

SETTLEMENT AGREEMENTS – AND BEYOND

1. Introduction

Employment legislation prevents employers from seeking to contract out of, or waive, statutory employment rights, duties and responsibilities because the two parties are almost always in unequal bargaining positions. It follows that legislation designed to give employees rights would be ineffective if employers were able to pressurise or persuade employees to agree that such provisions should not apply. However, where an employment dispute arises between the two parties it will often be in their joint interests to resolve the matter by agreement. This is because there are always uncertainties in legal proceedings which can be protracted and expensive for both the employers and employees - or the unions representing them. This bulletin updates the advice provided in reps bulletin 104.

2. Employers' duties

Detailed below are the duties that apply to employers.

- Employers must not impose contractual restrictions on employees' statutory rights, and any such restrictions will be deemed to be void.
- If an employer wishes to settle or resolve a claim by the employee in respect of their statutory employment rights, it

must ensure agreement is reached by way of a conciliation agreement through ACAS, or a settlement agreement (SA) reached in line with the ACAS guidance or by a consent order made by an employment tribunal (ET).

- When seeking to use a settlement agreement the employer must ensure all the requirements of a valid settlement agreement are met, including time to consider the offer and receipt of independent advice.

3. Employee's duties

The employee needs to understand that if they enter into any of the types of agreements identified above, and explained more fully below, its terms can be enforced by the employer in the courts.

4. Employment rights

The laws that create statutory employment rights, such as the right not to be unfairly dismissed or discriminated against, also make provision for employees and sometimes other workers to complain to an ET about the infringement of those rights.

5. Common law rights

The relationship between employer and employee may give rights to legal disputes that do not involve statutory

employment rights such as personal injury claims arising out of the duty of care owed to the employee by the employer, and breach of contract claims based in contractual, not statutory, rights. These are common law causes of action, capable of being pursued through the ordinary courts. At common law, as a matter of general principle, parties to any dispute can come to an agreement out of court whereby they agree to settle the dispute. An agreement to settle, once reached, operates as a bar to the further pursuit of the dispute in tribunals or courts, except to the extent of the right to enforce the agreement itself.

6. Conciliation through ACAS

Despite the general restriction on contracting out of employment rights, employers and employees may agree to settle their dispute through the intervention of an ACAS conciliation officer.

The main statutory rights that can be the subject of an agreement to refrain from instituting or continuing proceedings, where the agreement is through ACAS, are those for which ETs have jurisdiction, most commonly, but not limited to:

- unfair dismissal
- redundancy
- discrimination of all types
- working time
- minimum wage.

7. Settlement agreements

The other way for an employer to settle a dispute with an employee is through a SA (previously known as a compromise agreement). It is a written agreement signed by the parties which, in exchange for an agreed sum of money and/or other agreed terms, acts to bar the employee (claimant)

from taking any claims referred to in the SA to any court or tribunal.

SAs represent the other main exception to the prohibition against contracting out of the statutory provisions protecting employment rights.

Employers may use SAs when making employees redundant, if they offer enhanced redundancy payments. In this case, the employer may make it a condition of entitlement to the enhanced payment that the employee enters a SA – see reps action below.

8. Valid SA requirements

The main requirements for a valid SA are as follows:

- the agreement must be in writing
- the agreement must relate to the particular complaint or proceedings concerned
- the employee or worker must have received advice from a relevant independent advisor as to the terms and effect of the proposed agreement and, in particular, its effect on their ability to pursue any employment rights before an ET
- there must be in force, when the advisor gives the advice, a contract of insurance, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the employee or worker in respect of loss arising in consequence of the advice – see reps action below
- the agreement must identify the advisor
- the agreement must state that the conditions regulating SAs are satisfied.

9. Relevant independent advisers

An agreement will not be valid unless advice has been received by one of the following:

- a barrister
- a solicitor
- a legal executive that is a fellow of the Institute of Legal Executives and who is employed by a solicitors' practice, provided they are supervised by a solicitor holding a Practising Certificate issued by the Law Society
- officers, officials, employees or members of an independent trade union certified by the union as competent to give advice and authorised to do so on its behalf (provided the union is not the employer in question)
- advisors working in an advice centre who are certified as competent to give advice and authorised to do so (provided the advice centre is not the employer, and the complainant has not paid for the advice).

10. Binding effect of a SA

A valid SA will have the effect that an ET will not be permitted to hear any of the complaints or issues referred to in the SA.

A SA can also validly deal with potential contract claims in respect of non-statutory employment rights, such as those arising out of a breach of contract. It is sufficient for the agreement simply to confirm that any claims arising as a result of breach of contract are covered by the SA, since there are no specific requirements to be satisfied other than common law principles applicable to the validity of agreements.

11. Enforcement of SAs

A valid SA can, if necessary, be enforced through civil proceedings.

Thus, if payment of a sum agreed is not made, a civil claim can be brought for the sum due.

12. Penalties for unpaid tribunal awards/settlements

Since April 2016, where an employer fails within the requisite time period to pay a claimant the amount of compensation ordered by an ET, or the amount specified in a SA, an enforcement officer will issue a 28 day warning notice. Should the employer still fail to pay, a "penalty notice" will be issued. The penalty will be 50% of the outstanding amount, subject to a minimum of £100 and a maximum of £5,000. This is payable to the Secretary of State (not the claimant).

13. Consent orders

Employers and employees that have reached a private agreement to settle a dispute can ask the ET (at the hearing) to validate their agreement. The ET can make an order in the terms agreed between the parties or will simply make an order dismissing the proceedings by consent, on the basis that the complainant is withdrawing the proceedings, with terms having been agreed. Once the proceedings have been dismissed in this way the complainant will no longer be able to bring, continue or reinstate proceedings in respect of the original complaint, but would be able to take proceedings to enforce the agreement if the terms are not met.

14. Reps action

Reps who have a member that has agreed terms under a SA should NOT seek to act as their independent adviser. Rather, all settlement agreements should be sent - by email whenever possible - to Morrish solicitors, along with the members' contact details. The relevant designated email address is:

settlementagreement@morrishsolitors.com or the member can call 03333449603 and ask to speak to a solicitor.

Further Information

More information on this and other legal matters is available from:

- ❑ Val Stansfield, Employment Rights Adviser at stansfieldv@tssa.org.uk or 020 7529 8046
- ❑ the TSSA Helpdesk – 0800 328 2673

The information given here is for general guidance only and should not be regarded as an authoritative statement of the law.

Full details of settlement agreements are available on the ACAS website at www.acas.org.uk