LAW PUNDITS

Settlement of Unfair Dismissal Claims

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Settlement of unfair dismissal claims

Most tribunal claims, including those for unfair dismissal, never reach a full hearing, or are withdrawn during the hearing, following a private settlement between the parties or a settlement following conciliation by Acas.

It is open to a claimant to withdraw a claim at any time either orally at a tribunal hearing or in writing. A respondent may then apply in writing asking the tribunal to dismiss the withdrawn claim. Various provisions regulate the settlement of tribunal proceedings, largely for the protection of claimants (see below).
References: ET Rules, Rule 25

Employers may seek to avoid an unfair dismissal claim ever being made by reaching a compromise with their employee before proceedings are begun.

Contracting-out provisions

Whatever the stage at which an agreement is reached between employer and employee to compromise a claim or potential claim for unfair dismissal, there are specific statutory provisions (often referred to as 'contracting-out provisions') that render void and unenforceable any agreement not to pursue a claim, save in specified circumstances.

Although communications passing between employer and employee after an unfair dismissal claim has been commenced or at least intimated are likely to be exempt from disclosure during the proceedings as being 'without prejudice', such communications before proceedings have been issued or intimated may not be exempt. Parties should therefore be cautious as to the communications sent during the course of any pre-dismissal or pre-claim negotiations, as they may ultimately form part of the evidence at a tribunal hearing.

It is open to the parties to ask the tribunal to incorporate the terms of any agreed settlement into a tribunal order. If the tribunal agrees to do so, the terms will generally be binding irrespective of the contracting-out provisions. In many cases, one or both parties may wish the terms of settlement to be confidential and so may be reluctant to include them in a tribunal order.
References: Mayo-Deman v Univ of Greenwich [2005] IRLR 845

Conciliation

Before any claim has been presented to a tribunal, an Acas officer 'may endeavour to promote a settlement', ie he has a discretionary power to attempt to conciliate a solution to the dispute. For further information, see Settlement, withdrawal, dismissal of claims and consent orders in the employment tribunal -- Conciliation before proceedings have been brought.

Once proceedings have been commenced, Acas in effect has a duty to conciliate right up until the tribunal delivers judgment if (a) both parties request it or (b) in the absence of such a joint request, the conciliation officer nonetheless considers that conciliation would have a reasonable prospect of success. For further information, see Settlement, withdrawal, dismissal of claims and consent orders in the employment tribunal -- Conciliation once proceedings have been commenced

One of the exceptions to the contracting-out provisions is where a settlement has been reached following 'action' by a conciliation officer. For unfair dismissal, the relevant provisions are set out in ERA 1996, s 203.
References: Employment Tribunals Act 1996, s 18

ERA 1996, s 203

In this context, endorsing an agreement on a COT3 form will be sufficient to constitute 'action' by a conciliation officer.
References: Moore v Duport [1982] IRLR 31

Acas Form COT3 HotDocs Format

However, it is the general policy of Acas not to become involved in settlements where it has had no conciliatory role. Thus, where the parties reach terms of settlement themselves, Acas will not generally be willing to assist when asked merely to endorse the terms already agreed.

Any conciliated agreement will generally be binding on the parties within its terms. Unlike compromise agreements, a conciliated agreement may validly cover any disputes between the parties, including future disputes, without specifying the nature of the dispute that has or may arise. General settlement clauses are likely to be strictly construed by tribunals and very clear wording is therefore advisable, particularly if it is intended to settle future disputes.
References: RNOH v Howard [2002] IRLR 849

A conciliated agreement may validly be reached orally. However, it is advisable for its terms to be recorded in writing and, ideally, endorsed by the conciliating officer.
References: Duru v Granada Retail Catering (unreported EAT/281/00)

Compromise agreements

A further exception to the contracting-out provisions is where the parties reach an agreement that complies with the statutory conditions regulating compromise agreements. In the case of unfair dismissal, the relevant statutory provisions are set out in ERA 1996, s 203. A potential advantage of reaching a binding compromise agreement is that there is no need for there to have been any involvement by Acas or any other external body. Also, the compromise agreement will be a free-standing enforceable agreement between the parties which may be enforced through the courts much like any other contract.
References: ERA 1996, s 203

Compromise agreements may also be of particular use where proceedings have not yet been issued and the dispute between the parties may not even have arisen, for example where an employee and employer negotiate and agree severance terms prior to dismissal. The conditions regulating compromise agreements are that:

- the agreement must be in writing
- it must relate to the particular proceedings
- the employee or worker must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, as to its effect on his ability to pursue his rights before a tribunal
- there must be in force, at the time the adviser gives that advice, relevant insurance covering the risk of a claim by the employee or worker in respect of loss arising as a result of the advice
- the agreement must identify the legal adviser
- the agreement must state that the conditions regulating compromise agreements under the relevant statutory provisions (which should be identified) have been satisfied

'Relevant independent adviser' for these purposes includes:
References: ERA 1996, s 203(3A)-(4)

- a qualified lawyer (ie a barrister, solicitor or other authorised advocate or litigator)
- an officer, official, employee or member of an independent trade union who has been certified in writing by the union as competent to give advice and as authorised to do so on behalf of the union; however, such a person will not be a relevant independent adviser if the union in question is the employer of the person being given the advice or an associated employer
- someone who works at an advice centre and has been certified in writing by the centre as competent to give advice and as authorised to do so on behalf of the centre; however, such a person will not be a relevant independent adviser if the advice centre in question is the employer of the person being given the advice or an associated employer or if the person being given the advice makes a payment for the advice

The mere absence of the required statement that the conditions regulating compromise agreements under the relevant statutory provisions have been satisfied will be sufficient to render the compromise agreement void.

References: Lunt v Merseyside TEC [1999] IRLR 458

There has been much debate as to the meaning of the requirement that the compromise agreement must 'relate to the particular proceedings'. The current position appears to be that:
References: Hilton UK Hotels v McNaughton (unreported, EAT S/0059/04)

- the statutory requirement that a compromise agreement must relate to the particular proceedings does not limit it to claims that have already been presented to the tribunal
  References: Hinton v UEL [2005] IRLR 552
- blanket agreements signing away all an employee's rights will not generally be effective
  References: Lunt v Merseyside TEC [1999] IRLR 458
- the actual or potential claim must at least be identified by a generic description or a reference to the section of the statute giving rise to the claim
  References: Hinton v UEL [2005] IRLR 552
- parties may agree that a compromise agreement is to cover future claims of which an employee does not and could not have knowledge but, to do so effectively, the terms of the agreement must be absolutely plain and unequivocal
  References: RNOH v Howard [2002] IRLR 849

For further details on the requirements for compromise agreements, see Settlement, withdrawal, dismissal of claims and consent orders in the employment tribunal -- Compromise agreements.

See also our precedent Compromise agreement, which contains detailed drafting notes covering the requirements for compromise agreements in more depth. It also contains links to a suite of additional clauses for use with the main agreement.