**How to Have a Protected Conversation with Your Employer**



Has your employer invited you to have a  protected conversation?

The law allows an employer and an employee to have an ‘off-the-record’ conversation in certain circumstances. This is called a protected conversation.

**Some background**

Before 2013, many employers were afraid to have frank conversations with their staff because of the risk of legal proceedings.

Occasionally, an employer would try to have a frank conversation with a member of staff only to find that it backfired – the employee took offence, resigned and claimed constructive dismissal.

The Government proposed that “off the record” conversations be allowed so that “the boss and an employee feel able to sit down together and have a frank conversation – at either’s request” (David Cameron’s speech on 10 November 2011).

In 2013, “protected conversations” were introduced to help both employers and employees resolve disputes with the minimum of risk.

If you or your employer are proposing to [end your employment by way of a settlement agreement](https://www.masonbullock.co.uk/settlement-agreement-end-employment/), law requires that both parties keep the conversation confidential.

This means that what you say can’t be used as evidence in an unfair dismissal claim. Although there are some exceptions, generally the conversation is protected.

**What should you do if your employer asks to have a protected conversation?**

If you’re invited to have a protected conversation with your employer, make sure you prepare in advance. You need as much information as possible.

You may find it helpful to ask questions like:

* why is your employer proposing to terminate your employment?
* how much are you being offered and how is that calculated?
* will you be expected to work your notice period?
* will you be offered a reference?
* what is the alternative if you don’t agree to a settlement agreement?

You’re not under any obligation to accept any proposed settlement agreement. In fact, the law doesn’t allow you to accept it until you’ve taken legal advice on it. The [cost of this legal advice](https://www.masonbullock.co.uk/how-much-is-legal-advice-on-a-settlement-agreement/) is usually paid for by the employer.

Ask your employer to confirm the proposal in writing. This could be a draft settlement agreement or simply a letter or email. This will help you to clarify what is being offered.

**Can you have a protected conversation whilst on Furlough?**

In March 2020, the government introduced the [Coronavirus Job Retention Scheme](https://www.gov.uk/guidance/guidance-and-support-for-employees-during-coronavirus-covid-19).

This enabled employers to place their staff on “furlough leave” if it wasn’t safe for them to attend work and they couldn’t work from home.

The government guidance does not mention protected conversations. However, it does say that a furloughed employee cannot provide services to the employer during furlough.

Although the government guidance does not explicitly refer to having a protected conversation, it is probably allowed, even during furlough leave, provided that both the employer and employee agree.

This is because a protected conversation is unlikely to be viewed as providing a service to the employer. It is a means of exploring the possibility of ending the employment relationship with an agreed settlement. It’s fine for an employer to [offer a settlement agreement to an employee on furlough leave](https://www.masonbullock.co.uk/settlement-agreement-furlough/).

A protected conversation would probably be viewed in a similar way to disciplinary and grievance procedures. ACAS has confirmed that taking part in a disciplinary or grievance procedures whilst on furlough would  not breach the rules of the scheme, although [their guidance](https://www.acas.org.uk/disciplinary-grievance-procedures-during-coronavirus) does not mention protected conversations.

**Can you initiate a protected conversation yourself?**

Although a protected conversation is usually initiated by the employer, an employee can also request one, provided that it is with a view to agreeing a settlement agreement.

Ask your employer if they’re willing to have an off the record conversation. Let them know that the details of the conversation should be kept confidential because it’s with a view to reaching a settlement agreement.

Your staff handbook may contain more information about how your employer handles protected conversations but if it doesn’t, you could just send an email along the following lines:

*Dear [name]*

*I would like to have a meeting about the possibility of bringing my employment to and end by way of a settlement agreement.*

*I understand that, under section 111A of the Employment Rights Act 1996, this meeting should be conducted by way of a protected conversation.*

*Please could you let me know a convenient time.*

*Regards*

If your employer isn’t familiar with the principle of protected conversations, you may want to refer them to the [ACAS Guide to Settlement Agreements](http://www.acas.org.uk/media/pdf/o/a/Settlement_agreements_%28the_Acas_Guide%29JULY2013.pdf), which gives them all the information they need.

The timing of your request for a protected conversation may make a big difference to your chances of getting a decent settlement.

Put yourself in your employer’s shoes. They don’t want the hassle of going through a formal process, such as a disciplinary or [redundancy procedure](https://www.masonbullock.co.uk/redundancy-fair/). If you ask for a protected conversation at an early stage in the procedure, your employer may be more inclined to agree a settlement.

**Do you have the right to have a companion with you to witness the protected conversation?**

There is no legal right to be accompanied at a protected conversation. Unlike disciplinary or grievance hearings, you can’t insist that a colleague comes with you to the meeting.

However, it is good employment practice for the employer to allow the employee to be accompanied. Many employers have a policy on protected conversations that allows staff to bring a companion.

We recommend that you should at least ask to be accompanied at the meeting. However, if your employer won’t allow it, then you should attend alone if you feel able to.

**Exploring a Settlement Agreement**

At the meeting, you could propose a settlement agreement yourself or you could ask your employer to make an offer.

Although the most important aspect of a settlement agreement is usually the financial amount, you should consider non-monetary aspects such as:

* a detailed reference
* outplacement support (professional help with finding another job)
* release from anything in your employment contract that restricts you after the end of your employment

**Negotiation tactics**

There are three approaches to negotiating a settlement agreement (and we usually recommend the third wherever possible):

**1. Good will**

If you have a good relationship with your employer, you may be able to negotiate a better settlement, simply by being nice.

Explain to your employer how grateful you are for your job, how difficult you will find it to leave and the financial difficulties you may experience as a result.

Ask your employer if they’d be willing to offer you a higher payment in recognition of your contribution to the business over the time you’ve been there.

**2. Threaten legal proceedings**

Sometimes, you have to spell out to your employer the fact that you could take them to an employment tribunal.

If you were to do so, you may be able to claim significant compensation from them. It’s in their interests to settle the dispute in order to avoid:

* the legal costs of defending a claim
* the potential for a judge to order them to pay a much higher award if the dispute goes to a hearing
* bad publicity

This approach is more aggressive but, with some employers, it’s necessary.

Although you may not want to bring employment tribunal proceedings, it’s important that you [consider what a claim would be worth](https://www.masonbullock.co.uk/settlement-agreement-how-much/) because it affects the amount of compensation you should expect.

To find out why a settlement agreement is usually preferable to a tribunal claim, [click here](https://www.masonbullock.co.uk/settlement-agreement-beats-employment-tribunal-claim/).

**3. A mixture of good will *and* threatening legal proceedings**

If you plan the negotiation carefully, you may be able to have the benefit of both approaches.

The trick is to make your lawyer out to be the bad guy. Get some legal advice on how much a potential claim is worth and then say something like this:

*“My solicitor advises me that I could take you to an Employment Tribunal. I would prefer to avoid that if possible but I think the amount you offer me should reflect the fact that I could claim significant compensation”*

This kind of approach may enable you both to maintain good will at the same time as making your employer aware of the risk of legal proceedings.

For more tips on how to negotiate a settlement agreement, read [“9 Steps to Negotiating a Better Settlement Agreement”](https://www.masonbullock.co.uk/negotiate-settlement-agreement/).

**What happens next?**

Your employer should give you a reasonable period of time to consider any proposed settlement agreement. ACAS recommends 10 days, although employers rarely give this long in practice.

You will need to get [legal advice on any proposed settlement agreement](https://www.masonbullock.co.uk/legal-advice/settlement-agreements/). Otherwise, it won’t be legally binding.

We recommend that you speak to a solicitor at an early stage. There may well be scope for negotiating a better settlement agreement.

Generally, **unacceptable behaviour** can be defined as **behaviour** that creates, or has the potential to create, risk to the business or the health and safety of employees. It can include: Bullying. Harassment. ... Aggressive/abusive **behaviour**