HEADLINE: HR NEEDS A RETHINK ON 'LETTING GO' OF WORKERS;
A RECENT EAT RULING MEANS EMPLOYERS MAY HAVE TO INITIATE DISCIPLINARY PROCEEDINGS RATHER THAN OFFER CONVENIENT RESIGNATION PACKAGES TO EMPLOYEES 'OFF THE RECORD'

MICHAEL MCCARTNEY

It is a common dilemma for HR professionals - how to best go about the unpleasant business of ending the employment of someone senior management have decided they no longer want. Where there is no obvious case for a straightforward dismissal, the most convenient way has traditionally been to make an offer 'off the record.'

However, the Employment Appeal Tribunal's (EAT) recent decision in BNP Paribas v Ms A Mezzotero threatens to undermine this approach (see last week's lead story and legal Q&A, and Case round-up opposite).

When first broaching the subject, an employer usually uses the phrase 'without prejudice'. These magic words are used to prevent the parties' dialogue from being disclosed in court. However, the civil courts have recently determined when the words are genuinely applicable, and held that 'without prejudice' is only effective to protect discussions relating to a genuine effort to settle a dispute.

Ms Mezzotero was informed on a 'without prejudice' basis that she should consider a mutually-agreed termination, since her employer was not prepared to reinstate her to her original position after her return from maternity leave. She resigned on the basis that her grievance was unlikely to be considered fairly, and asked to refer this discussion to the tribunal in support of her claim for sex discrimination.

On appeal from a tribunal decision in her favour, the EAT considered whether the discussion related to a current dispute, and, if it did, whether refusing to allow Mezzotero to refer to the discussion would be prejudicial to her. It decided the 'without prejudice' discussion did not relate to a dispute, but even if it did, there would be prejudice to her if she were not to be permitted to refer to the discussion.

This raises questions about without prejudice offers. Employers often make an offer when a worker is not performing, instead of following a proper disciplinary process with hearings and warnings. In many cases, the employer may be prepared to dismiss them anyway if the settlement negotiation is unsuccessful, and face the consequences. If an employer fails to reach an agreement, the employee will probably be suspicious of any future disciplinary action taken by the employer as they believe there will be a pre-determined outcome.

However, most employers will argue that there should be a discreet way to approach a difficult employee, and make an offer to negotiate before risking litigation. In any event, the employee has to take advice from a lawyer or some other authorised person before any compromise is effective, so it is unlikely they will be prejudiced by this approach.

The result of BNP Paribas shows employers must ensure there actually is a dispute before attempting to settle. But if a negotiation takes place in the middle of a disciplinary process, there is a risk the employee will refer to it on the basis that the disciplinary outcome was not objective and impartial, and that the discussions should not be privileged on the basis the employee would be unduly prejudiced. Employers should now carefully consider whether to start disciplinary proceedings rather than resort to an offer or compromise agreement.

Initiating disciplinary proceedings may result in a black mark on the employee's record, and will raise questions as to what information should be disclosed in any future reference.

The EAT's encouragement of disciplinary action, when a negotiated settlement may have been conducted in a less acrimonious fashion, seems a backward step. Everyone loses in this situation.

Is it time for legislation to provide a secure process by which employers can approach employees on an 'off the record' basis?

LOAD-DATE: May 13, 2004