

Tactics for Termination

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Scope of discussion

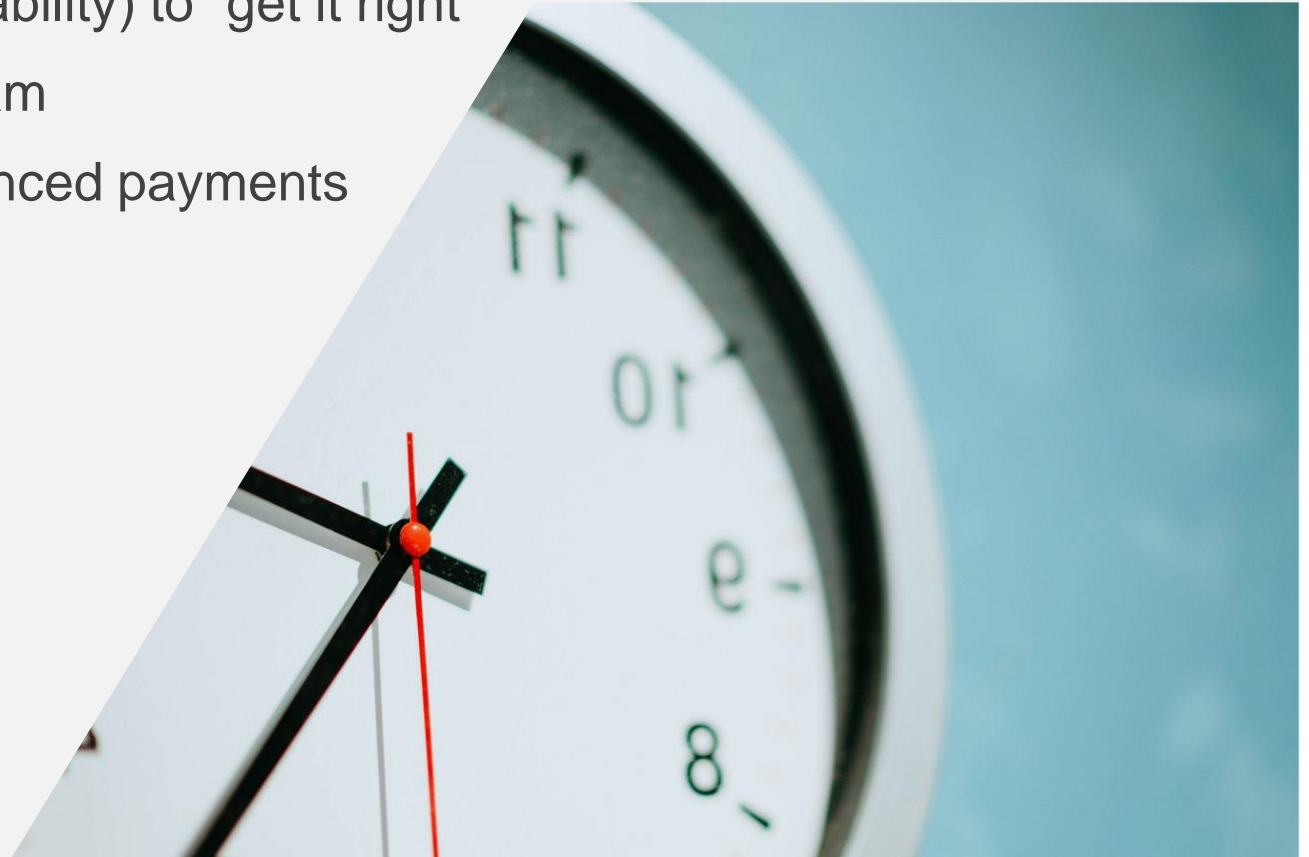
- When are protected conversations appropriate?
- How should protected conversations be approached?
- What settlement should be offered?
- What should be included in any settlement agreement?
- What are the potential pitfalls?
- How can you minimise the risks of Employment Tribunal claims?
- Schedule 1 Housing Act 1996
- Case law

When are protected conversations appropriate?

- Without prejudice rule
 - Communications undertaken with the aim of resolving a dispute are said to be undertaken on a WP basis
 - Cannot be referred to in open litigation
 - Must have an existing dispute
- Risk of proposing termination where no dispute
 - Employee previously could have used the fact of the offer as basis for claim
 - Breach of implied term of trust and confidence – constructive unfair dismissal
 - Subsequent processes are a sham/pre-determined
- Can now have a “protected conversation”
 - Where an offer of termination is made
 - Inadmissible in future unfair dismissal claim (but not discrimination claim) unless improper behaviour

When are protected conversations appropriate?

- Is speed of the essence?
- Is there an existing dispute?
- Management time and patience (and capability) to “get it right”
- Potential effect on other members of a team
- Wider exercise – redundancies with enhanced payments



How should protected conversations be approached?

- ACAS Code of Practice
 - Reasonable period to consider an offer - 10 working days
 - Allow an employee to be accompanied
 - Improper behaviour: harassment, intimidation, bullying, physical assault, victimisation, discrimination, putting undue pressure on a person – saying that employee WILL be dismissed

What settlement should be offered?

- Possible cost
 - Compensation if you lose plus legal costs of defending a claim
 - Maximum award discounted for litigation risk and accelerated receipt
- Employee's expectations
 - Has to be attractive enough that the employee will accept, rather than take the risk and gamble on litigation
 - Financial cushion
 - Non-financial elements – garden leave, outplacement, reference, health cover, keeping phone and laptop, waivers to restrictive covenants

What should be included in any settlement agreement?

- Non-financial aspect
 - Termination date
 - Confidential information
 - Company property
 - Agreed reference
 - Waiver of claims
 - Warranties and indemnities
 - Announcements
 - Restrictive covenants
 - Garden leave
 - Outplacement
 - Health cover and other benefits
 - Adviser's certificate



What should be included in any settlement agreement?

- Financial aspect
 - PILON?
 - Accrued holidays?
 - Termination payment?
 - PENP?
 - Contribution towards legal fees



What are the potential pitfalls?

- Can we terminate lawfully?
- What rights has the employee got?
- What is the litigation risk?
- Is there a risk of a successful claim and how much is it worth? Likelihood and impact or in legal language “liability and quantum”

What are the potential pitfalls?

- Day 1 Rights:
 - Contractual claims - notice
 - Discrimination – uncapped compensation
 - Whistleblowing type claims – automatic unfair dismissal claims – uncapped compensation
- After 2 Years
 - Ordinary unfair dismissal – capped compensation
 - 5 fair reasons for dismissal
 - Must demonstrate dismissal is fair in all the circumstances taking into account resources of employer – very process driven

What are the potential pitfalls?

- Employee's reaction / what impact will sending the employee off to a solicitor have?
- Rewarding failure?
- Reputational issues



How can you minimise the risks of Employment Tribunal claims?

- Present as a “genuine” choice
- Have a clear understanding of the offer and consequences of non-acceptance
- Script, letter (explains to the lawyer) and draft agreement (hard copy / word / pdf)
- Timing of meeting – how to invite, who should do it
- Agreed leave to consider the offer – messaging to others?
- The negotiation
- Remember – it isn't over until it's signed!

Don't forget Schedule 1!

- Paragraph 2 of Schedule 1 to the Housing Act 1996
- Permitted Payments and Benefits (Wales) Determination 2010
- 10th Exemption – early retirement, redundancy or restructuring for efficiency gains
- 11th Exemption – payments in settlement of employment related disputes
- Housing association circular RSL 005/10

Case Law

- Hudson v Oxford University UKEAT/0488/05/DM
- BNP Paribas v Mezzotero [2004] IRLR 508
- A v B&C UKEAT/0092/13
- Newbury v Sun Microsystems [2013] EWHC 2180



Questions?

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