

Key legislation.

AbbeyLegal

Legal Protection Insurance



Protected conversations and without prejudice communications – how to use them

Even the best of working relationships can fall apart. When this occurs, depending on how integral the employee's role is within the business, you may need to reach an amicable departure expediently. A protected conversation, when used at the right time can often assist in bringing about that much needed closure. With good employee relations built on solid employment policies, we hope that you can avoid these situations most of the time.



Protect yourself

It is often possible to have a polite 'protected conversation' about an employee's departure, and that conversation should be inadmissible at an Employment Tribunal if the employee brings an unfair dismissal claim.

A common mistake made by many is that any conversation will be viewed as protected or 'off the record'. As will be seen further along, this is not so.



The problem

When discord arises, a conversation may be a good place to start – that is to say, you may simply agree with your business partner, manager or other member of staff that you should part ways. They may well agree to shake hands and a hastily drafted letter is provided stating that monies will be paid to them in a full and final settlement. Everyone is happy and all is well. But there are pitfalls with this approach: If



this employee brings an unfair dismissal claim, will your well-meaning conversation show that you didn't follow your disciplinary or performance management policies? Or will the employee say that you forced them to agree to leave? Either scenario is not ideal and the full and final settlement letter was void from inception, and is therefore unable to rescue you from the pending litigation.

Abbey Legal Protection

20 Fenchurch Street, London EC3M 3AZ Tel: 0345 350 1099
sales@abbeylegal.com
www.abbeylegal.com

This content is provided by LHS Solicitors LLP (LHS) a division of Abbey Protection Group Limited and can advise on general UK law. LHS is regulated and authorised by the Solicitors Regulation Authority.





The solution

We are firm believers that employers should first look at ways of improving employee relations before taking more drastic measures.

But when this fails, the law provides two methods by which 'off the record' conversations can take place. Which method you use will depend on your circumstances.

If there is an identifiable fair reason as to why you wish to end the relationship, perhaps poor performance or persistent misconduct issues, then in order to avoid a protracted formal procedure to deal with the issue, a without prejudice communication may be a quick fix to dealing with the situation. This conversation and subsequent without prejudice communications are likely to seal a suitably worded settlement agreement.

Sometimes, there is no easily identifiable reason to bring the working relationship to an end, or it may be that the employee has become disengaged but it would take far too long to performance manage the person out of the business. In other instances, a longstanding business partnership has become untenable due to a difference of opinion about the business objectives. In these circumstances, the method to opt for is a protected conversation as provided by s.111A Employment Rights Act 1996. Protected conversations enable parties to enter into pre-termination negotiations, again it is wise to finalise these talks with a settlement agreement. Speak to our Legal Advice Line about how we can help in this regard.

Without prejudice communications can be difficult to apply as you need to wait for an actual identifiable dispute to arise before you can rely on this method. When you first decided to discuss your employee's departure, there was probably no dispute as such.

In order to address this situation, Parliament introduced protected conversations to plug the gap that without prejudice communications were failing to fill.

In the case of *Faithorn Farrell Timms LLP v Bailey*, UKEAT/0025/16/RN, which was handed down on 28 June 2016, this case highlights that in addition to filling a gap left by without prejudice communications, protected conversations have the following additional benefits:

1. If the conversation is protected, not only will the contents of the conversation remain confidential, but so would the fact of the conversation (this was always somewhat of a hazard when relying on without prejudice communications. If the negotiations collapsed and the matter progressed to tribunal, you would run the risk that the fact you were in negotiations would be mentioned in evidence as this fact is not protected under the without prejudice rule).

2. Follow-on discussions within the employer's business are protected: so when the manager discusses the details of the protected conversations with, for example, the HR manager, they are inadmissible. The same rule does not apply to without prejudice communications, the protection under this rule only extends to parties who are having the communication, one of whom would be the employee.
3. Finally, the without prejudice privilege can be waived – if the parties decide that they would like the conversation to be seen by the tribunal or court, they can waive privilege.



Warning

It's advisable to seek advice before you commence any conversations regarding 'off the record' conversations. Careful consideration has to be taken of which is the most appropriate method to use. Using either method incorrectly may lead you unwittingly into a situation where you have now provided your employee with grounds to raise a complaint of constructive unfair dismissal or otherwise.



Final thoughts

It is preferable to take time to find the best people for the job and then foster good employee relations. Not only does that improve productivity, but it reduces the risk of having to siphon precious resources towards combatting claims at an employment tribunal. Our selection of guides and documents should assist you with this.

If relations turn sour, pinpointing the source of the breakdown in the relationship is sometimes not a good use of resources. In that case, trying to engineer a settlement agreement is often the best course of action, provided you use protected conversations and without prejudice methods at the right time.

More information

Our key legislation bulletins are brought to you by the team of experienced solicitors at LHS Solicitors LLP. Here you can receive support for your business legal needs with their fee-paying consultancy services. Their aim is to quote fees that are competitive, fixed and transparent. For advice, email enquiries@lhs-solicitors.com