

## Code of Practice 4

29 July 2013

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### Foreword

The Acas statutory Code of Practice set out in paragraphs 1 to 24 below is designed to help employers, employees and their representatives understand the implications of section 111A of the Employment Rights Act (ERA) 1996 for the negotiation of settlement agreements (formerly known as compromise agreements) before the termination of employment.

In particular, it explains aspects of the confidentiality provisions associated with negotiations that take place to reach such agreements. The Code does not cover all aspects of settlement agreements.

Further guidance on settlement agreements can be found in the Acas booklet 'Settlement Agreements: a Guide', which also offers more detailed guidance on the confidentiality provisions set out in section 111A.

The Code is issued under section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992 and comes into effect by order of the Secretary of State on 29 July 2013.

Failure to follow the Code does not, in itself, make a person or organisation liable to proceedings, nor will it lead to an adjustment in any compensation award made by an employment tribunal. However, employment tribunals will take the Code into account when considering relevant cases.

The discussions that take place in order to reach a settlement agreement in relation to an existing employment dispute can be, and often are, undertaken on a 'without prejudice' basis. This means that any statements made during a 'without prejudice' meeting or discussion cannot be used in a court or tribunal as evidence.

This 'without prejudice' confidentiality does not, however, apply where there is no existing dispute between the parties. Section 111A of the ERA 1996 has therefore been introduced to allow greater flexibility in the use of confidential discussions as a means of ending the employment relationship.

Section 111A, which will run alongside the 'without prejudice' principle, provides that even where no employment dispute exists, the parties may still offer and discuss a settlement agreement in the knowledge that their conversations cannot be used in any subsequent unfair dismissal claim. It is the confidentiality aspect of section 111A that is the specific focus of this Code.

Throughout this Code the word 'should' is used to indicate what Acas considers to be good employment practice, rather than legal requirements. The word 'must' is used to indicate where something is a legal requirement.

## The Code of Practice

### Introduction

1. This Code is designed to help employers, employees and their representatives understand the law relating to the negotiation of settlement agreements as set out in section 111A of the Employment Rights Act (ERA) 1996.

In particular it gives guidance on the confidentiality provisions associated with negotiations about settlement agreements and on what constitutes improper behaviour when such negotiations are taking place.

2. Settlement agreements are only one way of handling potentially difficult employment situations. Problems in the workplace are best resolved in open conversations, including, where appropriate, through the use of performance management, or informal and formal disciplinary or grievance procedures.

### What are settlement agreements?

3. Settlement agreements are legally binding contracts which can be used to end the employment relationship on agreed terms. Their main feature is that they waive an individual's right to make a claim to a court or employment tribunal on the matters that are specifically covered in the agreement.

Settlement agreements may be proposed prior to undertaking any other formal process. They usually include some form of payment to the employee by the employer and may also include a reference.

4. For a settlement agreement to be legally valid the following conditions must be met:

(a) The agreement must be in writing.

(b) The agreement must relate to a particular complaint or proceedings.

(Note: Simply saying that the agreement is in "full and final settlement of all claims" will not be sufficient to contract out of employment tribunal claims. To be legally binding for these purposes, a settlement agreement has to specifically state the claims that it is intended to cover.)

(c) The employee must have received 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 that complaint or proceedings before an employment tribunal.

(Note: The independent adviser can be a qualified lawyer; a certified and authorised official, employee or member of an independent trade union; or a certified and authorised advice centre worker.)

(d) The independent adviser must have a current contract of insurance or professional indemnity insurance covering the risk of a claim by the employee in respect of loss arising from that advice.

(e) The agreement must identify the adviser.

(f) The agreement must state that the applicable statutory conditions regulating the settlement agreement have been satisfied.

5. Settlement agreements are voluntary. Parties do not have to agree them or enter into discussions about them if they do not wish to do so. Equally the parties do not have to accept the terms initially proposed to them.

There can be a process of negotiation during which both sides make proposals and counter proposals until an agreement is reached, or both parties recognise that no agreement is possible.

## Settlement agreement discussions and section 111A of the ERA 1996

6. Section 111A of the ERA 1996 provides that offers to end the employment relationship on agreed terms (i.e. under a settlement agreement) can be made on a confidential basis which means that they cannot be used as evidence in an unfair dismissal claim to an employment tribunal.

Under section 111A, such pre-termination negotiations can be treated as confidential even where there is no current employment dispute or where one or more of the parties is unaware that there is an employment problem.

Section 111A can also apply to offers of a settlement agreement against the background of an existing dispute, although in such cases the 'without prejudice' principle can also apply.

7. There are, however, some exceptions to the application of section 111A. Claims that relate to an automatically unfair reason for dismissal such as whistleblowing, union membership or asserting a statutory right are not covered by the confidentiality provisions set out in section 111A.

Neither are claims made on grounds other than unfair dismissal, such as claims of discrimination, harassment, victimisation or other behaviour prohibited by the Equality Act 2010, or claims relating to breach of contract or wrongful dismissal.

Throughout this Code there are a number of references to unfair dismissal. These references should be read in general as subject to the exceptions set out in this paragraph.

8. The confidentiality provisions of section 111A are, additionally, subject to there being no improper behaviour. Guidance on what constitutes improper behaviour is contained in paragraphs 17 and 18 of this Code.

Where there is improper behaviour, anything said or done in pre-termination negotiations will only be inadmissible as evidence in claims to an employment tribunal to the extent that the tribunal considers it just.

In some circumstances, for instance where unlawful discrimination occurs during a settlement discussion, this may itself form the basis of a claim to an employment tribunal.

9. Where there has been some improper behaviour for these purposes this does not mean that an employer will necessarily lose any subsequent unfair dismissal claim that is brought to an employment tribunal.

Equally, the fact that an employer has not engaged in some improper behaviour does not mean that they will necessarily win any subsequent unfair dismissal claim brought against them.

10. Where the parties sign a valid settlement agreement, the employee will be unable to bring an employment tribunal claim about any type of claim which is listed in the agreement.

Where a settlement agreement is not agreed, an employee may bring a subsequent claim to an employment tribunal but where this claim relates to an allegation of unfair dismissal the confidentiality provisions of section 111A of the ERA 1996 will apply.

## Reaching a settlement agreement

11. Settlement agreements can be proposed by both employers and employees although they will normally be proposed by the employer. A settlement agreement proposal can be made at any stage of an employment relationship.

How the proposal is made can vary depending on the circumstances. It may be helpful if any reasons for the proposal are given when the proposal is made. Whilst the initial proposal may be oral, one of the requirements for a settlement agreement to become legally binding is that the agreement must ultimately be put in writing (see paragraph 4).

12. Parties should be given a reasonable period of time to consider the proposed settlement agreement. What constitutes a reasonable period of time will depend on the circumstances of the case.

As a general rule, a minimum period of 10 calendar days should be allowed to consider the proposed formal written terms of a settlement agreement and to receive independent advice, unless the parties agree otherwise.

13. The parties may find it helpful to discuss proposals face-to-face and any such meeting should be at an agreed time and place. Whilst not a legal requirement, employers should allow employees to be accompanied at the meeting by a work colleague, trade union official or trade union representative. Allowing the individual to be accompanied is good practice and may help to progress settlement discussions.

14. Where a proposed settlement agreement based on the termination of the employment is accepted, the employee's employment can be terminated either with the required contractual notice or from the date specified in the agreement. The details of any payments due to the employee and their timing should be included in the agreement.

## Improper behaviour

15. If a settlement agreement is being discussed as a means of settling an existing employment dispute, the negotiations between the parties can be carried out on a 'without prejudice' basis.

'Without prejudice' is a common law principle (i.e. non-statutory) which prevents statements (written or oral), made in a genuine attempt to settle an existing dispute, from being put before a court or tribunal as evidence.

This protection does not, however, apply where there has been fraud, undue influence or some other 'unambiguous impropriety' such as perjury or blackmail.

16. Section 111A of the ERA 1996 offers similar protection to the 'without prejudice' principle in that it provides that any offer made of a settlement agreement, or discussions held about it, cannot be used as evidence in any subsequent employment tribunal claim of unfair dismissal. Unlike 'without prejudice', however, it can apply where there is no existing employment dispute.

The protection in section 111A will not apply where there is some improper behaviour in relation to the settlement agreement

discussions or offer.

17. What constitutes improper behaviour is ultimately for a tribunal to decide on the facts and circumstances of each case. Improper behaviour will, however, include (but not be limited to) behaviour that would be regarded as 'unambiguous impropriety' under the 'without prejudice' principle.

18. The following list provides some examples of improper behaviour. The list is not exhaustive:

(a) All forms of harassment, bullying and intimidation, including through the use of offensive words or aggressive behaviour.

(b) Physical assault or the threat of physical assault and other criminal behaviour.

(c) All forms of victimisation.

(d) Discrimination because of age, sex, race, disability, sexual orientation, religion or belief, transgender, pregnancy and maternity and marriage or civil partnership.

(e) Putting undue pressure on a party. For instance:

(i) Not giving the reasonable time for consideration set out in paragraph 12 of this Code.

(ii) An employer saying before any form of disciplinary process has begun that if a settlement proposal is rejected then the employee **will** be dismissed.

(iii) An employee threatening to undermine an organisation's public reputation if the organisation does not sign the agreement, unless the provisions of the Public Interest Disclosure Act 1998 apply.

19. The examples set out in paragraph 18 above are not intended to prevent, for instance, a party setting out in a neutral manner the reasons that have led to the proposed settlement agreement, or factually stating the likely alternatives if an agreement is not reached, including the possibility of starting a disciplinary process if relevant. These examples are not intended to be exhaustive.

20. In situations where there is no existing dispute between the parties, the 'without prejudice' principle cannot apply but section 111A can apply. In these circumstances the offer of, and discussions about, a settlement agreement will not be admissible in a tribunal (in an unfair dismissal case) so long as there has been no improper behaviour.

Where an employment tribunal finds that there has been improper behaviour in such a case, any offer of a settlement agreement, or discussions relating to it, will only be inadmissible if, and in so far as, the employment tribunal considers it just.

21. Where there is an existing dispute between the parties, offers of a settlement agreement, and discussions about such an agreement, may be covered by both the 'without prejudice' principle and section 111A.

The 'without prejudice' principle will apply unless there has been some 'unambiguous impropriety'. As the test of 'unambiguous impropriety' is a narrower test than that of improper behaviour, this means that pre-termination negotiations that take place in the context of an existing dispute will not be admissible in a subsequent unfair dismissal claim unless there has been some 'unambiguous impropriety'.

22. In court or tribunal proceedings other than unfair dismissal claims, such as discrimination claims, section 111A does not apply. In

these cases, the 'without prejudice' principle can apply where there is an existing dispute at the time of the settlement offer and discussions, meaning that these will not be admissible in evidence unless there has been some 'unambiguous impropriety'.

## **What if a settlement agreement cannot be agreed?**

23. If a settlement agreement is rejected and the parties still wish to resolve the dispute or problem that led to the offer being made then some other form of resolution should be sought.

Depending on the nature of the dispute or problem, resolution might be sought through a performance management, disciplinary or grievance process, whichever is appropriate. The parties cannot rely on the offer of a settlement agreement or any discussions about the agreement as being part of this process.

24. It is important that employers follow a fair process, as well as the other principles set out in the Acas discipline and grievance Code of Practice, because, if the employee is subsequently dismissed, failure to do so could constitute grounds for a claim of unfair dismissal.