Shropshire Council

Appendix A

Further information on Settlement Agreements and Employment Tribunals

1. Advantage/Disadvantages of using Settlement Agreements

Settlement Agreements are only one way of handling potentially difficult employment situations - problems in the workplace are best resolved in open conversations, including, where appropriate, through the use of performance management, or informal and formal disciplinary or grievance procedures. The Council proactively encourages open communication and has in place robust policies and procedures to deal with workplace disputes.

Some advantages/disadvantages of using Settlement Agreements:

Advantages:	**Disadvantages:**
√ Can provide a swift and dignified end to an employment relationship that is not working	× The cost of paying an agreed financial sum to an employee
√ Can avoid the time, cost and stress involved for both parties in a tribunal claim	× The potential risk to the ongoing employment relationship with the individual if a settlement is not agreed
√ Can provide compensation and often a reference for employees	× The potential risk to employment relations in the wider workforce if used inappropriately or as a substitute for good management practices

Source: ACAS Settlement Agreements: A Guide

There are a wide range of scenarios in which Settlement Agreements might be offered. These include situations where the Council does not want to follow a potentially long, drawn out process, such as a full performance/capability review or a full redundancy process, before being able to terminate. They are used either as an exit strategy or to resolve conflict where there is a risk of an Employment Tribunal (ET) claim being made. Settlement Agreements should only be used as a method to resolve a dispute when all other options have been exhausted.

A Settlement Agreement may be considered where:

There is a likelihood of an employment tribunal (ET) claim being made
There is a significant enough breach in ER legislation;
There is a significant enough breach of contract of employment.

Where there are ongoing issues such as alleged acts of discrimination or where the employee has raised a grievance which the Council have not felt able to uphold, it may be felt that trust and confidence has completely broken down. It may be in everyone's interests for a termination of employment on mutually agreeable terms. Legal advice should be taken before offering a Settlement Agreement to ensure that the Council is not exposed to an increased risk of litigation.

2. Settlement Agreement Discussions

Where the employer and employee are unable to reach an agreement, the settlement discussions cannot usually be referred to as evidence in any subsequent unfair dismissal claim. Where the settlement discussions are held to resolve an existing dispute between the parties they cannot be used as evidence in any type of claim.

Employees considering making an Employment Tribunal claim must contact ACAS first, who then offer 'early conciliation' to try and resolve the dispute between the employer and employee quickly and cost effectively, which can include Settlement Agreements.

It is important to be aware that communications with an ACAS conciliation officer, as to the acceptance of terms offered by way of a proposed settlement, may be capable of being binding upon either party, even without the agreement being confirmed in writing, or any such written document being signed.

Discussions that take place in order to reach a Settlement Agreement in relation to an existing employment dispute can be, and often are, undertaken on a 'without prejudice' basis. In situations where there is no existing dispute between the parties, the 'without prejudice' principle cannot apply but Section 111A of the Employment Rights Act 1996 can apply. In these circumstances the offer of, and discussions about, a Settlement Agreement will not be admissible in a Tribunal (in an unfair dismissal case) so long as there has been no improper behaviour. Where an Employment Tribunal finds that there has been improper behaviour in such a case, any offer of a Settlement Agreement, or discussions relating to it, will only be inadmissible if, and in so far as, the Employment Tribunal considers it just.

Where there is an existing dispute between the parties, offers of a Settlement Agreement, and discussions about such an agreement, may be covered by both the 'without prejudice' principle and Section 111A. The 'without prejudice' principle will apply unless there has been some 'unambiguous impropriety'. As the test of 'unambiguous impropriety' is a narrower test than that of improper behaviour, this means that pre-termination negotiations that take place in the context of an existing dispute will not be admissible in a subsequent unfair dismissal claim unless there has been some 'unambiguous impropriety'.

3. Employment Tribunal Compensation Limits

Compensation is payable from the day the judgement is received. Interest is charged from the day the judgement is received (not payable if the whole award is paid within 14 days). The Tribunal usually works out the amount based on the financial loss the person has suffered as a result of the Employer's actions. Employers may also have to pay back any Jobseeker's Allowance, Income Support or Employment Support Allowance (ESA) that the claimant claimed while taking their case to the Tribunal.

Compensation Limits:

Payments	6 April 2014	6 April 2015
Limit on a week's pay for calculating redundancy and unfair dismissal basic award	£464	£475
Maximum basic award for unfair dismissal and statutory redundancy payment (30 weeks' pay subject to the limit on week's pay)	£13,920	£14,250
Minimum basic award for dismissal on Trade Union, health and safety, occupational pension scheme trustee, employee representative and on working time grounds only	£5,676	£5,807
Maximum compensatory award for unfair dismissal	* £76,574	* £78,335
Minimum compensation for employees excluded/expelled from Trade Union	£8,669	£8,868
Contract claims (if a claim for breach of contract (eg wrongful dismissal) is brought in an employment Tribunal, compensation is capped at £25,000. If the claim is for more than £25,000, it can be made in the County Court or High Court.	£25,000	£25,000
Amount of award for unlawful inducement relating to Trade Union membership or activities, or for unlawful inducement relating to collective bargaining	£3,715	£3,800

*Compensatory award: lower of £78,335 or 12 months' gross pay

4. Financial Penalties on Employers who lose at Tribunal

In addition to the award made to the claimant, the Employment Tribunal (effective from 6 April 2014) can impose a financial penalty on the losing employer.

The penalty is half of the total award made by the Tribunal with a minimum amount of £100 and a maximum of £5,000; a 50% discount is applied for employers who pay within 21 days of the Tribunal's decision. The Tribunal will look at the employer's ability to pay in deciding whether to order the employer to pay a penalty.

Example Tribunal Costs awarded: Maximum, median and average awards for unfair dismissal and discrimination claims 2013-2014:

	Maximum award	Median Award	Average Award
Unfair dismissal	£3,402,245	£5,016	£11,813
Race discrimination	£162,593	£5,513	£11,203
Sex discrimination	£168,957	£8,039	£14,336
Disability discrimination	£236,922	£7,518	£14,502
Religious discrimination	£22,762	£3,191	£8,131
Sexual orientation discrimination	£27,659	£6,824	£8,701
Age discrimination	£137,000	£6,000	£18,801

NB: The highest unfair dismissal award above was in excess of the statutory cap of £76,574 (now increased to £78,335) but this cap does not apply where the unfair dismissal is for whistleblowing or for raising certain health and safety issues.

The cap on the compensatory award for unfair dismissal increased to £78,335 as a result of The Employment Rights (Increase of Limits) Order 2015 (SI 2015/16) which came into force in Great Britain on 6 April 2015 (this applies where the effective date of termination is on or after 6 April 2015).

In a successful case of Unfair Dismissal, the Tribunal will usually order the Employer to pay the claimant a sum consisting of a basic award and a compensatory award. The basic award is calculated in the same way as statutory redundancy pay, while the compensatory award is an amount based on the employee's loss of earnings. The overall limit on the compensatory award is currently £78,335 (or a sum equivalent to the claimant's annual salary, whichever is the lower). Alternatively, the Tribunal may order reinstatement or re-engagement.

Compensation following a successful claim for unlawful discrimination is unlimited. In determining compensation, Employment Tribunals have the discretion to order the employer to reimburse the claimant's Tribunal fees (but this is not automatic).

Tribunals do have the power to make a standard costs order against either party for any costs incurred by the other party in certain defined circumstances. A costs order may be made where:

There is an unreasonable postponement or adjournment of either the preliminary hearing or the final hearing
A party has, without good reason, in bringing or conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably
The bringing or conducting of the proceedings by a party has been misconceived
The party has, without good reason, not complied with an order or practice direction

Where a party continues with a case after being ordered to pay a deposit at a preliminary hearing and subsequently loses the case, there may similarly be strong grounds for making an order for costs.

Since 29 July 2013, employment judges may make cost awards exceeding £20,000 following a detailed assessment. (The Enterprise and Regulatory Reform Act 2013 enabled the Secretary of State to amend the Employment Rights Act 1996 (under Section 111A). The Tribunal may (but is not obliged to) take into consideration the party's ability to pay when considering whether it should make a costs order and for how much the order should be. If the costs award is £20,000 or less, the Tribunal may make the award without conducting a detailed assessment. Awards for over £20,000 may either be assessed by the employment judge or alternatively he or she may refer the matter on to the relevant civil court for a detailed assessment.

As an alternative to a costs order, a preparation time order may be made in favour of a party who has not been legally represented at a hearing. This is defined as time spent by the party or their employees carrying out preparatory work that is directly relating to the proceedings and/or time spend at the hearing itself. An hourly rate is applied (currently £35 from 6 April 2015).

The Tribunal can also make a wasted costs order directly against a party's representative if it considers that the representative has caused another party to incur costs as a result of any improper, unreasonable or negligent act or omission. A wasted costs award is, however, only permissible where the representative in question is one who has been paid for his or her services. Lay representatives can also be awarded costs at the same rate as is applied to preparation time (currently £35 per hour from 6 April 2015).

Costs awarded in Employment Tribunals cases 2013/14

Costs Awarded *	No of Cases Awarded to Claimant	No of Cases Awarded to respondent
<£200	47	124
£201-£400	36	40
£401-£600	16	58
£601-£800	7	28
£801-£1000	14	62
£1,001-£2,000	37	109
£2,001-£4,000	28	88
£4,001-£6,000	19	36
£6,001-£8,000	3	30
£8,001-£10,000	11	29
£10,000+	24	43
All	**242**	**647**
Maximum award	£58,022	
Median award	£1,000	
Average (mean) award	£2,856	

* Costs Awarded – does not include costs awarded for waste or preparation

Source: Employment and EAT Tribunal Statistics Financial Year 2013/2014 (completed statistics for 2014/15 not currently available)

5. Reaching a Settlement Agreement

For the Settlement Agreement to be legally binding the following conditions must be met:

The agreement must be in writing.
The agreement must relate to a particular complaint or proceedings.
The employee must have received advice from a relevant independent adviser, such as a lawyer or a certified and authorised member of a Trade Union, on the terms and effect of the proposed agreement and it's effect on the employee's ability to pursue that complaint or proceedings before an Employment Tribunal
The independent adviser must have a current contract of insurance or professional indemnity covering the risk of a claim by the employee in respect of loss arising from the advice.
The agreement must identify the adviser.
The agreement must state that the applicable statutory conditions regulating the Settlement Agreement have been met.

Employees should be given a reasonable amount of time to consider the proposed conditions of the agreement; the ACAS Code of Practice on Settlement Agreements specifies a minimum of 10 calendar days unless the parties agree otherwise.

Settlement Agreements are voluntary and parties do not have to agree to them or enter into discussion about them. There can be a process of negotiation during which both sides make proposals and counter proposals until an agreement is reached or both parties decide no agreement can be reached.

If a Settlement Agreement is not reached and depending on the nature of the dispute or problem, resolution may be pursued through a performance management, disciplinary or grievance process, or mediation whichever is the most appropriate. It is important that employers follow a fair process and use the Acas Code of Practice on Discipline and Grievance procedures because, if the employee is dismissed, failure to do so may be grounds for a claim of unfair dismissal.

6. Ending the employment relationship

When the Settlement Agreement includes an agreement to end the employment relationship, then employment can end with the required notice, or the timing can be agreed as part of the Settlement Agreement.

Details of payment and the timing should be included in the agreement; any payments should be made as soon as practicable after the agreement has been reached.

The discussions that take place in order to reach a Settlement Agreement in relation to an existing employment dispute can be, and often are, undertaken on a 'without

prejudice' basis. This means that any statements made during a 'without prejudice' meeting or discussion cannot be used in a Court or Tribunal as evidence. This 'without prejudice' confidentiality does not, however, apply where there is no existing dispute between the parties. Section 111A of the Employment Rights Act 1996 was introduced to allow greater flexibility in the use of confidential discussions as a means of ending the employment relationship. Section 111A, which will run alongside the 'without prejudice' principle, provides that even where no employment dispute exists, the parties may still offer and discuss a Settlement Agreement in the knowledge that their conversations cannot be used in any subsequent unfair dismissal claim.

There are, however, some exceptions to the application of Section 111a of the Employment Rights Act. Claims that relate to an automatically unfair reason for dismissal such as whistleblowing, union membership or asserting a statutory right are not covered by the confidentiality provisions set out in Section 111A. Neither are claims made on grounds other than unfair dismissal, such as claims of discrimination, harassment, victimisation or other behaviour prohibited by the Equalities Act 2010, or claims relating to breach of contract or wrongful dismissal.
The confidentiality provisions of Section 111A are, additionally, subject to there being no improper behaviour. Guidance on what constitutes improper behaviour is contained in Paragraphs 17 and 18 of ACAS Code of Practice on Settlement Agreements (under section 111A of the Employment Rights Act 1996).

Where there is improper behaviour, anything said or done in pre-termination negotiations will only be inadmissible as evidence in claims to an Employment Tribunal to the extent that the Tribunal considers it just. In some circumstances, for instance where unlawful discrimination occurs during a settlement discussion, this may itself form the basis of a claim to an Employment Tribunal. (Where there has been some improper behaviour for these purposes this does not mean that an employer will necessarily lose any subsequent unfair dismissal claim that is brought to an Employment Tribunal. Equally, the fact that an employer has not engaged in some improper behaviour does not mean that they will necessarily win any subsequent unfair dismissal claim brought against them.) Where the parties sign a valid Settlement Agreement, the employee will be unable to bring an Employment Tribunal claim about any type of claim which is listed in the agreement. Where a Settlement Agreement is not agreed, an employee may bring a subsequent claim to an Employment Tribunal but where this claim relates to an allegation of unfair dismissal the confidential provisions of Section 111A of the ERA 1996 will apply.

7. Improper behaviour

If a Settlement Agreement is being discussed as a means of settling an existing employment dispute, the negotiations between the parties can be carried out on a 'without prejudice' basis. 'Without prejudice' is a common law principle (i.e. non-statutory) which prevents statements (written or oral), made in a genuine attempt to settle an existing dispute, from being put before a Court or Tribunal as evidence.

This protection does not, however, apply where there has been fraud, undue influence or some other 'unambiguous impropriety' such as perjury or blackmail.

Section 111A of the Employment Rights Act 1996 offers similar protection to the 'without prejudice' principle in that it provides that any offer made of a Settlement Agreement, or discussions held about it, cannot be used as evidence in any subsequent Employment Tribunal claim of unfair dismissal. Unlike 'without prejudice' however, it can apply where there is no existing employment dispute. The protection in Section 111A will not apply where there is some improper behaviour in relation to the Settlement Agreement discussions or offer.

What constitutes improper behaviour is ultimately for a Tribunal to decide on the facts and circumstances of each case. Improper behaviour will, however, include (but not be limited to) behaviour that would be regarded as 'unambiguous impropriety' under the 'without prejudice' principle. The following list provides some examples of improper behaviour – this list is not exhaustive:

a. All forms of harassment, bullying and intimidation, including through the use of offensive words or aggressive behaviour.
b. Physical assault or the threat of physical assault and other criminal behaviour.
c. All forms of victimisation
d. Discrimination because of age, sex, race, disability, sexual orientation, religion or belief, transgender, pregnancy and maternity and marriage or civil partnership.
e. Putting undue pressure on a party. For instance:

    i. Not giving the reasonable time for consideration set out in paragraph 12 of ACAS code
    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.

The examples set out above are not intended to prevent, for instance, a party setting out in a neutral manner the reasons that have led to the proposed Settlement Agreement, or factually stating the likely alternatives if an agreement is not reached, including the possibility of starting a disciplinary process if relevant. These examples are not intended to be exhaustive.

In situations where there is no existing dispute between the parties, the 'without prejudice' principle cannot apply but Section111A can apply. In these circumstances the offer of, and discussions about, a Settlement Agreement will not be admissible in a Tribunal (in an unfair dismissal case) so long as there has been no improper behaviour. Where an Employment Tribunal finds that there has been improper behaviour in such a case, any offer of a Settlement Agreement, or discussions relating to it, will only be inadmissible if, and in so far as, the Employment Tribunal considers it just.

Where there is an existing dispute between the parties, offers of a Settlement Agreement, and discussions about such an agreement, may be covered by both the 'without prejudice' principle and Section 111A. The 'without prejudice' principle will apply unless there has been some 'unambiguous impropriety'. As the test of 'unambiguous impropriety' is a narrower test than that of improper behaviour, this means that pre-termination negotiations that take place in the context of an existing dispute will not be admissible in a subsequent unfair dismissal claim unless there has been some 'unambiguous impropriety'.

In Court or Tribunal proceedings other than unfair dismissal claims, such as discrimination claims, Section 111A does not apply. In these cases, the 'without prejudice' principle can apply where there is an existing dispute at the time of the settlement offer and discussions, meaning that these will not be admissible in evidence unless there has been some 'unambiguous impropriety'.

Flowchart of Settlement Agreement Process and Authorisation

Appendix B