

Settlement Agreements and “Agreed References”

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Settlement Agreements and “Agreed References”

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What is a settlement agreement?

A settlement agreement (formerly known as a compromise agreement) is a document that can settle the majority of employment claims that an employee may have against its employer (either the school and/or the local authority). They are most commonly used to bring an employee’s employment to an end by mutual agreement.

What is the purpose of a settlement agreement?

A settlement agreement provides a way for a school to remove a problematic employee without the need to follow a fair procedure. A settlement agreement can be used for any employee of the school, from a mid-day supervisor to teacher.

A settlement agreement allows a school to move on with a “clean slate”. A school does not have to live in fear of a potential employment tribunal claim landing on their doorstep following the employee’s termination of employment.

Why would you use a settlement agreement, and not just get written assurances from the employee that they will not bring a claim?

The majority of statutory claims (these are claims arising from law (as opposed to a claim for breach of contract), for example, unfair dismissal, failure to make certain payments or discrimination) cannot be settled unless through a legally valid settlement agreement. A mere written assurance from an employee that they will not bring a claim against the school is virtually worthless.

When can you enter into a settlement agreement?

Settlement agreements are normally entered into before an employee’s last day. However, it is very important that you do not present a settlement agreement to an employee without receiving confirmation that they are interested in exploring this route (this is sometimes called a “protected conversation” or a “without prejudice” discussion”). In addition, you should never present a settlement agreement to an employee as a “take it or you will be sacked” option as this action may constitute a (potentially unfair) dismissal in itself.

What is usually covered within a settlement agreement?

There are numerous clauses that can be included into a settlement agreement. The clauses below are the most important:

- Termination date/termination payment;
- What claims are being settled (and cannot be brought against the school);
- Legal advice;
- Confidentiality and other restrictions;
- An agreed reference.

Are you a maintained school?

Be wary of settlement agreement discussions because some local authorities will expect the school to use the standard local authority format and to first request permission from the local authority before agreeing to enter into a settlement agreement.

“Agreed references” in settlement agreements can be problematic for schools

Normally, when agreeing a reference as part of a settlement agreement, it is not usually advisable for employers to deviate from the agreed wording in the reference, because this could amount to breach of contract. However, there may be safeguarding and/or capability issues surrounding the teacher that can override any agreed reference in a settlement agreement.

A school has certain statutory duties and by law may have to provide certain information about a teacher, even if it wants to agree otherwise in a settlement agreement (for example there is a legal obligation to disclose if a teacher has been subject to capability procedures in the two years prior to termination). This potentially means that schools can risk a breach of contract claim (i.e. for breaching the terms of the settlement agreement) if they choose to deviate from the wording in an agreed reference.

Therefore, the wording of an agreed reference should be carefully considered and drafted based on the individual concerned.

Schools should also ensure a settlement agreement allows for amendments to a reference in the event that new information comes to light about an employee or if disclosure of information is required by law or part of a NCTL referral.

Here is a recent case example on an agreed reference used in a settlement agreement...

A teacher left his employment at a school through a settlement agreement. There were several allegations of misconduct made against the teacher relating to an inappropriate use of force in respect of his dealing with pupils. Two allegations were investigated and letters of professional advice issued. The final incident of misconduct led to a final written warning being issued and eventually an exit from the school via a settlement agreement was agreed. The settlement agreement contained an agreed reference.

Subsequently, the school referred the teacher to the Independent Safeguarding Authority and also provided information to the police in relation to his misconduct. The police reproduced this information in the Enhanced Criminal Record Check (ECRC) against the teacher. As a result, the teacher lost his job he had got at another school.

The teacher brought legal proceedings against the school on the basis that they had departed from the agreed reference. One of the claims by the teacher was breach of contract (in relation to the agreed reference). The good news however, is that this claim against the school was unsuccessful.

The Court decided that the settlement agreement cannot prevent a school or a local authority to decline reference request by the police or any third party interested in safeguarding issues. The school was under a statutory duty to disclose safeguarding information and it would be neglecting this duty if it restricted itself to the agreed reference in the settlement agreement. It is therefore very important to ensure that any reference in a settlement agreement takes this into account.



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