Settlement Agreements

Introduction

Employment legislation limits an employee's ability to waive their statutory employment rights. One way a binding waiver of employment claims may be achieved is through a Settlement Agreement which complies with certain legal requirements.

Settlement Agreements are one way of managing issues in the workplace. A business can of course follow disciplinary procedures or performance management procedures but Settlement Agreements provide greater flexibility and an ability to resolve an issue quickly and to the satisfaction of both employer and employee.

A Settlement Agreement is a legally binding agreement whereby the employer will usually pay compensation and provide other consideration or benefits (such as a reference) on an employee's departure from the business in return for an agreement by the employee not to commence or continue any employment-related claims against the company. The terms will be agreed between the parties and will often be negotiated until a settlement is reached.

A Settlement Agreement can allow an employer to terminate an employee's contract of employment without the need for following lengthy processes required by the disciplinary procedures. It is important to note that a Settlement Agreement does not necessarily have to relate to termination of employment (although it usually does) and can be used where an individual is to remain as an employee. It could therefore be considered as an alternative to settling a dispute with an employee.

Not all claims can be waived in a Settlement Agreement and those that are to be waived must be expressly stated. A Settlement Agreement with a 'catch-all' provision will not suffice and it is therefore important to consider which claims will be expressly included in the Settlement Agreement by reference to their description or statutory provision.

Claims that can be waived in a Settlement Agreement include claims relating to:

- Unfair dismissal;
- Statutory redundancy payments;
- Unauthorised deductions from wages;
- Maternity, paternity, adoption and parental leave;
- Flexible working;
- Working time or holiday pay;
- National minimum wage;
- Equality of terms;
- Direct or indirect discrimination, victimisation or harassment related to one of the nine protected characteristics under the Equality Act 2010 (age, disability, gender reassignment, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sex, or sexual orientation).

Some limited claims cannot be waived by a Settlement Agreement and this includes a claim for failure to inform and consult under TUPE 2006.

Settlement Agreements can be proposed by the employee as well as the employer but they are entirely voluntary and discussions can be halted at any time by either party. An employee cannot therefore be compelled to partake in a discussion to this effect if they do not wish to, nor to sign the Agreement.

Formalities

There are certain important requirements for a Settlement Agreement to be legally binding. These are as follows:

- It must be in writing;
- It must specifically state the claims that are included;
- It must confirm that the employee has received professional independent advice;
- The adviser must have professional indemnity insurance;
- The adviser must be identified in the Settlement

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Agreement;

- There must be a statement that the statutory conditions have been complied with.

'Without prejudice' discussions

Discussions and negotiations in Settlement Agreements can be kept confidential and inadmissible in subsequent proceedings (if settlement is not reached) by using the standard 'without prejudice' rule. If the negotiations are started in order to settle an existing dispute with a genuine attempt to settle, the rule will apply. It should be noted that an 'existing dispute' can't usually just be a complaint or grievance although this will depend on the facts. Generally speaking one party will have brought or will be intending to bring legal proceedings.

The rule will not however apply if there is 'unambiguous impropriety' i.e. undue influence, blackmail, fraud, unlawful discrimination etc.

Correspondence regarding a Settlement Agreement, including the Agreement itself, should be marked as 'without prejudice and subject to contract' until a binding agreement is in place.

Pre-termination discussions

The limitations relating to the confidentiality of without prejudice discussions have, in some circumstances been overcome by the introduction of section 111A of the Employment Rights Act 1996 in July 2013. Section 111A allows for confidential discussions to take place between employer and employee with a view to reaching a Settlement Agreement in relation to a termination even if a 'dispute' has not yet arisen. The confidentiality principle in these discussions will only extend to claims of 'standard' unfair dismissal and not, for example, claims of discrimination or breach of contract. Discussions will also lose confidentiality and as such may be held admissible if 'improper conduct' is found on the part of either party. 'Improper conduct' can include conduct such as harassment and bullying and is more extensive than the principle of 'unambiguous impropriety'.

Advantages

- A Settlement Agreement can provide for a 'clean break' and quick end to what could become a lengthy, time consuming and expensive exercise.
- Alternative procedures can, in some circumstances 'drag on' wasting staff time, company costs and potentially creating an unpleasant environment for other employees to work in.
- A Settlement Agreement can be used to reinforce post-termination restrictions.
- A Settlement Agreement can also be advantageous to the employee with the potential benefit of obtaining compensation and an agreed form of communication about their termination they may otherwise not have been able to seek.

Disadvantages

- As an employer you could find yourself liable to pay compensation you may not otherwise have had to pay if a Tribunal had found in your favour.
- There is a risk that the proposal of a Settlement Agreement may not work and an appropriate agreement may not be reached. If this occurs, it will be necessary to pursue or to continue with an alternative course of action such as performance management and disciplinary procedures. The Settlement Agreement procedure followed up to this point cannot be part of this process so a new procedure would need to start unless the off the record discussions have run in parallel to any formal (and open) procedure.

Practical considerations for employers

In practice these Agreements need to be handled with care and as an employer you must ensure that they are not used inappropriately. It is also important that the Settlement Agreement both complies with the statutory requirements and is tailored to the circumstances of the employee and the package/terms being proposed. This will include considerations such as payments, termination date, notice, taxation and indemnities, reference, announcement, return of company property, resignation from offices, post-termination restrictions and confidentiality.

It will usually be helpful to explain to the employee why an offer is being made, and it may be sensible to put this in writing at the outset (marked 'without prejudice and subject to contract'), with clear terms as to what you wish to be agreed so that the employee is then able to take independent legal advice on the Settlement Agreement.

When considering what offer to make, take into account the employee's length of service, the potential time wastage if an

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agreement is not reached, the reasons for the proposal and the cost of a Tribunal claim if this is likely to occur.

It's often appropriate to continue with some of the formal and 'open' procedure so that this is progressing in the event agreement on terms cannot be reached.

Be careful when agreeing to provide a reference as there is no legal obligation to do so. Any reference you give must be true, fair and accurate and so if a reference is to be provided, it may be sensible to agree appropriate wording as part of the discussions.

Set a timetable for discussions so that matters aren't allowed to drift. This needs to be balanced against putting undue pressure on the employee in relation to the Agreement. The ACAS Code advises that employees be given a 'reasonable' time to consider the settlement offer. Generally a minimum of 10 days is considered to be reasonable.

Respect the employee's confidentiality and listen to their concerns in order to encourage a positive outcome.

ACAS advises that you should allow the employee to be accompanied at meetings and allow this companion to contribute. Although this is not legally required, it is recommended as good practice.

If you would like any further information about our specialist employment law and HR services, please contact a member of the team.

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Kevin is experienced in all aspects of employment law, both claimant and respondent, from drafting contracts and procedures, through to providing representation before tribunals in cases involving multiple claimants, and advising on dismissal and re-engagement procedures in relation to contract variations for 500 plus employees. He has worked across the public and private sectors, for high street practices, local authorities and RSLs. This diverse range of experience has given him a very good understanding of the different pressures and considerations that apply when providing advice to individuals, businesses and public bodies. Kevin is admired for his pragmatic approach to most problems, and for finding solutions which minimise both cost and risk to clients.

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