behind the need for job cuts or the criteria relied on.

What if the employee merely raises concerns but stops short of a grievance? It is all a question of degree, of course, but it is likely that the expression of a concern or question by itself would not be seen as a dispute for these purposes. Employees are entitled to seek clarification, be nervous about things and even to disagree with the employer without that amounting to a dispute. The employer may agree that the concern is justified, for example, or the employee may go away unsatisfied by its answer but not intending to take it further. Though it is not determinative, his decision not to raise a formal grievance would also point strongly away from the situation being a WP-worthy dispute at that point in time. "Not determinative" because the question of whether there is a dispute is an objective one and not something which must first be consented to by either or both parties.

It was to side-step these issues that the protected conversation (technically, "pre-termination negotiation") was introduced via a new section 111A Employment Rights Act 1996 in 2013. Now there is no need for a dispute as a pre-condition of offering someone terms to leave and (if done correctly) no risk of the overture being turned against you as an alleged constructive dismissal. Therefore, if in doubt, start with a protected conversation – experience shows that you will generally have all the dispute you need shortly after that, and then you can revert to an "ordinary" WP platform for the rest of your negotiations with the employee.

Remember that neither without prejudice nor a protected conversation will be adequate cover to offer a settlement agreement if that offer is itself unlawful. If the employee's grievance or complaint constitutes a protected disclosure for victimisation or whistle-blowing purposes, responding primarily by offering terms to leave risks amounting to victimisation and so blowing up and away the cloak of secrecy you might have wanted for that particular manoeuvre.

Next Time

Settlement agreements while on furlough and who-pays-the-piper questions over the independence of legal advisors.

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