



The Law Society

Ending the Employment Relationship

Response to the Department for Business, Innovation and
Skills consultation

November 2012



The Law Society

The Law Society is the representative body for more than 140,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

This response has been prepared by the Society's Employment Law Committee ('the Committee'). The Committee is made up of senior and specialist employment lawyers from across England and Wales. Committee members provide advice and representation to employers and employees through practice in City and regional firms, local government, industry, trade unions and law centres. Some Committee members are fee-paid employment judges.

Our interest in employment law and practice is to secure 'good law making', to provide clarity for employers and employees, and to avoid possible unintended consequences. We offer our expertise and experience to help government to shape and tailor its policies accordingly.

Introduction

Compromise agreements, or as they are now to be known, settlement agreements are commonly used by small, medium and large organisations to avert litigation following the end of the employment relationship. They are used in a variety of circumstances such as voluntary redundancy, agreed retirement, and where there has been disciplinary proceedings. There are obvious benefits to the employer and employee in avoiding a protracted legal dispute and both parties can more or less negotiate the outcome they want.

The government appears to want to encourage more employers to use settlement agreements as a way of resolving and avoiding potential disputes. However, negotiating the end of the employment relationship is complicated. It is rare that 'one size fits all', so the use of standardised 'agreements' may lead to unforeseen consequences. The Society is concerned that employers will use the draft templates and revise them where they see fit without getting proper advice. Without proper advice, employers could make themselves liable to future employment tribunal claims if they do not revise the agreements in accordance with the law.

We are also concerned that applying the idea of a 'protected conversation' to negotiating a settlement agreement is risky. Employers may misunderstand the consequences of mishandling such a conversation which could result in them facing litigation.

While a statutory code of practice will go some way in providing employers with the information they need to safely offer their employees a settlement agreement, we would highlight the need for employers to seek independent advice. A statutory code of practice does not create obligations on the employer. It is relevant only as a benchmark for behaviour when considering whether a specific right has been breached. We presume that the specific right is 'ordinary' unfair dismissal since the proposed s.111A(3) Employment Rights Act 1996 disapplies the protection, 'in relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour.' This highlights the vulnerability of employers to litigation if settlement agreements are not handled in the right way.

The Law Society is opposed to the introduction of a cap on the compensatory award for unfair dismissal cases which will impact on a much broader group of claimants than government intends. The cap will prevent a substantial number of claimants who

have been unfairly dismissed from recovering their losses from the respondent. This is not mirrored in other jurisdictions where the principle of 'polluter pays' presides and compensation means just that.

Question 1: Do you agree that these are the correct principles to underpin the use of a settlement agreement which is inadmissible in unfair dismissal cases?

We will address each of the suggested principles in turn below:

1. The protection in legislation (inadmissibility of the offer in evidence to Employment tribunals) only applies in Unfair Dismissal cases

These provisions have been born out of the idea of 'protected conversations'. The proposal would allow parties to initiate a 'protected conversation' about performance issues or retirement plans without the fear of there being an employment dispute. Representing our members who have significant experience of advising businesses of all sizes, we recognise that poor performance is detrimental to an organisation and can be difficult for employers to manage. Yet, we are also aware of cases where the employee is simply unaware of their underperformance or the employer's concerns have not been communicated to the employee.

We are concerned that the proposed process would be used to override the process for addressing poor performance outlined in the ACAS Code of Practice on Discipline and Grievances: (1) bringing the issue to the employee's attention and considering what training may be necessary; (2) allowing a period for improvement; and (3) taking more formal action if there is no improvement. While we recognise that there may be some instances where a settlement agreement could be in the best interests of all at an earlier stage, we are concerned about this basic and procedural fairness being ignored to the ultimate detriment of employers if the conversation backfires.

We are also concerned that there may be some confusion about the time required to take employees through performance management processes. While some processes will take months depending on the nature of the job and what would be an appropriate period to allow for improvement, in some instances that period may be relatively short. Our members have at times encountered situations where managers do not deal with performance issues (often with the best of intentions or perhaps because of misunderstandings about what is needed to manage performance) and these issues are left unresolved. The employee is then confronted with a series of complaints and a suggestion of a compromise, which often backfires. We are concerned that these proposals could have a similar effect.

We query whether and how these provisions would apply in cases of constructive dismissal. For example, an employee could resign in response to a protected conversation and claim that they have been constructively dismissed. A constructive dismissal claim can be both a breach of contract and an unfair dismissal claim, so under these rules, the protected conversation could be taken into account in determining the breach of contract claim but not the unfair dismissal claim, which seems artificial. This is indicative of the problem referred to in paragraph 45 of the consultation document that, 'there is a risk that creating additional rules on 'protected conversations' could have the unintended consequence of establishing a new area of contention'. There will inevitably be satellite litigation on the extent to which conversations (or parts of conversations) are protected. Further, in our example

about constructive dismissal, if the conversation is protected and the claimant does not bring a breach of contract claim, then the Tribunal will be unable to hear essential evidence about the claim before it, thereby severely limiting the employee's ability to pursue the complaint.

We understand that, unlike the 'without prejudice regime', the need for there to be an existing dispute will be removed in relation to 'protected offers'. In the Law Society's view, the exclusions to the 'without prejudice' protection (for example 'unambiguous impropriety') should remain.

II. Either party may propose settlement

This is appropriate.

III. The reason for being offered the settlement should be made clear

This would seem a necessary requirement for an informed response from the employee.

IV. Settlement offers should be made in writing and set out clearly what is being offered as well as what the next steps are if the individual chooses not to accept the offer.

This would seem a necessary requirement for an informed response from the employee.

V. It would not be necessary for an employer to have followed any particular procedure prior to offering settlement.

We believe that a minimum of formality must be observed and so some procedure is inevitable. Productive discussions will be impossible where the employee feels ambushed, unprepared or isolated. The discussion should be held by written invitation and on notice. Up to 48 hours notice should be adequate and will minimise the period of anxiety for all concerned.

Because of the very serious nature of the discussion, the risks of abuse, the difference in relative bargaining positions and the fact that emotions may run high, the employee should have the right to be accompanied at that meeting. That companion could help support the employee, and act as honest witness. It is common for HR to accompany a manager in these circumstances, and the same opportunity for support should be extended to the employee. We would therefore urge that s.10 Employment Relations Act 1999 be extended to cover the protected conversations process.

We would recommend an extension to the 48 hours if the employee needs to find a representative.

- VI. *The Code will make clear that if an employer handles settlement in the wrong way (ie not as explained in the Code) there is a risk that this will give rise to a breach of the implied term of trust and confidence and allow the employee to resign and claim constructive dismissal.*

This principle illustrates the Law Society's concerns about the expanded use of settlement agreements. If the settlement is handled in a discriminatory way, none of the protections will apply anyway. The same is true of automatically unfair dismissal situations. If the handling of the settlement is relevant to a later dismissal or resignation then the issue of impropriety becomes relevant. Simply limiting guidance in the Code to the risk of behaviour amounting to a fundamental breach of mutual trust and confidence and leading to constructive dismissal gives a misleadingly narrow, and over-simplified, account. Clear and comprehensive guidance needs to be put into place to prevent parties believing that a protected conversation allows them to behave in any way they choose. If employers act incautiously the protected conversation regime may actually expose them to risks that they otherwise would have avoided.

- VII. *Where an individual refuses settlement, the employer must go through a fair process before deciding whether to terminate the relationship*

This must be a requirement. Guidance will need to indicate what employers need to do to manage the employment relationship if an offer is refused, as employers will still need to go through a performance management process.

- VIII. *Individuals should be given a clear, reasonable period of time to respond*

This would be appropriate, given that some employers in compromise agreement situations will tactically seek to impose a very tight deadline for the agreement to be signed, often as little as 24 hours, with an accompanying threat to withdraw the offer. This limits the time available to the employee to consider the situation, to find and consult appropriate advisers and to negotiate changes.

- IX. *The Code should give specific examples of what may constitute 'improper'*

This is a necessary principle to ensure that the employer conducts the discussion around the agreement 'properly'.

- X. *No undue pressure should be put on a party to accept the offer of settlement*

What constitutes 'undue pressure' needs to be outlined. It is inevitable that case law will build up about what 'undue pressure' means and what amounts to undue pressure will vary on a case by case basis as it is a fact-specific context. Inevitably, the decisions which get reported will be said to be 'illustrative'. What that means in practice is that the only way in which a claimant is going to know whether the pressure they felt was undue is to put it before an employment tribunal. We believe

that we will see a rise in the sort of issues that arose over what constituted a step 1 grievance under the previous statutory dispute resolution regime. This would undermine the purpose of protected conversations which is to address an employer's concerns about their ability to have conversations with their staff about sensitive work issues without facing an employment tribunal claim.

XI. As closely as possible, the approach should reflect current practice in without prejudice negotiations which many employers and legal professionals are already familiar with

We do not think that this is appropriate. It assumes that there is a regularised practice and that is not necessarily a safe assumption. It would not add anything to the usefulness of protected conversations, employers would just label everything 'without prejudice' which would encourage satellite arguments about what was actually covered by the without prejudice rule, what wasn't and what was impropriety.

XII. The employer should not make discriminatory comments or act in a discriminatory way when making an offer of settlement.

This is a necessary principle which illustrates our concerns regarding the potential rise in discrimination claims as a result of the misuse of settlement agreements by employers. See also our comments on principle 6.

Question 2: Do you agree that model letters proposing settlement and a template for producing a settlement agreement should be included in a Statutory Code?

We understand that the inclusion of template letters and settlement agreements meets the purpose of assisting more employers to use settlement agreements. However, negotiating the end of the employment relationship is complicated. It is rare that 'one size fits all'. For example, compromise agreements are used regularly once disputes are underway. Agreements in these circumstances can be quite legalistic and need to be tightly drafted. Hence, the draft template would be unlikely to be used in a situation where a dispute was already underway.

In order to meet the needs of a wider group of employers, the drafters have obviously kept the templates fairly simple. However, the templates do not provide sufficient detail for employers to be able to rely on in the tribunal, so employers will have to revise these template agreements for their own use. The risk is that employers will do so on the basis that because they are using a template outlined in the Code, that it carries with it some sort of precedent guarantee. Ultimately, the misuse of standardised 'agreements' may lead to unforeseen problems. The Code of Practice should stipulate that the template is a starting point and that employers should seek advice about the drafting of the actual agreement.

Question 3: If you currently use settlement or compromise agreements, what impact would these templates have on the costs to your organisation of using agreements?

Organisations that currently use settlement agreements tend to be those with good access to advice. It is likely that these organisations already have access to existing templates, or ready access to expertise to produce them. It is therefore unlikely that these draft templates will be used by these organisations.

Question 4: Would model letters proposing settlement and a template for producing a settlement agreement be likely to change your use?

No. See question 3.

Question 5: Do you have comments on the content of the model letters?

We have the following comments to offer on the content of the model letters:

- a. If an offer is not accepted, and unfair dismissal is claimed, an employer will need to establish that they followed a fair procedure. Part of that procedure is setting out the allegations and the evidence and giving the employee an opportunity to defend themselves. Such a letter might form part of the 'discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee' and thus rendered inadmissible by proposed section 111A(1) Employment Rights Act 1996. Ultimately, the extent to which correspondence, meetings, and parts thereof, are inadmissible is unclear.
- b. The opening sentence, '... we have reached a preliminary view' suggests a prejudged decision on the part of the employer, made before the allegations are put, before a defence can be considered, before any reasonable belief in guilt can legally be formed, and before the band of reasonable responses can reasonably be assessed. An employer must show that they have behaved fairly during the dismissal process and this sentence, suggests that the employer has reached a decision before engaging with the employee. This could be detrimental to the employer if an unfair dismissal claim is submitted.
- c. The nature of the meeting referred to in paragraph 2 is wholly ambiguous. It is not phrased so as to make it clear that it is actually a disciplinary hearing. That fact can be discerned through a knowledge of the right to be accompanied, but will be lost on most employees. As the earlier paragraph recommends only brief details of the problem to be given, and says nothing about handing over supporting material, the likely result is that the employee attends the meeting wholly misinformed about what to expect, unprepared to defend themselves, and very likely to be unfairly dismissed as a result.
- d. It is insincere to suggest that dismissal is likely, but then to go on to say that the employee will be given an opportunity to improve their performance and to give between the date of the letter and the date of the meeting to do so ('about 10 days'). This is likely to undermine any spirit of compromise from the start.
- e. Because it operates outside of the environment of the without prejudice rule this is an offer capable of being accepted immediately. The reference to asking the employee to enter into an agreement is inadequate as it appears to be put as something which can be agreed or not as the case may be. A settlement can be reached orally, and in correspondence. Simply emailing

back an acceptance is enough to create a contractual right to receive the offered sum. The letter fails to make a settlement agreement a condition precedent and exposes the employer to the situation where they settle the matter at common law, contract to pay the settlement monies, but get none of the protections afforded by s.203 Employment Rights Act 1996 and its equivalents; and

- f. Although the consultation at principle 8 talks about a reasonable period of time to respond the time frame in the template letter arguably does not comply with that principle. This draft sees the disciplinary meeting in 10 days. That may be just 6 working days (or less if there is a bank holiday) during which time the employee apparently is expected to continue working and prepare their defence to the allegations they face.

Question 6: Do you have comments on the content of the model settlement agreement and guidance?

Settlement agreements need to be carefully drafted so that employers do not become liable to a claim. They need to be simple enough for a small employer to use but also contain enough detail so that employers do not find themselves liable to a claim. The Law Society does not believe that these model templates and guidance strike that balance. They are too complicated and legalistic for the average user to use. If the model documents are to be user friendly, they must be simplified. Regardless, employers should still have the agreement checked by someone with suitable legal expertise so that they do not expose themselves to an employment tribunal claim or fail to cover all the areas they need protection on when the employment terminates.

We do not have any specific comments on the content of the guidance. However, we make the following comments on the model agreement:

- a. The agreement is too long and legalistic. Employers will most certainly have to edit the agreement for their own personal use which undermines the purpose of the template and exposes the employer attempting to draft an agreement to greater risk. A format more akin to a short form COT3 would be far more appropriate for the target user groups. However, we would still point out the difficulties in trying to apply a 'one size fits all' approach to drafting a settlement agreement, when the majority of agreements will need careful drafting by someone with a detailed understanding of the law in this area and the particular issues that need to be addressed.
- b. The draft agreement contains clauses which go significantly beyond the stated task of simply settling claims. By doing so the government is undermining its own statement that 'The Government is clear that legislation has an important role in setting a minimum baseline of fair legal protections, but that wherever possible, the State should not interfere in the relationship between an employer and employee.' We believe that any standard settlement agreement should do absolutely no more than settle the claims. It should not go beyond that remit.

- c. It is inappropriate, and legally incorrect, to mark the agreement 'without prejudice' despite the fact that there is no dispute (hence the reason for the protected conversation).
- d. Since this is supposed to be used before any proceedings are commenced the reference in clause 4.2 to writing to the Employment Tribunal to withdraw the claims is inappropriate and confusing.
- e. The employer is legally responsible for accounting to HMRC for tax. Therefore clause 5.2 misstates the true position and leaves the employer with a false sense of security in the event of a failure to account for tax.
- f. The parties are lay people and are in no position to make the declaration at clause 6 that the relevant statutory provisions have been complied with. The inclusion of this clause is required by law, but will confuse lay people in its current format. The Guidance does not really explain this well.
- g. Clause 7 goes beyond the act of settling claims. Furthermore the use of the format of warranties is inappropriate. In law a warranty is a strict liability undertaking. This means that if your warranty is wrong to any degree, no matter how much you believed it when you gave it, or tried to comply, you are strictly liable for any loss. If this clause is to remain in the agreement then this should be no more than a declaration to that effect.
- h. Clause 8.1 refers to restrictive covenants, although it should be noted that most employment contracts do not contain any.
- i. Clause 8.2 is far too wide. Confidentiality is a common condition which is drafted but it causes problems. In this regard, it is worth noting that preventing either party acknowledging the existence of an agreement is not always realistic or practical. Typically it may result in:
 - i. The employee being unable to explain a sudden departure from their job which may hamper their ability to obtain new employment, to claim unemployment benefit, or to unemployment insurance;
 - ii. By the time the agreement is signed there may be a wide pool of people to already know it exists. These include: HR staff; legal staff; managers; people the managers have told; trade union reps; spouses; close friends; independent financial advisors etc. This form of clause cannot bind these people retrospectively, and therefore seeks to impose confidentiality with often little effect.
- j. Clause 9 goes far beyond 'a minimum baseline'. In particular:
 - i. We repeat our observation about warranties;
 - ii. Clause 9.1.3 is not necessary for the agreement to be binding and should be removed. It also ignores the twin realities that the employee is a lay person and cannot come to that conclusion, and that for the fees generally available an independent advisor is unable to take a full case history and advise on whether other claims are available;

- iii. There is no requirement to have an advisor sign an agreement. This may slow down the advice process (see Question 7 below for details) although it is recognised that this is what typically happens at present with compromise agreements;
 - iv. Clause 9.1.5 is inconsistent with the point of a protected conversation termination. The point is to achieve a termination without having to go through a process. By accepting an offer an employee would be taking the risk that the settlement is an under value but accepts a clean break. The quid pro quo must be that the employer accepts the risk that had they chosen to do it properly they could have dismissed summarily;
 - v. We question why an employee is being expected to routinely give a warranty about claims which a third party may or may not have. The relevance of this aspect of clause 9.1.5 is difficult to see and goes even further beyond 'a minimum baseline' than the other provisions.
- k. There are no clauses 11, 13 or 14.
- l. Clause 16 should be amended to allow the independent advisor to sue the employer directly for a breach of the fees clause (clause 10).
- m. The final cross-reference to clause 8.2 is not correct and does not appear to be necessary.
- n. It is inappropriate for Annex A not to limit breach of contract claims to those arising out of the employment. It would unfairly compromise claims where the employee is also a customer of the business. For instance if the employee was injured by a faulty product produced by the employer this draft agreement would seek to compromise their claims for personal injury, and breach of contract. For this reason Annex A's inclusion of any other claim is too sweeping.

Question 7: Do you agree that the use of templates should not be compulsory?

Yes. Employers will still need to revise the agreement according to the individual situation at hand. To make the templates compulsory would restrict employer choice and make the employer liable to a claim if the template did not contain the necessary detail. If the templates are to be used, they serve much better as a guide.

Question 8: Do you think it would be helpful if the Government set a guideline tariff for settlement agreements?

No. Whilst we can see the appeal of having guidance regarding what a fair and appropriate level of award would be, the practical difficulty lies in applying such a tariff to the detail of the particular employment relationship at hand. For example, the length of service, the employee's salary, the nature of the employment breakdown will all be factors in determining what the award should be. A further danger of a tariff is that employers might actually rely upon it to try to justify an inappropriate or

unrealistic level of settlement. Employers will need to have regard to these factors and are likely to shy away from using the guideline tariff.

Question 9: What would you expect to be the impact of having a guideline tariff?

See question 8.

Question 10: If you do favour a guideline tariff for settlement agreements, do you have a view on the approach or formula that should be used?

See question 8.

Question 11: Do you have a view on what level of tariff would be appropriate?

See question 8.

Question 12: Do you have ideas for other ways to help effectively disseminate the guidance and materials?

No.

Question 13: Would the introduction of cap of 12 months' pay lead to more realistic perceptions of tribunal awards for both employers and employees?

No. A reduction in the cap does not address the issue of vexatious claims. If the justification for the proposal is to filter out unmeritorious claims, the Tribunal already has tools available to signal to claimants where it considers claims are weak, such as the making of a deposit order. Enforcement of costs rules and requiring vexatious litigants to repay an employer's legal costs, as happens in other jurisdictions, can also be used.

A cap on unfair dismissal compensation will do nothing to alter the perceptions of a claimant who is, in addition to unfair dismissal, bringing a claim for which there is no cap.

One further point to consider is that if claimants are supported by organisations such as the Equality and Human Rights Commission or a representative group, it is not uncommon for there to be a condition of representation that claimants are not permitted to settle claims without first speaking to that representative group. Settlement may not be appropriate where assistance is being provided specifically to raise awareness in connection with the particular issue being determined by the Tribunal.

It is disingenuous to suggest that a cap might have an effect on perceptions, when the main effect of a cap is plainly to reduce the amount of compensation available to claimants.

Question 14: Would the introduction of cap of 12 months' pay encourage earlier resolution of disputes?

No. The cap does take into consideration the motivation of employees in bringing an employment claim. A claimant has a right to establish as a finding of fact that they have been unfairly dismissed and/or discriminated against. Indeed, that may be the main driver of the claim, rather than compensation. Research conducted for BIS in 2009 by Professor Richard Moorhead and Rebecca Cumming looked at the reasons why claimants make claims to Employment tribunals, and concluded that claimants were largely motivated by a sense of injustice, rather than compensation.

It should be noted that for unfair dismissal, the employee is not compensated by receiving payment for hurt feelings or as a punitive award against the employer. They are only entitled to be put back in the position they would have been had they not been dismissed unfairly, and even then the duty is on the employee to mitigate their loss by trying to find alternative employment. To a claimant who is unable to find alternative employment as a result of having been dismissed for misconduct, a declaration that that dismissal was unfair can be far more valuable than an award of monetary compensation. Just because the amount of compensation has been capped, does not necessarily mean that employees will be deterred from bringing a claim. It is therefore unlikely that a cap would influence this behaviour.

Tribunals recognise that there are a range of remedies sought by claimants other than compensation, including a recommendation, reinstatement and re-engagement. This proposal does not appear to account for such remedies and the reasons why offers of remuneration may be rejected by a claimant. For all these reasons, the refusal of an offer of settlement cannot be equated to vexatious behaviour by a claimant.

Question 15: Would the introduction of a cap of 12 months' pay provide greater certainty to employers of the costs of a dispute?

No. The Law Society is concerned that the cap will add complexity when determining awards if the size of an employer, for example, needs to be assessed.

Question 16: Do you support the introduction of a cap on compensation of 12 months' pay?

No. The cap will prevent a substantial number of claimants who have been unfairly dismissed from recovering their full losses from the respondent. This is not mirrored in other jurisdictions where the principle of 'polluter pays' presides and compensation means just that.

Question 17: Do you have any comments on the impact of this proposal on claimants?

The Law Society is opposed to the introduction of this cap which will impact on a much broader group of claimants than the government intends. The government states that the median award is £4000. However, this does not take into consideration those claimants facing public sector pension loss and the significant number of claims that are settled before a hearing (by employers through compromise agreements or Acas).

Question 18: Do you have any comments about the impact of this proposal on employers?

The cap may encourage employers to take a calculated risk to dismiss someone without behaving properly if they know that the maximum cap is £25,882, particularly for employees on larger salaries. However, the potential pitfall for employers will be that they are still liable for discrimination and whistleblowing claims, which an employee may still choose to bring against an employer.

Question 19: Do you have any other comments on the proposal?

No.

Question 20: Do you consider that the overall cap on compensation for unfair dismissal is currently set at an appropriate level (£72,300)?

No.

Question 21: What do you consider an appropriate level for the overall cap, within the constraints of full time annual median earnings (c£26,000) and three times full time annual median earnings (c£78,000)?

The Law Society supports the civil law principle that a person who has suffered financial loss by reason of the legal wrong of another, should be fully compensated by the wrongdoer and supports the abolishment of the maximum limit on unfair dismissal awards. The introduction of a cap has led to applicants trying to find a discrimination angle in an otherwise straightforward unfair dismissal case. Whilst we acknowledge the widespread concern within the business community that without such a cap, there would be a surge in unfair dismissal cases, this has not been the case for discrimination.

Question 22: Do you have any other comments on the level of the overall cap?

No.