

Settlement Agreement Jargon Buster

Your guide to the jargon used in our article [‘Your guide to Settlement Agreements’](#).

What does without prejudice mean?

If something is said in a discussion or correspondence which is ‘without prejudice’ it cannot be used in a court or tribunal as evidence. The ‘without prejudice’ rule is designed to allow genuine attempts to settle a dispute. Admissions may be made during settlement discussions or correspondence by the parties in the knowledge that, because they took place in a without prejudice discussion, they generally cannot be used against them in evidence at a court or tribunal should the attempts at settlement fail and a claim like unfair dismissal be brought.

What is a protected conversation?

Protected conversations are similar to the ‘without prejudice’ rule and allow parties to air certain views or make certain concessions during settlement discussions. However, there are some important differences. For example:

- The without prejudice rule generally only applies to a live dispute between the parties – a conversation cannot come ‘out of the blue’ and be protected under the without prejudice rule, whereas a protected conversation can be initiated (by either party) ‘out of the blue’ without there being a live dispute.
- A protected conversation must be a conversation in which potential termination of employment is being proposed, whereas a without prejudice conversation can include other methods of resolution without termination of employment necessarily being considered.
- The protections in a protected conversation only apply to an unfair dismissal claim – whatever is said during that conversation could still be part of evidence in Tribunal if a discrimination claim (for example) is lodged, whereas, if the without prejudice rule applies, the protection can apply to a number of different types of claim.

Protected conversations are often used at the early stages of a performance concern being spotted in order to float a potential alternative to a formal performance management process. At that early stage there is often no live dispute but employers might, but for the protections offered in a protected conversation, be reluctant to put their cards on the table and propose an agreed departure. Employers can have a frank conversation but with reduced risk where it is a protected conversation.

What does subject to contract mean?

The use of the term is to emphasise that an offer or other things that have been said or written as part of negotiations is only provisional at that stage.

The phrase is helpful to show that parties have not yet reached binding agreement and are still in the process of negotiation or finalising what might have been agreed in principle.

However, the phrase is not fool proof. Whether a contract has formed will depend on the words being used and by parties' conduct.

In the context of a settlement agreement, a binding contract will usually be formed once it is in writing and signed by both parties, but most Employment Tribunal claims will only be waived if all the requirements have been met – for these, see above: What is required for a settlement agreement?

Are there any exceptions for without prejudice or protected conversations?

Yes. There are various exceptions including, but not limited to, evidence:

- Whether a settlement agreement has been concluded
- Misrepresentation, fraud, undue influence, perjury, blackmail or other unambiguous impropriety (such as acting in a way that is discriminatory)
- To explain delay or apparent acceptance of wrongdoing by an individual's action/inaction
- For an application for recovery of the expenses involved in a claim.

What is a COT3?

This is a form from [Acas](#) that settles a claim following conciliation by an Acas conciliation officer.

Wording is included in the COT3 form that sets out an agreement between parties to settle a claim. The form of words is usually much simpler than a settlement agreement.

What is an adviser's certificate?

The adviser's certificate is not obligatory but it is very commonly used in order to have the adviser separately confirm that the employee has received legal advice.

An adviser's certificate is the part of a settlement agreement that the employee's adviser completes to confirm that they have advised the employee on the terms of the agreement and the effect of the agreement on the employee's rights to pursue matters relating to the agreement in a court or tribunal. An adviser certificate will also normally state that there was insurance or indemnity in place covering the risk of a claim from the employee arising as a consequence of any advice given by the adviser.

What is garden leave?

This term describes a period when an employee is asked to stay at home rather than at the place of work, but is still employed, paid and has to comply with all the remaining terms of their employment. The period usually starts when the employee has been given notice that their employment is to end. The period is designed to prevent them from having further access to trade secrets, access to key clients, key staff or sensitive information. Sometimes employees are asked to sign a settlement agreement at the start of 'garden leave' and again at the end of it when the employment comes to an end to ensure that the employer is protected for the whole period. In other instances, the termination date may, by agreement, be brought forward so there is no need for 'garden leave'.

Take me back to ['Your guide to settlement agreements'](#) article.