

## **GUIDANCE ON COMPLETION OF A BUSINESS CASE FOR A SETTLEMENT AGREEMENT OR A VOLUNTARY RESIGNATION SECURED BY A FINANCIAL CONSIDERATION**

### **Context**

The Scottish Public Finance Manual (SPFM) sets out the governance of the circumstances in which an employee may be offered an arrangement as above.

The current version of the SPFM should be referred to for full details. An extract of the version current at the time this Guidance was issued (March 2014) is attached.

### **Settlement Agreements**

Settlement Agreements are generally pursued in two different circumstances. The first is where an end to the employment relationship is being considered or has actually happened in circumstances that are the subject of an employment dispute between the parties. The second is in situations where the employment relationship is continuing but the employee has indicated that s/he has an employment dispute that remains unresolved. A legal claim may already have been lodged by the employee or the employer might believe there to be grounds that one might be. Whatever the case, if the employer would wish to seek to settle the matter at issue, a Settlement Agreement could be pursued. Such agreements will often involve payment of a non-contractual financial consideration. A Settlement Agreement is legally binding in form and is intended to remove the possibility of the matters that it covers being the subject of future or, where commenced, further legal action. Settlement Agreements have statutory status. The ACAS Code of Practice <http://www.acas.org.uk/media/pdf/j/8/Acas-Code-of-Practice-on-Settlement-Agreements.pdf> and the ACAS 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) are essential further reference.

### **Alternative Approach**

In some circumstances employers may wish to consider the option of voluntary resignation secured by a financial consideration which does not involve a Settlement Agreement.

### **Choice of Approach**

An employer considering the offer of a financial consideration to secure a voluntary resignation will require to carefully consider whether instead to pursue a Settlement Agreement, and is expected to have taken legal advice. While a Settlement Agreement may entail some additional cost with regard to a contribution towards the cost of legal advice for the employee, it does have the effect of removing the possibility of future legal action and is likely to be the preferred mode in most situations.

### **Exclusions**

Not included in the requirement to submit a business case to the Scottish Government is the resolution of claims for reparations, personal injury or lost property which are handled by reference to the employer's normal litigation or lost property management procedures.

### **Defining Contractual versus Non-Contractual Payments**

It should be noted that in the case of Settlement Agreements, a non-contractual financial consideration is not always required in order for an Agreement to be reached whereas, by definition, securing a voluntary resignation by use of a financial consideration does. Where payments to an employee are made under either kind of agreement they will be either contractual or non-contractual in nature.

Contractual payments are those which would be received in the normal course of employment. These will include performance related payments and, on termination, notice payments and payments in lieu of time owed. They will also include lump sum and pension payments to which the employee is entitled in relation to termination of employment through the Civil Service Compensation Scheme or a non-civil service employer's equivalent.

Non-contractual payments are those to which the employee has no entitlement in the normal course of employment and which are being offered solely in order to resolve an employment dispute.

While it is non-contractual costs that may be subject to greatest public scrutiny, reporting arrangements to the Scottish Parliament in relation to Settlement Agreements may also include information on contractual costs as required.

### **The Business Case & Employment Information Schedule**

The sections for completion in the Business Case template are designed to promote rigorous consideration of whether a Settlement Agreement would be appropriate to pursue and, if so, what costs it might be appropriate to incur. It is essential that the narrative supporting the business case is clear and concise to allow proper judgement of the risks, costs and potential benefits to be made.

The data provided in the Employment Information Schedule, attached to the Business Case template, sets out the financial context. When completed, those considering the case will know what the value of the employee's current employment benefits are (before and after deductions), what the total employment cost is, contractual termination costs and, where applicable, what the costs of defending a legal case might be taking into account the likelihood of it being pursued and won by the employee. This will then help inform the decision on whether an agreement should be pursued and, if so, what if any non-contractual financial consideration it would be reasonable and proportionate to offer.

An Explanatory Notes section is provided with the Employment Information Schedule which sets out definitions of the relevant data required to populate the Schedule.

### **Business Case Submission Arrangements – Proposed Settlement Agreements**

Before offering or entering into any Settlement Agreement, any constituent part of the Scottish Administration (including SG Executive Agencies and non-ministerial departments) or bodies sponsored by the SG must – using the Business Case Submission template - consult the relevant SG Sponsor Team or SG lead contact, copying in the SG Director/ Lead and SG Head of HR (Email: [HeadofHR@scotland.gsi.gov.uk](mailto:HeadofHR@scotland.gsi.gov.uk)). The response from the SG will be in writing via the relevant Sponsor Team or SG lead contact and copied to the Accountable Officer.

**Any questions relating to the terms or value for money of any proposed agreement will be directed to the relevant Accountable Officer for that public body.** Ministerial views must also be obtained as and when appropriate, including in relation to any potentially high profile cases. The body is also required to notify the Sponsor Team or SG lead contact and SG Director/Lead and SG Head of HR, once the Settlement Agreement is finalised; and to provide, where applicable, the associated outturn costs of the Settlement Agreement. SG HR will hold the records.

Nothing in this process prevents a body from having a protected conversation with an individual to investigate whether a Settlement Agreement is a potential route to resolving on-going employment issues. Bodies should not, however, make any formal offer to an employee without first having consulted SG on the business case.

### **Business Case Submission Arrangements – Resignations Secured Through Financial Consideration**

Any proposal by constituent parts of the Scottish Administration (including SG Executive Agencies and non-ministerial departments) or bodies sponsored by the SG to offer a financial consideration to secure the voluntary resignation of an employee outwith any existing (and approved) scheme must be approved by the SG Head of HR and relevant SG Finance Business Partner (or equivalent) before any offer is made, whether orally or in writing. Ministerial views must also be obtained as and when appropriate, including in relation to any potentially high profile cases. The Business Case template should be used for making submissions.

### **Business Case Submission Arrangements – Employment Tribunal Cases**

Where an employee has lodged an Employment Tribunal claim, consideration should be given at an early stage as to whether a Settlement Agreement may be appropriate as an alternative to allowing the case to proceed to a full hearing. In such circumstances, a business case should be submitted setting out the estimated costs and potential award if the case is upheld, along with the estimated likelihood of success. A ceiling within which a settlement may be negotiated should be set out. A settlement up to this ceiling may be negotiated at any time during the Employment Tribunal process. Where costs exceed the original ceiling, a revised business case should be submitted for consideration providing a detailed explanation of the reasons for the higher costs.

### **Timeframes for Feedback**

A target for response is a maximum of 5 working days if the Scottish Government does not find the case to be contentious or novel, or within 15 working days if there may be elements which are contentious or novel, or if the case is being referred to Scottish Ministers. Where cases require fast tracking, contact should be made with the relevant Sponsor Team to discuss how this can be accommodated.

### **Final Confirmation Of Costs - Reporting Requirements for Settlement Agreements**

All categories of costs associated with Settlement Agreements are potentially reportable to the Public Audit Committee of the Scottish Parliament. Scottish Government will do this using the outturn data received from the Public Body that reaches an agreement with the employee. A proforma to be used for submissions is included later within this annex. Data protection principles will be observed in

relation to putting in place reasonable measures for protecting the identities of individuals.

Given the presumption against the use of confidentiality clauses the proforma also requires you to indicate if a confidentiality clause was used and if so why.

Please note there is no reporting requirement in respect of voluntary resignation costs.

**Technical Advice**

Advice on any technical aspects of the completion of the Business Case template, Employment Information Schedule or Final Confirmation of Costs return may be sought from the SG Employee Relations and Reward team.