



Protected discussion & settlement agreements

Introduction

In some circumstances, an employer may want to suggest a settlement agreement to end an employment contract. This may be because of concerns relating to the employee's performance, organisational changes, or simply a clash of personalities. Rather than go through a formal process it is often seen as beneficial to start confidential settlement discussions with a view to the employee leaving by way of a settlement agreement.

Usually, the employer will propose a settlement (the financial terms being offered) and the parties will negotiate and agree for it to be formalised by way of a settlement agreement. The employer will provide a draft agreement for the employee's consideration, the latter will then take legal advice on it and once agreed, the parties will sign the agreement.

This Really Useful Guide provides a useful overview of the issues relating to protected discussions and settlement agreements. However, by their nature these situations can be problematic, and it is sensible to take specific legal advice in each case before embarking on negotiations or proposing settlement agreement terms.

Issues concerning settlements can be complex. Whilst this information contains general guidance it is not a substitute for legal advice. Please call the helpline for further information. Some of the forms referred to in this guidance are available in the document centre.

When is it likely to be sensible to initiate a settlement discussion?

Since 2013, it has been easier for employers to initiate settlement conversations – often referred to as a “protected discussion” - with employees with less risk of those conversations being admissible in subsequent tribunal proceedings.

The following are likely to be situations in which a protected discussion should be considered:

- Where employment has ended and there is a risk of claims being brought in the employment tribunal.
- Where employment and active duties continue but the employment relationship has become strained, due to issues around performance, attendance, or conduct.

In either of these situations the employer may decide to initiate a protected discussion with a view to making an offer. If the main terms of settlement have been agreed verbally, the employer will normally give the employee a draft settlement agreement (marked “without prejudice and subject to contract”). The Acas guidance on pre-termination discussions suggests ten days for consideration of the offer. If the employee remains in the workplace, actively carrying out their duties, they should be asked to keep any settlement discussions confidential, including the existence of any proposed agreement.

Possible steps in a settlement discussion (where the employee is still employed)

Step 1: invitation to meeting

The employer invites the employee to a meeting at a mutually convenient time and place. In most cases the employer will not wish to notify the employee in advance that the purpose of the meeting is to discuss settlement. If the employer considers it necessary to give a reason for the meeting, it may be appropriate to refer to the underlying issue which has led the employer to make the offer and indicate that it is an informal discussion of that issue.

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It is equally open to an employee to approach their employer to request a 'protected discussion' or a pre-termination proposal.

Step 2: at the meeting

At the meeting, the employer generally sets out their concerns in a neutral manner and proposes an exit with an agreed settlement package. The employer should provide enough information for the employee to understand what has led to the offer and the potential consequences if no agreement can be made.

It is good practice for the employer to highlight that settlement discussions are likely to be inadmissible in tribunal proceedings and that they will have no bearing on any subsequent performance management or disciplinary procedures if settlement discussions are ultimately unsuccessful.

Step 3: written offer

If the employee agrees to explore the suggestion of settlement, the employer provides a written offer.

Step 4: The settlement agreement

If the employee is interested in proceeding with the settlement, the employer can provide the employee with a settlement agreement documenting the terms, if they have not already done so. The employee will need to take independent legal advice on the implication of entering into the agreement.

If the employee is not interested in exploring settlement, the employer should cease settlement negotiations and seek to tackle the underlying problem.

Acas guidance on conducting settlement discussions

Acas has produced the following guidance and resources:

- A Code of Practice on Settlement Agreements ('the Code') which focuses on the admissibility provisions regarding pre-termination negotiations.
- A guide to settlement discussions to help employers and employees understand when settlement agreements can be negotiated: Settlement Agreements: A Guide (the 'Guide').
- A model settlement agreement contained in the Guide.

The Code

The Code focuses on the admissibility provisions regarding pre-termination negotiations rather than settlement agreements generally. A failure to observe the Code does not of itself make the employer liable for any penalty. However, in the event of a claim any breach of the Code may be relevant.

Pre-termination negotiations

The Code contains relatively little in the way of practical guidance on initiating and conducting settlement agreement negotiations. However, it does give the following useful pointers:

- Examples of what may be considered improper behaviour by the employer e.g applying unreasonable pressure on the employee to sign the agreement.
- It may be helpful if any reasons for the proposal are given when the proposal is made. While the initial proposal may be oral, one of the requirements for a settlement agreement to become legally binding is that the agreement must ultimately be put in writing.
- Parties should be given a reasonable period to consider the proposed settlement agreement.
- The parties may find it helpful to discuss proposals face to face and any such meeting should be at an agreed time and place.
- While not a legal requirement, employers should allow employees to be accompanied at the meeting by a work colleague, trade union official or trade union representative. Allowing the individual to be accompanied is good practice and may help to progress settlement discussions.

Allowing time to consider offers

The Code states that parties should be given a reasonable period (10 days) to consider the proposed settlement agreement. Generally, ten calendar days should be allowed to consider the proposed formal written terms of a settlement agreement and to receive independent advice, unless the parties agree otherwise.

The Code is not intended to set down concrete rules, and that the question of whether the employer has behaved "improperly" will depend on the facts.

Improper behaviour

It is critical that the employer does not engage in "improper behaviour" as this will invalidate the "without prejudice" protection that the law wishes to allow the parties to benefit from when dealing with settlement negotiations.

The following behaviours have been classified as improper:

- No choice was given to the employee and the employer effectively announced that the employee's employment was over.
- The employer put undue pressure on the employee by setting a very short timescale to consider the offer.

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The following are some examples from the Code of what would not usually be considered improper behaviour:

- **Setting out in a neutral manner the reasons that have led to the proposed settlement agreement.**
- **Factually stating the alternatives if agreement cannot be reached, including the possibility of disciplinary action if relevant.**

The Guide

The Guide aims to help employers and employees understand when to use settlement agreements and how they can be negotiated. The Guide includes checklists for employers and employees, a model agreement, and some illustrative examples of how settlement agreements might be used. It also includes a number of useful scenarios and flow charts providing guidance on the admissibility of settlement negotiations in tribunal proceedings and what might amount to improper behaviour.

Annex 5 of the Guide contains a model settlement agreement together with guidance notes on each clause. The model agreement also includes a choice of wording depending on whether the agreement is to be used in England and Wales or Scotland. Use of the model agreement is entirely optional. It will not suit every situation, and changes must be made to fit the circumstances. For further information please contact the helpline.

FAQ's

What happens if it is not possible to reach an agreement with the employee?

If no agreement can be reached, the negotiation will come to an end and the employer will need to continue with the employment relationship. If the issue that led to the negotiation, such as performance, attendance or conduct remains to be dealt with the employer should do this in accordance with any workplace policies.

Does the employee always have to take independent legal advice before signing a settlement Agreement?

Yes. Under the relevant legislation the employee must take advice regarding the terms of the agreement

and the effect of signing it by a "relevant independent adviser". This will normally be a solicitor, who will sign a document called the "adviser's certificate" which is annexed to the settlement agreement.

Can the employee be required to keep the discussions about settlement confidential?

Yes, the standard settlement agreement terms include a clause that requires the employee to maintain confidentiality. It would also be prudent to inform the employee at the outset that s/he must maintain confidentiality from the beginning and that failure to do so would be considered a serious act of misconduct.

What are the main financial elements of a settlement agreement?

The employer will need to pay all contractual entitlements – such as pay to the termination date plus notice and any outstanding holiday pay. In addition, the employer will pay an "ex-gratia" (non-contractual) payment to the employee to compensate the employee for any potential claims that they may have.

What are the tax implications of the payment made under a settlement agreement?

The contractual payments relating to salary or wages, holiday and notice will normally be subject to income tax and National Insurance contributions. The "ex-gratia" element can normally be paid without deduction of tax or National Insurance up to a threshold of £30,000, although advice should always be sought from a suitably qualified accountant.

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