

Difficult Conversations.... Broaching an Exit

How do you de-risk exit conversations with problem employees who are no longer an appropriate fit for the company, even though they may not realise this?

Thursday 9th October, 2025

What's Risky about a Chat?

But we were “Off the record”?

- *Just because its not in writing.....a verbal discussion is still a matter of evidence*
- *It's an open discussion, both parties have their respective evidence to give*
- *Cross examined on oath regarding what was discussed*
- *Adjudication Officer will prefer one version over the other*
- *In UK: Employer can avail of a statutory form of “protected discussion”*
 - *Off the record chat held before a termination of employment*
 - *Even if there is no dispute in being*
 - *Inadmissible as evidence*
 - *Subject to certain limitations and exclusions*
- ***No ability in Irish law to facilitate a “protected discussion” in workplace***
- *It's “on the record”, even if you say its “off the record”*

What's Risky about a Chat?

But I said it was a “Without Prejudice” Chat?

- *Hugely Misunderstood Concept!*
- *Matter of public policy that its better to encourage resolution of disputed*
- *Can attach or label the term to a verbal or written communication*
- *Just using the term, does not invoke its protection*
- *There has to be a dispute **existing at the time of the communication***
- *And it must relate to a genuine attempt to resolve that dispute*
- *In a pre-termination discussion, generally no dispute yet in play*
- *Cannot have an unfair dismissal dispute until you've actually been dismissed*

Can we Route this into a Safer Forum?

Is the underlying issue capable of being steered into a mediation process?

- *Internal Dignity at Work Complaint*
 - *Bullying*
 - *Discrimination*
 - *Harassment*
- *Relevant Procedures (or Code of Practice) all promote and encourage mediation*
- *Mediation is a voluntary and confidential forum*
- *Mediator:*
 - *Can be external /internal but must be sufficiently able and qualified*
 - *Will assist all parties reach a mutually acceptable agreement or outcome*
 - *It's not imposed on you, it's your agreement, they help you get there*

Another Route: Can we re-route the discussion?

If there is a dispute in place, can we steer towards a representative?

- *Trade Union Representative*
- *Employee solicitor on record? Engage through employer solicitor*
- *They can hold a Without Prejudice Discussion*
- *Do not engage some “trusted third party employee” – breach of confidentiality*
- *Back to risk of “Off the record Chats” being “On the record”*
- *Stick within line management structure or HR etc*
- *An internal workplace disputes (even prior to claim) can be referred to WRC Facilitation*

We're just talking? What are looking to de-risk? *Unfair Dismissals Act*

S6(1) dismissal deemed unfair unless substantial grounds justifying

S6(4) : Dismissal deemed not to be unfair if wholly or mainly capability, conduct, redundancy, etc

or.... s6(6)there are other substantial grounds justifying the dismissal.

S6(7) of UD Act: regard may be had to the reasonableness or otherwise of the conduct of the employer in relation to the dismissal

*If UD Claim, “Not a good fit” –**not** a substantial ground justifying a dismissal*

If we get to have a discussion and that fails.....what is Plan B

Avoid Commencing a discussion with pre-determined language.

Avoid a stand alone conversation, just about an exit

Don't drive into a cul de sac! Leave open ability to undertake a fair dismissal and process

We're just talking? What are looking to de-risk? High Court Action

- *Application outlining some form of contractual breach has arisen*
- *Seek range of declarations and reliefs to unwind breach*
- *Typically, relate to either contractual missteps*
- *Or a failure to afford natural justice rights*
- *Expensive, public, deeply unsatisfactory*
- *Can trigger an Injunction Application*

Injunction: Underpinned by Affidavit

Form of Sworn Evidence

A poorly framed “Exit Chat” will feature

Employee will seek to imply predetermination

Why explore such an Exit Discussion ?

Not dealing with:-

- *Serious/Gross misconduct Issues – formal, structured and recorded in writing*
- *Redundancy dismissals – need a paper trail and process to support*
- *Straight forward failure to pass probation - can be done without same level of risk*

Category of employee where you are looking to invoke a discussion:-

- *“Not a good fit” – need to manage out but is appetite for some element of risk*
- *Unmanaged non-performer, crept over 1 year’s service*
- *Need for expedited change*
- *Often senior personnel, managers, HR.*
- *People who expect a straight conversation, over a managed process/PIP*
- *“No risk” options are not commercially viable*
- *Want to safely get into a negotiation space*

How do the WRC View Such an Approach?

Ms Danica Gutierrez v Cafico Corporate Services Limited ADJ-00050330

- *26 Sept 2023 – informed she would be placed on a PIP*
- *No advance warning*
- *Plan was ambiguous and unclear*
- *3 days into her PIP commenced invited to second meeting*
 - *Offered severance package;*
 - *€5,000, which consisted of 2 months*
 - *Other content of the Meeting very much disputed*
- *Manager constructively dismissed herself 30 Jan 2024 and took UD Claim*
- *WRC had to decide if circumstances justified a constructive dismissal*

How do the WRC View Such an Approach?

Ms Danica Gutierrez v Cafico Corporate Services Limited ADJ-00050330

Both parties agreed that €5k offer was made at the meeting and Adjudication Officer regarded it as :-

“the defining moment where the employment relationship between the Complainant and the Respondent was unequivocally and unambiguously damaged by the undisputed action of the Respondent.”

Employer’s conduct in its decision to offer the Complainant an exit package only three working days after she had been placed on a PIP was an action

“which any reasonable person would consider to be so serious or significant that it goes to the root of the contract of employment between the employer and employee.”

Employee claimed losses of €49k but awarded €18k.

So how do we de-risk and still engage?

Tips re Performance Matters:-

- *Prepare for Discussion*
- *Need a jumping off point – last review, major performance error, recent feedback discussion*
- *Needs to be a motivation to engage from the employee side*
- *And needs to be a Plan B from employer side,*
- *Stratigise a Plan B:*
 - *Moving to a Formal PIP*
 - *Who would be involved; What process*
 - *How is it commenced – follow the policy*
- *Draw up a Talk track as to what will be said*
- *Stick to it and take a note of discussion*

So how do we de-risk and still actually engage?

- *We spoke previously re performance issues*
- *Level not where it needs to be*
- *We have a Company PIP there to support*
- *That's the next step*
- *[Explain what's involved]*
- *From where we are now, the level of improvement is quite significant*
- *A PIP is there to provide support*
- *But ultimately a sustained failure here, it can lead to a termination of employment on performance grounds*
- *Right now, I want to pause that and talk to you about maybe a parallel discussion*
- *We could explore if mutual severance terms might be something that could be agreed*
- *If we that runs aground, you'll of course have the PIP available to you to support you*

How do I say it?

- *Written language v How you speak*
- *Need to clearly frame potential exit negotiation as mutual and optional*
- *Can step away and revert to Plan B – Supported PIP*
- *Avoid overt threats*
- *Avoid immediate deadlines; Allow them time and space to consider*
- *Sometimes, might be best to suggest they speak to representative?*
- *Stress potential tax treatment, Termination Payment - Tax Reliefs*
- *Get information ready for tax calculations behind the scenes*
- *Current Value of the Pension Tax Free Lump Sum*
- *Takes time to obtain relevant figures, Send pension figures to Employer only*
- *Stress confidentiality, need to build trust*
- *Do you have an offer worth making? Agreement will need the other party to agree!*

By Alive to Where this Could Go Next?

What issues are currently in play?

- *Employment Equality*
- *Protected Disclosures*
- *Safety, Health & Welfare at Work*
- *Existing Grievance*
- *Disciplinary*
- *Dignity at Work Complaint*
- *Appeals*

Stay away from difficult areas and issues

Don't leave yourself open to "penalisation" claim

Don't involve someone clearly engaged on an existing issue

Can we avoid involving a party who has a role in any later required process

Tips for Employers

- *Avoid reliance on “Without Prejudice” / “Off the Record”*
- *Are clearly Risks attached with taking the shortcut and pushing to an offer*
- *Know the risk and weigh up if the appetite is there to take it*
- *If an offer is rejected you need a Plan B.*
- *So, frame the offer within that context*
- *Allows an off-ramp and an ability to move back into Plan B*
- *Write out a Talk Track, say it aloud, don’t read it aloud!*
- *Be ready with tax treatment figures*
- *Build trust and allow the employee some control on timing*
- *Seek advice – for employer, yes, but for employee it could make sense too*

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**Thank you for your time.
Any questions?**

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