

Settlement Agreements - Frequently Asked Questions



Q: Is a settlement agreement the same as a compromise agreement?

A: Compromise agreements were in use until they were replaced by the introduction of settlement agreements in 2013. In practice they are largely the same. As long as discussions about the offer leading up to such an Agreement are carried out by way of a 'Protected Conversation', these discussions cannot be referred to in a standard unfair dismissal claim unless there has been improper behaviour by the employer. This protection does not preclude discussions being referred to in other claims such as discrimination or whistleblowing claims.

Q: Do I have to take legal advice in order to accept a settlement agreement?

A: One of the criteria for a legally binding settlement agreement is that you must receive independent legal advice on the terms and effect of the document before signing. A settlement agreement will be unenforceable unless you take this advice. It is often the case that the employer pays all of, or a contribution towards, your legal fees incurred taking that independent legal advice.

Q: If my employer has offered me a settlement agreement and I don't want to accept it but instead bring a claim against them, can I use the fact that they have offered me this as evidence?

A: You cannot use this as evidence in a standard unfair dismissal claim but this does not apply to claims for discrimination or unfair dismissal where the reason is a prohibited reason, such as whistleblowing cases.

Also, if there has been improper conduct by your employer (e.g. bullying, coercion or intimidating behaviour) in order to pressure you into the agreement then this would likely be classed as 'improper' conduct by the employer and therefore the discussions about a settlement agreement can be referred to in evidence.

Q: What happens if I don't sign the settlement agreement?

A: Quite often, a settlement agreement may be discussed when there is another process going on such as redundancy, disciplinary, grievance or capability. Settlement agreements can also be used when there is a mutually agreed termination of employment. If you do not want to exit under the settlement agreement that has been offered then you are free to reject the agreement, but it is likely that your employer will continue with the process which could still lead to the termination of your employment. Your employer will need to ensure that the process is followed properly and that it can justify the dismissal, otherwise it will leave itself exposed to a potential unfair dismissal claim (but this is an entirely separate topic).

Q: Is the ex-gratia sum I am being offered enough?

A: This will depend on the circumstances in which it is offered. When you meet with us to discuss the agreement, we will discuss any potential claims or complaints that you may have against your employer. We will explain to you how compensation is calculated in the Employment Tribunal.

The purpose of the ex gratia payment is often to compensate you for your loss of employment (or at least encourage you not to pursue a claim at all). If there are serious allegations of gross misconduct against you and there is evidence to support the allegations, then there may be no ex-gratia payment at all. Sometimes the employer offers little more than an agreement to take no further action and/or an agreed reference. However if the settlement agreement is being offered in a redundancy situation (i.e. "voluntary redundancy") then the ex-gratia payment should be at least what you would receive if you were to be made redundant under the statutory scheme. The ex-gratia payment offered under the terms of a settlement agreement can be a point for negotiation.

Q: Is the ex-gratia payment tax free?

A: The intention, in the majority of settlement agreements, is that the first £30,000 of any termination payment will be paid without deduction of tax. However, this will only be possible where it is a genuine termination payment and there was no expectation or obligation on the employer to make the payment.

There are circumstances which mean that the termination payment will not be a genuine compensatory payment (e.g. if the employer was contractually obliged to pay it or in the case of retirement) and therefore the whole of the termination payment may attract tax.

Where a genuine termination payment exceeds £30,000 there will be a tax liability on the excess (the amount over the £30,000 exemption). If there is any doubt as to the tax status of the termination payment you should seek tax advice from an accountant. We have a number of trusted advisers to whom we would be able to refer you if you have any questions in relation to the taxable status of termination payments.

Q: What other payments am I entitled to?

A: Usually upon the termination of your employment you will receive the following payments (subject to deductions of income tax and National Insurance):

- Payment of your salary and contractual benefits up to the date upon which your employment terminates;
- A payment in lieu of notice – unless you are working or on gardening leave for the period of your contractual notice (you will not be paid notice if your employment is terminated summarily for gross misconduct);
- A payment in lieu of accrued and untaken holiday Depending

on your contractual entitlement you may also receive:

- A payment in lieu of accrued time off in lieu (TOIL);
- A payment in respect of commission/bonus.

Q: Will my employer give me a reference?

A: Often employers will provide an agreed form of reference which will be annexed to the settlement agreement. The agreement should provide that your employer will issue this agreed reference on request to any prospective employer.

It is increasingly the case that former employers are only prepared to agree to give references that are limited to factual matters (i.e. name, dates of employment and job title). They are reluctant to leave themselves exposed to accusations of providing misleading references. However you can try and negotiate a more detailed reference to be annexed to the agreement. It is normal for the agreement to allow the employer to decline to give a reference if anything comes to light that affects the content of the reference.

Q: What can I tell people about my settlement agreement?

A: Most settlement agreements contain provisions which confirm that you will not:

- Make any derogatory or disparaging statements about your employer (or anyone involved in the organisation);
- Discuss the circumstances leading up to the settlement agreement or the existence or details of the settlement agreement with anyone (other than a select few e.g. your professional advisers, immediate family or if required to do so by law who will then also be bound by confidentiality);
- Disclose any confidential information (i.e. sensitive company information that you have acquired during the course of your employment).

This means that you should not discuss the matter with colleagues, even if you believe that they are being offered settlement agreements as well. It is also advisable to seek to agree with your employer what the reason for the termination is so that you can tell prospective employers and recruitment consultants. These provisions are open to negotiation.

Q: Can I expose my employer for wrongdoing after I leave under a settlement agreement?

A: We would need to know the specific allegations in order to advise you on the implications of doing this. However the confidentiality provisions that are included within all settlement agreements cannot prevent you from “blowing the whistle”, in accordance with the Public Interest Disclosure Act 1998. We would need to undertake an assessment of the disclosure that you are proposing to make to ensure that it meets the definition of a “protected disclosure” and the other criteria under the Public Interest Disclosure Act 1998 so that we can advise you. The law on Non-Disclosure Agreements is evolving and we are waiting to see what impact this will have on settlement agreements.

Q: I am bound by restrictive covenants which prevent me from working for competitors, will these still apply if I sign the settlement agreement?

A: This will depend on the terms of the settlement agreement. It is common for employers to either recite the restrictions within the settlement agreement or refer to the contract in which they are contained. If your employers is seeking to impose new or different restrictions on you then they should give you some additional monetary consideration in order for these to be legally binding. You can seek to negotiate a release from restrictive covenants as part of the settlement agreement.

It is important to remember that the terms of a settlement agreement are often up for negotiation and amendment.

Please do not hesitate to contact Kitsons’ employment team if you require advice in relation to a settlement agreement.