

Consultation Response

Draft Code of Practice on Settlement Agreements

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This ACAS consultation is examining proposals for the establishment of settlement agreements, which will be used as a means of ending employment relationships. The agreements will allow employers and employees to negotiate the terms of exit, often by-passing other processes for dismissal. Included is a draft statutory Code of practice.

Key points and recommendations

- We are concerned that some employers will use settlement agreements as a means of forcing older workers to leave their organisation because of their age alone.
- This could legitimise age discrimination via the backdoor, which would be a significant backwards step in efforts to combat ageism in the workplace.
- The draft Code of practice must include reference to such discrimination. It is an excellent opportunity to engage with employers about good practice in this area.
- It should be clear that offers of settlement are admissible as evidence in cases of harassment or discrimination. This will deter employers from mis-using them.
- The Code appears contradictory about whether an existing employment dispute must already exist between the parties. For issues relating to performance in particular, a settlement agreement must not be the first attempt to resolve any issues as it discourages good people management. The non-statutory guidance should make this clear.
- We are concerned that the drafting of the template letters will encourage employers to send these to all workers they want to remove, even where there are no previous performance or conduct issues.

1. Introduction

In spite of the introduction of the Employment Equality (Age) Regulations in 2006, age discrimination is still a significant problem in today's workplaces. Many older workers suffer from ageism – 40 per cent of employees aged over 50s believe they have suffered from discrimination because of their ageⁱ – and it is important that efforts to tackle this are improved.

The phasing out of the Default Retirement Age through 2011 and 2012, coupled with the ruling in the *Seldon vs. Clarkson, Wright and Jakes* case in April 2012, has reduced the number of employers forcing older workers to retire.ⁱⁱ The practice can, of course, still be 'objectively justified' in the courts.

With this change in employer practice, our main concern with the Settlement Agreement proposals is that it will give employers a tool by which to legitimately

discriminate against their older workers (and other minority groups), with little or no possibility of recourse.

Settlement Agreements represent an opportunity to reflect the inappropriateness of age discrimination in the workplace. The Statutory Guidance should include explicit references and recommendations of good practice around performance management. This would send a clear signal that the agreements are not a means for forcing retirement and that age discrimination is both unacceptable and illegal.

The non-statutory guidance could explore discriminatory behaviour in more detail, and provide strong evidence of good practice and its benefits. It is essential to ensure that settlement agreements do not become a substitute for the Default Retirement Age and perceived as a means of legitimately discriminating on grounds of age.

2. Consultation questions

Q1. Is it right that the Code should focus mainly on the new legal provisions regarding the inadmissibility of settlement agreement offers and discussions in unfair dismissal claims?

Q2. Should the Code also include reference to the statutory requirements for drawing up a settlement agreement, e.g. putting the agreement in writing, and the employee receiving advice from an independent advisor? If not, should these be set out in accompanying guidance?

Q3. Should the Code contain good practice guidance on how settlement agreements are offered and discussed, in addition to this being covered in non-statutory guidance?

Q4. What sort of information and good practice advice would you like to see included in non-statutory guidance on settlement agreements?

The template agreements appear to fall outside the usual performance management systems – an employer could write to an employee out of the blue, under the nominal heading of poor performance, when in fact the employer's sole aim is to remove the employee from their organisation in a risk-free way.

In spite of the claim in the introduction of the Code that: "This 'without prejudice' confidentiality does not, however, apply where there is no existing dispute between the parties", we are concerned that will not offer protection to individuals in practice.

The Code also states that: "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."

This second quote appears to contradict the first, and implies the template letters could in fact be used entirely at the employer's request.

If so, this directly undermines efforts to improve human resources management and the skills of individual line managers.

The wording appears to encourage settlement agreements to be used in a discriminatory manner. For instance if an employer wanted to remove all employees with a particular characteristic (e.g. over 60 years old, or with mental health issues), it could potentially issue notices to all staff to pursue this aim. Unless there is a clear instruction relating to mass usage, the danger is that settlement agreements will be more attractive for mis-use.

We are concerned it would be very difficult or impossible for an individual employee to seek redress for such action and that settlement agreements will be seen as an easy way out for managers.

Age UK believes that the Code should include reference to employers' legal obligations, and the non-statutory guidance must set out more detail about good practice on avoiding discrimination. It is an excellent opportunity to raise awareness among employers, and promote the business case of good performance management.

Q7. Having seen the draft of the new Code on settlement agreements do you feel the template letters should be included in a) the Code or b) the non-statutory guidance?

Because of the wording of the draft letters, we believe these should be restricted to the non-statutory guidance. However, if these were improved (see question 8) then they could be included in the Code.

Q8. Do you have any comments on the wording of the template letters?

Q9. In referencing the importance of having a reasonable time to consider a settlement agreement offer, should the Code specify a minimum time period?

Q10. Is so, how long should the period be?

We are concerned the wording of the template letters will fail to encourage dispute resolution, and instead allow for an easy reliance on settlement agreements. This approach by default bypasses proper performance management and the associated business benefits.ⁱⁱⁱ

The content of the agreement should be decided at a later date and only once alternative measures have been taken. Without such a precaution we are very concerned that receiving such a letter will place the employee under undue pressure to accept the terms and conditions. For many employees it may not be possible to find legal representation, obtain advice and make a sensible decision within a short time frame.

Any settlement agreement is unlikely to be reached from a position of equal bargaining power.

Q13. What do you think of the examples of improper behaviour and undue pressure set out in the draft Code and do you have any other examples that you feel might usefully be included?

Q14. Should the Code include examples of what does not constitute improper behaviour or undue pressure?

Q15. If so, what examples would you like to see included?

Age UK is principally concerned with age discrimination, in particular that settlement agreements could be used by some employers as a substitute for the Default Retirement Age.

We think that the Code or the non-statutory guidance should explicitly state this is not acceptable, and signpost employers to guidance on managing an ageing workforce. Examples should be included in the Code, but it should be clear that these are not exhaustive.

We also believe that it should include a statement to the effect that pursuing a settlement agreement could potentially be relevant in a harassment or discrimination case.

ⁱ CIPD (2010), Managing an ageing workforce

ⁱⁱ A recent survey by the law firm Eversheds found that less than 3 per cent of employers continue to operate a mandatory retirement age compared to 69 per cent two years ago. See http://www.eversheds.com/documents/training/HRe_dra_survey.pdf

ⁱⁱⁱ For example, CIPD (2009), Performance Management in Action