

## WITHOUT PREJUDICE AND PROTECTED CONVERSATIONS FLOWCHART

Are discussions a genuine attempt to settle dispute?

YES

NO

Is there a 'dispute'

Without prejudice rule is not engaged. Are the discussions pretermination discussions?

VES

YES

Without prejudice rule can generally be relied upon to prevent statements being put before a court or tribunal Without prejudice rule cannot be used to prevent statements being admissible before a court or tribunal

There will generally be an existing dispute where an employee has brought a claim or might reasonably contemplate bringing a claim

In order to be regarded as a 'genuine attempt to settle' the dispute the parties must do more than simply set out their differing positions

Even if the without prejudice rule is engaged it cannot be relied upon if:

- The question is whether a concluded settlement was reached in a dispute
- There is evidence of misrepresentation, fraud
  or undue influence
- There is evidence of perjury, blackmail or other procedural impropriety

The fact of the discussion and details of them will be protected from disclosure in relation to any ordinary unfair dismissal claim under s111A Employment Rights Act 1996 unless there has been 'improper behaviour' and the tribunal decides it would not be just and equitable to protect it

NO

Neither the without prejudice rule nor s111A Employment Rights Act 1996 are engaged. Discussion and documents are admissible in all proceedings.

NO

Pre-termination discussions are any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee (s111A(2) ERA 1996)

The ACAS Code on Settlement Agreements lists examples of Improper behaviour to include:

- All forms of bullying, harassment, and intimidation
- Physical assault or the threat of physical assault or criminal behaviour
  - All forms of victimisation
  - All forms of discrimination
  - Putting undue pressure on a party

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