

Ending the employment relationship: settlement agreements >>>



## Introduction

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 an end to the working relationship between the employer and the employee.

One way of bringing an end to the relationship is through the use of a settlement agreement. 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.

An employer can put forward proposals for terminating the employment without having to be concerned that those proposals will be referred to in any later employment tribunal claim. These are known as pre-termination negotiations. “Pre-termination negotiations” means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

Pre-termination negotiations cannot be referred to in evidence in an ordinary unfair dismissal case unless there has been “improper behaviour”. “Improper behaviour” means improper behaviour regarding the settlement agreement offer or discussions about it. Such improper behaviour includes:

- harassment through offensive language or aggressive behaviour
- physical assault
- discrimination
- undue pressure on one of the parties, for example an employer saying the employee will be dismissed if they reject the settlement agreement offer or an employee threatening to discredit the employing organisation or damage its reputation, unless the employer signs.

However, pre-termination negotiations can be referred to in cases in which the employee is alleging that the dismissal was for an automatically unfair reason. This means that the fact and content of such offer or discussions may be referred to in automatically unfair dismissal cases as well as all other types of case such as discrimination, unlawful detriment, and breach of contract.

This is a complex area and you should take legal advice before making any settlement proposals in pre-termination negotiations.



## Why use a settlement 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.**

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.

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.



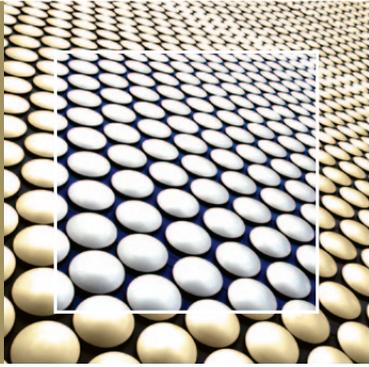
## What does a settlement agreement include?

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.



## 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.



## 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.

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