

# Settlement Agreements: A Guide



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# About this guide

Employment relations concerns can arise in most workplaces – employers may be unhappy with an employee’s performance or their behaviour whilst employees may feel discontented about the way they are being treated or the work they are being asked to do.

Problems in the workplace are usually best resolved in open conversations, including, as appropriate, through the use of performance management, informal and formal disciplinary or grievance procedures, workplace mediation or Acas conciliation.

However, settlement agreements are also a tool that can be used to deal with workplace problems. Most commonly they are used to help end an employment relationship in a mutually acceptable way.

This guide, which has been considered and approved by the Acas Council, is designed to help employers and employees understand what settlement agreements are, what their effect is, when they might best be used and how they can be negotiated.

Although settlement agreements can be proposed by employers or employees they are usually proposed by employers and this guidance is focused accordingly. Nevertheless, the guidance will also be helpful to employees who have been offered a settlement agreement or where employees are themselves considering proposing settlement. Employees considering these options may wish to seek further advice. This is available from a number of sources including the Acas Helpline, their trade union, their local Citizen’s Advice Bureau, or an employment lawyer.

This guide focuses, in part, on explaining the law relating to the use of settlement agreement offers and discussions as evidence in unfair dismissal claims before employment tribunals, as regulated by section 111A of the Employment Rights Act 1996. It also provides guidance on settlement agreements more broadly.

The guide sets out good practice and has no formal status in employment tribunal proceedings. It should therefore be used in conjunction with the Acas statutory Code of Practice *Settlement Agreements (under section 111A of*

*the Employment Rights Act 1996*). The Code is taken into account by employment tribunals when considering relevant cases.

Throughout this guide the word 'should' is used to indicate what

Acas considers to be good employment practice, rather than legal requirements. The word 'must' is used to indicate where something is a legal requirement.

# What are settlement agreements?

Settlement agreements, formerly known as compromise agreements, are documents which set out the terms and conditions agreed by

those involved (the two parties) when they agree to settle a potential employment tribunal claim or claims, or other court proceedings.

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# Who can enter into settlement agreements?

Normally it is an employer and employee (or former employee) who are the contracting parties to a settlement agreement.

An individual settlement agreement will be signed by two parties and cannot be signed by groups of individuals.

They can also be agreed between an employer and someone other than an employee (or former employee) who may be able to bring a claim to an employment tribunal – for instance, a worker who has a complaint about holiday pay, or an unsuccessful job applicant who feels they were discriminated against at a job interview.

## Box 1: Key features of settlement agreements

- They are legally binding
- They can waive an individual's rights to bring a claim covered by the agreement – for example, the right to make a claim to an employment tribunal or court
- The employee (or former employee) usually receives some form of financial payment and will also often receive a reference as part of the agreed terms
- They are entirely voluntary – they include terms and conditions that are mutually agreed, and parties do not have to enter into them if they do not wish to do so
- They are often reached through a process of discussion and negotiation. The parties do not have to accept the terms initially offered – there may be a process of negotiation during which both sides make offers and counter offers
- Negotiations about settlement agreements are often confidential in the sense that, if an agreement is not reached, the negotiations may not be admissible as evidence in claims before an employment tribunal or in other court proceedings.

# When might settlement agreements be used?

Settlement agreements are normally used to bring an employment relationship to an end in a mutually agreed way. They are often used in situations where an employer and employee feel that their employment relationship is no longer working and a 'clean break' is the best way forward. In these situations both parties can agree the basis for bringing the employment to an end.

They can also be used to reach an agreed and final conclusion to a workplace dispute or issue which does not result in an end to the employment relationship. For instance, a settlement agreement may be used to resolve a dispute over holiday pay. Examples 1 and 2 illustrate how they might be used by an employer and an employee.

## *Example 1: How a settlement agreement might be used by an employer*

John has been working for his employer as a sales representative for ten years. The company has recently had to reduce the number of sales representatives it employs and, as a result of discussions, John has agreed to move from his sales role to an administrative role in head office.

Despite ongoing attempts by his employer to support and encourage him to adapt to his new job, John is struggling to perform his new duties to a satisfactory level. John is unhappy in his new role and his difficulties are beginning to impact on the performance of others in head office.

In discussions with his manager, John has let it be known that, whilst he appreciates the efforts his employer is making to help him, he feels he will never be able to adapt to his new job and he is becoming increasingly demotivated. In view of this, and his previous good work as a sales representative, the company decides to offer John a settlement agreement.

After giving the matter due consideration, discussing terms and taking independent advice, John decides to accept the offer. He leaves the company with an agreed one-off payment and a good reference, which he feels will put him in a good position to look for a new job as a sales representative, and the company has the reassurance that John will not raise an employment tribunal claim against it.

## *Example 2: How a settlement agreement might be used by an employee*

Magdalena and Zoe are members of the IT team in a financial services company. Each is highly motivated in their work and has expertise that is valued by the company. However, they have never got along well with one another on a personal level. When their colleagues begin to mention that this 'personality clash' is having an adverse effect on the performance of other members of the team, their manager, Raman, tries various ways to improve relations between them, but without any lasting success.

With all parties now feeling that the situation may never improve significantly, and with everyone somewhat at a loss as to how to proceed, Magdalena begins to consider whether a settlement agreement may provide a way forward. She enjoys her work with the company, but she is now prepared to consider that there may be advantages in reaching an agreement to part ways with them if suitable terms can be agreed.

Magdalena therefore approaches Raman in confidence. She explains her concerns and proposes that they explore the possibility of reaching a settlement agreement. Raman is reluctant to lose Magdalena as a valued employee but recognises that the current situation is not working for either Magdalena or Zoe nor the business itself. Raman can see that Magdalena's proposal may provide a way through the impasse and so, through a series of meetings, they discuss the scope for a settlement agreement and are able to reach mutually agreeable terms. The company agrees to provide Magdalena with a good reference and a financial payment, and Magdalena agrees to leave on a date that will allow the company to conduct a recruitment process in good time to replace her with someone who has comparable skills and expertise.

Settlement agreements can be offered at any stage of an employment relationship. As Example 1 illustrates, there is no legal requirement to go through a disciplinary process, or even start one, before offering a settlement agreement.

Employers will, however, want to think carefully about when and how to offer a settlement agreement. Not all disputes or problems in the workplace lend themselves to resolution through a settlement agreement and employers should be careful not to rely on them as an alternative to good management. Settlement agreements are one 'tool' to use in appropriate situations, but problems with employees are usually best resolved by talking with the employee and working with them constructively to resolve the issue that is causing the difficulty.

In particular, where there has been no previous mention of a problem, such as a disciplinary issue or a grievance, employers will want to consider whether an offer of settlement could appear 'out of the blue', and therefore how it might affect an individual's reaction to the offer and the ongoing relationship if an agreement is not reached.

Fairness, transparency and good workplace relations are promoted by developing and using rules and procedures for handling performance management and disciplinary and grievance situations. Settlement agreements should not be used as a substitute for such good practice. The *Acas Code of Practice on Disciplinary and grievance procedures* and associated guidance, and the *Acas guide on How to manage performance*, explain how employers can use both informal and formal procedures to resolve problems at work.

Brief checklists designed to help employers and employees consider and use settlement agreements are attached at Annexes 1 and 2.

## Some advantages/disadvantages of using settlement agreements

### Advantages:

- ✓ Can provide a swift and dignified end to an employment relationship that is not working
- ✓ Can avoid the time, cost and stress involved for both parties in a tribunal claim
- ✓ Can provide compensation and often a reference for employees.

### Disadvantages:

- ✗ The cost of paying an agreed financial sum to an employee
- ✗ The potential risk to the ongoing employment relationship with the individual if settlement is not agreed
- ✗ The potential risk to employment relations in the wider workforce if used inappropriately or as a substitute for good management practices.

# How do you make a settlement offer?

Employers can open settlement discussions and make an offer either orally or in writing. Speaking to the employee involved about the issues and the proposal of settlement can be a helpful first step. Putting an offer in writing can help prevent misunderstandings.

A written offer would usually outline the proposed terms of an agreement – for example, what the proposed compensation might be. Any final agreement must be put in writing.

However the offer is made, it is usually helpful if the employer gives the employee a clear indication of why the offer is being made. For example, is it due to concerns about the employee's poor performance or attendance? In explaining such reasons, it should be borne in mind that settlement discussions do not form part of a disciplinary or performance management process (see p43).

## Template letters

Employers may already have appropriate offer letters; however two

optional draft template letters, which can be used in some common situations to open or confirm settlement discussions and to make offers, are at Annexes 3 and 4.

The template letter in Annex 3 is for use where the settlement agreement is being offered where no associated formal process has been undertaken. The template in Annex 4 is designed to be used where the settlement agreement is being offered in relation to an issue that has already been the subject of an associated disciplinary or performance management process.

Employers do not have to use these template letters if they do not wish to do so. However, it is important that employers ensure that in any letter used, the wording is appropriate to the particular situation. For instance is the letter being used to initiate settlement discussions, or to confirm the details of an offer made at a previous discussion?

The template letters are designed to be a convenient resource for employers, but employers should

also follow the principles of good practice and must follow the legal requirements set out in this guidance when offering and discussing settlement agreements.

### What should be covered in a settlement offer?

What the offer consists of will be for each employer to determine in the light of the particular circumstances, but offers often include a proposed financial payment to the employee and often also a reference.

In offering and negotiating a payment amount, employers will wish to consider a number of factors, some of which are set out in Box 2 below.

An employer is not obliged to provide a reference but, where this is being considered, the parties will need to consider an agreeable form and content for the reference. In some cases a full and comprehensive reference can be agreed. In other cases a short statement confirming that the individual was employed, the dates of the employment and the employee's job title may be preferred.

### *Box 2: How to decide how much money you might offer?*

You might bear in mind:

- what the employment contract says about issues such as remuneration, notice period and untaken annual leave
- length of employment
- the length of time it may take to resolve the problem if a settlement is not reached
- how difficult it would be to fill the post
- how long it might take the employee to find another job
- the reasons for offering settlement
- the possible liabilities and costs involved in dealing with any potential tribunal or court claim if settlement is not reached.

In all cases, the employer should consider their responsibility towards the employee and the recipient of the reference and the potential liability for any misleading information provided. A reference should provide a true and accurate summary of the employment and an employer should only give information that they believe to be correct.

Where the terms of a reference have been agreed, an employer who is subsequently asked for an informal, oral reference regarding that employee should ensure that what they say is consistent with what has been agreed in the written reference.

# How do you discuss and negotiate settlement offers?

When approaching settlement discussions and negotiations, it is best to consider the following factors:

- The time you need
- The process that works best
- The people involved
- The sensitivity of the issues being discussed
- The payment arrangements
- How to end the employment relationship.

## The time you need

The employee needs to be given reasonable time to consider an offer of a settlement agreement. What is reasonable will depend on the circumstances of each case, including what both parties might agree is a reasonable time.

As a general rule, *a minimum period of 10 calendar days* should be allowed to consider the proposed formal written terms of a settlement agreement and to receive independent advice, unless the parties agree otherwise.

In some circumstances, not allowing a reasonable time might mean that the settlement discussions can be referred to as evidence in a subsequent unfair dismissal claim before an employment tribunal.<sup>1</sup>

It can be helpful to agree a timetable for discussions which allows parties time to take advice and to consider offers, whilst also avoiding any unnecessary delays.

<sup>1</sup> The period of ten calendar days is a specific requirement of the Acas Code of Practice on *Settlement Agreements (under section 111A of the Employment Rights Act 1996)* (see paragraphs 12 and 18 of the Code), the failure to adhere to which may affect the admissibility of pre-termination settlement negotiations as evidence in unfair dismissal cases before an employment tribunal. See further pp25-34 of this guide.

## The process that works best

The party proposing a settlement (normally the employer) should be clear about the reasons for making the offer and be prepared to answer likely questions that may follow in discussion.

A meeting with the employee, or a series of meetings, provides a good opportunity to clarify exactly what is being offered and to discuss any questions. A meeting also provides the employee with an opportunity to make a counter offer if they so wish.

Ideally meetings should be held on a day and at a time that is convenient to both parties. The number of meetings needed and the time they take may depend on the nature of the problems being discussed.

At the start of any such meeting it is good practice to make sure that those involved are aware that any discussions about the proposed settlement agreement are expected to be inadmissible in relevant legal proceedings (see pp23-37 for more guidance on the inadmissibility of settlement negotiations in legal proceedings). It may be helpful for this purpose if the party initiating settlement discussions draws the other party's attention to the *Acas Code of Practice on Settlement Agreements* and this guidance

booklet before the meeting or at the outset of the discussions.

It should also be made clear that the discussions at the meeting, and any later discussions about settlement which may follow, will have no bearing on any disciplinary or performance management procedure in the event that an agreement on settlement is not reached.

The discussion process is voluntary and either party is free to decide that they do not wish to enter into discussions, or that they no longer wish to continue the process at any time. Parties are also free to turn down an offer of a settlement agreement. However, parties must bear in mind the importance of allowing a reasonable period of time to consider an offer.

## The people involved

A settlement agreement is made between two parties, the employer and the employee, but the employee may want to involve someone else in the discussions. Whilst not a legal requirement, employers should allow employees to be accompanied at the meeting by a work colleague, trade union official or trade union representative. Allowing the individual to be accompanied is good practice and may help to progress settlement discussions.

Where an employer does allow an employee to be accompanied at a settlement discussion meeting, a companion who is a work colleague should be given paid time-off to attend the meeting. At the meeting, it is good practice to allow the companion to play a full part, including expressing views on behalf of the employee and responding to questions or proposals put by the employer. The companion should also be allowed to confer with the employee during the meeting, privately if necessary.

There is no statutory right to accompaniment at meetings held to discuss settlement agreements and, in view of this, companions should be aware that there is no statutory protection against 'detriment' for those undertaking this role, as there is for companions who attend disciplinary or grievance hearings. However, if an employer dismisses an employee for accompanying a colleague to a settlement discussion, it could lead to a claim of unfair dismissal. Also, any detriment to a trade union official or trade union representative for undertaking activities in their role as a companion is unlawful.

### **Definition check: Detriment**

The word 'detriment' refers to a disadvantage or less favourable treatment received by an employee or worker as a consequence of having exercised or attempting to exercise certain statutory rights.

Employers should be aware that, in certain circumstances, refusing to allow an employee to be accompanied might amount to unlawful discrimination. For example, it might be a reasonable adjustment to allow a disabled employee to be accompanied because of the nature of their disability. Refusing to do so may therefore constitute unlawful discrimination in such circumstances.

Parties may want offers of a settlement agreement and discussions about them to be confidential. If so, all those involved at meetings, including any companions, should respect the confidential nature of what is said.

### **The sensitivity of the issues being discussed**

The quality of the interaction between the parties during settlement discussions is often a key to reaching agreement. If the settlement discussions are conducted in a

sensitive manner, including listening to concerns and providing informative answers to questions, there is a greater chance of reaching a mutually acceptable outcome.

## Payment arrangements

Details of payment arrangements and their timing should be included in the agreement. It is good practice to agree that any payments should be made as soon as practicable after the agreement has been reached.

Payment under a settlement agreement can often be made free from tax and National Insurance (NI) up to a value of £30,000. (The £30,000 threshold only applies to tax, so settlement payments in excess of £30,000, where their source is the termination of the employment, will be free from NI but not tax.)

However, the taxation of settlement payments can be a complex matter. For example, if the reason for the employment coming to an end is redundancy, a statutory redundancy payment will not be subject to income tax and NI, but a contractually enhanced redundancy payment might be. Also, a payment (or portion of a payment) which relates to any unpaid wages or holiday pay will be subject to income tax and NI.

It is therefore advisable for a settlement agreement to:

- clearly specify any constituent portions that make up the overall settlement payment;
- state whether any particular portion is to be paid either with or without deductions for tax and NI;
- and, if deductions are to be made, wherever possible state the actual sums that are to be paid and to be deducted.

Guidance on how payments can be specified in a settlement agreement is given in Annex 5 (see pp58-61). However, parties in any doubt should consult a tax adviser or HMRC.

## How to end the employment relationship

Where the settlement agreement includes an agreement to end the employment relationship, then employment can be ended with the required notice, or as agreed between the parties in the terms of the settlement agreement.

Entering into a settlement agreement which ends the employment relationship does not necessarily mean that the employee has been or will be 'dismissed'. The parties may be deemed to have mutually

consented to bring the contract of employment to an end for a reason other than dismissal – for example, that the employee has simply agreed to leave voluntarily on agreed terms.

There is no need for a settlement agreement to state why the employment relationship is ending. However, if the parties wish to do so, then the settlement agreement may state that the employee is being, or will be, dismissed, if this reflects the underlying situation that has led to the settlement agreement.

Parties should bear in mind during settlement discussions that the specific circumstances and underlying reason for the ending of an employment contract can have an impact on, for example, entitlement to Jobseekers Allowance, Universal Credit and payments under some insurance policies. Parties in any doubt should seek advice, for example from Jobcentre Plus or their insurance policy provider.

# The formal written agreement

Following any discussions and negotiations, if the parties wish to conclude a settlement agreement they will need to draw up a formal written agreement.

Each settlement agreement will, of necessity, reflect the particular circumstances of its individual case. However, to help parties draw up agreements quickly and easily, and to provide a basis on which to work, a model agreement is attached at Annex 5 together with guidance on completing the various clauses in the agreement. The model agreement should be adapted to meet different circumstances.

## The legal requirements involved in drawing up a settlement agreement

For a settlement agreement that waives an individual's right to bring legal proceedings to be valid, certain legal conditions must be met (see Box 3).

As Box 3 shows, the employee must receive independent advice from a relevant adviser. There may be a cost involved in obtaining such advice and employers may wish to offer to pay any such fee, or a contribution towards it, in the interests of ensuring that the employee gets the necessary advice.

It should be remembered that settlement agreements are legal documents and employers may also wish to seek legal advice when drawing them up.

## Box 3: What are the legal requirements involved in drawing up a settlement agreement?

For a settlement agreement to be valid in waiving an individual's right to bring a complaint or complaints before an employment tribunal or other court, all of the following conditions must be met:

- a. The agreement must be in writing
- b. The agreement must relate to a particular complaint or proceedings<sup>2</sup>
- c. The employee must have received advice from a relevant independent adviser<sup>3</sup> on the terms and effect of the proposed agreement and its effect on the employee's ability to pursue that complaint or proceedings before an employment tribunal or other court
- d. The independent adviser must have a current contract of insurance or professional indemnity insurance covering the risk of a claim by the employee in respect of loss arising from that advice
- e. The agreement must identify the adviser
- f. The agreement must state that the statutory provisions which set out the above conditions regulating the validity of the settlement agreement have been satisfied.

2 Simply saying that the agreement is in 'full and final settlement of all claims' will not be sufficient to contract out of employment tribunal and court claims. To be legally binding for these purposes, a settlement agreement has to specifically state the claims that it is intended to cover.

3 An independent adviser can be a qualified lawyer, or a certified and authorised officer, official, employee or member of an independent trade union, or a certified and authorised advice centre worker. The adviser must not be employed by, acting for, or connected with the employer.

## Confidentiality clauses in settlement agreements

Settlement agreements often contain clauses relating to confidentiality whereby the parties agree to keep the agreement itself confidential and not disclose its details to third parties (usually with limited exceptions such as close family members and professional advisers, or an exception that makes it clear that the parties can disclose details where they are required to do so by law). Such confidentiality clauses are voluntary and are a matter for the parties to agree during the course of the settlement discussions.

It is important to note that any part of the agreement which is aimed at keeping the agreement confidential will not prevent the individual from making a protected disclosure under whistleblowing legislation, as any provision which attempts to prevent protected disclosures is unenforceable.

An employee will often continue to be bound by confidentiality clauses that are already included in the terms and conditions of their employment contract, unless the parties agree otherwise.

# The admissibility of settlement agreement negotiations in employment tribunals and courts

It is an important principle of settlement agreements that the parties should be free to consider and discuss them in the knowledge that, if the parties do not reach an agreement and a related claim is then brought to an employment tribunal or court, the discussions cannot be used as evidence in those legal proceedings.

The rules relating to the admissibility of settlement negotiations as evidence in legal proceedings are highly technical. The overview in the following paragraphs is intended to explain the principles involved as simply and accurately as possible for a general audience.

The admissibility of settlement offers and discussions in legal proceedings is now regulated by two provisions:

- the **'without prejudice'** principle, and
- the **admissibility provisions** on settlement agreements set out in **section 111A** of the Employment Rights Act 1996 (an amendment to the 1996 Act which was introduced in 2013).

## What does 'without prejudice' mean?

'Without prejudice' is a common law principle which prevents statements, whether written or oral, which are made in a genuine attempt to settle an 'existing dispute', from being put before an employment tribunal or other court as evidence in legal proceedings between those parties about that dispute.

This principle can apply to any type of employment tribunal or court claim – for instance unfair dismissal claims, breach of contract claims, unlawful discrimination claims, wages claims, and so on.

In order for settlement discussions and agreements to be protected under the ‘without prejudice’ principle, there must be:

- an **‘existing dispute’** between the parties **and** a genuine attempt to settle that dispute, and
- **no ‘unambiguous impropriety’** in the conduct of the parties during the settlement discussions.

In situations where there is no ‘existing dispute’ between the parties at the time that settlement is proposed and discussed, or where some ‘unambiguous impropriety’ takes place in relation to the settlement offer or discussions, then the ‘without prejudice’ principle will not apply.

### Definition check: ‘Unambiguous impropriety’

This might include blackmail, fraud, physical violence or unlawful discrimination. It might also cover the use of threats or intimidation when making an offer. What constitutes ‘unambiguous impropriety’ is ultimately for an employment tribunal or court to decide on the facts and circumstances of each case.

The simple fact of making an offer with a view to settling an existing dispute does not of itself amount to ‘unambiguous impropriety’ because one party would have preferred the other to take a different approach to trying to resolve their dispute.

**‘Existing dispute’:** This term is difficult to define precisely. It has a technical legal meaning which can cover a variety of situations, but it does not cover every disagreement between two parties and determining exactly what constitutes an ‘existing dispute’ for the purposes of the ‘without prejudice’ principle can be problematic. For example, the fact that the employee has raised a grievance will not necessarily constitute an ‘existing dispute’.

In general, for there to be an ‘existing dispute’ it is key that one of the parties has brought, or might reasonably have contemplated bringing, legal proceedings against the other party at the time that the settlement offer and discussions took place.

For example, there will be an ‘existing dispute’ in a situation where the employment relationship has already ended and the employee has brought an employment tribunal claim of unfair dismissal against the employer. There can also be an ‘existing dispute’ in some other situations where the employment is ongoing and a settlement agreement is offered before any claim has been brought to an employment tribunal or court – for example, where an employee is considering bringing a claim that their employer has breached their contract of employment.

However, where an employer offers an employee a settlement agreement to end the employment relationship ‘out of the blue’, ie where that employee was not previously aware of any issue which placed the continuation of their employment in question, then it is unlikely that there would be have been an ‘existing dispute’ between the parties when

that offer was made. In this situation, the offer could not therefore be made and discussed on a ‘without prejudice’ basis, although it might be ‘protected’ under section 111A of the Employment Rights Act 1996 (see below).

Section 111A provides more certainty as to when settlement offers and discussions may not be used as evidence, although only in unfair dismissal claims before employment tribunals, as it does not require there to be an ‘existing dispute’ between the parties.

### What are the admissibility provisions of section 111A of the Employment Rights Act 1996?

These provisions, sometimes simply referred to as ‘s.111A’, provide a similar protection to the ‘without prejudice’ principle but apply *only* to:

- settlement offers and discussions that relate to the ending of an employment relationship (**pre-termination negotiations**); and
- **unfair dismissal claims (including constructive unfair dismissal claims)** brought to an employment tribunal.

The provisions of s.111A mean that pre-termination settlement negotiations cannot normally be referred to as evidence in an unfair dismissal claim, ***even where there was no 'existing dispute'*** between the parties at the time that the settlement offer and discussions took place.

In particular, the provisions of s.111A mean that an employee will normally not be able to refer to the fact that their employer has offered a settlement agreement to end their employment contract as evidence in support of a constructive unfair dismissal claim at an employment tribunal.

It is important to note, however, that s.111A does *not* apply to other types of claim, such as wrongful dismissal or breach of contract claims, *even when* these are brought *together with* an unfair dismissal claim or constructive unfair dismissal claim. (See further p37.)

### Definition check: Constructive unfair dismissal

If an employer's conduct involves a significant and fundamental breach going to the root of an employee's contract of employment, that employee can in some circumstances resign and claim that they have effectively been dismissed by their employer's conduct. Such an employee may then bring a claim of constructive unfair dismissal to an employment tribunal.

Examples of a serious breach of contract that might amount to constructive unfair dismissal might be a failure to provide safe working conditions, failure to pay wages, or a unilateral and significant alteration of an employee's job content or status. (However, any employee contemplating resigning in such circumstances, with a view to claiming constructive unfair dismissal, should get advice before doing so.)

## *Example 3: Offering a settlement agreement under the section 111A provisions*

### **Scenario**

David has worked in George's shop for several years. After deciding to start studying at college last year, David began to regularly turn up late for his shifts. George informally discussed David's timekeeping with him several times and was able to take account of David's study commitments by re-arranging his shift pattern. However, when David continued to regularly turn up late, George started a disciplinary process which resulted in David receiving a first written warning.

Since then, David's timekeeping has still not improved. In further informal discussions, George has explained to David that if his timekeeping does not become more reliable, then further disciplinary action, including a final written warning and ultimately dismissal, may result. David continues to promise that he will improve, but at the same time has asked George to understand that his college studies must come first.

George is sympathetic to David's college commitments, but his discussions with David so far give him no optimism that David will come to appreciate the impact that his poor timekeeping is having on the business. He decides to invite David to a meeting to propose a settlement agreement. He tells David that he values him as a good employee but suggests that he may wish to consider whether the situation is likely to improve sufficiently. He proposes that, as an alternative to the possibility of further disciplinary action, an agreed reference and a financial settlement may be an attractive option for David. David protests that George is 'jumping to conclusions' and treating him unfairly and he refuses the offer.

## Example 3: Offering a settlement agreement under the section 111A provisions (cont)

Over the following weeks, with David's conduct still showing no sign of improvement, George follows the company disciplinary procedure which leads to David receiving a final written warning. The situation continues as before, however, and further disciplinary action at a later date results in David being dismissed.

### Comments

- When considering whether to offer David a settlement agreement to end his employment, George does not have to worry about whether or not there is technically an 'existing dispute' between them because s.111A is applicable regardless of whether or not there is an 'existing dispute'.
- If David brings a claim of unfair dismissal to an employment tribunal then s.111A should apply here, so David should not be able to refer to George's settlement offer and settlement discussions as evidence at the tribunal hearing.

### Circumstances in which s.111A will not apply in unfair dismissal cases

There are some circumstances in which the s.111A provisions will **not** apply to prevent pre-termination settlement negotiations being used as evidence in unfair dismissal cases.

The provisions of s.111A do not apply to '**automatically unfair dismissal**' claims – for example, claims that an employee was dismissed for asserting a statutory right, carrying out trade union activities, or 'whistleblowing'.

### Definition check: 'Automatically unfair dismissal'

Some dismissals are classed as 'automatically unfair' regardless of any question as to whether the dismissal was 'reasonable'. These include where an employee is dismissed for exercising specific rights to do with:

- pregnancy, including all reasons relating to maternity
- family, including parental leave, paternity leave (birth and adoption), adoption leave or time off for dependants
- acting as an employee representative
- acting as a trade union representative
- joining or not joining a trade union
- being a part-time or fixed-term employee
- health and safety
- protection against unlawful discrimination (on the grounds of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation)
- pay and working hours, including the Working Time Regulations, annual leave and the National Minimum Wage
- public interest disclosure (whistleblowing)
- asserting other statutory rights.

The provisions of s.111A may also not apply in any type of unfair dismissal claim if there has been some **'improper behaviour'** in anything said or done in relation to the settlement negotiations.

Where an employment tribunal finds that there has been some 'improper behaviour', the tribunal will then have

discretion to decide whether, in the circumstances, it is just to admit evidence of those settlement negotiations.

### What is 'improper behaviour'?

What constitutes 'improper behaviour' for the purposes of s.111A is ultimately a matter for an

employment tribunal to decide on the facts and circumstances of each case. It includes, but is not limited to, behaviour that would be regarded as ‘unambiguous impropriety’ under the ‘without prejudice’ principle (see pp 23–25).

The following list provides some examples of ‘improper behaviour’. The list is not exhaustive.

- All forms of harassment, bullying and intimidation, including through the use of offensive words or aggressive behaviour;
- Physical assault or the threat of physical assault and other criminal behaviour;
- All forms of victimisation;
- Discrimination because of age, sex, race, disability, sexual orientation, religion or belief, gender reassignment, pregnancy and maternity, and marriage or civil partnership;
- Putting undue pressure on a party. For instance:
  - i. Not giving a reasonable period of time to consider an offer. What constitutes a reasonable period of time will depend on the circumstances of the case. As a general rule, a minimum period of 10 calendar days should be allowed to consider the proposed formal written terms of a settlement agreement and to receive independent advice, unless the parties agree otherwise;
  - ii. An employer saying before any form of disciplinary process has begun that if a settlement proposal is rejected then the employee *will* be dismissed;
  - iii. An employee threatening to undermine an organisation’s public reputation if the organisation does not sign the agreement, unless the provisions of the Public Interest Disclosure Act 1998 apply.

### Definition check: Bullying and harassment

‘Bullying and harassment’ means any unwanted behaviour that makes someone feel intimidated, degraded, humiliated or offended. It might be obvious or it might be insidious. It may be persistent or an isolated incident. It can occur in written communications, by phone or through email, not just face to face.

Examples of bullying/harassing behaviour could include:

- spreading malicious rumours, or insulting someone
- exclusion or victimisation
- unfair treatment
- deliberately undermining a competent worker by constant criticism.

‘Harassment’ more specifically is unwanted conduct which is related to one of the following: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. It is unlawful under the Equality Act 2010.

### Definition check: Victimisation

‘Victimisation’ has a special, technical, meaning which is not always the same as its everyday meaning of ‘treating someone unfairly’.

In employment law, ‘victimisation’ means treating someone less favourably than others because that person has exercised, or intends to exercise, specific rights – such as maternity rights, or the right to holiday pay or annual leave.

For example, the Equality Act 2010 makes it unlawful to treat someone less favourably than would otherwise have been the case because he or she has exercised, or intends to exercise, rights under that Act.

So, for instance, treating an employee less favourably because they have raised a grievance about discriminatory treatment on the basis of race or disability, or have provided information to support a colleague’s complaint about unlawful discrimination, would be victimisation.

It would also be victimisation to subject an employee or worker to any ‘detriment’ in the sense defined above on p17.

## Example 4: 'Improper behaviour'

### Scenario

Anna worked as a helpline adviser in a call centre for three years. When the company upgraded its call handling software six months ago, her employer provided training for all the helpline advisers. Anna found it difficult to adapt to the new technology and her performance began to fall behind that of her colleagues. However, her manager, Adebayo, reassured Anna that her performance was still satisfactory, commenting that it would probably just take some time for Anna to get used to the new system.

When Adebayo left the organisation shortly afterwards, Anna's new manager Mark took a very different approach. At their first team meeting, Mark made it known that he had 'no time for slackers' and that he expected all his staff to work to high standards at all times. A few weeks later, Mark called Anna to his office for a meeting and explained that he had been reviewing the performance records of all his staff. He stated angrily that Anna was 'the worst performer in the whole section' and told her, "You're not going to last in here. I don't see that you're going to improve and I won't be as patient as my predecessor. You'll end up being dismissed for poor performance; it's just a matter of time." Anna felt intimidated by Mark's aggressive behaviour and was shocked when Mark then offered her a settlement agreement to terminate her employment, commenting that Anna could 'take it or leave it, it's up to you. But this is a generous offer and you should think about it carefully – it won't be on the table tomorrow.'

When Anna refused to consider the offer, Mark commenced a disciplinary process for poor performance which led to Anna being dismissed. Anna is convinced she has been treated unfairly and brings an unfair dismissal claim to an employment tribunal. She wishes to refer to the comments Mark made when he offered the settlement agreement as evidence to support her claim.

## Example 4: 'Improper behaviour' (cont)

### Comments

- S.111A should not apply here as Mark's behaviour at the meeting may be regarded as 'improper behaviour' in three respects: firstly, he acts in an aggressive and intimidating manner towards Anna; secondly, he provides only a very short time for Anna to consider the offer; and, thirdly, he states that Anna will end up being dismissed even though there has not yet been any disciplinary procedure.
- It is also unlikely that there was an 'existing dispute' when the settlement offer was made, so the offer and discussion are unlikely to be 'protected' by the 'without prejudice' principle.
- It is therefore likely that Anna will be able to refer to Mark's comments as evidence at the employment tribunal hearing.

The test of 'improper behaviour' is not intended to interfere with existing and acceptable negotiating practices in relation to settlement agreements. For example, it is common practice to make offers of financial payment that include a reasonable time-limit for responses.

However, employers should consider whether their presentation of an offer could be perceived by an employment tribunal as 'improper behaviour'. For instance, adopting a negotiating tactic that the amount offered reduces progressively while the employee is considering the offer could be considered as applying undue pressure on the individual to

rush a decision, and therefore constitute 'improper behaviour'.

What constitutes undue pressure will, however, depend on the particular circumstances of each case. For example, should an employer's financial position, or other factors outside of their control, suddenly change significantly, they may be able to withdraw or amend a financial offer within the period that the employee has been given to consider that offer, without that constituting undue pressure.

Employment tribunals have discretion to determine whether or not there has been 'improper behaviour' in an individual case, and to determine

whether to admit evidence of the settlement discussions where they find that there has been ‘improper behaviour’. The following list provides some examples of what, depending on circumstances, usually would *not* be considered as ‘improper behaviour’:

- Setting out in a neutral manner the reasons that have led to the proposed settlement agreement;
- Factually stating the likely alternatives if an agreement is not reached, including the possibility of disciplinary action which may lead to dismissal if relevant;
- Factually stating that if an employee refuses a settlement agreement and any subsequent disciplinary action results in dismissal then the employee may not be able to leave on the same terms as set out in the proposed settlement agreement;
- Not using the template letters or model agreement set out in the Annexes to this guide;
- Not agreeing to provide a reference;
- Not paying for the employee’s independent advice;
- Encouraging an employee, in a non-threatening way, to reconsider a refusal of a proposal.

It is important to bear in mind that the fact that there has been some ‘improper behaviour’ does not necessarily mean that an employer will lose a subsequent unfair dismissal claim. Equally, the fact that an employer has *not* engaged in some ‘improper behaviour’ does not necessarily mean that they will win a subsequent unfair dismissal claim brought against them.

## *Example 5: Behaviour that is not 'improper'*

### **Scenario**

Youssef is the general manager of a hotel. He receives a formal grievance raised by Julie, a member of the hotel's bar staff, about bullying behaviour by Gary, the bar manager. Youssef is concerned that history may be repeating itself, as six months ago Gary was issued with a final written warning after similar accusations from Chang, another member of the bar team, were investigated.

Youssef is aware that the investigation process in that previous instance caused distress among the entire bar team. There was also some evidence that Gary's bullying behaviour became more intimidating during the process and, despite his grievance being upheld, Chang left his job shortly afterwards, citing an inability to continue working with Gary. Youssef is anxious to avoid a repeat of that situation if possible and he decides to speak to Gary to see if he might be open to reaching a settlement agreement to leave on agreed terms.

He invites Gary to a meeting and explains that he will next be arranging for a full and fair investigation of the allegations made against him, which will be carried out in line with the hotel's grievance procedure. He explains that no conclusions have yet been reached, but that if the grievance is upheld then disciplinary action may follow, which may lead to Gary's dismissal. Youssef remarks that the process is likely to be stressful and time-consuming for everyone and suggests, as an alternative, that Gary might wish to reflect on his position and on whether an agreement to part ways on mutually agreed terms might be an option he would consider. Gary reacts angrily to this suggestion and refuses to discuss settlement any further.

## Example 5: Behaviour that is not 'improper' (cont)

A thorough investigation then follows which provides firm evidence suggesting that Gary has been acting in a bullying manner towards Julie. A disciplinary hearing is next arranged which results in Gary being dismissed. Gary brings a claim of unfair dismissal to an employment tribunal. He wishes to refer to the settlement discussion with Youssef as evidence that Youssef had plans to get rid of him all along and that the investigation and disciplinary hearing were not fair.

### Comments

- Youssef's conduct during the settlement discussion should not be regarded as 'improper behaviour'. He explained to Gary that there was a possibility of disciplinary action, including dismissal, but made it clear that a fair and proper process would be followed before any such decision was taken.
- S.111A should therefore apply here so that Gary should not be able to refer to the settlement discussion as evidence at the unfair dismissal hearing.

### How does s.111A apply alongside the 'without prejudice' principle in unfair dismissal cases?

In unfair dismissal cases, settlement discussions may potentially be inadmissible as evidence in an employment tribunal hearing under the provisions of *both* s.111A *and* the 'without prejudice' principle.

Annex 6 provides a simplified diagrammatic illustration of how the provisions of s.111A work alongside

the 'without prejudice' principle in unfair dismissal cases.

In situations where there was **no existing dispute** between the parties at the time the settlement agreement was offered and discussed, the 'without prejudice' principle cannot apply. However, s.111A can apply. In these circumstances, pre-termination settlement negotiations will not be admissible in an unfair dismissal hearing so long as there has been no **'improper behaviour'**.

Where there was an **existing dispute** between the parties at the time the settlement agreement was offered and discussed, then the offer and discussions may be covered by *both* the ‘without prejudice’ principle and s.111A. The ‘without prejudice’ principle will apply unless there has been some ‘unambiguous impropriety’. As this test is narrower than that of ‘improper behaviour’, then this effectively means that settlement negotiations will not be admissible here unless there has been some ‘**unambiguous impropriety**’.

### How does s.111A apply in cases involving multiple types of claim?

The provisions of s.111A *do not* apply to employment tribunal claims other than unfair dismissal – for example, claims made about discrimination, wrongful dismissal or unlawful deduction of wages. The provisions of s.111A are not extended to such claims even where those claims are brought together with an associated unfair dismissal claim.

This means that in cases involving a claim of unfair dismissal together with some other claim or claims, settlement discussions may be inadmissible under s.111A in relation to the unfair dismissal part of the

claim but admissible in relation to the other parts of the claim. It is worth bearing in mind, however, that settlement discussions for all parts of the claim may be inadmissible if the ‘without prejudice’ principle applies.

#### Definition check: Wrongful dismissal

Wrongful dismissal is the name given to the dismissal of an employee in circumstances which amount to a breach of their employment contract.

Wrongful dismissal claims occur most commonly where an employer dismisses an employee without notice, or with insufficient notice, under his or her contract of employment, and without paying adequate compensation in lieu in notice.

The relevant considerations for a court or tribunal hearing a claim of wrongful dismissal will be the relevant contractual obligations of the employer (not the fairness of the dismissal itself).

# Discrimination and victimisation and the use of settlement agreements

The occurrence of unlawful discrimination against an employee in relation to the protected characteristics under the Equality Act 2010 – age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation – or the occurrence of unlawful victimisation (see p31), may constitute ‘improper behaviour’ or ‘unambiguous impropriety’ in the context of settlement discussions.

This means that discussions in which discrimination or victimisation occurs may be admissible as evidence in unfair dismissal cases or other cases that may be brought to an employment tribunal or court.

Moreover, employers should be aware that, in certain circumstances, the reason for a settlement offer may itself constitute the basis for a claim of unlawful discrimination or victimisation to an employment tribunal. Examples of such discriminatory reasons may include:

- offering a settlement agreement to an employee because she informs her employer that she is pregnant
- offering a settlement agreement to an older employee who has reached a certain age in an attempt to encourage him or her to retire.

If either of these employees brought a claim of unlawful discrimination to an employment tribunal then s.111A would not apply, since s.111A only applies to unfair dismissal claims.

The ‘without prejudice’ principle may also not apply in such a discrimination claim if there was no ‘existing dispute’ about discrimination at the time that the settlement agreement was offered, and also because discrimination may, in any event, constitute ‘unambiguous impropriety’.

## *Example 6: Unlawful discrimination in offering a settlement agreement*

### **Scenario**

Sophie has worked on the production line in a shoe factory for seven years. She has begun to develop arthritis in her hip which has affected her mobility. Worried that this will begin to affect her performance at work, Sophie discusses this with her GP who writes a fit note to her manager recommending that Sophie's workplace environment is adapted to allow her to sit periodically and avoid standing for long periods of time.

A few days later, Sophie's manager, Eddy, asks her to come up to his office. Eddy refers to the GP's note and then comments, "I empathise with your situation Sophie, but you know you can't carry on working here now that you've got a bad hip. It's just not going to work." He then tells Sophie that he is prepared to offer her a settlement agreement to terminate her employment, which will include a good reference and a financial offer that reflects her seven years' service with the company. When Sophie refuses the offer, Eddy then commences a performance improvement process followed by a disciplinary process which leads to Sophie being dismissed.

Sophie believes the performance process was a sham and that she has also been discriminated against on the basis of her having arthritis. She brings a claim of unfair dismissal together with a claim of disability discrimination to an employment tribunal and wishes to use Eddy's comments during the settlement agreement meeting as evidence in both these claims.

## Example 6: Unlawful discrimination in offering a settlement agreement (cont)

### Comments

- Eddy's comments during the settlement discussion may amount to unlawful disability discrimination and may therefore be regarded as 'improper behaviour' or 'unambiguous impropriety'. Therefore, the settlement discussion may be admissible as evidence in the tribunal hearing for Sophie's *unfair dismissal claim*.
- Eddy's comments also form the basis of Sophie's further disability discrimination claim. S.111A does not apply to discrimination claims. Also, there was no 'existing dispute' about disability discrimination between Sophie and her employer at the time that Eddy offered the settlement agreement, so the 'without prejudice' principle will not apply either. Therefore, Eddy's comments are likely to be admissible as evidence in the tribunal hearing for the *disability discrimination claim*.

Employers should always take care to ensure that the way in which settlement discussions are conducted takes into account the particular circumstances of the individual employee. Adopting a 'one size fits all' approach to the process could lead to an employer inadvertently discriminating against employees with some protected characteristics.

For example, while the Acas Code of Practice on Settlement Agreements (paragraph 12) specifies that there should be a minimum of at least 10 calendar days in which to consider

the proposed formal written terms of a settlement agreement and to receive independent advice (see p15 of this guide), this time period may need to be reasonably adjusted in particular circumstances. For instance, a disabled employee might need to be given a longer period because of the nature of their disability (eg they may need to arrange a palantypist or British Sign Language interpreter for a meeting with an independent adviser).

Care should also be taken to ensure that the arrangements as to the time and place for a meeting to discuss

settlement do not discriminate against an employee. For example, employers should not arrange a meeting:

- At a place that may be difficult to access for a disabled employee;
- At a time that may be difficult for an employee to attend due to their religious belief; or

- On a day that is not one that the employee is due to work because they are looking after a disabled relative.

It is good practice for employers to review their use of settlement agreements periodically, to check if there is any unintended impact on employees with protected characteristics, as this may amount to unlawful discrimination.

### *Example 7: Checking for unintended discrimination*

Tomasz is the HR Director in a food distribution company which has 10 outlets located across Britain. He becomes aware that a number of settlement agreements have been offered and reached by the company over the past year. He conducts an equality impact review of the use of settlement agreements by the company which reveals that they have been largely used by local managers in relation to workers who have reached pensionable age.

Tomasz realises that there is a risk that this pattern may constitute unlawful discrimination on the basis of age. He arranges equality awareness training for the local managers to ensure that they understand that settlement agreements should not be offered in a default way to encourage older workers to retire.

# Settlement agreements and collective redundancies

Employers proposing to make 20 or more employees redundant over a period of 90 days or less should consider carefully their obligations to consult collectively with employees. Where employers run voluntary redundancy or severance schemes, employees who leave under such schemes and sign settlement agreements may still need to be counted when determining whether the thresholds for collective redundancy rules have been met. Whether such employees need to be counted will depend on the circumstances under which the employees left their employment and in particular whether the reason was 'redundancy' or not.

The underlying reason for the ending of an employment relationship can still be 'redundancy' even where a settlement agreement has been reached between the parties.

Further guidance on handling collective redundancies can be found in Acas' guidance booklet *How to manage collective redundancies*.

# What if a settlement agreement is not reached?

Where an offer of a settlement agreement is rejected, employers can choose not to follow up with any further action and continue with the employment relationship unchanged. However, depending on the reason for the settlement offer, this is unlikely to be the best way of maintaining the effectiveness of the organisation and keeping staff motivated and engaged. Employers should seek to tackle any underlying causes of workplace problems – for example, by improving communications, training or working arrangements, or by going through a performance management or disciplinary process as appropriate.

Offers of a settlement agreement may often follow, or arise during, a performance management or disciplinary procedure. Where this is the case the performance management or disciplinary procedure can be resumed.

The settlement discussions should, however, have no bearing on any such procedure and the normal principles of fairness in such procedures must still be applied in all

cases. For example, an employee should be encouraged and supported to improve their performance; a reasonable investigation must be carried out into alleged misconduct; and an employee must be given a fair disciplinary hearing in accordance with an organisation's own procedures and the principles contained in the Acas Code of Practice on Disciplinary and Grievance Procedures.

Any correspondence in relation to settlement discussions should be regarded as separate from correspondence relating to disciplinary or performance management procedures, such as invitations to disciplinary meetings. Moreover, any discussions that may have taken place about the employee's conduct or performance as part of the settlement agreement negotiations should not form part of these procedures. For example, an employer should not regard a discussion about poor attendance during a settlement agreement negotiation as constituting a disciplinary warning.

Employers must always follow a fair process before an employee is dismissed. Failure to do so will leave them vulnerable to potentially losing any subsequent unfair dismissal claim the employee may make. Following fair procedures is also an integral part of maintaining good employment relations throughout the workplace.

In situations where there were no disciplinary or performance concerns prior to the settlement discussions – for example, where a breakdown in communication or in the working relationship had prompted the settlement discussions – ways of improving communications should be explored. Mediation can often provide a way forward in such situations.

# What happens if a settlement agreement is not honoured?

If any provision of a settlement agreement is not honoured, for instance, if an employer does not pay the employee the compensation set out in the agreement, or an employee fails to abide by an agreed

confidentiality clause, then the remedy is usually to claim breach of contract and damages in the county or high court (or, in Scotland, in the Sheriff Court).

## Annex 1: Checklist for employers proposing a settlement agreement

### Before deciding whether to offer a settlement agreement

- What is the reason you are considering a settlement agreement? Is a settlement agreement the best way to deal with the issue? (See p7 and pp10-11)
- Have you considered the implications for the employment relationship with the employee if an agreement cannot be reached? And the implications for employment relations in the wider workforce?
- Is it clear that there is no unlawful discrimination or victimisation involved in offering a settlement agreement in the circumstances? (See pp38-41)

### Offering and negotiating a settlement agreement

- Have you carefully considered whether a financial payment should be offered? If you are offering a financial payment is the amount an appropriate offer for settlement? (See p13)
- Will you offer to provide a reference? If so, what might that reference say? (See p13)
- Making an offer of a settlement agreement is inevitably a sensitive issue – have you considered how best to raise the matter with the employee? And have you thought about the appropriate information the employee may need to allow him/her to make an informed decision about their options?
- If writing to the employee, are you going to use or adapt one of the Acas template letters? Or, if using a letter of your own, have you made sure that it covers similar points to those in the Acas template letters? (See Annexes 3 and 4)
- Will it be useful to arrange a meeting, or a series of meetings, to discuss your proposal with the employee? Are you going to ask the employee if they would like to be accompanied at any such meeting? (See pp16-17)

- Do you understand the admissibility provisions relating to settlement agreement discussions in employment tribunals and courts, and have you made the employee aware of these provisions? (See pp23-37)
- Have you considered what might be a realistic and reasonable timescale for any discussions and negotiations? (See pp15-16)

### **Drawing up a formal written settlement agreement**

- Are you aware of all the legal requirements for a settlement agreement to be valid? (See p21)
- Are you going to use the model agreement set out in Annex 5 to this guide? If so, have you read and understood the guidance on the model? If using an alternative form of agreement, does it meet all the legal requirements to ensure it will be valid?
- Will you offer to pay the cost, or a contribution towards the cost, of the employee's independent advice? (See p22)
- Do you wish to seek legal advice to help you draft the proposed formal agreement, or to help you understand the legal implications?
- Have you given the employee a minimum period of 10 calendar days to consider the proposed formal written terms of the settlement agreement and to receive independent advice? (See p15)

## Annex 2: Checklist for employees who have been offered a settlement agreement

### Considering whether to try to reach a settlement agreement

- What is the reason your employer is offering you a settlement agreement?
- Are you clear about what the possible alternative outcomes might be if a settlement agreement is not reached?
- Have you considered the potential implications for future employment – for example, the potential advantages of securing an agreed reference?
- Have you considered other potential implications of agreeing a settlement agreement – for example, whether or not the agreement will be a 'dismissal' and the impact that may have on your eligibility for some benefits? (See pp18-19)
- Do you understand the admissibility provisions relating to settlement agreement discussions, eg that such negotiations cannot normally be used as evidence in any subsequent unfair dismissal claim? (See pp23-37)
- Do you know that signing a settlement agreement will mean that you cannot bring any employment tribunal or court claims listed in the agreement?
- Do you know that settlement agreement discussions are voluntary, ie that you do not need to enter into them, or continue with them, if you do not wish to do so?

### Discussing and negotiating a settlement agreement

- If you think you might consider settlement, have you considered what might be a reasonable financial amount to accept? (See p13)
- Is your employer offering you a reference? Or do you wish to request one as part of the agreement? If so, have you thought about what might be an agreeable form of wording for the reference? (See pp13-14)

- Might it be helpful to discuss your options with a trusted third party?
- Will it be useful to request a meeting with your employer to discuss the proposed settlement agreement? If your employer gives you the option, do you wish to be accompanied at any such meeting, eg by a work colleague? (See pp16-17)

### **Considering the proposed formal written terms of a settlement agreement**

- Are you aware of all the legal requirements for a settlement agreement to be valid? (See p21)
- Have you taken advice from an appropriate independent adviser on the terms of the proposed settlement agreement and its effect on your ability to pursue your rights before an employment tribunal or other court? A settlement agreement will not be legally valid unless you have received such advice. (See p21)

## Annex 3: Optional template letter to initiate settlement discussions under section 111A of the Employment Rights Act 1996

### (where there has been no previous performance management or disciplinary action)

Dear [ ]

#### Your employment: Confidential settlement proposal

We are writing to you because [as we discussed on *insert date of previous discussion if applicable*,] we have had some concerns about your conduct/attendance/performance [*delete as appropriate, and specify sufficient detail about the concerns to allow the employee to make an informed decision about his/her options*].

We consider that, in these circumstances, one option is to offer you a settlement agreement to bring our employment relationship to an end, and we invite you to consider the proposal set out below.

If we are unable to reach such an agreement, then you should be aware that [*delete as appropriate*]

[we will next investigate these concerns further in accordance with our disciplinary procedure and then decide whether it may be appropriate to convene a disciplinary meeting [*insert brief details of where the employee can reasonably access the written disciplinary procedure*].]

[we will address our concerns about your performance [in accordance with our performance management procedure] and you will be encouraged and supported to improve your performance before we decide whether it may be appropriate to convene a disciplinary meeting [*insert brief details of where the employee can reasonably access the written disciplinary procedure and, if appropriate, performance management procedure*].]

You should note that there is no obligation for you to enter into discussions with us in relation to this proposal. Whether you choose to do so or not,

please also note that any response to this letter, and any correspondence or discussions which may follow, will have no bearing on any later disciplinary [or performance management] procedure or subsequent decision taken by us, in the event that we are unable to reach an agreement.

The terms we would like to offer you are as follows [*delete terms, or add further terms, as appropriate*]:

[You would receive:

[- a [lump sum] payment of [£x], free of tax and NI [*up to £30,000*]] [*providing further details of how the proposed sum has been arrived at may help the employee make an informed consideration of the proposal*]

[- payment of [£x] for outstanding holiday entitlements, subject to tax and NI]]

[Your employment would end on [*insert date which must take into account the employee's statutory or contractual notice period, or include details of payment in lieu of notice if that is permitted by the employment contract*].]

[You would agree not to bring a claim [or claims] of [*refer to claim(s) that it is proposed to settle, eg unfair dismissal*]] to an employment tribunal.]

[You would receive an agreed reference covering your period of employment with us.]

[*Add if appropriate*: If you wish us to arrange a meeting with you to discuss this proposal and the terms of the offer then we will do so [*insert details of contact person and method of contact*]]. [*Add if appropriate*: You may be accompanied by a work colleague, trade union official or trade union representative at any such meeting.]

This offer is made subject to final agreement of full terms, and it is open for you to consider until [*insert time*] on [*insert date, which must be reasonable taking account of the particular circumstances*].

If you do wish to accept this offer we will draw up a formal agreement in writing. The law provides that you would need to obtain independent advice on the terms and effect of the proposed agreement before signing it.

It is our intention that this letter will be covered by section 111A of the Employment Rights Act 1996. This means that the offer we are making and any subsequent discussion about it may not be admissible as evidence in any subsequent unfair dismissal claim. Further information on the provisions of section 111A and details on who may act as your independent adviser can be found in the Acas Code of Practice on Settlement Agreements, and associated guidance, which can be accessed at [www.acas.org.uk](http://www.acas.org.uk).

Yours sincerely,

# Annex 4: Optional template letter to initiate settlement discussions under section 111A of the Employment Rights Act 1996

**(where there has been previous or there is ongoing performance management or disciplinary action)**

Dear [ ]

## **Your employment: Confidential settlement proposal**

We are writing to you because, as you are aware, we have had some concerns about your conduct/attendance/performance *[delete as appropriate, and specify sufficient detail about previous disciplinary/performance management action taken, and about the ongoing concerns, to allow the employee to make an informed decision about his/her options].*

We consider that, in these circumstances, one option is to offer you a settlement agreement to bring our employment relationship to an end, and we invite you to consider the proposal set out below.

If we are unable to reach such an agreement, then you should be aware that it is our intention to proceed to the next stage of our disciplinary *[or performance management]* procedure *[insert brief details of where the employee can reasonably access the appropriate written procedure.]*

You should note that there is no obligation for you to enter into discussions with us in relation to this proposal. Whether you choose to do so or not, please also note that any response to this letter, and any correspondence or discussions which may follow, will have no bearing on any disciplinary *[or performance management]* procedure or decision taken by us, in the event that we are unable to reach an agreement.

The terms we would like to offer you are as follows *[delete terms, or add further terms, as appropriate]*:

[You would receive:

[- a [lump sum] payment of [£x], free of tax and NI *[up to £30,000]* *[providing further details of how the proposed sum has been arrived at may help the employee make an informed consideration of the proposal]*

[- payment of [£x] for outstanding holiday entitlements, subject to tax and NI]]

[Your employment would end on *[insert date which must take into account the employee's statutory or contractual notice period, or include details of payment in lieu of notice if that is permitted by the employment contract].*]

[You would agree not to bring a claim *[or claims]* of *[refer to claim(s) that it is proposed to settle, eg unfair dismissal]* to an employment tribunal.]

[You would receive an agreed reference covering your period of employment with us.]

*[Add if appropriate: If you wish us to arrange a meeting with you to discuss this proposal and the terms of the offer then we will do so [insert details of contact person and method of contact]]. [Add if appropriate: You may be accompanied by a work colleague, trade union official or trade union representative at any such meeting.]*

This offer is made subject to final agreement of full terms, and is open for you to consider until *[insert time]* on *[insert date, which must be reasonable taking account of the particular circumstances]*.

If you do wish to accept this offer we will draw up a formal agreement in writing. The law provides that you would need to obtain independent advice on the terms and effect of the proposed agreement before signing it.

It is our intention that this letter will be covered by section 111A of the Employment Rights Act 1996. This means that the offer we are making and any subsequent discussion about it may not be admissible as evidence in any subsequent unfair dismissal claim. Further information on the provisions of section 111A and details on who may act as your independent adviser can be found in the Acas Code of Practice on Settlement Agreements, and associated guidance, which can be accessed at [www.acas.org.uk](http://www.acas.org.uk).

Yours sincerely,

## Annex 5: Model settlement agreement

The following model settlement agreement is an optional basis for a standard agreement ending the employment relationship. It provides a suggestion of the kind of text which can be used and is designed to be as simple as possible. It will need tailoring to suit the needs of a particular situation between any two parties.

It will clearly be important for both the employer and the employee to get the agreement right. If an employer wants to use the model settlement agreement they may wish to seek legal advice to check that their draft agreement is accurate and achieves the settlement that they intend. If a settlement agreement is to be legally valid, an employee must have received independent advice before they sign the settlement agreement (see p21).

The model, and the guidance on it below, is not intended as a substitute for legal advice, nor does it replace the requirement for the employee to receive independent advice.

The model agreement is intended to be referred to particularly in those cases where the employment relationship is ongoing and the parties are discussing ending the relationship under the terms of a settlement agreement.

The model does not cover every issue that parties may wish to include in a settlement agreement. For example, it is common for settlement agreements to include specific provisions dealing with other matters which are particular to individual circumstances, such as share options and pension entitlements. Any provisions dealing with such matters will very much depend on the individual circumstances and it would usually be prudent to obtain some legal advice on these issues.

The following guidance should be read alongside the model settlement agreement. It explains what the different clauses in the model are designed to deal with and how they should be amended to reflect your particular circumstances.

## Guidance on using the model agreement

### Cover page

The agreement states that it is 'subject to contract'. This means that, in respect of agreements in England and Wales, the draft agreement will not be binding on either party until it is signed. (In Scotland, this statement indicates that it is the intention that the agreement will not be binding until signed. However, if an agreement has in fact been reached on essential terms then there may be a binding contract between the parties, regardless of the fact that the written agreement has not yet been signed and agreement on certain details may not yet have been reached.)

If the 'without prejudice' rule applies, it is also advisable to state on the cover page that the agreement is 'without prejudice'. Where the rule does apply, this means that the draft agreement cannot be used in evidence in subsequent court or tribunal proceedings (except in limited circumstances). Whether the rule applies or not will depend on whether there is an 'existing dispute' between you and the employee which you are trying to settle. For guidance on this see p23-25. You may also wish to seek legal advice on this.

Where a settlement agreement is being discussed with a view to ending the employment in a situation where there is no 'existing dispute', it is advisable to state on the cover page that the agreement is 'covered by section 111A of the Employment Rights Act 1996'. This means that the draft agreement cannot be used as evidence in a subsequent unfair dismissal hearing (except in limited circumstances). For guidance on this see p25-35.

You should insert the names of the parties. Once agreement has been reached on the terms of the settlement agreement, you should insert the date that the agreement is signed by the parties. If the agreement is signed by each party on different dates then you should insert the later of the signing dates.

The names of the parties and the date of the agreement should also be inserted at the top of the first page of the agreement (before Clause 1).

## **Clause 1: Background**

This clause sets out briefly that the parties are entering into a settlement agreement and that in doing so the employer does not admit any liability.

You should enter the employee's job title and employment start date in Clause 1.1.

## **Clause 2: Definitions**

This clause sets out the definitions of the terms used in the agreement. If appropriate, you could add other terms to this list.

## **Clause 3: Termination Date and Notice**

Clause 3.1 Where the employer and employee are agreeing to end the employment, they will need to agree the date when employment will end (the 'termination date'). This agreed date should be inserted here.

Clause 3.2 You should set out here the wages/salary payments that the employee is entitled to receive during the notice period. The wages/salary payments during the notice period will normally be determined by the contract of employment and will be subject to the normal rules on taxation of employment income.

Any holiday entitlement that the employee will have accrued but not taken at the agreed termination date should be calculated and the number of these outstanding days inserted in the agreement. (The employee has a right to payment of any statutory holiday entitlement that has accrued during the employment but has not been taken at the date of termination. Entitlement to pay for any contractual holidays over and above the statutory minimum entitlement will depend on the terms of the employment contract.)

It should be noted that these wages/salary and holiday payments are the normal payments due at the end of the employment contract. They do not constitute part of the agreed 'Settlement Payment' (on which see Clause 5 below).

*Payment in lieu of notice:* Alternatively, the contract of employment may allow the employer to make a payment in lieu of notice or, if the employment

contract does not allow this, the parties may agree that the employee will be paid in lieu of notice. This means that the employee does not work the notice period and the employer makes a payment to the employee to reflect what they would have received during the notice period, including wages/salary and accrued but untaken holidays. Where payment in lieu of notice is to be made, then details of the wages/salary payment and holidays should be given in Clause 3.2.

*'Garden leave'*: In some situations, the parties can agree that the employee will not work during the notice period and instead be on 'garden leave'. You should check the contract of employment to see whether the employee can be required or can be asked to stay on 'garden leave'. If the contract does not allow this, you will need to ask the employee to agree to such an arrangement. The payments due to the employee during 'garden leave' will normally be determined by the contract of employment, or can be agreed between the parties. However, if the employee is to go on a significant period of 'garden leave' (for example several months) then there are some important legal issues to consider and it is usually prudent to obtain specific legal advice about this.

#### **Clause 4: Withdrawal of Proceedings and Waiver**

In reaching a settlement agreement the employee agrees to settle particular claims, ie agrees not to pursue specified claims which they have already presented, or which they may potentially present, to an employment tribunal or court. Clause 4 sets out that it is acknowledged and accepted that the agreement is made in full and final settlement of those specified claims. It also sets out that the employee agrees to withdraw any claims that have already been brought.

To be legally valid in waiving an individual's right to bring a complaint or complaints before an employment tribunal or other court, a settlement agreement has to specifically state the claims that it is intended to cover. These can be actual claims that have already been brought, or potential claims not yet brought but which can be reasonably anticipated at the time the agreement is reached. However, simply saying that the agreement is in 'full and final settlement of all claims' will not be sufficient to waive an individual's right to bring or continue employment tribunal or court claims.

The settlement agreement must therefore properly specify the particular claims which the parties are agreeing to settle. For this purpose, **Annex A** to the model agreement provides an extensive list of possible claims which the parties may wish to settle.

It is important that the employer reads the list in **Annex A** carefully and deletes any claims which are not relevant to, or which could not be reasonably anticipated in, the particular situation – eg claims which, in the circumstances, the employee could never bring. For example, if the employee always worked full-time for the employer, the employer should delete the reference to the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. Also, claims under the Merchant Shipping (Working Time: Inland Waterways) Regulations 2003 will only be relevant in a small number of cases involving employees in that industry, so this should usually be deleted.

## **Clause 5: Settlement Payment**

Clause 5.1 This clause sets out the amount of money the employer agrees to pay to settle the claims that the employee has agreed not to take to, or to pursue further at, an employment tribunal or court. This sum is referred to as 'the Settlement Payment'. (This is distinct from the normal wages/salary, holiday and notice payments due on the termination of employment, as specified under Clause 3).

Clause 5.2 sets out the tax liabilities that the parties expect to attach to the Settlement Payment. In certain circumstances, payments of up to £30,000 of a Settlement Payment (or the first £30,000 of larger Settlement Payments) may be paid free of tax and NI (see HMRC guidance<sup>4</sup> on this for further information). However, the taxation of settlement payments can be complex, and parties in any doubt should consult a tax adviser or HMRC.

If the reason for the employee's employment coming to an end is redundancy, it is prudent to state the amount which is paid as redundancy payment in Clause 5.2, as statutory redundancy payments will not be subject to income tax and National Insurance, but a contractually enhanced redundancy payment might be.

<sup>4</sup> HMRC's guidance on tax and NI in relation to settlement payments made on the termination of employment can be found at <http://www.hmrc.gov.uk/manuals/eimanual/eim12800.htm> (tax) and <http://www.hmrc.gov.uk/manuals/nimmanual/nim02510.htm> (NI).

Clause 5.3 If the Settlement Payment, or a portion of it, is paid without deducting tax and/or National Insurance contributions, it is common for one of the parties to agree to pay any tax and/or National Insurance contributions which later become payable in respect of the payment.

Clause 5.4 If it is agreed that a reference will be provided as part of the settlement this should be mentioned in Clause 5. A copy of the reference could be included as an annex to the settlement agreement. The reference could be a simple statement of the employee's dates of employment and position held, or a more detailed description of their duties, role, performance, etc. (See pp13-14 for guidance on providing an employment reference.)

## **Clause 6: Conditions Regulating Settlement Agreements**

There are a number of legal conditions that must be met in order for a settlement agreement to be valid in waiving an individual's right to bring a complaint or complaints before an employment tribunal or other court (see p21). A valid settlement agreement must also state that these conditions have been satisfied.

Annex B provides a list of the legislative provisions in which these legal conditions are set out. All the provisions listed in Annex B refer to the legal conditions set out in Box 3 in the guidance above (see p21).

Clause 6, together with Annex B, means that the parties are agreeing that these legal conditions have been satisfied.

## **Clause 7: Employer's Property and Employee's Property**

Clause 7.1 In some cases the employee will be in possession of property or information which is owned by the company (for example, a laptop, mobile phone, confidential records, etc.). Where that is the case, it is usually prudent to include this clause which specifies that, and when, the property will be returned or information deleted. A list of the property that needs to be returned or the information which needs to be deleted can be included if necessary.

Clause 7.2 covers any property that the employer is agreeing to return to the employee.

## **Clause 8: Confidentiality**

Clause 8.1 relates to situations where the parties agree that confidentiality clauses and/or restrictive covenants in their employment contract should remain binding after the end of the employment relationship. It is important to specify any such terms of the employment contract that the parties intend to remain binding, in order to ensure that these are incorporated as part of the terms of the settlement agreement. (In some situations, where there is no contractual right to make a payment in lieu of notice but the employee agrees to accept one, there are specific issues relating to tax to consider if the parties also wish to agree that the employee will remain bound by confidentiality clauses or restrictive covenants in the employment contract. It would be advisable to obtain separate legal advice in this situation.) Where no such provisions are contained in the employment contract then Clause 8.1 should be deleted.

Clause 8.2 relates to situations where the parties agree to keep the settlement agreement itself confidential (except for limited exceptions). Where this is not a part of the agreed terms in a particular situation then this clause should be deleted.

Sometimes the parties will also want to agree that they will not make derogatory comments about each other after the settlement agreement has been concluded. Such a clause is not included in the model agreement but could be inserted here.

## **Clause 9: Employee's Representations and Warranties**

Clause 9.1 sets out an undertaking by the employee about their conduct during the employment relationship.

Clause 9.2 means that, if it turns out that the employee was not truthful in relation to the undertaking in Clause 9.1, then the employer may be able to withhold or recover the Settlement Payment and/or potentially sue the employee for any relevant losses or damages.

## Clause 10: Employee's Advice and Costs

Clause 10.1 It is a legal requirement that the agreement records that the employee has received advice from a relevant independent adviser<sup>5</sup>. This is covered by Clause 10.1.

Clause 10.2 An employer may, if he or she wishes, pay for this advice. There is no legal requirement to do so, but employers may wish to offer to pay any such fee, or a contribution towards it, in the interests of ensuring that the employee gets the necessary advice. This clause sets out how much an employer is willing to contribute.<sup>6</sup> If the employer is not contributing anything, this clause should be deleted.

## Clause 11: Entire Agreement and Enforceability

Clause 11.1 In many cases the parties will want the settlement agreement to supersede any previous agreement between them, such as the terms of the employment contract. If this is the intention of both parties then Clause 11.1 should be included to make this clear. (In Scotland this clause may be open to challenge if the statement does not genuinely reflect the common intention of the parties.) Clause 8.1 can be used to specify any relevant provisions in the employment contract, such as confidentiality clauses or other restrictive covenants, which the parties do intend to continue to apply.

Clause 11.2 provides clarification that the agreement may only be varied by the agreement of both parties.

Clause 11.3 explains the enforceability of the terms of the agreement.

## Clause 12: Jurisdiction

This clause sets out the jurisdiction under which the agreement is made and optional wording is provided for agreements that will be covered by the law of England and Wales, and those that will be covered by Scots law. The wording that is not relevant to a particular settlement agreement should be deleted.

5 An independent adviser can be a qualified lawyer, or a certified and authorised officer, official, employee or member of an independent trade union or a certified and authorised advice centre worker. The adviser must not be employed by, acting for, or connected with the employer.

6 HMRC guidance on the taxation of payments made to meet such costs can be found at <http://www.hmrc.gov.uk/manuals/eimanual/eim13740.htm>

If the agreement is to be governed by Scots law then there are some parts of the agreement where additional or alternative text will need to be included. (In addition to Clause 12, this applies to Clauses 2.1, 5.1, 6 and 13 and to the headings to Annexes A, B and C.) Optional text has been included in each instance which should be included or deleted as appropriate.

### **Clause 13: Parties to the Settlement Agreement**

This clause makes it clear that only the employer and employee will have any rights under the settlement agreement.

The wording required here is different depending on whether the agreement is being made under the jurisdiction of the law of England and Wales, or of Scots law. The wording that is not relevant to a particular settlement agreement should be deleted.

The final sentence in the model agreement makes it clear that the parties are agreeing that, once the agreement has been signed and dated, it will become a legally binding document.

### **Signing**

The employer should ensure that the document is signed by an authorised signatory.

# Model Settlement Agreement

Dated [enter date DD/MM/YYYY]

## SETTLEMENT AGREEMENT

(Subject to Contract)

[Insert name of Employer]

-and-

[Insert name of Employee]

THIS SETTLEMENT AGREEMENT (the 'Agreement') is dated  
[enter date DD/MM/YYYY].

This Agreement is made between [insert Employer name] ('the Employer') and [insert Employee name] ('the Employee').

## **1: Background**

- 1.1. The Employee has been employed by the Employer as [enter job title] since [enter start date].
- 1.2. The Employer and Employee have agreed to settle the Particular Claims on the terms set out in this Agreement.
- 1.3. The Employer enters into this Agreement without any admission of liability.

## **2: Definitions and Interpretations**

- 2.1. In this agreement:

'Claims' means any claim, claims or causes of action that the Employee has or may have against the Employer.

'Particular Claims' are those Claims which the Employee and Employer intend to be settled by this Agreement, arising out of the Employee's employment or the termination of employment, as set out in Annex A *[if the Agreement is being used in Scotland the following additional words should be inserted at the end of this clause 'as set out in Annex A which is hereby incorporated into this agreement']*.

'Termination Date' means the date on which the employment has ended or will end, as set out in Clause 3.1.

- 2.2. References to the singular in this Agreement shall include references to the plural and vice versa and words in the masculine include the feminine and vice versa.
- 2.3. The headings in this Agreement are for ease of reference and shall not affect interpretation.

### **3: Termination Date and Notice**

- 3.1. The Employee's employment with the Employer will terminate on **[enter date DD/MM/YYYY]** ('the Termination Date'). The Employer and Employee will continue to be bound by the terms and conditions of employment until the Termination Date.
- 3.2. [Provided that the Employee continues to comply with the terms and conditions of their employment, the Employer will pay the Employee's usual wages/salary (less tax and National Insurance contributions) up to and including the Termination Date. [Along with the final wages/salary payment, the Employer will also pay a sum in respect of **[insert number]** days accrued but untaken holiday (less tax and National Insurance contributions).]]

**[OR]**

[The Employer will pay the Employee **[insert number]** weeks' wages/salary in lieu of notice which will be paid less tax and National Insurance contributions. [Along with the payment of wages/salary in lieu of notice, the Employer will also pay a sum in respect of **[insert number]** days accrued but untaken holiday (less tax and National Insurance contributions).]]

- 3.3 Except as set out in this Agreement, the employee will have no right to any benefits under the terms and conditions of employment after the Termination Date.

### **4: Withdrawal of Proceedings and Waiver**

- 4.1. The Employee accepts that this Agreement is in full and final settlement of all of the Particular Claims set out in Annex A.
- 4.2. The Employee agrees immediately upon signature of this Agreement to write to the relevant employment tribunal(s) or court(s) to withdraw any proceedings that have already been presented but which have been settled by this Agreement, and not to present to an employment tribunal or any other court any Claim which is a Particular Claim.

- 4.3. The Employer and Employee acknowledge that it is their intention that this Agreement is in full and final settlement of all of the Particular Claims.

## **5: Settlement Payment**

- 5.1. Subject to the Employee complying with the terms of this Agreement, the Employer will pay the Employee **[insert figure]** ('the Settlement Payment'). The Settlement Payment will be paid within 14 days of receipt by the Employer of a signed copy of this Agreement and the signed certificate from the Employee's adviser which is set out at Annex C *[if the Agreement is being used in Scotland the following additional words should be inserted at the end of this clause 'Annex C, which is hereby incorporated into this Agreement']*.
- 5.2. The Employer and Employee believe that [the first £30,000 of] the Settlement Payment is not subject to tax or National Insurance. [The remainder is subject to tax but not National Insurance.]
- 5.3. The [Employee/Employer] agrees to indemnify the [Employer/Employee] for any further tax and/or Employee's National Insurance contributions due in respect of the Settlement Payment.
- 5.4. [The Employer agrees to provide the Employee with a reference in the terms agreed in the attached Annex *[identify the Annex]*, and when responding to a written or verbal request for a reference from a prospective employer, will do so in a manner which is consistent with the agreed reference.]

## **6: Conditions Regulating Settlement Agreements**

The Employer and the Employee agree and acknowledge that the conditions regulating settlement agreements which are contained in the legislative provisions listed in Annex B *[if the Agreement is being used in Scotland the following additional words should be inserted here: 'which is hereby incorporated into this Agreement']* have been satisfied.

## **[7: Employer's Property and Employee's Property**

- 7.1. The Employee warrants that [he/she] [has returned] [OR will return by the Termination Date] [OR will return by (*insert agreed date*)] all property belonging to the Employer, including all records, correspondence, documents and any other information and that the Employee has not retained any copies.
- 7.2. The Employer warrants that it [has returned] [OR will return by the Termination date] [OR will return by (*insert agreed date*)] all property belonging to the Employee.]

## **8: Confidentiality**

- 8.1. [The Employee agrees that [he/she] will continue to be bound by the terms and conditions of employment which relate to confidentiality and restrictive covenants: see clause[s] [**insert number(s) of those terms and conditions.**]
- 8.2. [The Employer and Employee agree that they will keep the existence and terms of this Agreement confidential (with the exception of disclosure to immediate family or relevant professional advisers, provided that those persons agree to keep the information confidential, or where disclosure is required by law).]

## **9: Employee's Representations and Warranties**

- 9.1. The Employee represents and warrants that there are no circumstances of which [he/she] is aware or ought reasonably to be aware which would amount to a material breach of the terms and conditions of employment which would justify summary dismissal.
- 9.2. The Employee acknowledges that the Employer has acted in reliance on these representations and warranties in entering into this Agreement.

## **10: Employee's Advice and Costs**

- 10.1. The Employee confirms that [he/she] has received advice from an independent adviser ('the Adviser') as to the terms and effect of this

Agreement, including its effect on the Employee's ability to present any Claim before an employment tribunal or other court.

- 10.2. The Employer will pay the Employee's reasonable costs incurred in connection with the preparation of this Agreement up to a maximum of [**£insert figure**] plus VAT. Such fees will be payable directly to the Adviser on receipt from the Adviser of an invoice addressed to the Employee and marked payable by the Employer. The Employer agrees to pay these costs within 30 days of receipt of the invoice.

## **11: Entire Agreement and Enforceability**

- 11.1. This Agreement sets out the entire agreement between the parties and supersedes all prior statements, representations, terms and conditions, warranties and guarantees whenever given and whether orally or in writing.
- 11.2. No variation of this Agreement shall be effective unless it is agreed by both parties and in writing.
- 11.3. If any term of the Agreement is held to be illegal, invalid or unenforceable, in whole or in part, such part shall be deemed not to form part of the Agreement but the legality, validity or enforceability of the remainder of the Agreement shall not be affected.

## **12: Jurisdiction**

[This Agreement shall be governed by and construed in accordance with the law of England and Wales and the parties agree to submit to the exclusive jurisdiction of the courts in England and Wales in relation to any Particular Claim or any matter connected with this Agreement.]

### **[OR, if the Agreement is being used in Scotland]**

[This Agreement shall be governed by and construed in accordance with Scots law and the parties agree to submit to the exclusive jurisdiction of the Scottish courts in relation to any Particular Claim or any matter connected with this Agreement.]

**13: Third Parties**

[The Contracts (Rights of Third Parties) Act 1999 shall not apply to this Agreement and only the Employer and Employee shall have rights under it.]

**[OR, if the Agreement is being used in Scotland]**

[The parties intend that no third party shall have rights under this Agreement.]

Notwithstanding that this Agreement is marked ‘subject to contract’, once it has been signed and dated by the Employer and Employee it will become an open and binding document (subject to Clause 8.2).

.....

**Signed by** **Date**  
**on behalf of the Employer**

.....

**Signed by the Employee** **Date**

## ANNEX A

### THE PARTICULAR CLAIMS

*[If the Agreement is being used in Scotland the following text should be added here: 'This is Annex A to the Settlement Agreement between [insert name of Employer] and [insert name of Employee] as referred to and incorporated into that Agreement.]*

#### **The matters listed below are Particular Claims:**

*[Delete the first sentence and table if none of the claims being settled has yet been presented to an employment tribunal]*

The following Employment Tribunal claims:

Claim number	This claim concerns
[insert claim number]	[insert brief details of claim]
[repeat as necessary]	[repeat as necessary]

The following claims arising from the Employee's employment or the termination of employment:

*[Delete any claims in this list that are not relevant]*

1. Under the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA):
  - (a) sections 68 (deduction of unauthorised subscriptions)
  - (b) section 86 (exemption or objection to contributing to political fund)
  - (c) section 137 (refusal of employment on grounds related to union membership)
  - (d) section 145A (inducements relating to union membership or activities)
  - (e) section 145B (inducements relating to collective bargaining)

- (f) section 146 (detriment on grounds related to union membership or activities)
  - (g) section 152 (dismissal on grounds related to union membership or activities)
  - (h) section 153 (selection for redundancy on grounds related to union membership or activities)
  - (i) section 168 (time off for carrying out trade union duties)
  - (j) section 168A (time off for union learning representatives)
  - (k) section 169 (payment for time off for union learning representative activities)
  - (l) section 170 (time off for trade union activities)
  - (m) section 191 (termination of employment during protected period)
  - (n) section 192 (failure to pay remuneration under a protective award)
  - (o) sections 238 and 238A (dismissal connected to industrial action)
  - (p) paragraph 156 of Schedule A1 (detriment on grounds related to union recognition, bargaining or voting)
  - (q) paragraph 161 of Schedule A1 (dismissal on grounds related to union recognition, bargaining or voting)
  - (r) paragraph 162 of Schedule A1 (selection for redundancy on grounds related to union recognition, bargaining or voting)
2. Under the Employment Rights Act 1996 (ERA):
- (a) section 8 (right to itemised pay statement)
  - (b) section 13 (right not to suffer unauthorised deductions)
  - (c) section 15 (right not to have to make payments)
  - (d) section 28 (right to guarantee payment)
  - (e) Part V (protection from suffering detriment)
  - (f) Part VI (time off work)
  - (g) Part VII (suspension from work)

- (h) section 63F (request in relation to training and study)
  - (i) section 80(1) (in relation to the postponement, attempted prevention or prevention of parental leave)
  - (j) sections 80F and 80G (duties in relation to an application for a change in terms and conditions of employment for flexible working)
  - (k) section 92 (right to written statement of reasons for dismissal)
  - (l) Part X (unfair dismissal)
  - (m) section 135 (right to a redundancy payment)
3. Any claim under the Protection from Harassment Act 1997
  4. Under the National Minimum Wage Act 1998:
    - (a) section 10 (worker's right of access to records)
    - (b) section 23 (right not to suffer a detriment)
  5. Under section 10 (right to be accompanied) of the Employment Relations Act 1999
  6. Under Part 5 of the Equality Act 2010:
    - (a) Direct discrimination;
    - (b) Discrimination arising from disability
    - (c) Indirect discrimination
    - (d) In respect of the duty to make adjustments
    - (e) Harassment
    - (f) Victimisation
    - (g) In relation to the:
      - (i) effect of a non-discrimination rule
      - (ii) effect, or a breach, of an equality clause or rule
      - (iii) enforceability of a contractual or non-contractual term

7. That the Employer instructed, caused, induced or knowingly aided any act which is unlawful under the Equality Act 2010.
8. Under the Working Time Regulations 1998:
  - (a) regulations 10(1) and (2) (daily rest)
  - (b) regulations 11(1), (2) and (3) (weekly rest period)
  - (c) regulations 12(1) and (4) (rest breaks)
  - (d) regulation 13 (entitlement to annual leave)
  - (e) regulation 13A (entitlement to additional annual leave)
  - (f) regulation 14(2) (entitlement to compensation related to entitlement to leave where worker's employment terminated during leave year)
  - (g) regulation 16(1) (payment in respect of periods of annual leave)
  - (h) regulation 24 (compensatory rest where worker required to work during rest period or rest break)
  - (i) regulation 24A (adequate rest for mobile workers where relevant parts of regulations 10, 11 and 12 are excluded)
  - (j) regulation 27(2) (compensatory rest for young workers where there has been a force majeure)
  - (k) regulation 27A(4)(b) (compensatory rest for young workers under other exceptions)
9. Under regulation 19 (detriment relating to pregnancy, maternity or parental leave) of the Maternity and Parental Leave etc Regulations 1999.
10. Under the Transnational Information and Consultation Regulations 1999:
  - (a) regulation 25 (right to time off for members of a European Works Council)
  - (b) regulation 26 (right to remuneration for time off)
  - (c) regulation 31 (right not to suffer a detriment)

11. Under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000:
  - (a) regulation 5 (less favourable treatment on the grounds of being a part-time worker)
  - (b) regulation 7(2) (right not to be subjected to a detriment)
12. Under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002:
  - (a) regulation 3 (less favourable treatment on the grounds of being a fixed-term employee)
  - (b) regulation 6(2) (right not to be subjected to a detriment)
  - (c) regulation 8 (successive fixed-term contracts)
  - (d) regulation 9 (right to receive written statement of variation)
13. Under regulation 28 (detriment relating to paternity or adoption leave) of the Paternity and Adoption Leave Regulations 2002
14. Under the Merchant Shipping (Working Time: Inland Waterways) Regulations 2003:
  - (a) regulation 10 (entitlement to adequate rest)
  - (b) regulation 11 (entitlement to annual leave and payment for leave)
15. Under the Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004:
  - (a) regulation 7 (entitlement to adequate rest)
  - (b) regulation 11 (entitlement to annual leave and payment for leave)
16. Under the Information and Consultation of Employees Regulations 2004:
  - (a) regulation 27 (right to time off for information and consultation representatives)
  - (b) regulation 28 (right to remuneration for time off)
  - (c) regulation 32 (right not to suffer a detriment)

17. Under regulation 13 (duty to inform and consult representatives) of the Transfer of Undertakings (Protection of Employment) Regulations 2006
18. Under the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006:
  - (a) schedule, para. 2 (right to time off for functions as a representative)
  - (b) schedule, para. 3 (right to remuneration for time off for functions as a representative)
  - (c) schedule, para. 8 (right not to be subject to a detriment)
19. Under the Companies (Cross-Border Mergers) Regulations 2007:
  - (a) regulation 43 (right to time off for members of special negotiating body etc.)
  - (b) regulation 44 (right to remuneration for time off in capacity as member of special negotiating body)
  - (c) regulations 49 or 50 (right not to be subject to a detriment)
20. Under the Cross-border Railway Services (Working Time) Regulations 2008:
  - (a) regulation 3 (entitlement to daily rest)
  - (b) regulation 4 (sole driver's entitlement to break)
  - (c) regulation 5 (breaks for drivers)
  - (d) regulation 6 (breaks for other drivers)
  - (e) regulation 7 (entitlement to weekly rest)
21. Under the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009:
  - (a) regulation 26 (time off for membership of a special negotiating body)
  - (b) regulation 27 (remuneration for time off)

- (c) regulation 31 (detriment for membership of a special negotiating body)
- 22. Under the Employment Relations Act 1999 (Blacklists) Regulations 2010:
  - (a) regulation 5 (refusal of employment relating to a prohibited list)
  - (b) regulation 6 (refusal of employment agency services relating to a prohibited list)
  - (c) regulation 9 (detriment relating to a prohibited list)
- 23. Under regulation 33 (detriment relating to additional paternity leave) of the Additional Paternity Leave Regulations 2010
- 24. For personal injury (except any latent personal injury)
- 25. For breach of contract
- 26. In relation to notice or pay in lieu of notice.
- 27. *[Any other claim arising under UK statute, UK common law and/or under European Law (except any accrued and future pension rights) which the parties wish to settle can be added here. Any such claim or claims must be specifically listed.]*

## ANNEX B

### CONDITIONS REGULATING SETTLEMENT AGREEMENTS

*[If the Agreement is being used in Scotland the following text should be added here: 'This is Annex B to the Settlement Agreement between [insert name of Employer] and [insert name of Employee] as referred to and incorporated into that Agreement.]*

- section 288(2B) of the Trade Union and Labour Relations Consolidation Act 1992
- section 203(3) of the Employment Rights Act 1996
- section 49(4) of the National Minimum Wage Act 1998
- section 147(3) of the Equality Act 2010
- regulation 35(3) of the Working Time Regulations 1998
- regulation 41(4) of the Transnational Information and Consultation of Employees Regulations 1999
- regulation 9 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000
- regulation 10 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002
- the Employment Relations Act 1999
- the Merchant Shipping (Working Time: Inland Waterways) Regulations 2003
- sub-paragraphs (a) to (e) of r40(4) of the Information and Consultation of Employees Regulations 2004

- the Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004
- sub-paragraphs (a) to (e) of paragraph 13(1) of the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006
- sub-paragraphs (a) to (e) of r62(4) of the Companies (Cross-Border Mergers) Regulations 2007
- the Cross-border Railway Services (Working Time) Regulations 2008
- sub-paragraphs (a) to (e) of r39(4) of the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009

## ANNEX C

### DECLARATION FROM THE EMPLOYEE'S INDEPENDENT ADVISER

*[If the Agreement is being used in Scotland the following text should be added here: 'This is Annex C to the Settlement Agreement between [insert name of Employer] and [insert name of Employee] as referred to and incorporated into that Agreement.]*

I can confirm that:

1. I am a relevant independent adviser within the meaning of the legislation listed in Annex B above.
2. I advised **[insert name of Employee]** ('the Employee') on the terms and effect of the agreement between [him/her] and **[insert name of Employer]** and, in particular, its effect on [his/her] ability to pursue [his/her] rights before an employment tribunal or other court.
3. At the time that I provided advice to the Employee, a contract of insurance, or an indemnity provided for members of a professional body, covering the risk of a claim by the Employee in respect of loss arising as a consequence of my advice was in force.

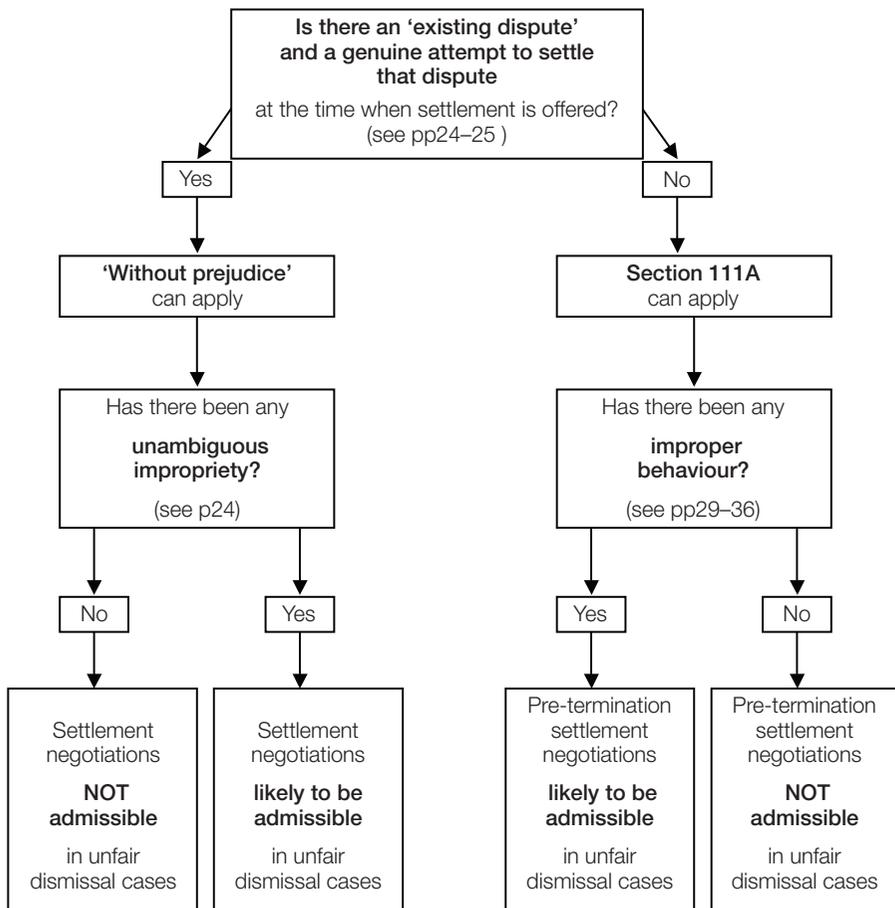
Signed .....

Adviser's organisation .....

Address of Adviser's organisation .....

## Annex 6: An illustration of the admissibility of settlement agreement negotiations in unfair dismissal cases

(how s.111A works alongside the ‘without prejudice’ principle)<sup>7</sup>



<sup>7</sup> This flowchart illustrates how, in general, these provisions may be applied. However, their application in an individual case is a matter for the employment tribunal to decide.





Information in this booklet has been revised up to the date of the last reprint – see date below. For more up-to-date information, please check the Acas website [www.acas.org.uk](http://www.acas.org.uk).

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

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July 2013

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