

Date of issue: 10th September 2013

MEETING	EMPLOYMENT & APPEALS COMMITTEE (Councillors Rasib (Chair), Plenty, Brooker, Chohan, Coad, Davis, A S Dhaliwal, S K Dhaliwal and Sharif)
DATE AND TIME:	THURSDAY, 12TH SEPTEMBER, 2013 AT 6.30 PM
VENUE:	MEETING ROOM 2, CHALVEY COMMUNITY CENTRE, THE GREEN, CHALVEY, SLOUGH, SL1 2SP
DEMOCRATIC SERVICES OFFICER: (for all enquiries)	GREG O'BRIEN 01753 875013

SUPPLEMENTARY PAPERS

The following Papers have been added to the agenda for the above meeting:-

* Items 6 and 7 were not available for publication with the rest of the agenda.

PART 1

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7.	Senior Management and Leadership Grades	15 - 18	

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SLOUGH BOROUGH COUNCIL

REPORT TO: Employment & Appeals Committee

DATE: 12th September 2013

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WARD(S): All

PART 1
For information

SETTLEMENT AGREEMENTS (Formerly Compromise Agreements)

1 Purpose of Report

- 1.1 To update members of changes in guidance relating to settlement agreements.

2. Supporting Information

- 2.1 Settlement agreements were known as compromise agreements prior to 29 July 2013. Settlement agreements have often been used to avoid the commencement of litigation, and to forestall its serious contemplation even arising. Human Resources professionals, lawyers and the Advisory, Conciliation and Arbitration Service (ACAS) accept that a settlement agreement is a pragmatic way of dealing with a problematic dismissal and a correct use of money - it is often cheaper than dealing with the litigation that may ensue without the agreement
- 2.2 A settlement agreement is a legally binding agreement between an employer and an employee under which the employee agrees to give up his/her right to bring an employment tribunal or court claim relating to the matters covered by the agreement,
- 2.3 A settlement agreement is often used to end the employment relationship on agreed terms, for example as an alternative to the employer instigating disciplinary or capability proceedings. It is common for settlement agreements to include a term that the employer will provide an agreed reference to the employee. It is usually agreed that the settlement agreement will remain confidential.

- 2.4 A settlement agreement will be effective to prevent an employee from bringing proceedings only if;
- It is in writing;
 - It is stated to relate to the particular complaint or proceedings;
 - The employee has received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his or her ability to pursue his/her rights before an employment tribunal;
 - The adviser is covered by the professional indemnity insurance;
 - The adviser is identified in the agreement; and
 - The agreement states that the applicable statutory conditions regulating settlement agreements are satisfied.

3. **Safeguards and Audit**

- 3.1 The Council's Auditors will require a high level of justification for the Council to use settlement agreements. Settlement agreements and business cases that sit underneath them receive scrutiny as part of the Council's Annual Audit processes.
- 3.2 The Council's Auditors will examine and determine if the resulting benefit to the Council is proportionate to the expenditure involved.

4. **Conclusion**

- 4.1 When the Council considers the use of a settlement agreement it will do so within the relevant HR and Legal guidance, including the ACAS Protocol which is attached at appendix 1.

Appendices Attached

Appendix 1: Advisory, Conciliation and Arbitration Service ACAS Code of Practice on Settlement Agreements.

July 2013



Code of Practice 4

Settlement Agreements

(under section 111A of the
Employment Rights Act 1996)

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Foreword

The Acas statutory Code of Practice set out in paragraphs 1 to 24 on the following pages is designed to help employers, employees and their representatives understand the implications of section 111A of the Employment Rights Act (ERA) 1996 for the negotiation of settlement agreements (formerly known as compromise agreements) before the termination of employment. In particular, it explains aspects of the confidentiality provisions associated with negotiations that take place to reach such agreements. The Code does not cover all aspects of settlement agreements. Further guidance on settlement agreements can be found in the Acas booklet "*Settlement Agreements: A Guide*" which also offers more detailed guidance on the confidentiality provisions set out in section 111A.

The Code is issued under section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992 and comes into effect by order of the Secretary of State on 29 July 2013. Failure to follow the Code does not, in itself, make a person or organisation liable to proceedings, nor will it lead to an adjustment in any compensation award made by an employment tribunal. However, employment tribunals will take the Code into account when considering relevant cases.

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 ERA 1996 has therefore been 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. It is the confidentiality aspect of section 111A that is the specific focus of this Code.

Throughout this Code 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.

The Code of Practice

Introduction

1. This Code is designed to help employers, employees and their representatives understand the law relating to the negotiation of settlement agreements as set out in section 111A of the Employment Rights Act (ERA) 1996. In particular it gives guidance on the confidentiality provisions associated with negotiations about settlement agreements and on what constitutes improper behaviour when such negotiations are taking place.
2. 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.

What are settlement agreements?

3. Settlement agreements are legally binding contracts which can be used to end the employment relationship on agreed terms. Their main feature is that they waive an individual's right to make a claim to a court or employment tribunal on the matters that are specifically covered in the agreement. Settlement agreements may be proposed prior to undertaking any other formal process. They usually include some form of payment to the employee by the employer and may also include a reference.
4. For a settlement agreement to be legally valid the following conditions must be met:
 - (a) The agreement must be in writing;
 - (b) The agreement must relate to a particular complaint or proceedings¹;
 - (c) The employee must have received advice from a relevant independent adviser² 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;

¹ Simply saying that the agreement is in "full and final settlement of all claims" will not be sufficient to contract out of employment tribunal claims. To be legally binding for these purposes, a settlement agreement has to specifically state the claims that it is intended to cover.

² The independent adviser can be a qualified lawyer; a certified and authorised official, employee or member of an independent trade union; or a certified and authorised advice centre worker.

- (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 applicable statutory conditions regulating the settlement agreement have been satisfied.
5. Settlement agreements are voluntary. Parties do not have to agree them or enter into discussions about them if they do not wish to do so. Equally the parties do not have to accept the terms initially proposed to 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 recognise that no agreement is possible.

Settlement agreement discussions and section 111A of the ERA 1996

6. Section 111A of the ERA 1996 provides that offers to end the employment relationship on agreed terms (i.e. under a settlement agreement) can be made on a confidential basis which means that they cannot be used as evidence in an unfair dismissal claim to an employment tribunal. Under section 111A, such pre-termination negotiations can be treated as confidential even where there is no current employment dispute or where one or more of the parties is unaware that there is an employment problem. Section 111A can also apply to offers of a settlement agreement against the background of an existing dispute, although in such cases the 'without prejudice' principle can also apply.
7. There are, however, some exceptions to the application of section 111A. 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. Throughout this Code there are a number of references to unfair dismissal. These references should be read in general as subject to the exceptions set out in this paragraph.

8. 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 this Code. 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.
9. 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.
10. 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 confidentiality provisions of section 111A of the ERA 1996 will apply.

Reaching a settlement agreement

11. Settlement agreements can be proposed by both employers and employees although they will normally be proposed by the employer. A settlement agreement proposal can be made at any stage of an employment relationship. How the proposal is made can vary depending on the circumstances. It may be helpful if any reasons for the proposal are given when the proposal is made. Whilst the initial proposal may be oral, one of the requirements for a settlement agreement to become legally binding is that the agreement must ultimately be put in writing (see paragraph 4).
12. Parties should be given a reasonable period of time to consider the proposed settlement agreement. 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.

13. The parties may find it helpful to discuss proposals face-to-face and any such meeting should be at an agreed time and place. 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.
14. Where a proposed settlement agreement based on the termination of the employment is accepted, the employee's employment can be terminated either with the required contractual notice or from the date specified in the agreement. The details of any payments due to the employee and their timing should be included in the agreement.

Improper behaviour

15. 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.
16. Section 111A of the ERA 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.
17. 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.
18. The following list provides some examples of improper behaviour. The 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 this 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.
19. The examples set out in paragraph 18 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.
20. In situations where there is no existing dispute between the parties, the 'without prejudice' principle cannot apply but section 111A 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.

21. 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'.
22. 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'.

What if a settlement agreement cannot be agreed?

23. If a settlement agreement is rejected and the parties still wish to resolve the dispute or problem that led to the offer being made then some other form of resolution should be sought. Depending on the nature of the dispute or problem, resolution might be sought through a performance management, disciplinary or grievance process, whichever is appropriate. The parties cannot rely on the offer of a settlement agreement or any discussions about the agreement as being part of this process.
24. It is important that employers follow a fair process, as well as the other principles set out in the Acas discipline and grievance Code of Practice, because, if the employee is subsequently dismissed, failure to do so could constitute grounds for a claim of unfair dismissal.

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SLOUGH BOROUGH COUNCIL

REPORT TO: Employment & Appeals Committee

DATE: 12th September 2013

CONTACT OFFICER: Kevin Gordon, Assistant Director Professional Services
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WARD(S): All

PART 1
To Resolve

AMENDMENTS TO SENIOR MANAGEMENT & LEADERSHIP GRADES

1 Purpose of Report

- 1.1 To address anomalies in the grading structure of the Council's Senior Management and Leadership (SML) pay scales.

2 Recommendation(s)/Proposed Action

- 2.1 Employment & Appeals are asked to resolve;
1. Changes to incremental points 111 – 113 of SML Grade 11 with effect from 1 October 2013
 2. Changes to incremental points 121 – 124 of SML Grade 12 with effect from 1 October 2013.

3. Other Implications

(a) Financial

- 3.1 The proposal will be cost neutral and should deliver a small saving on salary costs as future appointments to SML 12 will be at the new starting rate of £63,165, a saving of £2790. The savings at the top of scale will be £6560, members should note, although not automatic, once an SML staff member has been awarded a scale point they remain on that level, therefore savings at the top of grade SML 12 will be recurrent.
- 3.2 Over time these savings will offset any cost of the increases at the lower points of SML11.

(b) Risk Management

Recommendation	Risk/Threat/Opportunity	Mitigation(s)
Changes to pay grades to prevent overlaps into grades below or above.	Risk of Challenge around inequality and possible equally pay claims.	Agree recommendations to change current grades

(c) Human Rights Act and Other Legal Implications

- 3.3 Section 3.4 of the constitution, Responsibility for Council Functions enables the Employment & Appeals Committee to determine matters relating to conditions of service. Members should note that, although the Chief Executive, Director and Assistant Director posts fall within the SML grading scheme, the proposals do not recommend any changes to their grades or arrangements. The grade of the report author is similarly unaffected.

(d) Equalities Impact Assessment

- 3.4 No equalities impact.

(e) Workforce

- 3.5 The council currently has one staff member at SML12, who is due to leave the council at the end of September 2013. Therefore no staff currently in post will be affected by the proposed changes to SML12.
- 3.6 Of the 22 staff currently on SML11, 15 are at the top of the grade point and will not be affected. 7 members of staff on the lower grades of SML11 will be affected by the modest changes to their incremental points. The increases will only cover a 6 month period and will not be backdated. As a consequence the actual increase for any individual represents a rise of less than 1%, compared to the increase of 2.02% that non SML grades have received over the period.

4 Supporting Information

- 4.1 Following the national pay award for main grade local government staff and the continued pay freeze for SML grades, anomalies are beginning to appear within the Council pay bands.
- 4.2 This paper proposes amendments to the Council pay bands to ensure proportionate and equitable pay arrangements are in place. The proposals also tackle historical issues where grades have overlapped or their design has meant unnecessary costs for the council and increased the risk of equal pay challenge.

Overlap between Top of L10 and bottom of SML 11

- 4.3 Pay for non SML grades has risen 2.02% over the last 5 years, whilst SML pay has not increased. This has resulted in the top of L10 overtaking the bottom of the SML scale. This presents a number of difficulties and risks, including;
- Potential for staff to be paid more than their manager.
 - Pressure to appoint at the second incremental point in the SML11 band leading to increased costs for the council.
 - Potential challenges from staff around equal pay.
 - Problems increasing if the pay freeze for SML grades continues in 14/15.
- 4.4 To remedy the situation the three bottom incremental points of SML 11 have been adapted to ensure sufficient gaps and distance between them and the grade below.

Costly SML 12 grade that overlaps with SML 13

- 4.5 The current SML12 grade is broad starting at £65,955 and finishing at £76, 925. The generous width of the incremental points is unsustainable within the current climate of budget restrictions. The start of the grade is over £5k more than the top of the preceding grade and the top of the grade overlaps unnecessarily into the grade above.
- 4.6 The proposal is to shorten the financial breadth of the grade saving £2790 at the bottom and £6560 at the top of the scale.

5. General

- 5.1 Members should be aware that incremental progression is not automatic and is dependent on satisfactory delivery of performance objectives.

6. Conclusion

The proposals represent a pragmatic response to a number of long-standing and emerging anomalies in the SML grading structure at roughly neutral cost to the Council.

Appendices Attached

- 'A' - Current and Proposed SML Grades

Appendix A: Current and Proposed SML Grades

Current

Grade	Salary Range				
L10 01	47,464				
L10 02	48,424				
L10 03	50,361				
L10 04	52,281				
Grade	Salary Range	Grade	Salary Range	Grade	Salary Range
SML 111	52,094	SML 121	65,955	SML 131	72,743
SML 112	54,837	SML 122	69,426	SML 132	76,572
SML 113	57,725	SML 123	73,080	SML 133	80,600
SML 114	60,765	SML 124	76,925	SML 134	84,843

Proposed

Grade	Salary
Current top of L10	52,281
Proposed	
SML 111	53,415
SML 112	55,865
SML 113	58,315
SML 114	60,765
SML 121	63,165
SML 122	65,565
SML 123	67,965
SML 124	70,365