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Pride and 'without prejudice' - how not to exit an employee

Whilst most employers these days have in place procedures to deal with underperforming employees, there is still the temptation to short cut the process and do a deal early on to avoid the pain and effort it can sometimes take to go through the formal steps to exit an employee. Without question, done at the right time, in the right way, this can be an incredibly useful tactic, but the recent decision of the Guernsey Employment & Discrimination Tribunal in *Langmead v The Scout Association Bailiwick of Guernsey* is an almost perfect example of how not to do it.

The employee in this case was originally employed as an administrator on 8 September 2014. It quickly became apparent that she was having difficulties in the role, making errors and giving excuses that there was too much to do or the systems were inadequate. The employer decided to hire a supervisor to support the employee in June 2015, following which the employer said it became apparent that the employee's excuses had been without merit. The relationship between the employee and her supervisor quickly deteriorated and whilst the employee was on annual leave, the supervisor reorganised the workplace, changed the computer systems and took over all of the administration duties, meaning that all there was for the employee to do, on her return on 9 September 2015, was cleaning.

When the employee complained about this to a committee member, she was asked by email to attend a meeting with the chairman the next day, on 1 October 2015, without any explanation of the purpose of the meeting. Whilst the exact details of what was said at the meeting were disputed, it appears the chairman did say that the meeting was to be 'without prejudice', and rather than undertake a capability procedure, the employee could take voluntary redundancy terms. At that point the employee was told to go home and details of the package would be emailed to her. An email was subsequently sent to the employee headed 'without prejudice' making an offer, but stating that it could not be discussed with anyone other than her immediate family. Ultimately, a deal was not done and the employee brought a claim for unfair dismissal, alleging she had been dismissed at the meeting on 1 October 2015.

The main argument of the employer was that the meeting on 1 October 2015 was 'without prejudice', the consequence of which would have meant that any evidence relating to it would have been inadmissible before the Tribunal and so could not be taken into account. Somewhat unsurprisingly given the evidence of how the employer had conducted the meeting, the Tribunal rejected that the meeting was 'without prejudice' on the grounds that there was no 'dispute' between the parties which has previously been cited as one of the components of the status in previous English Employment Appeal Tribunal decisions. The Tribunal then considered the meeting itself, including the lack of any minutes or surrounding process, and concluded that the employer had decided it wished to dispense with the employee's services by gaining her agreement to take voluntary redundancy. As a consequence the Tribunal found that despite no-one ever saying it expressly, the employee was deemed to have been dismissed at the meeting and that dismissal was unfair.

This case was a catalogue of misjudgements and missed opportunities for the employer and the truth is it could very easily have been avoided. Here a just a few of the most obvious ones:

- The employer did not tackle the known performance issues and just let matters come to a head.
- The employer could have terminated the employment a month earlier before the employee had reached twelve months' service, without risk of an unfair dismissal.
- The employer did not make clear to the employee that she was still employed at the end of the meeting.
- The employer never thought about what might happen if the employee rejected the offer.

Without question, when you are going to have that difficult exit conversation with an employee, there are risks involved and simply saying the magic words of 'without prejudice' does not offer blanket protection. However, equally there are ways and means of doing this that can greatly increase the chances of discussions being categorised as without prejudice and equally reduce the chances of landing up in a Tribunal in the first place. A good starting point is don't say anything that you wouldn't want repeated back to you before a Tribunal. However, probably the most important point is to consider whether the employee might reject the offer and if they do what is your fall-back position? If you are going to offer an employee so much money that they are never going to reject the offer, then you can be almost as bullish as you like in making the offer if you are going to get the employee to sign a compromise agreement. However, at a time when we are all under pressure to reduce costs, do you really want to be writing a blank cheque to an underperforming employee? That is why, more often than not, employers are better at least starting the formal process before having an exit conversation, because not only is there a better chance of persuading a Tribunal that there is a 'dispute' and so gaining the 'without prejudice' protection, but also the employee's perception is more likely to be that they have a genuine choice. If that is the case they are less likely to feel aggrieved, more willing to accept a deal and ultimately less likely to run to a Tribunal.

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