PEOPLE MANAGER'S GUIDE

EXIT NEGOTIATIONS & SETTLEMENT AGREEMENTS

GUARDIAN
EMPLOYMENT LAW

IT'S NOT WORKING OUT

HOW TO MANAGE THE PROCESS

If you employ people, you may face the situation where the relationship is strained for whatever reason and eventually you reach the point where you make the decision to let someone go.

There are employment laws in place to protect staff from unfair treatment, including dismissal. This often means that employers are expected to follow formal procedures before a dismissal may be deemed fair. Employees with more than 2 years' service can claim unfair dismissal but those with less than 2 years' service have rights too, for example, the right to be paid all contractual sums and not to be discriminated against.

Does mean that you have to follow your procedures before every dismissal? Not necessarily, there is another way; but it has to be handled very carefully and we suggest you seek legal advice before you depart from a fair process.

The answer may be to negotiate exit terms and formalise them in a Settlement Agreement. But before you go steaming ahead, here is some guidance on how to manage this process properly, which should hopefully make it run more smoothly

CHALLENGE YOUR THINKING

STEP ONE

Offering someone a package to go is a big step, particularly if they are not expecting it!

Consider the reasons why you are thinking of ending the relationship.

- Is this a knee jerk, heat of the moment reaction to a particular situation?
- Is the relationship really broken with this employee or can you fix it another way?
- Are you scapegoating the employee?
- Has a situation reached breaking point because you haven't dealt with something that you should have done years ago?
- Does the business need this employee longer term (after you've got over your current emotions)?I
- s this an alternative to a fair dismissal without going through a process?

You need to get really clear on why you are doing this so that you can make a business case that makes sense to the employee (and their lawyer). Your rationale will be relevant in your negotiations and the final agreement between you and the employee.

GET YOUR DUCKS IN A ROW

STEP TWO

Gather your evidence in support of the business case. If you are offering this as a way out to avoid disciplinary action that could result in dismissal, collate the evidence that would back up that dismissal. This might mean that you have to start a formal process before you make an offer to go, in order to spell out the circumstances to the employee so that they can put the offer into context.

For example, if someone has previously been an excellent employee with a clean disciplinary record but they have committed an act of gross misconduct (that has injured another employee and been caught on camera) and it would almost certainly justify summary dismissal, you may want to investigate the matter and invite them to a disciplinary hearing before you make them an offer to accept their resignation and pay them in lieu of notice in exchange for dropping the disciplinary process and giving them a basic factual reference.

You should check their contract to find out what their contractual entitlements are before you offer them anything. It could be disastrous if you assumed that they had less than 2 years' service and budgeted to pay them one week's notice pay when in fact they have more than 2 years' service (and therefore unfair dismissal rights) and have a 3-month notice period.

GET YOUR DUCKS IN A ROW

STEP TWO

Check out how many holidays they have accrued but not yet taken and whether there are any other contractual bonuses or benefits that they would be entitled to if their employment terminated.

You should also check whether they are bound by any restrictive covenants and training fees clawbacks that need to be factored into any exit deal.

You will need to think about when you would like them to go too. Do they need to do a handover?

Will you put them on garden leave? Will they work their notice period or leave sooner and be paid in lieu of notice?

WHAT IS IT WORTH TO YOU

STEP THREE

Now you know what you would have to pay on termination of employment, you need to think about what else you are prepared to offer to incentivise the employee to go. Often this is cold hard cash, but you can include other things such as the transfer of ownership of company property or outplacement support.

As a starting point, it might be worth considering what an employee may get if they were successful in a claim for unfair dismissal against you and this is a basic award that is calculated on the same basis as a statutory redundancy payment.

This may a be sufficient offer in the circumstances, but you also need to factor in something called a compensatory award which a Tribunal may award to the employee to compensate them for their losses up to the date of the Hearing and future losses for a period of time as a result of their unfair dismissal. This might be the loss of income or the difference between their benefits/pay from the new job and what they used to earn whilst working for you.

The compensatory award for an ordinary unfair dismissal claim is capped at a year's net pay but is often less when a Judge takes into account the employee's duty to mitigate their losses or contributory fault.

WHAT IS IT WORTH TO YOU

STEP THREE

There are also other types of compensation in relation to injury to feelings and loss of statutory rights.

In some cases, the first £30,000 of an ex-gratia sum paid as compensation for loss of employment can be paid tax-free.

You'll hopefully get the point that it's not straightforward and this is why we encourage you to get legal advice at this stage, so you know the potential risk and liability if you don't reach an agreement and it ends up with a successful Tribunal Claim against you.

CHOOSE YOUR WORDS CAREFULLY

STEP FOUR

The conversation that you have with your employee in which you broach the subject of them leaving employment on agreed terms must be handled carefully, both in terms of sensitivity and legalities.

You may have heard terms such as 'without prejudice' or 'protected conversation'. They are effectively terms that, when used correctly, make the conversation "off the record" so that it cannot be referred to in later litigation if it all goes wrong.

Prior to 2013, parties relied upon the "without prejudice" principle which prevented statements made in a genuine attempt to settle an existing dispute from being put before the court or tribunal as evidence.

The problem with relying solely on this principle was that, if there was no dispute, having such conversations could have been considered a breach of contract by the employer and resulted in valid constructive unfair dismissal claims.

It put you at risk of allegations that your attempt to get rid of someone amounted to discrimination or victimisation.

If your offer was rejected, and you then went through a process e.g. disciplinary procedure and subsequently dismissed, employees could refer to the earlier settlement offer as evidence that you had already made up your mind to dismiss, the procedure was a sham and the dismissal consequently unfair and/or discriminatory.

CHOOSE YOUR WORDS CAREFULLY

STEP FOUR

So, employers were effectively prevented from having exploratory conversations with staff about "options", including potential exits, unless a dispute had arisen. Thankfully, the Employment Rights Act was amended in 2013 to allow employers to have "pre-termination negotiations" or "protected conversations", where there was no requirement for there to be a dispute. Hooray!

Having a protected conversation only provides protection from ordinary unfair dismissal claims and won't do so in relation to other types of claims, such as detriment following whistleblowing or unlawful discrimination.

There are various formalities associated with protected conversations and so it's important to prepare an outline script or aide-memoire to use during your conversation with the employee so that you don't forget the key components. For example, you must set the scene for the conversation being without prejudice (dispute) or a protected conversation and explain what that means at the outset. You should ask the employee to confirm that they are happy to speak to you on that basis.

It might be worthwhile getting a lawyer to draft or check over your script before you meet with the employee.

WHAT YOU CAN & SHOULD OFFER

STEP FIVE

It's up to you as to what you can and will offer but make it look attractive. You should aim to make it more attractive than what they would get it they just stuck it and you went through the proper process.

Here is a handy checklist of things that you may want to consider including in your offer:

- Salary up to the proposed leaving date;
- Notice pay;
- Accrued but untaken holidays up to the leaving date (or you may be able to ask the employee to take them during their notice or garden leave period);
- Benefits up to and including the leaving date;
- Continuation of or pay in lieu of benefits accrued during the notice period;
- Payment of contractual bonuses, commission or other allowances;
- A statutory redundancy payment/sum equivalent to one;
- An additional ex-gratia sum as compensation for loss of employment – this is the sweetener to make the deal worthwhile;
- Release from payment of sums that the employee owes the company;
- Release from restrictive covenants (that would have prevented them from working for a competitor);
- Payment for outplacement (career transitioning) support;
- An agreed reference;
- An agreed internal and external announcement;
- Resignation from directorship;
- A payment to buy back any shares they hold in the Company;
- Payment of non-contractual, discretionary, sums e.g. a bonus that would not ordinarily be paid if an employee's employment had ended or they were under notice;
- Transfer of ownership of company property e.g. mobile phone (with or without number) or computer equipment;
- A contribution towards their legal fees in connection with getting advice on the terms and effect from an independent lawyer. It is common practice to contribute to the employee's legal fees as they must obtain do so in order for the agreement to be valid, but there is no statutory obligation to do so.

THERE IS A TIME AND A PLACE

STEP SIX

Choose your moment to have a protected conversation carefully. The timing can be crucial to how the employee responds to it.

Remember what we said earlier about having the conversation partway through a disciplinary process? Don't fabricate a disciplinary situation in order to create an opportunity to have a without prejudice protected conversation but recognise that you may have more chance of the employee accepting your proposal if they can see the alternative looks less favourable.

If you have performance concerns, start your performance management process and consider when would be the most appropriate time to make the offer.

If an employee has raised a grievance, listen to that first, ask them what outcome they want and gauge whether it is appropriate to suggest an agreed exit if they think that the relationship has irretrievably broken down.

You might want to consider other factors such as the time of day to have the chat, who is around and where you have it. It's slightly insensitive to suggest to an employee that they leave just before they are about to have a meeting with their team or to hold the conversation in your office with glass walls in an open plan room with their colleagues in full view.

THERE IS A TIME AND A PLACE

STEP SIX

You may consider holding the meeting off-site or at the end of the day if there are fewer people around.

In almost all cases, don't notify them in advance that you are inviting them to a meeting to discuss a settlement offer. Instead, refer to the underlying issue resulting in the offer. So, for example, you could say "I'd like to chat with you about some performance concerns that I've got."

PREPARING FOR THE MEETING

STEP SEVEN

Take your preparation with you into the meeting and use it as a guide during the conversation. Every 'script' will be bespoke but in outline, it should cover the following:

- Raise concern(s)
- Ask to speak off the record – get agreement from employee to do that
- Explain what 'without prejudice' or a 'protected conversation' is
- Refer to the process that the company could follow with regard to the concern(s)
- Explain that you would like to explore an alternative and that is an amicable termination of their employment on agreed terms.
- Outline the terms
- Tell employee that they don't have to make a decision now.
- Tell them that you will write to them to confirm the offer and would like them to call before/meet with you at [time] and [date] to let you know whether they are agreeable in principle to the terms.
- Tell them the arrangements between now and deadline for agreement in principle – paid leave, confidentiality, suspend access to the system and property, who they should contact at the company, what their out of office message should say etc.
- Confirm the best telephone number and email address to reach them on.
- Tell them that they are entitled to reject the offer and it will be withdrawn as if it had never been made and you will proceed with the formal process thereafter.
- Discretely escort them to their desk and off the premises if you feel that is necessary
- Write to them to confirm the offer.

PUT IT IN WRITING

STEP EIGHT

If you have done your pre-work, the letter/email confirming the offer should be relatively easy to prepare based on what you said at the meeting.

It is worthwhile getting it checked over before you press send to make sure you've covered the legalities.

FALLING INTO THE ABYSS

STEP NINE

Once you have made an offer to an employee, it's important to take steps to manage what happens next very carefully in order to maintain a semblance of an amicable relationship with the employee and to protect the business.

The ACAS Guide on Pre-termination Discussions suggests that employees should be given 10 days to consider a settlement offer, but this is not a legal requirement and in our experience, it is not helpful to either party to prolong the negotiation any longer that necessary.

We suggest that you have the conversation, follow up in writing (email is fine but make sure it satisfies the requirements for protection), giving them 24-48 hours to consider the offer in principle and then, if they are open to an agreed exit, they should let you know by a specified time and you can instruct a solicitor to draft a Settlement Agreement for you (more on that later).

Consider allowing the employee a period of paid leave whilst they consider the offer. This can avoid the scenario where the employee feels too upset to come to work and calls in sick citing work-related stress. Agree with the employee what you will tell their colleagues if they ask where the employee is and commit to mutual confidentiality which you go through the process.

Think about whether you need to suspend their access to your IT system or the workplace. Is there a risk that they will sabotage your business operations, remove or copy confidential data or cover their tracks.

FALLING INTO THE ABYSS

STEP NINE

Hopefully, the employee will come back to you and accept your offer or try to renegotiate the terms.

If the employee makes a counteroffer, you should pause and consider the bigger picture. It is common for employers to think "why should I give them a bigger pay-out?!", or "they don't deserve more money", but you have to remember that you have made the offer because you want them to go, potentially without going through the motions of a fair process beforehand. They have rights, you have legal responsibilities, and you have to consider the impact on the business if you now let them stay (when that is not what you want anyway).

For example, if you have an employee is frequently off sick, this could be costing the business a lot of money in terms of paying sick pay, not to mention the added stress of finding staff to cover the absent employee's workload. But you may be concerned that they haven't been off long enough to warrant ending their employment or you may have concerns about whether or not you have done enough to keep them in employment.

In each set of circumstances, you should weigh up the overall costs to the business of keeping them and see whether it would, in the long term, be beneficial for you to enter into settlement negotiations with them.

You can negotiate revised terms if you want to, and once they are agreed in principle, the next stage is to prepare a Settlement Agreement to formalise those terms.

If the employee rejects the offer completely without putting forward a counteroffer, you can withdraw it and ask the employee to return to work then proceed with your process or you can increase your offer and see if the revised offer is attractive enough to put the matter back on the table again.

LET'S GET THIS WRAPPED UP

STEP TEN

So, what's a Settlement Agreement?

It's a legally binding contract between you and your employee which is entered into voluntarily to settle a dispute and/or any claims or complaints that they have or may have against you arising out of their employment or its termination.

Either party may propose a settlement agreement but more often than not, it is offered by the employer.

Settlement agreements formalise the end an employment relationship on agreed terms. They can also be used to resolve an ongoing workplace complaint, for example, a grievance about underpaid holiday pay during employment, or to settle a dispute post-employment.

They used to be known as compromise agreements and some people still refer to them as such now, but the correct term is a Settlement Agreement.

The employee will need to take independent legal advice on the implication of entering into the agreement as set out above.

LET'S GET THIS WRAPPED UP

STEP TEN

Why do you need a Settlement Agreement if you'd agreed on terms with the departing employee?

Employees may have claims against you under statute, their contract of employment or other common law rights such as the law of negligence which have arisen at any point during the employment relationship.

A Settlement Agreement provides you with comfort that, in exchange for the terms that you have offered, the employee will not make any claims against you arising from their employment (or its termination). It is intended to be a full and final settlement of the matter and provide the peace of mind that you will not face future litigation with the employee.

LET'S GET THIS WRAPPED UP

STEP TEN

Legal requirements

For a Settlement Agreement to be valid, certain conditions must be met:

- The agreement must be in writing;
- It must relate to a "particular complaint" or "particular proceedings";
- The employee must have received legal advice from a relevant independent adviser on the terms and effect of the proposed agreement and its effect on the employee's ability to pursue any rights before an employment tribunal;
- The independent adviser must have a current contract of insurance, or professional indemnity insurance, covering the risk of a claim against them by the employee in respect of the advice;
- The agreement must identify the adviser; and
- The agreement must state that the conditions regulating settlement agreements under the relevant statutory provisions have been satisfied.

If an agreement fails to comply with any of the requirements, it will be invalid, and your former employee will be free to pursue claims against you.

LET'S GET THIS WRAPPED UP

STEP TEN

Advantages & Disadvantages of a Settlement Agreement

Advantages

- Prevention of potential claims in the employment tribunal /Court;
- Can achieve a clean break between the parties;
- Can be more cost-effective than the cost of defending a claim;
- Speed – typically you can resolve the issue or agree on the terms relatively quickly with minimal disruption to your business; and
- Can eliminate the time, stress, and cost of managing difficult situations and difficult employees!

Disadvantages

- Could potentially set a precedent for other employees that they may be "paid off" if there is a problem – although this need not be an issue if handled properly;
- Simply offering employee's a settlement agreement may not deal with internal issues that may be causing the problems in the first place. For example, if the reason for ending the relationship is due to poor performance, you may want to consider if your people managers know how to identify and address concerns in relation to an employee's poor performance;
- Cost - Could be a high cost with regard to the agreed financial sum paid to the employee; and
- Ongoing relationships could be damaged with the employee if you are unable to reach an agreement.!

LET'S GET THIS WRAPPED UP

STEP TEN

What type of claims can be covered by a Settlement Agreement?

An employee can settle any contractual claims, so long as they receive "valuable consideration" for that waiver.

Most, but not all, statutory claims can be compromised by using a settlement agreement and so you should take legal advice to make sure that the terms you are offering actually prevent the claims that you intend them to. It would be devastating to pay an enhanced package to an employee to leave, only to have them catch you out by submitting a valid claim that you can't defend because you didn't go through the correct process to avoid it.

LET'S GET THIS WRAPPED UP

STEP TEN

Other factors to consider

It is good practice to instruct a lawyer to draft your Settlement Agreement for you each time, particularly as your employee will be sent to a lawyer to discuss it. A badly drafted agreement will result in more to-ing and fro-ing and increased legal fees so it's worth investing in getting it right at the outset.

Resist the temptation to just change the names on the last Settlement Agreement that you used. Important clauses may be missing that could leave your business exposed. For example, the previous scenario may have involved a junior employee with no company property, benefits, restrictive covenants or statutory offices (Directorships).

The reason for termination of employment is significant and must be accurate as there may be knock-on consequences. The Settlement Agreement is a legally binding document and may be shown to third parties in specific circumstances (as should be clearly defined in the Agreement). For example, an employee who wishes to claim unemployment benefit may have to disclose the terms to the benefits agency. They may receive certain benefits if there has been a genuine redundancy, however, if the reason for their employment ending is 'mutual agreement' or 'resignation', they may not.

If there is a long gap in time between the agreement is signed and when the employee's employment ends, it may be necessary for the employee to re-affirm their agreement to the terms.

LET'S GET THIS WRAPPED UP

STEP TEN

You might want to consider staging payments under the terms of the agreement.

It is worthwhile considering whether you will need ongoing assistance for a period of time post-employment. For example, if they were involved in regulatory matters and you need their input on an upcoming audit.

Confidentiality and mutual no-derogatory statement provisions are commonly found in Settlement Agreements, These clauses should be drafted with specific reference to your business.

You should consider what provisions you want in place in the event of a breach of the agreement, say, a breach of confidentiality or a restrictive covenant or in the event of a Claim by the employee. Often a Settlement Agreement will state, as a minimum, that any sums paid over and above contractual entitlements will be repaid to you.

CALL IN THE EXPERTS!

AND FINALLY...

When you've checked through each step and you're ready for some expert help, we're ready to help you navigate all and every situation...

Give the Guardian team a call and see how we can help guide you through exit negotiations and settlement agreement

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