



REVIEW



How Much Time Should
An Employee Get To
Consider Settlement
Terms



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How Much Time Should An Employee Get To Consider Settlement Terms

EMPLOYMENT settlement agreements are a useful way of settling workplace disputes that have either crystallised or are in the pipeline but such agreements have to be done properly to ensure they are binding on the parties.

The Isle of Man continues to rely on settlements being brokered through Manx Industrial Relations Service ('MIRS'). It is a statutory requirement for MIRS to conciliate otherwise the agreement will not validly waive employment statutory claims the employee may make. UK employment law moved away from this practice in the 1990's and permitted employers and employees to make a private settlement agreement that was valid provided the employee had seen a relevant independent adviser, normally an employment lawyer. The employer in those circumstances must contribute to the employee's reasonable legal fees, the amount differing depending on each case.

A question that frequently arises when an Isle of Man employment settlement agreement is in the offing is how long an employee should be given to consider possible settlement terms. Things can move very fast when employers and employees are engaged in such discussions and delay might not suit either party especially if, for instance, the departing employee is perceived by colleagues as being absent from work without good reason.

In England ACAS guidance suggests employees should be given a reasonable time to consider a proposed settlement and as a

general rule a minimum period of ten calendar days should be allowed for the employee to consider formal written terms of a settlement agreement and receive independent advice, although the parties can agree otherwise. In the Isle of Man there is no written MIRS guidance on this specific issue but our High Court has commented on this point in a 2018 case which discussed the validity of an employment settlement agreement and reviewed the relevant timeline. The Deemster in that case concurred that an employee in these circumstances should be given a reasonable time to consider the terms of a possible employment settlement agreement. The Court commented that being forced into a quick decision could amount to unreasonable behaviour by the employer and even an illegitimate threat which may then engage the law on duress.

So Isle of Man employees should be given a reasonable period of time to consider settlement terms and a good yardstick for this would be the ACAS suggestion of a minimum period of ten calendar days. There is an extra layer of law in England if an employee is being railroaded into signing such settlement terms. UK tribunals have found that where employees are ambushed with settlement terms and pressurised to sign that could amount to improper behaviour for the purposes of section 111A of the Employment Rights Act 1996 of Parliament - which outlines the statutory without prejudice privilege given to a 'protected conversation'. That statutory privilege does not apply

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where there has been improper behaviour. Compromising a UK employee on time when proposing settlement terms might therefore strip away the protected nature of the conversation making it admissible as powerful evidence in a subsequent tribunal claim. This law however does not apply in the Isle of Man where normal common law without prejudice privilege applies with the exception being the 'unambiguous impropriety' rule which has a higher threshold than the UK statutory improper conduct exception.

An employer should approach a possible employment settlement agreement with caution particularly by allowing an employee enough time to consider the terms. The employee needs to take legal advice and/or consult MIRS. The parties should consider whether it is suitable for the employee meantime to attend the workplace and, if some special paid leave is agreed, external messaging needs to be consistent, not eyebrow raising.

In some settlements employers only offer to pay what the departing employee is entitled to by contract anyway. In those cases, there is no incentive for an employee to sign a fulsome waiver agreement, something MIRS or a specialist adviser will rapidly point out. The size of an ex-gratia (that is, goes beyond contract entitlement) payment is usually the key to securing these types of agreement; MIRS and specialist advisers are best placed to explain what might constitute a reasonable

sum in these circumstances, each case differs and depends on its own facts.

The parties must not lose sight of the possibility that no settlement agreement is reached and the employee resumes work. Such cases tend to be in the minority simply because once a termination discussion has started, even if on a without prejudice basis, the genie is out of the bottle. There is often an inevitable loss of trust and confidence between the parties making a return to normal duties awkward at best or untenable at worst.

The tried and tested Manx system of settling employment claims works well and MIRS plays a vital role in conciliating such agreements. If this manner of settling an employment dispute is being contemplated it usually pays dividends for both parties to take early specialist advice.

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