LAW PUNDITS

# Settlement and Withdrawal of Claims

LP Learn Material

# Settlement, withdrawal, dismissal of claims and consent orders in the employment tribunal

The vast majority of employment tribunal claims never reach a full hearing and those that do often do not proceed to judgment, typically because they are either withdrawn by the claimant following a private settlement between the parties or settled following conciliation by Acas. However, there are various provisions in place that regulate the settlement of tribunal proceedings, largely for the protection of claimants.

## Withdrawal

A claimant can withdraw all or part of a claim at any time, either orally at a tribunal hearing or in writing. Withdrawn proceedings are brought to an end, but withdrawal does not affect proceedings as to:
References: ET Rules, Rules 25(1)-(3)

- costs
- preparation time
- wasted costs

Withdrawing a claim is not without risk, particularly if it is done late on in proceedings. The respondent may well seeks a costs or preparation time order to compensate for the time and money that has been wasted in defending the claim. Whether or not such an order is granted will be subject to the usual tests, eg whether the proceedings were misconceived or the claimant or his representative acted unreasonably in the conduct of them.

It is open to the respondent to make an application for costs straight away after a withdrawal by the claimant, and the tribunal may go ahead and determine that application. Issues as to costs may be dealt with and finalised even though the claimant's claim has not been dismissed, and even where the respondent has not applied for the claim to be dismissed.
References: Turning Point Scotland v (1) Perry (2) Hamilton (UKEATS/0049/11/BI)

Turning Point Scotland:

A claimant may withdraw a claim, or part of it, orally at a hearing, or in writing. If he withdraws it in writing, the written notification to the Employment Tribunal Office must:
References: ET Rules, Rules 25(1)-(2)

- inform the Office of the claim or the parts of it which are to be withdrawn, and
- specify against which respondents the claim is being withdrawn, if there is more than one respondent

Where a litigant before an employment tribunal, particularly one who is self-represented or who has a lay representative, seeks orally to concede a point or to abandon it, it may not be clear whether he wishes to withdraw some part, or all, of his claim. In those circumstances:
References: Segor v Goodrich Actuation Systems (UKEAT/0145/11/DM)

Segor:

- such a concession or abandonment cannot properly be accepted as a withdrawal of part, or all, of his claim by the tribunal unless it is:
    - clear
    - unequivocal, and
    - unambiguous
- the tribunal should ensure that the litigant truly wishes to concede or abandon the point, and clearly understands the significance and consequences of doing so, and

- the tribunal must take care to ensure that the case put by the litigant is properly understood, if necessary asking the litigant to reduce it to paper and agree it

When a claimant announces his intention to abandon a full tribunal hearing part way through the hearing, this will not necessarily amount to an oral withdrawal of the claim. In such circumstances:
References: Smith v Greenwich Council (UKEAT/0113/10/JOJ, UKEAT/0114/10/JOJ)

Smith v Greenwich Council:

- the tribunal should clarify with the claimant whether he is intending to withdraw his claim and, if so, make appropriate orders (eg recording the withdrawal and perhaps, if requested by the respondent, dismissing the claim)
- if the claimant does not confirm his withdrawal, the tribunal may then use its powers under Rule 27(5), which deals with the circumstances of a party failing to attend or be represented at a hearing, subject to the provisions of Rule 27(6), which allow the tribunal to:
  References: ET Rules, Rules 27(5)-(6)

  - hear the respondent's evidence
  - adjourn the proceedings, or
  - dismiss the claim, having first considered any information provided to it by the parties, including the contents of the Claim Form and Response and any written submissions or correspondence from the parties

Where a claim is withdrawn, but is not dismissed (which includes situations where a respondent has not applied for a dismissal, where a respondent has applied for the dismissal, but is unsuccessful, and where the dismissal is successfully reviewed or appealed) a second claim may be lodged, which relies on the same facts (the pre-existing claim cannot be 'continued', as those proceedings have been brought to an end). It is therefore advisable for a respondent to apply for a withdrawn claim to be dismissed.

References: Khan v Heywood and Middleton Primary Care Trust [2006] IRLR 793

Verdin v Harrods Ltd [2006] IRLR 339

Fraser v HLMAD [2006] IRLR 687

An employment tribunal has no jurisdiction to set aside a notice of withdrawal of a claim.
References: Khan v Heywood and Middleton Primary Care Trust [2006] IRLR 793

## Dismissal of claim following withdrawal

As noted above, where a claim is withdrawn, but is not dismissed, a second claim may be lodged, which relies on the same facts. For this reason, a respondent, on learning of a claim's withdrawal, may well wish to apply for the claim to be dismissed

A respondent may, within 28 days of the notice of the withdrawal being sent to the respondent, apply in writing to have the proceedings against him dismissed.
References: ET Rules, Rule 25(4)

If, having received such an application, the tribunal dismisses the proceedings, the claimant may not commence a further claim against the respondent for the same, or substantially the same, cause of action (unless the decision to dismiss is successfully reviewed or appealed).
References: ET Rules, Rule 25(4)

As noted above, a claimant may withdraw a claim (or part of it):
References: ET Rules, Rules 25(1)

- orally at a hearing, or
- in writing

Where the claimant withdraws the claim orally at a hearing, the respondent may then apply orally at that same hearing for the proceedings to be dismissed, and the tribunal may rule upon the issue straight away, without any need for the respondent to make a written application for dismissal. Although the wording of rule 25 appears to require an application to dismiss a claim to be in writing, the overriding objective requires that the rule should be interpreted in a way that does not prevent a tribunal from dealing with the question of dismissal then and there.
References: Drysdale v Department of Transport (The Maritime and Coastguard Agency) (UKEAT/0171/12/LA)

Drysdale:

ET Rules, Rule 25(4)

**The discretion on whether to order dismissal**

However, it will not always be appropriate in these circumstances for the tribunal to accede to an application by the respondent for the claim to be dismissed. This is because the effect of withdrawal and dismissal on the right to continue to pursue a claim are different:

- a withdrawal (without a dismissal) does not give rise to a cause of action estoppel, even though it results in the proceedings being brought to an end, because it does not involve a judicial decision in relation to the cause of action in question. Hence, on its own, the act of withdrawing a claim does not prevent the claimant from pursuing that same cause of action in some other proceedings (either in different employment tribunal proceedings, or in proceedings before the civil courts)
  References: Dattani v Trio Supermarkets [1998] IRLR 240
- by contrast, dismissal of a claim requires an order by the tribunal. Because the making of such an order requires a judicial decision (even though there has been no consideration of the merits of the case), the doctrine of cause of action estoppel will apply once an order to dismiss (following withdrawal) has been made, barring the claimant from pursuing that same cause of action in some other proceedings (whether before the tribunal or elsewhere)
  References: Barber v Staffordshire CC [1996] IRLR 209

  Lennon v Birmingham CC [2001] IRLR 826

  Kirklees MBC v Farrell (EAT/1060/99)

Hence, in circumstances where a claimant wishes to withdraw his tribunal claim, but wants to pursue the cause of action at the heart of that claim in separate proceedings (either in the tribunal or the civil courts), a tribunal's decision to dismiss that claim, which would prevent him from pursuing it in separate proceedings, might not be appropriate.

One common set of circumstances in which a claimant may wish to withdraw proceedings in the employment tribunal, in order to pursue the same underlying cause of action in different proceedings, is where a claimant:

- brings a breach of contract claim in the employment tribunal
- discovers subsequently that the value of that claim significantly exceeds the £25,000 cap applied to contract claims in the tribunal, and
- wishes instead to pursue the claim in the High Court or County Court, where the cap does not apply, in order to recover the claim's full value

In such circumstances, it will be important to the claimant that his contract claim is not dismissed after he withdraws it, because that dismissal might allow the respondent/defendant to mount a cause of action estoppel argument as a defence in the High Court or County Court proceedings. For the same reason, the respondent would be well advised to apply to the tribunal for dismissal of the claim.

The EAT has, in *Verdin v Harrods*, formulated a test to be applied by tribunals in such situations, to determine whether or not a claim that had been withdrawn should, on application by the respondent, be dismissed:
References: Verdin v Harrods [2006] IRLR 339, para 39

- the tribunal should ask itself two questions:
  - question 1: is the withdrawing party intending to abandon the claim?
  - question 2: if the withdrawing party is intending to resurrect the claim in fresh proceedings, would it be an abuse of process to allow that to occur?
- if the answer to either of these questions is yes, then it will be just to dismiss the proceedings. If the answer to both these questions is no, it will be unjust to dismiss the proceedings

Because there is nothing to highlight it, the importance of the distinction between withdrawal and dismissal represents something of a trap for the litigant in person. Hence, even if an application for dismissal of the claim is unopposed, the employment judge should, if the claimant is a litigant in person, see whether there is any material on the file which might suggest that it would be unjust, applying the *Verdin* test, to dismiss the claim without further enquiry.
References: Cokayne v British Association for Shooting and Conservation (UKEAT/0467/07/MAA)

Cokayne:

The formulation of the first of the two *Verdin* questions has been queried in a subsequent EAT judgment in *Thomas Cook Airline Services v Wolstenholme*. However, we would suggest that the original formulation of the first question (as set out just above) is sound, provided it is appreciated that 'abandon the claim' means 'abandon the relevant underlying cause(s) of action', ie what the first question seeks to determine is whether the claimant no longer wishes to pursue those cause(s) of action henceforward in *any* court or tribunal, whether in the current proceedings or fresh proceedings.
References: Thomas Cook Airline Services v Wolstenholme (UKEAT/0353/12/KN)

Wolstenholme:

The second question seeks to determine whether the bringing of fresh proceedings would be an 'abuse of process'; this concept is explored immediately below.

**Abuse of process**

The type of abuse of process that is relevant here is that first identified in *Henderson v Henderson*. The original formulation of the rule states that where a claimant seeks to raise issues before a court in new proceedings which could have been raised in separate, earlier proceedings, but were not, those claims in the new proceedings may be struck out as an abuse of process, because there should be finality in litigation, and a defending party should not have to deal with two sets of proceedings where matters could and should have been resolved in one.
References: Henderson v Henderson [1843-60] All ER Rep 378

The rule was applied in the context of employment tribunals in *Divine-Borty v Brent LBC*. However, in more recent times, the way in which the rule was interpreted in *Divine-Borty* has been criticised as too rigid.
References: Divine-Borty v Brent LBC [1998] IRLR 525

The leading case is now the judgments of the House of Lords in *Johnson v Gore Wood*, where the proper approach is explained as follows:
References: Johnson v Gore Wood [2001] 1 All ER 481

- the bringing of a claim in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim should have been raised in the earlier proceedings if it was to be raised at all

- it is, however, wrong to hold that because a matter *could* have been raised in earlier proceedings it *should* have been, so as to render the raising of it in later proceedings necessarily abusive
- instead, there should be a broad, merits-based judgment which takes account of:
    - the public and private interests involved, and
    - all the facts of the case
- the crucial question is whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before

The EAT has since confirmed that tribunals should apply the test as explained in *Johnson v Gore Wood* rather than the earlier more rigid interpretation in *Divine-Borty*. Hence tribunals needs to be satisfied not only that a complaint *could* have been raised in earlier proceedings, but also, applying a broad merits-based approach, that it *should* have been raised at that earlier stage, having regard to the public and private interests involved, and all the facts of the case.
References: Parker v Northumbrian Water [2011] IRLR 652, para 70

Parker:

For information on *Henderson v Henderson* abuse of process, see Harvey PI[1018]-[1025.01] -- The rule in Henderson v Henderson: abuse of process.

Hence, in the context of applying the second question in *Verdin* (see above) to determine whether or not a claim that has been withdrawn should be dismissed, if the claimant has withdrawn the first set of proceedings with a view to bringing a second set of proceedings in circumstances amounting to an abuse of process in the sense identified in *Johnson v Gore Wood*, the tribunal will be entitled to accede to the respondent's request to dismiss the first proceedings.
References: Verdin v Harrods [2006] IRLR 339, para 39

## Automatic dismissal of claim

Under rule 25A, there is an automatic dismissal of proceedings (without the need for the respondent to apply) where:
References: ET Rules, Rule 25A

- the parties settle the whole or part of the proceedings through Acas
- the settlement is agreed in writing
- the parties to the settlement have confirmed in the settlement agreement, or otherwise in writing, their understanding that the proceedings covered by the settlement will, following the withdrawal of the claim (or relevant part of the claim) by the claimant, be dismissed, and
- the claimant withdraws the whole of, or the part of, the claim that is covered by the settlement by informing the Employment Tribunal Office of the withdrawal

The automatic dismissal takes place no later than 28 days after the date on which the Employment Tribunal Office receives:

- written evidence that the parties to the settlement have confirmed in the settlement agreement, or otherwise in writing, their understanding that the proceedings covered by the settlement will, following the withdrawal of the claim (or relevant part of the claim) by the claimant, be dismissed, and
- the written notification of the withdrawal from the claimant

In the same way as where a claim has been dismissed following an application for such dismissal by the respondent, if proceedings are automatically dismissed under rule 25A, the claimant may not commence a further claim against the respondent for the same, or substantially the same, cause of action (unless the decision to dismiss is successfully reviewed or appealed).
References: ET Rules, Rule 25A

## Consequences of, and challenges to, dismissal of a claim

As noted above, the claimant may not commence a further claim against the respondent for the same, or substantially the same, cause of action if:

- the tribunal grants the respondent's application to dismiss a claim that has been withdrawn by the claimant (see Dismissal of claim following withdrawal, above), or
  References: ET Rules, Rule 25(4)
- proceedings are automatically dismissed under rule 25A (see Automatic dismissal of claim, above)
  References: ET Rules, Rule 25A

In both these cases, as the wording of the rules states, the only way that the claimant may, after such a dismissal of the claim, put himself in a position such that he might, after all, commence a further claim against the respondent for the same, or substantially the same, cause of action, is by:

- seeking (and getting) a review of the order to dismiss the claim (see Review of employment tribunal decisions -- Review of other judgments and decisions), or
- successfully appealing the order to dismiss the claim (see Jurisdiction of the Employment Appeal Tribunal and Submission of an appeal)

Generally speaking, review would be the better course to take, if possible.

The EAT has confirmed that there is no avenue other than review (or appeal) of the order to dismiss which can achieve that result. Where the claimant applies for a review in these circumstances, because he wants to be able to commence a further claim against the respondent for the same, or substantially the same, cause of action, the tribunal should, in reviewing the order to dismiss the claim, apply the *Verdin* test (as explained above, under the heading 'The discretion on whether to order dismissal') to decide whether the dismissal should be upheld or overturned.
References: Cokayne v British Association for Shooting and Conservation (UKEAT/0467/07/MAA)

Cokayne:

Verdin v Harrods [2006] IRLR 339, para 39

There are also powers under Rule 10 for an Employment Judge to:

- dismiss a 'claim against a respondent who is no longer directly interested in the claim'
  References: ET Rules, Rule 10(2)(l)
- join as a party to the proceedings 'any person who the Employment Judge or tribunal considers has an interest in the outcome of the proceedings'
  References: ET Rules, Rule 10(2)(r)

These are part of the tribunal's extensive case management powers (see Employment tribunal case management and Amendment and changing parties -- Changing parties).

The EAT has held that 'dismissal' as used in Rule 10(2)(l) means the same as 'dismissal' in Rule 25(4): where a case against a particular respondent is 'dismissed', that means that the proceedings against that respondent are brought to an end, by a judicial act, and those proceedings cannot be revived. Hence, once a tribunal has exercised its power under Rule 10 to dismiss a claim against a particular respondent:
References: Downing trading as Downing Private Nursing Homes v McAllister (UKEATS/0040/08/BI)

Downing:

ET Rules, Rule 10(2)(l)

ET Rules, Rule 25(4)

- it is not open to a tribunal to resurrect the claim against that respondent by joining it once more as a party to proceedings, using its power under Rule 10(2)(r)
  References: ET Rules, Rule 10(2)(r)
- the only way to resurrect the claim against that respondent is by seeking a review of the order dismissing the claim against that respondent

As regards how a claimant might seek a 'review' of an order under Rule 10(2)(l) dismissing a claim against a particular respondent, it seems that there are potentially two possibilities:
References: ET Rules, Rule 10(2)(l)

- he might apply under Rule 11 for the order to be revoked -- see Employment tribunal case management -- Case management, under the heading 'Application by a party'
  References: ET Rules, Rule 11
- he might apply for a review under Rule 34 -- see Review of employment tribunal decisions -- Review of other judgments and decisions
  References: ET Rules, Rule 34

There is a question mark over whether the latter option of review under Rule 34 is available in these circumstances: review can only be used if an order under Rule 10(2)(l) dismissing a claim against a particular respondent is properly characterised as a 'judgment' within the meaning of Rule 34(1)(b), as the review framework is not available to challenge mere interim orders. However it would seem likely that an order under Rule 10(2)(l) *does* qualify as a judgment, and hence *is* susceptible to review under Rule 34, because:

- such an order would appear to fit within the definition of 'judgment' under Rule 28(1)(a), viz 'a final determination of the proceedings or of a particular issue in those proceedings'
  References: ET Rules, Rule 28(1)(a)
- the EAT has confirmed that a dismissal of claim under Rule 25(4) is a 'judgment' within the meaning of Rule 28(1)(a), and hence may be reviewed under Rule 34, and it is hard to see why dismissing a claim against a respondent under Rule 10(2)(l) should be regarded any differently
  References: Cokayne v British Association for Shooting and Conservation (UKEAT/0467/07/MAA), para 36

## Conciliation before proceedings have been brought

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. The Acas officer is not required to justify the reasons for his decision. Acas's Guidance Note explains that Acas will only exercise its discretionary power to conciliate where:
References: ETA 1996, s 18(3)

Acas guidance note on conciliation

- the employer and employee concerned have already made reasonable efforts to resolve the issue(s) eg by using the organisation's grievance or discipline procedures
- there are grounds to believe that a valid claim is likely to be made ie where there is a *prima facie* cause of action at the time of the request, where the claimant appears eligible to make the claim, and where there is not already a prior binding agreement to settle the matter, or
- doing so will not conflict with the maintenance of good employee relations in the organisation concerned eg where providing conciliation In potential individual rights claims could risk undermining collective agreements

Acas will provide pre-claim conciliation for all types of potential claim. Where the volume of potential claims may exceed Acas's capacity, cases will be prioritised, taking a proportionate and balanced approach, with the aim of investing available resources in interventions most likely to have the greatest impact. Priority will be given to:

- situations where employment relationships have not yet broken down
- claims which tend to lead to longer hearings such as workplace discrimination
- multiple related 'monetary' jurisdiction cases

## Conciliation once proceedings have been commenced

Where the tribunal Secretary accepts a claim he notifies the parties that the services of a conciliation officer may be available to them (provided conciliation is an option for the type(s) of claim being made).
References: ET Rules, Rule 2

The fixed conciliation periods which applied after proceedings had been commenced were removed with effect from 6 April 2009. The tribunal Secretary therefore no longer warns the parties that Acas's conciliation services may cease to be available after the end of any fixed period.
References: ET Rules, Rule 10(2)(g)

ET Rules Amendment Regulations 2008, SI 2008/3240, reg 4(16)

In effect this means that Acas has a duty to conciliate in employment tribunal cases from the moment that proceedings are commenced, right up until the tribunal delivers judgment if:
References: EA 2008, s 6

Employment Tribunals Act 1996, s 18(2)

- a conciliation officer is requested to do so by the person by whom **and** the person against whom the proceedings are brought, or
- in the absence of any such request, the conciliation officer nonetheless considers that conciliation would have a reasonable prospect of success

## Effect of contracting-out provisions

In the High Court or County Court, it is generally open to the parties to reach an agreement to settle that claim which will generally bind the parties in accordance with usual contractual principles and prevent the claimant from resurrecting the claim. This applies to breach of contract claims in the employment tribunal, even where such an agreement attempts to settle other tribunal claims as well (in which case the breach of contract claim would be validly settled even if the other claims were not).
References: Sutherland v Network Appliance [2001] IRLR 12

There are specific contracting-out provisions making agreements not to pursue other tribunal claims void and unenforceable unless they satisfy certain conditions (such as agreements reached following conciliation and compromise agreements).

## Consent orders

It is open to the parties to ask the tribunal to incorporate the terms of any agreed settlement into a tribunal order. Such orders are usually referred to as 'consent orders'. If the tribunal agrees to make a consent order, the terms will generally be binding irrespective of the contracting-out provisions.
References: Mayo-Deman v Greenwich University [2005] IRLR 845

In many cases, one or both parties may be reluctant to have their agreed terms made an explicit part of the order itself, because they wish the terms of settlement to be confidential. If this is the case, the agreed terms may instead be set out in a schedule to the order, or in some other document. The actual order the tribunal makes will simply be along the lines of '*the parties having agreed terms as set out in [the relevant document], these proceedings are stayed until further order*'. Many employment tribunals have a locally approved pro forma for such agreements, which incorporates the preferred wording in that region, which tribunal staff will supply on request. Where this method is adopted:

- the terms of the settlement do not form part of the actual order of the tribunal

- if the terms are not complied with, they may be enforced either:
    - by commencing separate proceedings in the county court, or
    - by applying to the tribunal to lift the stay and continue with the proceedings

Generally speaking, it will not be appropriate to revisit consent orders once they are made. There are, however very limited circumstances in which consent orders may be clarified, or even set aside:

## Conciliated settlements

The contracting-out provisions do not apply where a settlement has been reached following action taken by a conciliation officer under one of the relevant statutes, such as ERA 1996, s 203. The provisions in the other relevant employment statutes are materially the same.
References: Employment Tribunals Act 1996, s 18

ERA 1996, s 203

'Taking action' must be given its ordinary meaning so that:
References: Allma Construction v Bonner (UKEATS/0060/09/BI)

- it will cover any action taken by an Acas officer in relation to the claim
- he does not need to broker the settlement nor does he need to record it
- his statutory duty goes no further than that he is to endeavour to promote a settlement of the proceedings
- how he does that will be a matter for him and will vary from case to case according to its particular circumstances
- the practice of Acas being involved in the recording of settlements on form COT3 does not need to have been followed

Endorsing an agreement on a COT3 form (a standard form available from Acas) will be sufficient to constitute 'action' by a conciliation officer.
References: Moore v Duport [1982] IRLR 31

Any conciliated agreement will generally be binding on the parties and, unlike compromise agreements, may validly cover any disputes between the parties, including future disputes, without specifying the nature of the dispute that has arisen or may arise. It is likely that general settlement clauses will be strictly construed by tribunals and very clear wording is therefore advisable, particularly if it is intended to settle future disputes.
References: RNOHT 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

The contracting-out provisions do not apply where the parties reach an agreement that complies with the statutory conditions regulating compromise agreements (such as ERA 1996, s 203). The provisions in the other relevant employment statutes and regulations are materially the same. A potential advantage of reaching a binding compromise agreement is that there is no need for 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. 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.
References: ERA 1996, s 203

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, ss 203(3A), 203(4)

- a qualified lawyer (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 except where the union is the employer (or associated employer) of the person being given the advice
- 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 except where the advice centre is the employer (or associated employer) of the person being given the advice or if the person being given the advice makes a payment for the advice

There was much debate as to whether s 147 Equality Act 2010, as originally enacted, prevented a complainant's legal representative acting as the 'independent adviser' for the purpose of a compromise agreement (referred to as a compromise contract under the Equality Act 2010). The situation has now been resolved by an amendment to s 147 EqA 2010, which came into force on 6 April 2012 and applies to compromise contracts entered into on or after that date. The mechanism chosen for this amendment does indeed have the intended effect, ie it does remove any perceived or actual problem with the original drafting of the section. Therefore advisers may now use compromise contracts to settle Equality Act 2010 matters in full confidence of their efficacy.
References: EqA 2010, s 147

The Equality Act 2010 (Amendment) Order 2012, SI 2012/334

Problems with the original drafting of section 147 will only potentially effect compromise contracts entered into before 6 April 2012.

A solicitor may still be 'independent' if they are on a panel appointed by the employer for the purpose of advising their employees about compromise agreements, and are paid by the employer, provided that payment is not conditional upon the employee(s) concerned agreeing to settle.
References: McWilliam v Glasgow City Council UKEATS/0036/10/BI

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 make the compromise agreement void.
References: Lunt v Merseyside TEC [1999] IRLR 458

Palihakkara v BT (UKEAT/0185/06/DM) PDF Format

There has been much debate about 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)

Lunt v Merseyside TEC [1999] IRLR 458

- 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

  Lunt v Merseyside TEC [1999] IRLR 458

  Hilton UK Hotels v McNaughton (EATS/0059/04)
- nor does it require a formal grievance to have been raised by the employee
  References: Lunt v Merseyside TEC [1999] IRLR 458

  Hilton UK Hotels v McNaughton (EATS/0059/04)

  McWilliam v Glasgow City Council (UKEATS/0036/10/BI)
- a 'complaint' may include nothing more than an expression of dissatisfaction about something
  References: McWilliam v Glasgow City Council (UKEATS/0036/10/BI)
- blanket agreements signing away all an employee's rights will generally be ineffective
  References: Hinton v UEL [2005] IRLR 552
- only actual or potential claims raised between the parties at the time the agreement is reached may be validly compromised. Claims which have not been raised in this way cannot
  References: Hinton v UEL [2005] IRLR 552
- but an employer does not have to wait until a complaint is made by the employee before a compromise can be offered if it is apparent that there may be a potential claim: the complaint may be one identified by the employer as opposed to one identified by the employee
  References: McWilliam v Glasgow City Council (UKEATS/0036/10/BI)
- the actual or potential claim must be identified in the compromise agreement, at the very least, by a generic description (eg 'unfair dismissal'), or a reference to the section of the statute giving rise to the claim
  References: Hinton v UEL [2005] IRLR 552
- parties would, however, be well advised to identify claims with as much factual and legal detail as possible, in order to ensure precise identification of each claim intended to be compromised. This applies equally to potential claims which the parties do already have in contemplation when formulating the agreement: in such cases sufficient details should be recorded in the agreement to illustrate precisely what type of claim it was the parties had in mind, which they wished to compromise in advance
- what matters is that both parties know which particular complaint cannot be litigated in the future
  References: McWilliam v Glasgow City Council (UKEATS/0036/10/BI)

It is sufficient for advice on the agreement to be given to groups of employees via a PowerPoint presentation, where each employee also has a one-to-one consultation with a solicitor afterwards at which the agreement is actually signed.
References: McWilliam v Glasgow City Council (UKEATS/0036/10/BI)

Only advice on the terms and effect of the compromise agreement is required: the employee need not be advised on whether the deal on offer is a good one for them personally, in order for the agreement to be a valid compromise.
References: McWilliam v Glasgow City Council (UKEATS/0036/10/BI)

However, most individuals seeking advice on a compromise agreement will expect this aspect to be covered and so those advising individuals should make it clear (eg, in the engagement letter) if such advice is not to be within the scope of the engagement.

## Arbitration/Mediation

It is increasingly common for parties to enter into arbitration or mediation in an attempt to settle claims, as an alternative to conciliation or settlement.