



What are protected or 'without prejudice' conversations?

15 July 2021



Introductions

Presenters



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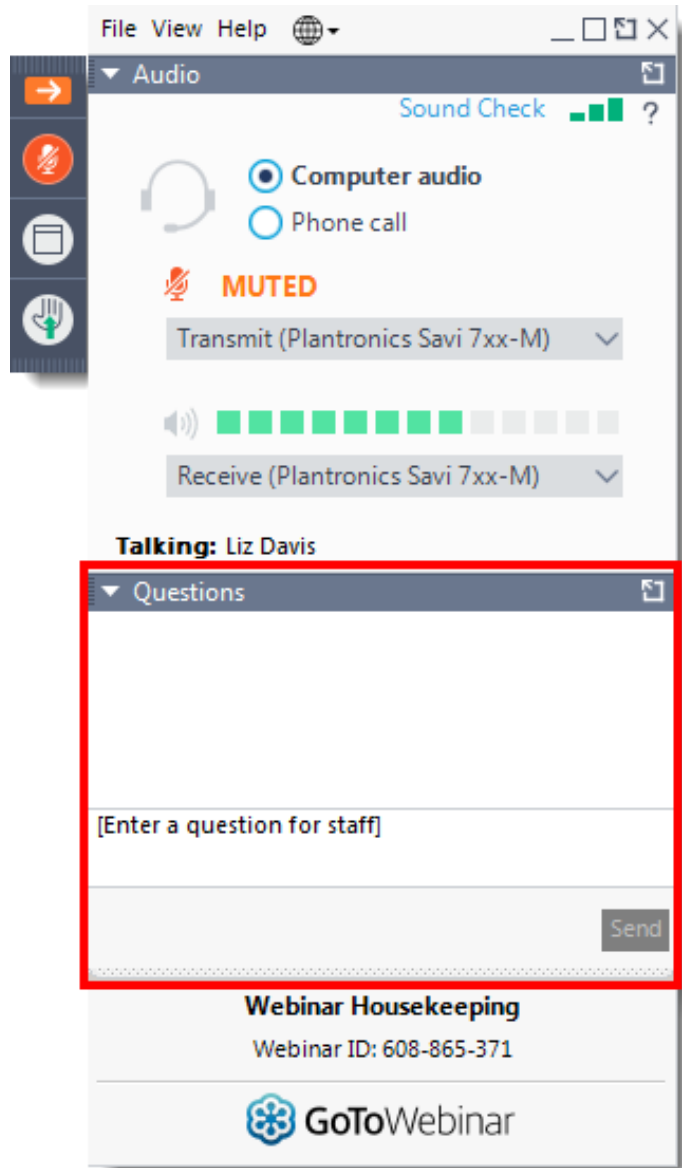
A group of diverse professionals are seated in a modern office environment, likely attending a meeting or training session. In the center, a man with a beard and glasses, wearing a grey cardigan, has his right hand raised high, indicating he wants to ask a question or make a point. To his left, a woman with long dark hair is looking towards him. Behind them, other participants are visible, some looking at their devices or notebooks. The background features large windows with green plants and a bookshelf. The overall atmosphere is professional and collaborative.

How to ask questions





GoToWebinar Housekeeping: Time for Questions



Your Participation

- Please continue to submit your text questions and comments using the Questions panel





What are protected or 'without prejudice' conversations?

15 July 2021

Agenda

- **Ending employment via a Settlement Agreement**
- Without Prejudice
- Protected Conversations
- Why are they used?
- Which conversation and when?
- Sources of further help



Ending Employment via a Settlement

Redundancy

Conduct

Capability

Some other
substantial reason

Contravention of a
duty or restriction
imposed under
statute

Resignation

Settlement
Agreement

Ending Employment via a Settlement

- A legally binding document
- Sets out agreed terms in exchange for the employee waiving their rights to take the matter to a tribunal
- Can be used for:
 - unfair dismissal claims
 - settling workplace disputes
 - Settling issues not resulting in the termination of employment.
- Two ways in which achieved:
 1. Without prejudice conversation
 2. Protected conversation

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Without Prejudice

- What was the old 'compromise agreement'
- Communications protected by without prejudice privilege:
 - inadmissible in court
 - Cannot be made the subject of a disclosure order in proceedings
- Requires a dispute
- Conversation must be held for the genuine purpose of attempting to resolve the dispute and seek a compromise

Without Prejudice

- No limitations associated so the communications can cover claims of:
 - Discrimination
 - Automatic unfair dismissal
 - Unlawful detriment
 - Breach of contract
 - Health and safety matters
- TUPE claims are not protected

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Protected Conversation

- Pre Termination Agreement
- 2013 introduced section 111a into the Employment Rights Act
- Existence and content are non disclosable at tribunal
- An existing dispute is not needed but must have agreement from the employee to enter the protected conversation

Protected Conversations

- Limitations on this type of conversation
- Narrow definition restricting to unfair dismissal cases
- When conversations go outside this narrow definition
 - the contents become unprotected and
 - can be admitted as evidence in a tribunal claim
- Can be initiated by employee or employer
- The conversation cannot be improper

Protected Conversations

- Protection can be lost where there is improper behaviour
- What is 'improper' is determined by the Tribunal on the circumstances of the case:
 - Employer puts undue pressure on the employee to consider any settlement
 - Employee is told to enter into a settlement agreement or be dismissed
 - All forms of harassment, bullying and intimidation

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Why are they used?

Data provided by the Ministry of Justice for the 2019/20 financial year:

	Maximum Award	Median Award	Average Award
Race Discrimination	£30,330	£8,040	£9,801
Sex Discrimination	£73,619	£14,073	£17,420
Disability Discrimination	£265,719	£13,000	£27,043
Age Discrimination	£243,636	£11,791	£38,794
Sexual Orientation Discrimination	£96,645	£27,936	£9,245

Why are they used?

- Cost effective way to ending the relationship
- Short cut a process beneficial for the organisation
- May be more appropriate, less stressful for the employee than to go through a formal process
- Provide protection from future employment tribunal claims

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Which conversation and when?

Scenario 1:

You employ a senior manager who is under performing and you do not have the confidence that it will improve. Rather than a lengthy drawn out process, which could become challenging and cause tensions in the relationship you decide to hold a...

Without prejudice conversation

Or

Protected conversation

Which conversation and when?

Scenario 2:

A discussion needs to take place with an employee who has been on long term sick for 10 months. The business has genuine concerns that they will not be able to return. You decide to enter a...

Without prejudice conversation

Or

Protected conversation

Which conversation and when?

Scenario 3:

A female employee has raised a grievance about how they have been treated compared to a male colleague and is refusing to return to work after a period of stress related absence. She has asked to leave employment under a settlement agreement.

You accept her request and hold a...

Without prejudice conversation

Or

Protected conversation

Which conversation and when?

Scenario 4:

You employ a sales manager with 4 years service but because of the pandemic, you need to restructure the business and fundamentally change the role. You want to avoid an upsetting process and would like the matter to be dealt with as quickly as possible for the employee to save them going through a lengthy and stressful process. You opt to hold a...

Without prejudice conversation

Or

Protected conversation

Which conversation and when?

Scenario 5:

Your employee raises the question of whether a settlement is possible during their disciplinary process.

Without prejudice conversation

Or

Protected conversation

Which conversation and when?

Scenario 6:

You want to terminate the employment contract but there is not sufficient reason for a fair dismissal so you decide to hold a...

Without prejudice conversation

Or

Protected conversation

Which conversation and when?

Without Prejudice	Protected Conversation
Dispute required	Agreement required from the employee to enter the discussion
Genuine purpose of attempting to seek compromise	Cannot be improper
No limitations	Limitations – restricted to ordinary unfair dismissal (2 + years service)
Can cover discrimination, breach of contract, H&S, automatic unfair dismissal (no qualifying service)	

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Sources of Help

1. Knowledge Base:

- Template settlement agreement & cover letter
- Articles on ending employment

2. Acas [Code of Practice on Settlement Agreements](#)





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HR, Management & Development – Online

Communication Skills	16 September, Thursday 9.30am – 1pm
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Managing Poor Performance	30 September, Thursday 9.30am – 1pm
Effective Appraisal Skills	19 October, Tuesday 9.30am – 1pm
Employment Law for Line Managers	21 October, Tuesday 9.30am – 1pm
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Fire Safety, Fire Marshall	11 October, Monday 10am – 4.30pm

Kettering Park Hotel, Kettering, Northamptonshire NN15 6XT

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MATTERS

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