

Consultation Response

Ending the employment relationship

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This consultation by the Department for Business, Innovation and Skills aims to improve certainty for businesses who may wish to end an employment relationship and also seeks views on capping the payout on unfair dismissal claims.

It suggests giving greater legal protection to 'settlement agreements', whereby an employer and employee could negotiate a severance package to terminate the employment contract, for example a pay-off and a reference, in exchange for the employee giving up the right to make a claim to an Employment Tribunal. The consultation seeks views on how this system should operate in practice. The Age UK response focuses on the proposals around settlement agreements.

Key points and recommendations

- We agree that 'protected conversations' would be unworkable, and are pleased that BIS has decided not to pursue this avenue.
- The Government must remain committed to eradicating age discrimination. No policy should be enacted which could undermine the abolition of the Default Retirement Age.
- The Government should give careful consideration to the processes and practicalities of settlement agreements from the employee's perspective. This viewpoint should be incorporated into the statutory guidance in some form.
- The Government must ensure that the types of legal protection settlement agreements do *not* offer is clear. For example, employers must be clear that settlement agreements could not be used in conjunction with discriminatory aims.
- Settlement agreements are not a substitute for good management practice. The Government should act to strengthen good practice in leadership and management.
- We believe that the uncertainty faced by employers could be more easily resolved by improving communication about what is and is not acceptable behaviour. Creating new procedures is unnecessary and will only serve to make the system more complex.
- Individuals who leave via a settlement agreement should be classed as non-voluntary leavers, and therefore entitled to make day one claims for Jobseekers Allowance.

1. Introduction

Ending the employment relationship can be difficult for both employer and employee. If done correctly, measures to ease this could be beneficial to both parties.

The introduction of settlement agreements offers a potentially viable solution. Age UK's main concern is that they must not provide unscrupulous employers with a legitimate tool to discriminate against employees because of their age.

The Government and BIS have both done much good work with the abolition of the Default Retirement Age – it is vital that this is not jeopardised by allowing settlement agreements to be used as a means of targeting older workers. If this were to happen it could re-legitimise the concept of forced retirement and continue to stigmatise older workers.

While the proposals in the consultation paper do not appear to legitimise discrimination, they are focussed exclusively on the employer's perspective, and the Government needs to make it clear that discriminatory behaviour would be unacceptable.

Settlement agreements must also be fair to the employee. How they achieve a satisfactory level of fairness and transparency is crucial to their success, and to their acceptance as a legitimate tool for employers. We suggest that the operation of settlement agreements from the employee's perspective is examined in greater detail before statutory guidance or a code of practice is published.

While it may, in some circumstances, be reasonable to disallow the offer of a settlement agreement as evidence in unfair dismissal cases, any guidance should also be clear that they would still be admissible in other types of case, for example discrimination.

It also needs to be acknowledged that repeated offers could constitute harassment or indicate discrimination.

The individual's right to refuse a settlement agreement is very important to the whole process – it should be made perfectly clear to employers in the statutory guidance or code of practice that these are not a substitute for effective people management.

As employers will have to interact with statutory tools and formal procedures, it creates an excellent opportunity to broaden knowledge of employment law and good management practice.

'Protected conversations'

We welcome the recognition that protected conversations are unworkable in practice, and if implemented would be detrimental to all parties.

The consultation paper identifies many issues with which we would agree, especially that managers would use protected conversations as a way of avoiding following due process and procedures.

We would particularly emphasise the negative impacts for many older workers if protected conversations were used in conjunction with retirement issues. They could be used to mask harassment and discrimination. In some cases this could be a tool to force people to retire.

Communication around 'difficult' issues

The evidence base clearly shows that it is beneficial for businesses to engage their employees rather than simply trying to avoid difficult conversations.¹

There is no substitute for good management practice.

According to the consultation paper, employers sometimes complain of uncertainty about actions that can be taken to end employment relationships. If this is indeed the case, we believe that improved communication of what behaviours are and are not acceptable is a more effective means than using statutory tools, such as settlement agreements.

Benefit entitlements

It is unclear whether individuals leaving employment via a settlement agreement would be classed as voluntary leavers or be recognised as leaving work through no fault of their own. It is important this is clarified as it will affect peoples' ability to claim certain benefits, most notably Jobseekers Allowance. Jobcentre Plus advisers can place a non-payment sanction of between one and 26 weeks for voluntary leavers.

We believe leavers via settlement agreements should enjoy a day-one right to claim JSA as non-voluntary leavers, or it will harm people's ability to get the necessary back-to-work support and also deter employees from taking up settlement agreements.

2. Consultation questions

Question 1: Do you agree that these are the correct principles to underpin the use of a settlement agreement which is inadmissible in unfair dismissal cases?

The principles appear to be broadly acceptable. We hope the principles will be reflected in the guidance, not simply stated as a series of stand-alone ideals.

We welcome the principle stating that employers 'should not make discriminatory comments or act in a discriminatory way when making an offer of settlement'.

However, we believe this should go further and explicitly state that acts of discrimination are not covered by the legal protection afforded to settlement agreements. This will help employees better understand their rights and encourage employers to think about why they are making the offer.

It also represents an excellent opportunity to go even further and ensure that employers are signposted to other official guidance, for example the ACAS guidance on discrimination in the workplace or the Equality Act Code of Practice.

Question 12: Do you have ideas for other ways to help effectively disseminate the guidance and materials?

Employers using settlement agreements should be required to signpost employees to all relevant information, advice and guidance. Links to where this could be found on relevant websites could be included in the statutory guidance, making it a relatively simple task for employers.

This should include materials held by ACAS, and also the National Careers Service. The National Careers Service should ensure that they classify employees leaving employment through a settlement agreement as a 'priority group', meaning they would be eligible for additional face-to-face advice sessions. Individuals would still be free to decide whether to take up the option of face-to-face sessions but this should increase the chances of people who require some help and support moving into employment more quickly.

ⁱ See for example: Hayward et al (2007) 3rd work-life balance employer survey, BERR