

UNIVERSITY OF ABERDEEN

GUIDANCE

USE OF PROTECTED CONVERSATIONS, SETTLEMENT AGREEMENTS AND NON-DISCLOSURE AGREEMENTS

1. Introduction

1.1 The University is committed to ensuring that in the limited circumstances where protected conversations, settlement agreements and non-disclosure agreements are used that an approach based on good practice as well as compliance with the law is adopted.

1.2 Definitions:

Settlement Agreement - a legally binding agreement between an employer and an employee under which the employee agrees to give up the right to bring an employment tribunal or court claim relating to the matters covered by the agreement, usually in return for financial compensation.

Non-Disclosure Agreement (NDA) – contracts where one party agrees not to disclose certain information. Please refer to further information below concerning their limited use by the University.

2. Protected Conversations

2.1 Section 111A of the Employment Rights Act introduced protected conversations which allow employers and employees to speak in an 'off the record' conversation with a view to agreeing the termination of an employee's contract of employment through a settlement agreement. The pre-termination conversation and terms of the settlement are protected in so far as they cannot be used in any subsequent employment tribunal claim for unfair dismissal other than where it is deemed that there has been 'improper behaviour'. Examples of improper behaviour would include: harassment, bullying and intimidation; discrimination, victimisation and putting undue pressure on a party (for example, an employer stating before any form of disciplinary process has begun that if the settlement agreement proposed is rejected then the employee would be dismissed). Guidance suggests further examples of inappropriate behaviour would be:

- Not giving an employee a minimum of 10 calendar days to consider an offer of a settlement agreement;
- 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 organisation's public reputation

3. Settlement Agreements

Settlement agreements are legally binding contracts which can be used to end a contract of employment on agreed terms and may be the outcome of a protected conversation.

The Advisory, Conciliation and Arbitration Service (ACAS) created a statutory Code of Practice on Settlement Agreements in 2013 and updated it in 2018¹. In conjunction with this,

¹ http://www.acas.org.uk/media/pdf/f/k/11287_CoP4_Settlement_Agreements_v1_0_Accessible.pdf

ACAS also published a non-statutory guide² which provides general best practice guidance on the use of protected conversations and settlement agreements.

Severance payments, proposed as part of any settlement agreement, will be in accordance with the University's Severance Policy (link to be inserted).

4. Non-Disclosure Agreements (NDA) as part of Settlement Agreements

NDAs may be used appropriately as part of settlement agreements. Thus, clauses may be included in a settlement agreement requiring a member of staff not to speak about events that happened during the employment, the reasons for termination or the terms of the settlement. Such NDAs may also contain non-disparagement clauses whereby both parties agree not to make derogatory statements about each other.

Inappropriate use of NDAs would include improper 'gagging' of staff.

5. The University's approach

The University is committed to going beyond its legal obligations by following the good practice guidance developed by ACAS (referred to above). Thus, we will adopt the approach and practices outlined below:

- Staff will be provided with notice of any meeting where a protected conversation will take place and will be afforded the right to bring a companion (trade union representative or a work colleague);
- In order to reduce the risk of an offer appearing 'out of the blue':
 - Where concerns relate to capability or conduct, staff will be aware of such concerns, as a minimum informally;
 - Where matters relate to consultation on avoidance of redundancy, collective consultation and individual consultation will have taken place prior to any meeting involving a protected conversation as an alternative to the consultation on avoidance of redundancy procedure being followed;
- Clarity will be given that 'protected' means that any matters discussed would be off the record and as such would not be admissible should there be any legal proceedings;
- It will be emphasised that it is entirely up to the member of staff whether or not they wish to enter into such a discussion and if they ever wish to withdraw from such discussions they can, in which case the alternative process will be followed;
- The key points of the settlement offer will be provided in writing;
- Clarity will be given regarding the settlement agreement should a member of staff agree to proceed, including the requirement to seek independent legal advice and the contribution that the University will make towards legal fees (up to £350 plus VAT). Clarity will also be given that the member of staff is entitled to up to 10 days to consider the settlement agreement and to receive advice from a legal adviser of their choice (including a union representative);
- Further meetings to discuss any settlement offer will be arranged as required where the member of staff will be provided with the right to be accompanied by either a colleague or a trade union representative;
- If the member of staff does not want to consider the offer formally, the protected conversation discussion will be closed and the member of staff advised that consideration will be given to the way forward – this will be the alternative process

² http://www.acas.org.uk/media/pdf/2/f/Settlement_agreements.pdf

which has either commenced already or will now commence (consultation on avoidance of redundancy, capability, disciplinary);

- An annual review of the use of protected conversations/settlement agreements will be undertaken by Human Resources to ensure there is no unintended impact on employees with protected characteristics.
- NDAs will not generally be incorporated into settlement agreements other than as already provided for in the University's template settlement agreement.
- NDAs do not prevent an employee from giving evidence in a court of law or responding to questions by the relevant authorities, where criminal activity is suspected.

6. Protected conversations initiated by staff

Legislation also provides for a member of staff to request a protected conversation, provided that it is with a view to agreeing a settlement agreement.

In such circumstances, the member of staff should ask their line manager and Human Resources if they are willing to have an off the record conversation and confirm the details of the conversation should be kept confidential as it is with a view to reaching a settlement agreement.

At the meeting, the member of staff could propose a settlement agreement or ask the University to make an offer.

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

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

Thereafter, the processes outlined above will be followed.

7. Further Information

If you require further information about anything contained in this guidance please contact the HR Partner for your school/section.

Date agreed: February 2020

Date for Review: February 2022