Mackrell Turner Garrett

Settlement Agreements

A Guide

TOP RANKED CHAMBERS GLOBAL 2013 Leading Law Firm Network

Top Ranked CHAMBERS GLOBAL 2014 Leading Firm

Top Ranked CHAMBERS GLOBAL 2015 Leading Firm

TOP RANKED GLOBAL CHAMBERS 2016

4500 Lawyers
92 Firms
60 Countries

MACKRELL INTERNATIONAL 30 YEARS

www.mackrell.net

Mackrell Turner Garrett are winners of 6 National legal awards

Mackrell Turner Garrett

ENDING THE EMPLOYMENT RELATIONSHIP: SETTLEMENT AGREEMENTS

Employment relationships do not always run smoothly. In some cases, they may break down to such an extent that it may be necessary to bring to an end the working relationship between the employer and the employee.

A traditional way of facilitating the end of the relationship has been through the use of compromise agreements. These are legally binding agreements, entered into voluntarily and agreed through negotiation, which set out the financial and other terms on which an employer and employee will go their separate ways.

Essentially, they include a severance payment made by the employer in return for the employee agreeing not to bring certain legal claims against the employer, as a way to avoid costly and time-consuming employment disputes and employment tribunal cases.

Under the Enterprise and Regulatory Reform Bill, which is due to become law in summer 2013, compromise agreements will be renamed settlement agreements. The government says that the new name is designed to emphasise the benefits such agreements can offer as a way to resolve and bring finality to disputes.

At the same time, a new section will be included in the Employment Rights Act 1996 that will mean offers of settlement cannot be presented as evidence at employment tribunals in unfair dismissal cases, regardless of whether there is an employment dispute between the employer and employee, provided there has been no improper behaviour during discussions about the agreement.

This guide sets out some of the key points involved in settlement agreements but seeking legal advice is essential if you are considering ending an employment relationship through such an agreement.

Mackrell Turner Garrett

WHY USE A SETTLEMENT AGREEMENT?

There are various circumstances in which a settlement agreement may be appropriate, for example redundancy or as a result of performance or conduct issues. They can be offered at any stage of an employment relationship and the offer can be made regardless of whether any disciplinary or grievance process is underway.

The government wants to encourage greater use of settlement agreements as a way to end employment relationships by mutual agreement before they have reached the stage of a formal dispute.

It believes that the new legislation will make settlement offers and discussions inadmissible in unfair dismissal claims and will benefit businesses by making it easier for them to deal with workplace disputes before a formal dispute arises and to bring employment relationships to a close.

Employees will continue to enjoy full protection of their employment rights, as they can choose to reject the offer of a settlement agreement and proceed to a tribunal.

WHAT DOES A SETTLEMENT AGREEMENT INCLUDE?

Every settlement agreement is unique because the circumstances of each case will be different. However, there are some elements that are common to most agreements. Typically, they will contain details of:

- the amount of compensation to be paid (which may include payments for redundancy, unpaid wages, bonuses, pay in lieu of notice and any holiday pay entitlement)
- any restrictions on the employee's future employment
- confidential matters, such as trade secrets. A confidentiality clause may bar the employee from telling anyone they have signed a settlement agreement or allow them to tell people they have done so but not to discuss the contents
- any assurances given by the employer
- the reference that will be provided by the employer upon request
- whether there will be an announcement made to the employee's colleagues/clients
- a mutual agreement that the parties will not make derogatory comments about each other.

The employee cannot be asked to (and is not allowed to agree to) waive a possible future claim for a personal injury that neither they nor their employer is aware of, for example for a condition such as asbestosis, which can take many years to develop. The employee is also not allowed to contract out of any accrued pension rights.

Mackrell Turner Garrett

PROTECTED CONVERSATIONS

Section 111A of the Employment Rights Act 1996 allows an employer and an employee to have an 'off-the-record' conversation when either party is proposing to end the employment relationship on agreed terms. The effect of having an 'off-the-record' conversation means that it remains confidential and cannot be referred to in any subsequent unfair dismissal proceedings.

ACAS recommends that an employee is given 10 days to consider any proposed settlement agreement and to seek legal advice.

The 'off-the-record' exclusion will not apply if there is improper behaviour regarding the settlement agreement offer or related discussions. Such improper behaviour is likely to include:

- harassment through offensive language or aggressive behaviour
- physical assault
- discrimination
- undue pressure on one of the parties – for example an employer saying that the employee will be dismissed if they reject the settlement offer.

LEGAL IMPLICATIONS

To be legally valid, the settlement agreement must comply with a number of conditions, including:

- it must be in writing
- it must relate to a particular complaint
- the employee must have received legal advice from a relevant independent adviser, such as a solicitor, on the terms and effect of the proposed agreement and its effect on their ability to take a claim to an employment tribunal. It is standard practice for the adviser to sign a certificate confirming that they have provided advice annexed to the agreement
- the adviser must have professional indemnity insurance to cover the risk of a claim by the employee in relation to the advice provided
- the agreement must state that the conditions regulating compromise agreements have been satisfied.

The employer is under no obligation to contribute to the employee's legal fees but it is usually the case that they will make a contribution of between £250 to £1,000 (inclusive or exclusive of VAT).

This contribution usually covers advice in relation to the terms of the agreement and the signing of the agreement.

Mackrell Turner Garrett

WHAT HAPPENS IF THERE IS NO SETTLEMENT AGREEMENT?

If the employee decides not to sign, their employment may be terminated with them receiving only what they are contractually or statutorily entitled to.

If they decide not to sign and to instead pursue an employment tribunal claim, they will usually have three months, minus one day, from the date of termination to lodge the claim.

Payments made in respect of salary and holiday pay will be subject to the normal deductions for tax and national insurance contributions while compensation for loss of employment is tax-free up to £30,000.

To find out more about how we can help you, please contact us:

Donna Martin

Donna is a solicitor in the Employment team of Mackrell Turner Garrett's London office, where she advises both employers and employees on a full range of contentious and non-contentious issues.

Her experience includes drafting employment contracts and handbooks, advising on grievance and disciplinary procedures and preparatory work prior to employment tribunals, including advising on the advantages and disadvantages of settling cases. She has particular expertise in settlement agreements and managing social media in the workplace.

T: 00 44 (0) 20 7240 0521 E: Donna.Martin@mackrell.com