

Subject:	Settlement Agreements		
Date of Meeting:	24 September 2013		
Report of:	Executive Director Finance & Resources and Head of Law & Monitoring Officer		
Contact Officer:	Name:	Abraham Ghebre-Ghiorghis	Tel: 291500
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Ward(s) affected:	All		

FOR GENERAL RELEASE**1. SUMMARY AND POLICY CONTEXT:**

- 1.1 As the body responsible for corporate employment matters, the council's Executive Leadership Team ('ELT') recently agreed a new policy on the use of settlement agreements, to reflect best practice. However, ELT wished to bring the policy to the attention of Audit & Standards Committee for added assurance.

2. RECOMMENDATIONS:

- 2.1 That Audit & Standards Committee note the Statement of Council Policy on the Use of Settlement Agreements set out in Appendix 1, coming into effect on 1st October 2013.

3. RELEVANT BACKGROUND INFORMATION

- 3.1 The use of settlement agreements has been the subject of much public attention and interest. The National Audit Office issued a report on 21st June 2013 titled "Confidentiality Clauses and Special Severance Payments". This was a review of the use of settlement agreements in central government departments. Although the main focus was on the use of confidentiality clauses, it was generally critical of the practice and made several recommendations. One of these was that the Cabinet Office should provide guidance on the use of settlement agreements, including the requirement that departments have a clear and published policy on the use of settlement agreements. It also recommends greater transparency in reporting "special severance payments". It is likely that there will be similar expectations placed on local authorities.
- 3.2 Locally, as a result of developments at national level (severance settlements in the NHS and other high profile exit packages), the concerns raised in the Global HPO report about the need to monitor and review the application of settlement agreements from an equalities perspective, together with the apparently high number of such agreements entered into by the Council in previous years, it was decided to review our practice. This was done with a view to adopting a

corporate approach that reflects best practice and gives the process additional challenge, transparency and assurance. Officers in Human Resources and Legal Services undertook the review and the recommendations were presented to the Executive Leadership Team (ELT.) The policy agreed by ELT is attached as appendix A and it is being reported to this committee for information.

- 3.3 The following table details the number of settlement agreements entered into in the last five years:

Year	No. of settlement agreements, excluding those for voluntary severance	Agreements related to voluntary severance
2008/09	26	
2009/10	35	
2010/11	53	
2011/12	52	121
2012/13	50	2

- 3.4 Settlement agreements entered into with staff employed in schools account for about 1/3 of the overall number of settlement agreements in each year. Schools have delegated powers in relation to appointment and dismissal and so make their own decisions in relation to settlement agreements.
- 3.5 Settlement agreements have been used for this year's voluntary severance scheme and 119 staff have agreed to leave through this process. The average cost of these settlements (including payments to the pension fund for early access to pensions where applicable) is £16,500.
- 3.6 For broad comparison purposes, the following table shows the number of settlement agreements per year for the council's Nearest Neighbours (as defined by CIPFA). The source for this information is the response to a series of Freedom of Information requests that are published on the internet and were publicised in the national media earlier this year:

	2008/2009	2009/2010	2010/2011
Bath and North East Somerset	2	7	5
Bedford		9	9
Bournemouth	16	17	
Brighton & Hove	26	35	53
Bristol	46	54	
City of York	1	2	7
North Tyneside	23	22	23
Portsmouth	23	8	8
Reading	6	2	3
Sefton	0	10	9
Southampton	2	9	19
Southend on Sea	0	0	0
Torbay	2	8	3
Trafford	8	5	12

4. Legal Status of Settlement Agreements and Public/Media Perception

- 4.1 Section 203 of the Employment Rights Act 1996 provides the statutory framework for settlement agreements. They are legally-binding agreements entered into between an employer and an employee to settle a dispute. The employee agrees to waive their rights to pursue a legal claim in a Tribunal or other court and this is usually in exchange for some form of compensation or settlement. Often this will include an agreement to terminate the employment relationship but not always. An employee's right to make certain claims, such as unfair dismissal, redundancy or discrimination are generally protected by statute and cannot be excluded even by agreement, unless it is done by way of a settlement agreement certified by the employee's legal representative.
- 4.2 The media periodically highlight the use of settlement agreements, particularly in situations involving public bodies and usually high profile departures in the context of publicising high value settlements. There is negative reporting in relation to the use of public money and consequently reference to settlement agreements is usually perceived to mean large severance payments and therefore reports of high numbers of settlement agreements creates a very negative image.
- 4.3 The recent media coverage of settlement agreements in the NHS and the inclusion of so-called 'gagging clauses' aimed at silencing whistle blowers has also created a negative image of the use of such agreements and consequently where organisations are reported as having used a higher number of settlement agreements, this creates a negative perception around transparency and is perceived as an organisation potentially seeking to silence its critics.
- 4.4 It should be noted that standard settlement agreements used by the council do include a confidentiality clause which prohibits the employee from disclosing the existence of the agreement and the content (e.g. any compensation given) and on some occasions prohibits the disclosure of the events leading up to the agreement. This clause does not prevent the employee from making any protected disclosures or 'whistleblowing' under the Public Interest Disclosure Act 1998 nor is it intended to do so.
- 4.5 There is no record of the Council ever having taken legal action to enforce any confidentiality provision.

5. Reasons for Using Settlement Agreements

- 5.1 There are, broadly speaking, three scenarios where settlement agreements tend to be used:
- (a) **Risk of legal claims** – this applies where there is a perceived risk to the council of a successful tribunal or county court claim (because of procedural flaws, inadequate grounds for a dismissal, unjustifiable treatment or breach of contract).

(b) **Efficiency of the Service:** these involve cases where management view that it is desirable for an employee to leave the organisation but there are not sufficient grounds to pursue a fair dismissal.

(c) **Alternative to dismissal** – these are cases where management have a reasonable case to pursue through formal procedures but a settlement agreement is sought as an alternative as the perceived timeframes and resources involved in pursuing a formal process means it is preferable to reach an early and mutual agreement. The biggest cost can often be because the time to pursue an issue through procedures involves the continued payment of salary during the process plus the cost of notice (between one and three months pay depending on circumstances) as well as other impact on the service depending on the circumstances/.

5.4 There are some types of cases which cannot always be managed through settlement agreements such as those involving issues related to safeguarding of children or vulnerable adults where safeguarding considerations may have to take precedence.

6. Key Features of New Policy

6.1 On 10th July 2013 the council's Executive Leadership Team agreed the new policy on settlement agreements, as set out in Appendix 1.

6.2 The council's Compensation Panel already has responsibility for authorising/making decisions in relation to requests for early retirement and enhanced redundancy compensation payments. The Panel comprises senior officers from legal, finance and HR as well as a relevant senior service manager.

6.3 Under the new policy, the Compensation Panel has authority and responsibility to decide whether a settlement agreement is appropriate in any case and also the financial limits of any financial settlement as part of any agreement for the purposes of negotiation. Managers are not authorised to enter negotiations without the authorisation of the Compensation Panel nor exceed the financial limits agreed by the Panel.

6.4 This will ensure a consistent corporate approach to the circumstances in which settlement agreements are used as well as the levels of compensation offered as part of the agreements. This will also provide a greater level of challenge to managers proposing settlement agreements and encourage exploration of other options.

6.5 To reduce the number of settlement agreements entered into and the amount they pay out, the Panel will assess the strength of the business case behind a each request for a settlement agreement, and the implications/likelihood of resolving a situation through alternative means such as a mutual termination agreement or pursuing formal procedures.

6.6 There has already been a shift in practice in recent months to make greater use of mutual termination agreements where no compensation outside of contractual/statutory entitlements (eg pay in lieu of notice or holiday pay) is used.

Previously, settlement agreements may have been used as the mechanism in such situations so this will reduce the numbers.

- 6.7 The Compensation Panel will determine whether a settlement agreement can be explored in a particular situation, and will only give approval if:
- the level of legal risk indicates settlement of an issue should be considered; or
 - there is a clear business case from a financial and organisational perspective that demonstrates the benefits and why alternative solutions are not viable, and
 - a settlement agreement is both necessary and proportionate in the circumstances
- 6.8 Requiring authority from the Compensation Panel should have the effect of reducing the number of agreements and the value of settlements. The situation will be reviewed 6 months after policy implementation to see whether there has been a meaningful reduction in the number of agreements and the amounts paid.
- 6.9 For reasons of corporate accountability, the Chief Executive will be informed of all settlement agreements. Further, any involving members of CMT or payments in excess of £50k will be subject to prior approval of the Chief Executive in addition to the Compensation Panel.
- 6.10 The council's Auditors have an important role to play in providing an additional level of assurance. It would be disproportionate to require consultation with them in every case. The Executive Director for Finance & Resources, in her capacity as the Chief Finance Officer with responsibility for the financial affairs of the Council, will be best placed to form a judgement as to which cases should be referred to the Auditors for consultation, having regard to the views of the Compensation Panel.

7. Conclusion

- 7.1 The new policy will enable the council to strike the right balance between securing the benefit of settlement agreements where it is necessary, and moving away from them being used routinely without careful consideration of whether one is actually needed in each case.
- 7.2 Referring every proposed settlement agreement to the Compensation Panel for decision against specified criteria will help the Council achieve consistency.

8. FINANCIAL & OTHER IMPLICATIONS:

Financial Implications:

- 5.1 It is expected that the new policy outlined in section 6 of the report will save the council money by leading to a reduction in the frequency and the value of settlement agreements. This will be assessed by the review due to be made six months after policy implementation.

Finance Officer Consulted: Peter Francis

Date: 28/08/13

Legal Implications:

- 5.2 Where, under the new policy, the council determines that a settlement agreement is appropriate, the conditions regulating such agreements as specified in section 203(3) of the Employment Rights Act 1996 must be satisfied.

With effect from 29 July 2013, references in section 203 of the 1996 Act to “compromise agreements” were re-named “settlement agreements”.

Lawyer Consulted: Oliver Dixon

Date: 27/08/13

Equalities Implications:

- 5.3 As part of the ongoing work to improve the capture, analysis and reporting of workforce data, changes have already been made to the PIER system to enable better recording of the outcomes of HR case work including the use of settlement agreements.

These improvements will enable HR to monitor effectively not only the number of settlement agreements being entered into but also to determine whether they are being used disproportionately in cases where the employee has a protected characteristic(s). It is intended that this data will be reported regularly, together with other workforce equality information, to DMT’s, ELT and the Workforce Equalities Group to enable issues/trends to be identified and any necessary actions discussed. This work directly addresses one of the recommendations made in the recent Global HPO report.

Corporate / Citywide Implications:

- 5.8 The new policy should help to reduce or even eliminate negative publicity about the number and value of pay-outs to employees entering into settlement agreements with the council.

SUPPORTING DOCUMENTATION

Appendices:

1. Statement of Council Policy on Use of Settlement Agreements