

Audit Committee

Report Title:	End of employment matters
Meeting Date:	29 November 2016
Lead Councillor(s):	Councillor Michael Bond
Local Councillor(s):	All
Director:	Geoff Dobson, Director of Resource Management
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Brief summary of report

1. In response to the publication of the 2015/16 Statement of Accounts, the Audit Committee have questioned the appropriateness of settlement agreements, end of employment payments, and confidentiality clauses as currently used by the Council.
2. This report presents information explaining these employment matters and the advantages and disadvantages of settlement agreements in particular.
3. It is the view of the Head of HR and our specialist Employment Lawyer that these arrangements are vital components of employment law for the Council to make use of in the relevant circumstances and any suggestion to remove their use would have a significantly adverse impact on the management and potential cost of resolving employment issues and disputes in the workplace.

Action recommended

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| <ol style="list-style-type: none"> 4. The Committee notes the information in relation to the purpose and current use of settlement agreements, end of employment payments and confidentiality clauses for employees of Suffolk County Council. 5. The Committee considers the advantages and disadvantages of these arrangements. 6. The Committee notes the anticipated forthcoming legislative changes in relation to end of employment payments. |
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Reason for recommendation

7. To respond to the request from the Audit Committee to receive a report from the Head of HR setting out the case for and against the use of end of employment payments, settlement agreements and confidentiality clauses.

Alternative options

8. If the Committee is dissatisfied with the information provided, representations could be made to the Constitution Working Group to consider alternative arrangements which may then proceed to Full Council for decision making.

Who will be affected by this decision?

9. All staff in the corporate workforce (excluding those in schools).

Main body of report

Settlement agreements

10. A settlement agreement (formally known as a compromise agreement) is a specific type of contract, regulated by statute, between an employer and its employee (or ex-employee) under which the employee receives a negotiated financial sum in exchange for agreeing that he or she will have no further claim against the employer as a result of any perceived potential breach of a statutory obligation by the employer, a common law right or contractual right.
11. Examples of perceived potential breaches include, but are not limited to, unfair dismissal; constructive dismissal; unauthorised deductions from wages; various maternity and paternity rights; the right not to be discriminated against on certain prohibited grounds such as gender, marital status, racial origin, national origin, disability, sexual orientation, religion/belief, trade union membership and age; breaches of contractual rights; breaches of general law in relation to the treatment of an employee and lack of formal consultation. These are all well-established technical terms recognised in law and by the HR and Legal professionals who are guardians of the sensitive procedure associated with settlement agreements.
12. Settlement agreements are used to resolve otherwise intractable employment problems and avoid the risk of litigation. Most commonly they are used to help end the employment of an individual in a mutually acceptable way to the benefit of both parties.
13. The Advisory, Conciliation and Arbitration Service (ACAS) describe the key features of a settlement agreement to be that:
 - i) They are legally binding.
 - ii) They can waive an individual's rights to bring a claim covered by the agreement – for example, the right to make a claim to an employment tribunal or court.
 - iii) The employee (or former employee) usually receives some form of financial payment and will often receive a reference as part of the agreed terms.
 - iv) They are entirely voluntary – they include terms and conditions that are mutually agreed, and parties do not have to enter into them if they do not wish to do so.

- v) They are often reached through a process of discussion and negotiation. The parties do not have to accept the terms initially offered – there may be a process of negotiation during which both sides make offers and counter offers.
 - vi) Negotiations about settlement agreements are often confidential in the sense that, if an agreement is not reached, the negotiations may not be admissible as evidence in claims before an employment tribunal or in other court proceedings.
14. The advantages for the County Council in using settlement agreements are as follows:
- i) They can provide a swift and dignified end to an employment relationship that is not working.
 - ii) They can avoid the significant cost involved for both parties in an employment tribunal claim as well as the cost and time of management, Legal and HR support.
 - iii) They can avoid the cost and management time associated with a long and difficult redundancy, disciplinary or capability process.
 - iv) The confidential nature and non-derogatory comments clause serves to protect the organisation from potential reputation damage.
 - v) They can offer a clean break to both the employer and employee.
 - vi) They can be a sensible commercial option by reducing costs associated with continued employment during dispute.
 - vii) They offer significant flexibility in terms of dealing with a wide range of employee relations matters.
15. The disadvantages for the County Council in using settlement agreements are as follows:
- i) The cost of paying a financial sum to the employee.
 - ii) The cost of engaging Legal advice.
 - iii) The potential risk to employment relations generally if they are used as a substitute for good management practices.
 - iv) The potential risk to the ongoing relationship with the individual if an agreement is not reached.
 - v) Public perception of the use of such contracts.
16. Prior to engaging in discussion about a potential settlement agreement, a cost-benefit analysis is considered. This includes elements such as the cost of departure balanced against the cost of continued employment during resolution of the issues / dispute; cost of contractual notice; cost of management time; cost of leaving the role vacant during recruitment; the cost and impact on service provision; the cost of potential absence should the employee suffer ill health; the indirect cost of productivity loss; potential reputation damage for the Council and finally, the cost of potential litigation.
17. Between April 2015 and March 2016, 83,032 claim forms were presented to the English and Welsh Employment Tribunals, with a total of 177,592 causes of action (a claim form can contain more than one cause of action).

18. Costs of taking a claim to the Employment Tribunal can range drastically depending on the nature of the complaint with a full hearing relating to an allegation of discrimination having the potential to cost in excess of £30,000. In general, it would be expected that on average a claim would cost around £10,000 if it went to full hearing. The earlier claims can be settled, the lower the costs.
19. Unlike in many other legal actions, costs do not follow the event in an Employment Tribunal claim, i.e. the losing party does not automatically have to make a contribution to the successful party's costs. Costs are in fact the exception in the Employment Tribunal and it is rare they are awarded; in fact costs were only awarded to the Respondent in 265 of the 83,032 claims made between April 2015 and March 2016 and even then the median award was £1,000.
20. In all cases where settlement agreements are used, trained, qualified and experienced HR and Legal staff are involved in order to support managers through this technical and sensitive procedure and to ensure that management decisions are made in the best interests of the Council.
21. Authorisation of payments is dependent on the level of staff involved and the value of financial payment. For some cases, the Section 151 Officer, the Monitoring Officer and the Head of HR are consulted and final sign off rests with Directors / Chief Executive. All redundancy authorisations are also made by the Head of HR and Section 151 Officer.
22. With the exception of the statutory posts of Chief Executive, the Chief Finance Officer (Section 151 Officer), Monitoring Officer or Deputy Monitoring Officer, decisions in relation to termination of employment are made by the relevant managers, Directors and Chief Executive in accordance with Part 3 of the Constitution (Officer Delegations). Part 1 of the Constitution (Articles of the Constitution) paragraph 11.4.4 references the Dismissal Appeals Committee as the relevant body for such matters relating to those roles. Decisions pertaining to employment matters are accountabilities of officers except where the Constitution details otherwise.

Forthcoming changes to end of employment payments

23. The government is expected to legislate for two key changes in relation to end of employment payments (commonly referred to as exit payments) over the next year which will affect all Councils. Whilst recognising that such payments play an important role in enabling employers to reform and reorganise quickly, they intend to respond to public concern around the payment of six figure sums to those in the public sector.
24. The first change is the expected introduction of a £95,000 cap on end of employment payments. This will apply to all staff irrespective of salary.
25. The second change is the expected introduction of recovery of end of employment payments which are made to staff who earn more than £80,000 a year and are re-employed elsewhere within the public sector within 12 months.
26. Both of these legislative changes have been delayed since the early part of 2016. Guidance and confirmed timescale for implementation are anticipated before the end of December 2016. Their purpose is to limit the value of end of employment payments within the public sector.

Confidentiality clauses

27. Confidentiality clauses are commonplace in settlement agreements and are of benefit to both parties. In practice, it would be highly unusual for a settlement agreement not to contain such a clause.
28. For the employee, there is an assurance that a future employer will not be provided with details of the circumstances leading to the termination of their employment.
29. For the Council, there is the assurance that information about the circumstances leading up to the agreement which may be sensitive; the fact that an agreement was made and the amount contained in the agreement, will not become public knowledge and that therefore any amount offered to a particular employee could not be used as a benchmark by another employee wishing to obtain a similar payment. This means that each case can be judged on its merits and dealt with in the most cost efficient manner possible. Additionally, the Council is not at risk of a claim that it has differentiated between employees on the basis of a protected characteristic such as gender or race.
30. The use of such clauses prevents sensitive commercial information relating to payments from becoming public information without the benefit of the full background and commercial considerations that have been made. Exceptions to this is that which is required for the Statement of Accounts relating to most senior roles as well as grouped payments by financial bandings.
31. As currently drafted, the wording used by the Council is standard within the area and is as follows:

Each party to this Agreement will not divulge the existence or details of this Agreement or the circumstances leading to the termination of employment to any other person other than the Employee's immediate family, relevant professional advisers, and any competent authority, without the express consent in writing of the other party; save that nothing in this clause will prevent the [Council] from disclosing details of this Agreement as required by law. If the Employee discloses the terms of the agreement to the Employee's immediate family and/or relevant professional advisers, the Employee agrees to take reasonable steps to prevent further disclosure by such family members or professional advisers to any other person. For the avoidance of doubt, nothing in this clause prevents the Employee from making a protected disclosure within the meaning of section 43A of the Employment Rights Act 1996.
32. Settlement agreements cannot prevent an individual from whistleblowing. This is important as a confidentiality clause is not intended to be a "gagging order" and an employee can still raise serious concerns such as safeguarding matters, any allegations of fraud or other similar matters that need to be dealt with.
33. A breach of a confidentiality clause would have serious and significant consequences as a settlement agreement is a legally binding contract. If the agreement is broken for whatever reason, then the usual remedy would be that the wronged party could claim breach of contract and to raise an action for damages. If the employee were to breach the agreement, the Council would be indemnified for any losses incurred and would be released from any on-going obligations.

Conclusion

34. Officers within the Council value the use of settlement agreements in order to deal with employment matters sensitively, swiftly and in a cost effective manner. It is recognised that the publication of end of employment payments does not extend to the full cost benefit analysis which is completed to inform decision making and as such, Councillor and external scrutiny can be negative. It is also the case that robust internal controls are in place to ensure appropriate focus on cost and value.
35. If the Audit Committee is satisfied that the checks and balances are in place to ensure the appropriate use of settlement agreements within the Council, then given the sensitive nature of such circumstances, professional officers feel strongly that it would be inappropriate to share precise details of cases more widely.
36. Full assurance is given that robust officer controls are in place and that a number of checks and balances are in place surrounding such matters.

Sources of further information

- a) Acas Settlement Agreements: a Guide
[http://www.acas.org.uk/media/pdf/o/a/Settlement_agreements_\(the_Acas_Guide\)JULY2013.pdf](http://www.acas.org.uk/media/pdf/o/a/Settlement_agreements_(the_Acas_Guide)JULY2013.pdf)
- b) Articles of the Constitution (Part 1)
<https://www.suffolk.gov.uk/assets/council-and-democracy/the-council-and-its-committees/constitution/PART-1-final.pdf>
- c) Officer Delegations (Part 3) <https://www.suffolk.gov.uk/assets/council-and-democracy/the-council-and-its-committees/constitution/PART-3-final.pdf>
- d) Reforms to public sector exit payments: response to the consultation
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/555304/reforms_to_public_sector_exit_payments_consultation_response.pdf
- e) Statement of Accounts 2015-16 (audited)
<https://www.suffolk.gov.uk/council-and-democracy/budget-council-tax-and-finance/council-accounts/>