Understanding Settlement Agreements

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Introduction

A settlement agreement is a type of legally binding contract used to ensure employment relationships end on agreed terms. From an employer's perspective, one of the main (and most attractive) features of settlement agreements is the protection they provide.

How? Because items that are covered in the agreement are exempt from claims or employment tribunal action

Most of the time it'll be the employer that initiates a settlement agreement, however, they can be proposed by employees too. Furthermore, either party can suggest a settlement agreement at any stage of an employment relationship.

Usually – but not always – a settlement agreement will include some form of financial payment to the employee in return for them agreeing to certain conditions

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What do they have to include?

To stand up legally, settlement agreements must tick the following six boxes:

1. It must be in writing.

2. It must relate to a specific complaint or proceeding.

3. Affected employees must discuss the terms and impact of the agreement with a qualified independent adviser to ensure they fully understand what they're agreeing to, and how it will affect any future wishes to lodge a complaint or go before an employment tribunal.

It's worth noting that standard practice involves employers making a reasonable contribution to the employee's costs when seeking legal advice on the draft agreement. Although no amount is set in stone, this is usually in the region of £250-£500.

4. The independent adviser who provides the employee with advice must have a current and valid contract of professional indemnity insurance in place. Should the employee incur any losses on the back of their advice, this offers protection.

5. The settlement agreement must clearly identify the employee's independent advisor. They will usually sign the agreement (often in a separate annex) to confirm their credentials and that they have suitable insurance in place. They'll also confirm they have advised the employee on the terms and effect of the agreement.

6. Within the agreement, you must clearly clarify that the statutory conditions relevant to the settlement agreement have been met.

There's no obligation

Settlement agreements are 100% optional – neither you or the employee are obliged to enter into one, nor does either party have to entertain discussions about one.

Once an initial settlement agreement has been put on the table, both you and the employee may wish to negotiate the terms before a binding agreement is made.

Conversely, if, after proposals and counter proposals have gone back and forth, it's clear that an agreement can't be reached, both parties can conclude that this is the case, cease negotiations with no conditions in place, and consider other avenues – like disciplinary or grievance procedures, for example

Negotiation Confidentiality

Under section 111A of the Employment Rights Act (ERA) 1996, settlement agreement discussions are done in confidence. This means anything said in relation to the settlement agreement cannot be used as evidence for an unfair dismissal claim.

There are, however, a few exemptions from this rule, like claims that relate to an automatically unfair dismissal.

Examples of this include dismissals linked to:

- Whistleblowing
- Union membership
- Asserting a statutory right.

In addition, many claims made on grounds other than unfair dismissal also aren't covered.

For example:

- Claims of discrimination
- Claims of harassment
- Claims of victimisation
- Other actions prohibited by the Equality Act 2010
- Claims relating to breach of contract
- Claims relating to wrongful dismissal.

Improper behaviour

If, during settlement agreement discussions, either party behaves improperly – either verbally or physically – then anything that's been said during the negotiation phase will only be excluded as evidence if the employment tribunal considers it just.

However, in some cases, the improper behaviour might form the basis of an employment tribunal claim.

For example, if an employer displays unlawfully discriminatory behaviour during settlement agreement negotiations, the former alone would warrant a claim. The Section 111A process is intended to allow an open and frank discussion to try and resolve issues as amicably as possible. It's not to be used as a way to cover up unlawful or inappropriate actions to prevent them from being revealed in tribunal.

What's Classed as improper behaviour?

Examples of improper behaviour include, but are by no means limited to:

- Any form of bullying, harassment or intimidation
- Physical assault or the threat of it
- Any form of victimisation
- Discrimination against protected characteristics
- Applying unnecessary pressure

At the end of the day though, it's up to the tribunal to decide what constitutes improper behaviour based on the facts and circumstances of each individual case.

Reaching and agreement

If, Once a proposed settlement agreement has been put on the table, both parties should be given a reasonable amount of time to consider the terms and seek advice.

There's no legal minimum or maximum timeframe for this, but 10 days is recommended by ACAS and will generally be enough. If the initial draft of the settlement agreement needs to be renegotiated, you might find it easier to do this face-to- face.

If you do, do this, it's good practice to allow the employee to be accompanied (by a colleague, trade union official or trade union representative, for example), and make notes throughout.

To Agree Or not To Agree?

Where a settlement agreement including the termination of employment is reached, the employee's employment will come to an end either on the date outlined in the agreement, or after they've served their contractual notice period.

If the settlement agreement is subject to a payment to the employee, full details – like the sum, type of payment and timings – must be included in the agreement.

If you're at loggerheads and the agreement is taken off the table, then you'll still need to address the issue that led to settlement agreement talks in the first place.

Depending on the nature of the trigger, this could be through performance management, disciplinary or grievance processes.

It's often a good idea to put in place the first stages of the relevant process before opening settlement discussions, so that it's already in place to return to if necessary. Whichever path you take, it's pivotal that you follow a fair process throughout – failure to do so could leave you facing claims of unfair dismissal.

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