acas working for everyone

Confidentiality

When discussing a settlement agreement, employers and workers should be able to have open and honest conversations.

Settlement discussions are sometimes called 'protected conversations'. These discussions usually cannot be used as evidence in an employment tribunal or another court.

An employer and worker can also agree to keep specific things confidential in a confidentiality clause.

Confidentiality clauses

Settlement agreements often include a 'confidentiality clause'. This is also called a non-disclosure agreement (NDA).

Confidentiality clauses are voluntary.

As part of a confidentiality clause, an employer and worker can agree to:

- keep the fact a settlement agreement has been made confidential
- not share the details of the agreement with anyone else
- keep other specific information confidential

Agreements usually allow for some details to be shared with close family and professional advisers.

The wording of a confidentiality clause should make it clear:

- what details can be shared
- who the details can be shared with

Employers cannot use a confidentiality clause to stop a worker:

- whistleblowing
- reporting a crime to the police
- sharing information about a crime to get advice and support if they're a victim of crime in England or Wales

> Important: From 6 April 2026, sexual harassment will become a 'qualifying disclosure' under whistleblowing law. This means whistleblowers making a sexual harassment disclosure will be protected from detriment and unfair dismissal.

English universities and other higher education providers cannot use a confidentiality clause to stop workers disclosing:

- sexual misconduct, abuse or harassment
- other bullying or harassment

Our settlement agreement template includes an example of a confidentiality clause.

Using settlement agreement discussions as evidence

By law, the confidentiality of settlement discussions is covered by:

- the 'without prejudice' legal principle
- section 111A of the Employment Rights Act 1996

This means that settlement discussions usually cannot be used as evidence in an employment tribunal or another court.

In some specific circumstances, discussions can be shared as evidence if there's been:

- 'unambiguous impropriety' – when the 'without prejudice' principle applies
- 'improper behaviour' – when section 111A of the Employment Rights Act 1996 applies

Without prejudice

Some settlement discussions are legally protected under the 'without prejudice' principle.

This means they cannot be used as evidence in an employment tribunal or another court.

For settlement discussions to be protected under 'without prejudice', there must be:

- an 'existing dispute'
- a genuine attempt to settle that dispute
- no 'unambiguous impropriety' during the settlement discussions

The without prejudice principle can apply to any type of legal claim, for example:

- unfair dismissal
- breach of contract
- discrimination
- wages

What counts as an existing dispute

A situation counts as an 'existing dispute' if at the time of the settlement discussions, the employer or worker either:

- has made a legal claim
- might reasonably consider making a claim

For example, it's likely to be an existing dispute if:

- someone makes an unfair dismissal claim against their employer after being dismissed
- a worker is considering making a claim for discrimination while they continue working for their employer

The type of claim someone can make to an employment tribunal or another court depends on their employment status.

The term 'existing dispute' does not cover every issue between an employer and a worker.

For example, it's unlikely to be an existing dispute if:

- a worker raises a grievance but is not considering a legal claim
- an employer offers a settlement agreement to end employment without warning

If it's not an existing dispute, the discussions would not be protected under the 'without prejudice' principle. But they might be protected under section 111A of the Employment Rights Act.

Unambiguous impropriety

If there is 'unambiguous impropriety' during settlement discussions, they might be allowed as evidence at an employment tribunal or another court.

Unambiguous impropriety means serious wrongdoing.

Unambiguous impropriety might include:

- blackmail
- discrimination
- fraud
- intimidation
- physical violence
- threats

Simply having settlement discussions does not count as 'unambiguous impropriety'.

For example, if an employer offers a settlement agreement but the worker prefers to settle the dispute in a different way, it's unlikely to be unambiguous impropriety.

If someone makes a legal claim to an employment tribunal or another court, the judge will decide what counts as unambiguous impropriety.

Section 111A of the Employment Rights Act

Some settlement discussions are protected under section 111A of the Employment Rights Act 1996.

This means they cannot be used as evidence in an employment tribunal or another court.

Section 111A only applies to:

- 'pre-termination negotiations' – these are the settlement discussions that end an employment relationship
- some claims for constructive dismissal and unfair dismissal

There does not need to be an existing dispute for section 111A to apply.

Legal claims covered by section 111A

Section 111A applies to claims for constructive dismissal and unfair dismissal, except if it's an 'automatically' unfair reason.

Automatically unfair reasons include:

- asking for a legal right – for example to be paid the National Minimum Wage
- carrying out trade union activities
- whistleblowing

Only someone with the legal status of employee is eligible to make a claim for unfair dismissal or constructive dismissal. This includes former employees.

Someone is not likely to be an employee if they're:

- an agency worker
- a casual worker
- on a zero-hours contract

If an employee is offered a settlement agreement to end their employment, they cannot use the settlement offer to make a constructive dismissal claim.

Find more advice on:

- constructive dismissal
- unfair dismissal, including automatically unfair reasons

Improper behaviour

If there's been 'improper behaviour' during settlement discussions, they could be used as evidence in an employment tribunal or another court.

Improper behaviour during the settlement discussions could include:

- harassment, bullying and intimidation – including offensive words or aggressive behaviour
- physical assault, threats of physical assault and other criminal behaviour
- victimisation
- discrimination

Improper behaviour also includes putting undue pressure on someone, for example:

- not allowing a reasonable time to consider a settlement agreement offer
- telling someone before a disciplinary procedure that they'll be dismissed if they turn down a settlement offer
- threatening to harm an organisation's reputation if the employer does not sign an agreement

What does not count as improper behaviour

Actions which are not improper behaviour include:

- setting out the reasons for suggesting a settlement agreement
- stating likely alternatives if a settlement is not agreed – including disciplinary action and possible dismissal
- factually stating that if an offer is refused and disciplinary action results in a dismissal, they will not be allowed to leave on the terms offered
- not agreeing to provide a reference
- not paying for the cost of independent advice
- encouraging someone to reconsider an offer after turning down

If someone makes a claim to an employment tribunal or another court, the judge will decide if there has been improper behaviour.

Example of improper behaviour

Kai has worked in a call centre for 3 years. When the organisation upgrades their systems, they struggle to adapt to the new technology. Kai's performance starts to be affected, but their manager tells them their performance was still satisfactory and they'd soon adapt.

When a new manager reviews everyone's performance, they tell Kai to improve or they'll be dismissed. They are shocked when the manager offers them a settlement agreement in an aggressive manner, saying "take it or leave it". Kai is given the weekend to consider the offer. When Kai turns down the offer, their manager starts a disciplinary procedure and then dismisses them.

Kai makes a claim to an employment tribunal for unfair dismissal. They want to use the manager's comments when they made the offer, as evidence to support their claim.

In this situation, it's likely there was improper behaviour under section 111A because Kai's manager:

- was aggressive and intimidating
- did not give a reasonable period of time to consider the offer
- threatened to dismiss Kai before following disciplinary procedures

It's likely that Kai would be allowed to use the manager's comments as evidence at an employment tribunal.

Example of where there's no improper behaviour

Chris has worked in a shop for 5 years. Recently they have not been turning up for work on time. Chris's manager discusses their timekeeping and rearranges their shift pattern to help them. Chris continues to turn up late and is given a first written warning.

Their poor timekeeping is affecting the organisation. Their manager suggests Chris leave their job in return for a payment and an agreed reference. Chris turns down the offer.

Chris continues to be late. So their manager follows the company disciplinary procedure. This leads to a final warning and then dismissal.

If Chris makes an unfair dismissal claim, it's likely they cannot use the settlement discussions as evidence at an employment tribunal or another court.

This is because:

- pre-termination discussions for unfair dismissal claims are protected under Section 111A
- there was no improper behaviour

When section 111A and without prejudice principle both apply

Settlement discussions will be protected under both section 111A and without prejudice if all of the following apply:

- it relates to an existing dispute
- there's a claim for unfair dismissal or constructive dismissal
- there was no unambiguous impropriety

If there are multiple claims

Section 111A only applies to unfair dismissal and constructive dismissal claims.

It does not apply to other claims, for example:

- discrimination
- wrongful dismissal – read about unfair dismissal, including wrongful dismissal
- unlawful deduction of wages

Example of multiple claims

Someone makes a claim for both unfair dismissal and discrimination where there's no existing dispute.

The settlement discussions relating to the unfair dismissal claim are protected under section 111A. So they cannot be used as evidence.

The discussions relating to the discrimination claim are not protected under the 'without prejudice' principle. This is because there's no existing dispute.

So in this situation, they might be able to use settlement discussions as evidence for the discrimination claim.

Discrimination when using settlement agreements

Discrimination law (Equality Act 2010) protects people against discrimination at work. It could be discrimination if someone is treated 'less favourably' than someone else, because of a 'protected characteristic'.

For example, offering a settlement agreement to:

- a worker because they tell their employer they have a disability
- an older worker to encourage them to retire

If a worker makes a discrimination claim at an employment tribunal and there's an existing dispute, they cannot use the settlement discussions as evidence. This is because the discussions are protected under the 'without prejudice' principle.

If there's no existing dispute about the discrimination at the time of offering the settlement agreement, the discussions would not be protected. This means they can be used as evidence.

By law, if there's discrimination, including victimisation, during settlement discussions, this could count as:

- 'improper behaviour' under section 111A of the Employment Rights Act
- 'unambiguous impropriety' under the without prejudice principle

If there's discrimination during settlement discussions, they can be used as evidence in an employment tribunal or another court.

Example of discrimination in offering a settlement agreement

Mo has worked on a production line for 7 years. Their mobility is being affected by arthritis. They discuss it with their GP who suggests a reasonable adjustment at work to allow them to sit from time to time.

Their manager calls a meeting and says "You know you can't carry on working here with mobility issues. It's just not going to work." The manager offers them a settlement agreement to end employment.

When Mo turns down the offer, their manager starts a performance improvement process. This is followed by a disciplinary procedure and Mo is dismissed.

Mo feels discriminated against and makes an unfair dismissal claim and a disability discrimination claim. Mo wants to use their manager's comments during the settlement agreement meeting in both claims.

For the unfair dismissal claim, the settlement discussions would usually be protected under section 111A. But because the manager's comments count as 'improper behaviour', it's likely Mo could use the discussions.

For the discrimination claim, it's likely that Mo can use the manager's comments because they are not protected under:

- section 111A – section 111A does not apply to discrimination claims

- without prejudice – without prejudice does not apply if there's no existing dispute at the time of the settlement discussions

Reasonable adjustments

Employers must make reasonable adjustments for disabled workers.

For example, if someone needs a sign language interpreter, they might need more than 10 days to get independent advice.

Preventing discrimination

It's good practice for employers to review their use of settlement agreements. They should make sure that their use of settlement agreements does not discriminate against anyone who has a protected characteristic.

Example of checking for discrimination

Dan is an HR Director for 10 retail outlets across Britain. They become aware that a number of settlement agreements have been made in the past year.

Dan decides to do an equality impact review of the use of settlement agreements. They notice they're being used in relation to workers aged 65 and over.

Offering settlement agreements as a default to encourage older workers to retire might be discrimination.

Following the review, Dan arranges equality awareness training for all managers.

Find out more about preventing discrimination