

Compromise Agreements

With an increasing amount of employee legislation, writing a compromise agreement is becoming more and more popular for employers who want to save themselves the worry of a claim or a trip to Tribunal. Julia Carter, solicitor at Human and Legal Resources Limited, explains exactly what is involved.

A Compromise Agreement is a way of reaching a settlement with your employee where there is concern that he or she could bring a claim against you, perhaps for unfair dismissal or discrimination. Once they have signed, that employee cannot then pursue you through a court or Tribunal for matters arising out of their employment though the agreement will not usually prevent an employee bringing a claim in respect of any work-related injury.

How much should you offer the employee?

How much you decide to offer depends on what the parties agree. The lawyer advising the employee will consider what claims they may have in order to advise whether it is in their best interest to accept. It is therefore advisable to pitch the settlement at a realistic sum, bearing in mind they will probably try to negotiate upwards.

In addition the employee is likely to have contractual claims e.g. unpaid wages, contractual notice, loss of benefits but also, an employee who proves that s/he has been unfairly dismissed, would normally get a basic award (based on age and number of years service). Such an employee would also receive a compensatory award for financial loss following termination. So, you should consider how long it will take this employee to find another job that will pay a similar amount bearing in mind the employee's age and experience, the industry and the financial climate at the time. Generally, three to six months net salary is a reasonable starting point.

Is the payment tax-free?

Settlement will frequently include a number of different elements such as unpaid salary, holiday pay, notice pay, redundancy pay, compensation for loss of office and so on. It is important for tax purposes that these are separately identified. There is a common misconception that the first £30,000 of any termination payment is tax free, but this is not necessarily the case. If any of the payment is classed as "earnings" it will be taxable and this would include most payments that are received under the employee's contract of employment e.g. unpaid salary, holidays, bonuses and notice pay. (Notice pay is only contractual if you have a clause in the employee's contract allowing the you to elect to pay them in lieu of notice – if there is no such clause then dismissal without notice will be breach of contract and any sum paid "in lieu of notice" will actually be compensation.) Payments made purely as compensation for loss of office and redundancy pay come under the £30,000 tax-free limit.

How does the Compromise Agreement work?

Basically you are asking the employee to contract out of his/her right to bring proceedings arising from his/her employment and this can only be done with a Compromise Agreement which must comply with certain legal requirements. Even if you agree to pay an employee a sum of money and asks them to sign to say he or she accepts that sum "in full and final settlement of any claim that the employee may have against the Company" this is NOT binding in law and will not prevent an employee from taking the money AND bringing a claim.

A Compromise Agreement is only binding if:

- it is written.
- it relates to particular proceedings. In fact most lawyers now draft Compromise Agreements to include a list of every possible claim an employee may consider bringing and gets the employee to confirm the list includes potential claims that s/he has and that s/he has taken legal advice to this effect.
- the employee receives advice from an independent legal Adviser on the agreement, who is named in the agreement and covered by insurance. The Adviser needs to advise the employee of the effect of the agreement on his/her ability to bring a claim before an Employment Tribunal. It is usual for the employer to pay money to the legal adviser for the advice given to the employee and to ask the Adviser to sign a certificate to confirm that s/he has complied with the above.

- the agreement states that the conditions regulating compromise agreements are satisfied.

If the Compromised Agreement has complied with all of this, even if you might have been forced to shell out more than perhaps you had hoped for, you can at least relax in the knowledge a nasty claim or a trip to Tribunal is not lurking around the corner.

For further details or advice on Compromise Agreements please see www.liquidhr.co.uk or telephone 01494 870870.

Story from Growing Business:
<http://www.gbmag.co.uk/Ya9sOfY.html>

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The Court of Appeal has held that compromise agreements must clearly identify the particular claims the employee waives by signing it. The use of generic expressions such as “all outstanding claims, whether statutory, contractual or otherwise” is not sufficient to compromise an employee’s statutory rights.

Background

Disputes about breach of contract can be settled by the parties entering into a simple agreement.

However, most of the statutory claims that may be made by employees (eg unfair dismissal and discrimination) can only be settled by a COT3 (through ACAS) or a compromise agreement.

Various conditions, set out in statute, have to be satisfied for a compromise agreement to be binding, including that (i) it must be in writing; (ii) it must relate to particular proceedings; and (iii) the employee must receive advice from an independent adviser before signing it.

An issue often arises in relation to what is meant by the compromise agreement relating to “particular proceedings” – how particular does the agreement have to be?

Hinton v University of East London concerned a compromise agreement which included a statement that it was “in full and final satisfaction of all claims in all jurisdictions (whether arising under statute, common law or otherwise) which the employee has or may have against the University arising out of or in connection with his employment with the University, the termination of his employment or otherwise including in particular the following claims which have been raised by or on behalf of the employee as being claims which he may have”.

That was followed by a list of 11 kinds of claim (including unfair dismissal, race discrimination etc). This is a formulation that will, no doubt, be familiar to many employers.

However, the list did not include a claim of continuing detriment arising from “whistleblowing” (under section 47B of the Employment Rights Act 1996) – so, when Dr Hinton brought a complaint of continuing detriment on the grounds of whistleblowing (ie detriment other than dismissal), the question was – was it covered by the compromise agreement?

What has the Court of Appeal decided?

The particular statutory claims to which a compromise agreement relates must be clearly identified. This can be done either by:

generic description of the claim (e.g. unfair dismissal); or

reference to the particular section of the relevant statute (e.g. section 98 Employment Rights Act 1996).

Using a general expression such as “all statutory rights” or simply naming the statute (without identifying the relevant part of it) is not sufficient and will not compromise the employee’s claims.

The Court of Appeal also made 2 general observations about drafting compromise agreements:

the particular claims covered by the agreement should be identified by a brief factual and legal description; and

employers should not use standard form agreements which refer to all imaginable employment rights, irrespective of whether or not they are relevant to the particular circumstances – rather it should be tailored to the individual employee.

What does this mean for employers?

The claims that the employee is waiving should, ideally, be listed clearly and comprehensively in the compromise agreement.

Employers should take care to check ET1 forms and correspondence to make sure that all of the claims the employee has actually raised are clearly identified in the agreement.

If the employee has not raised any claims, or even if they have, the employer should think carefully of all the claims to which the particular circumstances could give rise - and identify them in the agreement as well.

The “catch all” phrases will still be useful to ensure that all contractual claims are covered by the agreement – but it is now clear that they will not “save” the employer if a statutory claim is accidentally omitted from the list of waived claims.

This means that the list of claims to be waived should be really quite full – but only as far as is sensible. The Court was not impressed by employers using only precedent agreements. However, it will be useful for employers, when putting a compromise agreement together, to start out with a comprehensive list of all of the claims that the employee could make - and then delete those claims that the employee almost certainly has no grounds to bring (e.g. discrimination on the grounds of pregnancy for a man).

We would be pleased to provide a comprehensive list of claims – please contact us!

For further details, please contact Mike Pitt at Pearson Hinchliffe Solicitors on 0161 785 3500: