Protected settlement conversations

At the second reading of the Enterprise and Regulatory Reform Bill last month, the business secretary, Vince Cable, announced an amendment to allow employers to offer 'settlement agreements' (the new compromise agreements) to employees without the fear that the offer could be used as evidence in unfair dismissal proceedings. In effect, this would enable 'without prejudice' settlement discussions prior to there being an extant dispute between the parties. Rumour has it that this is what Lib Dem leader Nick Clegg's 'protected conversations' idea – aimed at facilitating discussions about poor performance and retirement – has become, although a resurrection of this idea has not been ruled out.

The workability of settlement agreements' will depend on the drafting, which is expected at the Commons committee stage. It is unclear whether it is just the offer that would be protected or all the negotiations/meetings concerning it, and whether an employer repeatedly making the same offer would retain protection. Does the reference to inadmissibility in unfair dismissal proceedings mean that the offer could be referred to in discrimination claims (in which case how many employers will be sufficiently sure of the absence of a potential discrimination claim), or is this really shorthand for saying that the protection is lost in relation to something discriminatory actually being said or done in the course of the negotiations (ie importing the unambiguous impropriety exception to without prejudice protection)?

During the debate the shadow business secretary Chuka Umunna asked how trust and confidence would be maintained where, out of the blue, an employer has made a termination offer to an employee. Further, will an employment tribunal know that an offer has been made, but not the terms? And, if so, is a tribunal hearing a subsequent claim more likely to conclude that any subsequent performance or disciplinary process was a sham?

There is to be a consultation in the summer on guidance to be published on using settlement agreements along with model letters and agreements, with the apparent aim of enabling small employers to settle employment claims without legal advice. It will be a gung-ho employer that chooses to do so, particularly as there seems to be no suggestion of removing the requirement for an employee to obtain independent legal advice.

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Race and illegality

Hounga v Allen [2012] EWCA Civ 609 is essential reading for anyone dealing with a discrimination claim where the contract is illegal because of tax evasion or immigration status.

Unfair dismissal and breach of contract claims will fail if the contract is tainted with illegality. The position is different for discrimination, which is a statutory tort not dependent on an enforceable contract. The illegality defence is available in discrimination only if the claim is so clearly connected with the illegal conduct that the court could not allow the claim without appearing to condone it (*Hall v Woolston Hall Leisure* [2001] ICR 99). In *Vakante v Governing Body of Addey and Stanhope School (No 2)* [2005] ICR 231, the Court of Appeal applied this test to disallow a discrimination claim from an illegal immigrant who had knowingly misrepresented that he had a right to work in the UK.

Linstead: *Hounga* decision leaves vulnerable unprotected

Both Ms Hounga and the family she worked for as an au pair knew she was working illegally. The tribunal had found that they employed her because she was a vulnerable illegal immigrant and dismissed her and treated her less well than they would have treated a hypothetical comparator because of that status. The Court of Appeal said that the difference from the position in *Vakante,* namely that the employer was aware of the employee's immigration status, was immaterial – what mattered was that the employee knew what she was doing was illegal. Further, Ms Hounga's claim was that she had been treated badly because she was an illegal immigrant; in other words, the illegality formed a material part of her case. To allow her claim would be to condone her own illegality.

It is now hard to see when an illegal immigrant might be able to claim discrimination. The message from *Hounga* and *Vakante* is that the right to claim discrimination arises from an employment situation that is unlawful and therefore likely to be too closely connected with the illegality to allow the claim. Claims might only succeed where the employee does not realise he or she has no right to work, precluding an argument that the behaviour is condoned. This asks the question: does the law adequately protect this vulnerable group?

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Peter Linstead, Tanfield Chambers