



1. Introduction

Occasionally there may be circumstances where it is unlikely the identified capability issue(s) will be resolved despite the best intentions of all concerned. Under these circumstances, it may be appropriate for discussions to take place between you and the employee about alternative options and may involve a 'protected conversation' with that individual.

2. What is a Protected Conversation?

Protected conversations aim to make it easier for employers and employees to have open and risk-free discussion about possible termination of employment when things are not working out.

Pre-termination negotiations are confidential and are not admissible ie cannot be referred to in any subsequent unfair dismissal claim, intended so that employers and employees will not be permitted to refer in a court or Employment Tribunal to the pre-termination negotiations, even if there is no pre-existing dispute between the parties. They can therefore talk freely about the reasons for wanting to end employment without risk of a claim.

3. Limitations of Protected Conversations

It only applies in ordinary unfair dismissal claims and will not apply to claims related to pregnancy, whistleblowing, union membership, asserting a statutory right or discrimination.

If 'anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour' then evidence is admissible only 'to the extent that the Tribunal considers just'.¹

Examples of 'Improper behaviour'

- all forms of bullying, intimidation and harassment, including the use of offensive words or aggressive behaviour
- all forms of victimisation and discrimination
- physical assault or threats of physical assault, or other criminal or wrongful behaviour
- putting 'undue pressure' on an individual

Examples of 'undue pressure'

- Not giving the employee a minimum of 10 calendar days to consider the offer;
- An employer reducing the value of offer over the course of the 10 days;
- An employer saying dismissal is inevitable
- An employee threatening to undermine the University's public reputation

What is not '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 or the employee having to leave on less favourable terms
- not agreeing to pay for legal advice
- refusing to provide a reference

¹ <http://www.acas.org.uk/media/pdf/j/8/Acas-Code-of-Practice-on-Settlement-Agreements.pdf>



4. Having a Protected Conversation

If consideration is being given to having a protected conversation then you should speak to the Human Resources Employment Relations Team beforehand.

5. Additional Web Resources

- [HR Employment Relations Team](#)
- [Performance at work](#)
- [Professional Development](#)