BIS | Department for Business Innovation & Skills

FACILITATING SETTLEMENT AGREEMENTS:

Impact Assessment

SEPTEMBER 2012

CONTENTS

Title:	Impact Assessment (IA)
Facilitating Settlement Agreements	**Date:** 22/05/2012
IA No: BIS0362	**Stage:** Final
Lead department or agency: BIS	**Source of intervention:** Domestic
Other departments or agencies:	**Type of measure:** Primary legislation
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Summary: Intervention and Options

RPC: RPC Opinion Status

Cost of Preferred (or more likely) Option				
Total Net Present Value	**Business Net Present Value**	**Net cost to business per year** (EANCB on 2009 prices)	**In scope of One-In, One-Out?**	**Measure qualifies as**
£m	£m	£m	No	NA

What is the problem under consideration? Why is government intervention necessary?

Feedback through the Employment Law Review and Red Tape Challenge highlighted concerns about employers' ability to have conversations about sensitive workforce issues with their staff without ending up in tribunal. This was most notable in relation to discussions around ending the employment relationship. It is already common practice for employers and employees to enter into a compromise agreement whereby the employee leaves the employment, receiving some level of compensatory payment in return for a waiver of their rights to bring employment tribunal claims. There are limitations to the protections surrounding its use, so the existing Government intervention could be improved to enhance efficiency.

What are the policy objectives and the intended effects?

The objectives of the proposal are: 1) Make it easier for employers and employees to have open discussions with each other where the employment relationship is not working out without the concern that this could be used against them in the event of a tribunal claim. 2) Make it easier for parties to explore settlement agreements even where no formal dispute has arisen as a means of facilitating agreed separations while reducing the number of cases going to tribunal. 3) Give businesses greater clarity about the detail of what they can do and confidence in managing where the employment relationship is not working out.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

The options considered are 1) (Preferred option) Amend the Employment Rights Act to make the fact a settlement offer was made irrelevant in determining an unfair dismissal case and inadmissible as evidence, to be supported by a statutory code to help employers and employees use settlement agreements. 2) Non-legislative proposals (guidance and template letters). 3) Create a new system of off the record workplace conversations. 4) Codify and extend the common law principle of "without prejudice". 5) Formal statutory process for employers/employees to follow.

Option 1 is considered the best option because it addresses specific problems with the use of compromise or settlement agreements without introducing further potential risks and unintended consequences. Where employers choose to use settlement agreements this is optional, they are still able to pursue redundancy or disciplinary/dismissal procedures as now.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** 2016

Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	**Micro** No	**< 20** No	**Small** No	**Medium** No	**Large** No
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** N/A	**Non-traded:** N/A	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: Date:

Summary: Analysis & Evidence

Policy Option 1

Description: Amend the Employment Rights Act to make the presence of settlement agreements inadmissible evidence in unfair dismissal cases to be supported by a statutory code to help certainty in their use.

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best Estimate:**

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low				
High				
Best Estimate				

Description and scale of key monetised costs by 'main affected groups'

Other key non-monetised costs by 'main affected groups'

Employers: (voluntary) administrative and legal advice costs for using settlement agreements if they decide to do so. The risks and costs associated should be lower than "do nothing".
Employees: legal advice costs (although the employer will typically pay for basic legal advice, often employees will get some additional advice on whether the agreement represents a good deal for them).
Exchequer: costs of drawing up statutory code and associated guidance.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low				
High				
Best Estimate				

Description and scale of key monetised benefits by 'main affected groups'

Other key non-monetised benefits by 'main affected groups'

Employers: increased certainty and reduced risk around using settlement agreements should make them an option for employers in more circumstances. Possible reduction in administrative/legal advice costs of drawing up a settlement agreement.
Employees: slightly higher chance of leaving a job under a settlement agreement, and as a result with a pay-off and an employment reference. More opportunities to initiate an agreement.

Key assumptions/sensitivities/risks **Discount rate (%)**

Small risk that if settlement agreements are easier to use, employees may lobby for an agreement where they would previously have resigned and moved on to another role. Risk is considered to be minimal given the ability of employers to turn down the option of a settlement agreement, and the incentives of employees regarding their future employment

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	**Benefits:**	**Net:**	No	NA

Summary: Analysis & Evidence

Policy Option 2

Description: Non-legislative proposals (guidance and template letters)

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low				
High				
Best Estimate				

Description and scale of key monetised costs by 'main affected groups'

Other key non-monetised costs by 'main affected groups'

Exchequer: staff time and costs to produce guidance.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low				
High				
Best Estimate				

Description and scale of key monetised benefits by 'main affected groups'

Maximum of 5 lines

Other key non-monetised benefits by 'main affected groups'

Employers: some improvement in clarity over using settlement agreements.

Employees: some improvement in access to guidance in helping them understand settlement agreements.

Key assumptions/sensitivities/risks **Discount rate (%)**

The option is likely to have limited impact because it will not solve the problem of legal certainty surrounding the use of compromise agreements.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:	No	NA

Summary: Analysis & Evidence

Policy Option 3

Description: Create a new system of off-the-record workplace conversations

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low				
High				
Best Estimate				

Description and scale of key monetised costs by 'main affected groups'

Other key non-monetised costs by 'main affected groups'

Employers: Familiarisation costs for dealing with a new regime. Probable administration and legal advice costs incurred in entering into an off-the-record conversation.
Employees: possible legal advice costs on entering an off-the-record conversation, stress.
Exchequer: costs of satellite litigation around what constitutes an off-the-record conversation.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low				
High				
Best Estimate				

Description and scale of key monetised benefits by 'main affected groups'

Maximum of 5 lines

Other key non-monetised benefits by 'main affected groups'

Employers: Would provide another option for ending the employment relationship with some legal certainty.

Key assumptions/sensitivities/risks **Discount rate (%)**

There is a high risk with this option that management practice suffers as employers rely on the "off-the-record conversation" in place of handling open and regular conversations with their staff. Also high risk of satellite litigation around what constitutes an "off-the-record conversation". Would not be possible to "protect" against discrimination, employers may have a false level of comfort.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:	No	NA

Summary: Analysis & Evidence

Policy Option 4

Description: Codify and extend the common law principle of "without prejudice"

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	**High:**	**Best Estimate:** N/Q

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low				
High				
Best Estimate				N/Q

Description and scale of key monetised costs by 'main affected groups'

Maximum of 5 lines

Other key non-monetised costs by 'main affected groups'

Employers: currently the level of understanding of "without prejudice" is low, and this measure would not be expected to increase employers' use of settlement agreements. Would need same or higher levels of legal advice than currently.
Employees: as for employers the level of understanding is low so there are risks that employees will not understand situations they find themselves in.

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low				
High				
Best Estimate				

Description and scale of key monetised benefits by 'main affected groups'

Maximum of 5 lines

Other key non-monetised benefits by 'main affected groups'

Employers: would clarify legislation and address some of the specific problems with the use of settlement agreements in the absence of a dispute.

Key assumptions/sensitivities/risks **Discount rate (%)**

The need for a different without prejudice regime operating in different legal settings and locations is at risk of increasing confusion.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			**In scope of OIOO?**	**Measure qualifies as**
Costs:	**Benefits:**	**Net:**	No	NA

Summary: Analysis & Evidence

Policy Option 5

Description: Formal statutory process for employers/employees to follow

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low				
High				
Best Estimate				

Description and scale of key monetised costs by 'main affected groups'

Maximum of 5 lines

Other key non-monetised costs by 'main affected groups'

Employers: a prescriptive approach would raise the administrative costs to employers. Those that use settlement agreements already have internal procedures that may need changing (unnecessarily). Not following the process correctly may be grounds for an employment tribunal claim.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low				
High				
Best Estimate				

Description and scale of key monetised benefits by 'main affected groups'

Maximum of 5 lines

Other key non-monetised benefits by 'main affected groups'

Employers: greater certainty in the use of settlement agreements.

Key assumptions/sensitivities/risks **Discount rate (%)**

This approach risks undermining existing good practice within organisations by making a process too prescriptive.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:	No	NA

Evidence Base (for summary sheets)

Settlement Agreements: Impact Assessment Evidence Base

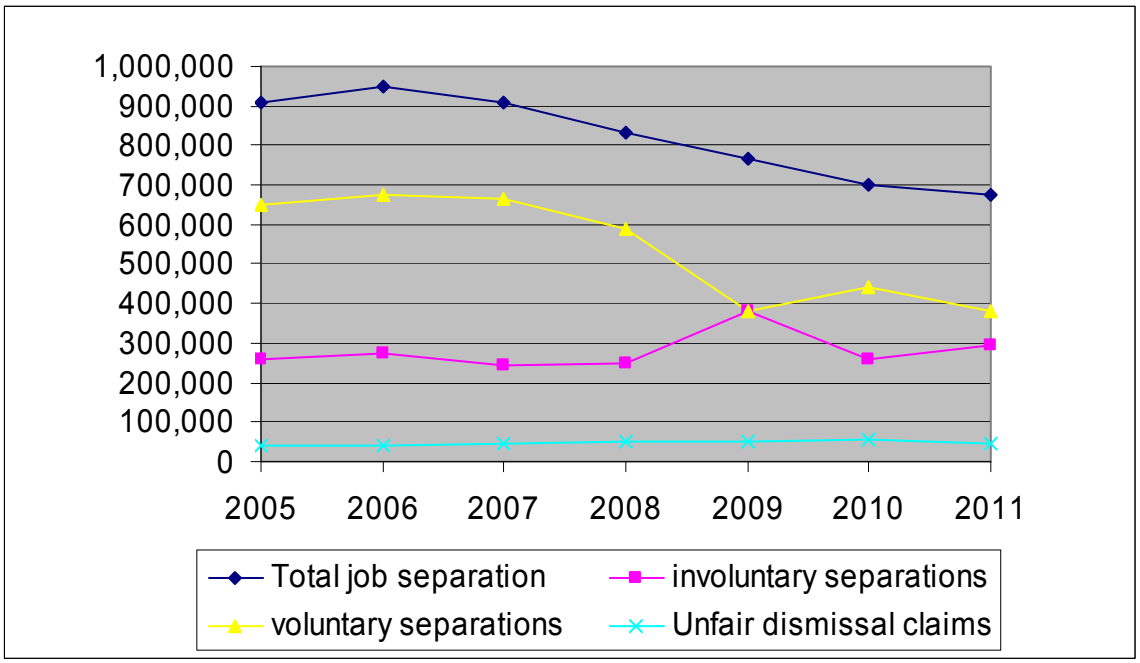
Introduction

1. This Impact Assessment (IA) accompanies a proposal to be taken forward as a Government amendment in the Enterprise and Regulatory Reform Bill. The measure will amend the unfair dismissal rules in the Employment Rights Act 1996 to, in effect, mean that for the purposes of deciding whether a dismissal was fair, an offer of settlement is not relevant, and furthermore, is not admissible in an unfair dismissal claim brought before an Employment Tribunal. This will be supported by a statutory code, but the key principles of the code and supporting guidance materials will be the subject of a public consultation.
2. The measure is proposed as a proportionate and effective means of addressing a problem with the existing compromise agreement regime which deters employers from making an offer of settlement as a means of ending an employment relationship, particularly in non-dispute situations. The supporting guidance will include draft letters for employers to send and model templates to use as the basis of agreements, potentially saving employers time and effort. We will also consult on whether it would be helpful for Government to publish a guidleine tariff for settlement agreements.
3. Also as part of the existing draft Bill, but not the subject of this IA, the Government is proposing to change the name of compromise agreements to settlement agreeements as a means of encouraging a more positive attiude to settlement and encourage its use – promoting agreement between parties in place of Employment Tribunal (ET) proceedings.

Background

4. The UK labour market is characterised by a high degree of churn – movements betweeen jobs, between employment, unemployment and inactivity. There are a number of ways in which employment relationships can come to an end. Often this is by consensus, or with the employee in control, with employees finding alternative employment and moving on. Chart 1 below illustrates the number of job separations annually. This is broken down by voluntary and involuntary separations. Involuntary separations will typically refer to dismissals and compulsory redundancies, situations where the employer makes the decision to end the employment relationship.

Chart 1: Job separations and unfair dismissal claims (2005-2011)



Source: ONS, HMCTS Annual Statistics

5. In a small number of cases the employment relationship does not work and the employer may need to dismiss an employee (an involuntary separation – rates are given in subsequent paragraphs). In order to dismiss an employee fairly, an employer must do so for a potentially fair reason (capability, conduct, redundancy, breach of statutory requirements, or some other substantial reason). The employer must also be acting reasonably in deciding that the reason is sufficient to justify dismissing the employee. In some of these cases, employees will bring claims to an employment tribunal for unfair dismissal or other breaches of employment law such as discrimination. Claims for unfair dismissal are illustrated in chart 1 above.

6. It is uncertain exactly how many dismissals there are annually (the separations data above does not give us this level of detail). However, the 2004 Workplace Employment Relations Survey[1] (WERS) suggests there is a rate of 1.65 dismissals per 100 employees. Multiplying this up by 24.9 million employees (ONS Labour Market Statistics), gives a rough approximation of 400,000 dismissals per year. This represents just over 1 per cent of those in employment.

7. WERS 2004 also shows a rate of 5.71 disciplinary sanctions per 100 employees. This is useful as it provides an indicator of how many problems there are in the workplace which do not end up in dismissal. However, this can only serve as an indicator as it is a snapshot in time. The study also states that about half of the workplaces surveyed reported using at least one of the following sanctions: verbal warning, written warning, suspension without pay, deductions from pay, internal transfers and dismissals. Forty-six per cent of respondents cited poor performance as the reason for the above sanctions.

8. Unfair Dismissal is the jurisdiction most commonly claimed by Employment Tribunal claimants, and as chart 1 shows, they currently stand at around 50,000 claims per year. 52 per cent of unfair dismissal claims follow a dismissal and 23 per cent a redundancy[2] (SETA 2008). This suggests as a very rough estimate that 6.5% of dismissals resulted in an unfair dismissal claim (26,000 / 400,000). Where an unfair dismissal claim is lodged, employers

[1] http://www.wers2004.info/

[2] Claims can also follow resignations, and after the end of a contract.

face on average £3,700 worth of time and legal representation costs in responding to the tribunal claim (see the Resolving Workplace Disputes impact assessment for more information on this calculation[3]). This excludes money spent on awards.

9. Employment tribunal claims can be costly for claimants and respondents and are reported to be stressful for both sides.

10. Furthermore, it is important to note that not all employment-related claims are heard by employment tribunals. In cases covering breach of employment contract with a potential value of over £25,000, proceedings are heard by mainstream civil courts.

Settlement (Compromise) Agreements and "Without Prejudice"

11. Settlement agreements are legally binding agreements between employer and employee at the end of the employment relationship (although there are some instances, for example disputes over bonuses, where agreements are made and the employment relationship continues). A settlement agreement usually provides for a severance payment to the individual by the employer, in return for not pursuing any claim in an employment tribunal. Quite often, the settlement agreement will also include an agreed reference. The employee must have the settlement agreement explained by an independent legal advisor before the agreement becomes binding. The solicitor giving advice must also sign the agreement and certify that the appropriate advice has been given.

12. If the individual and employer end their relationship without a settlement agreement, an employee has the right to take a case to employment tribunal if there are grounds to do so. This remains the case where negotiations over a settlement break down or if settlement is offered and not accepted.

13. If the settlement agreement is being discussed as a means of settling an existing dispute, the negotiations between the parties can be carried out on a *without prejudice* basis. *Without prejudice* is a common law principle which prevents statements (written or oral) made in a genuine attempt to settle an existing dispute from being put before a court as evidence against the interest of the party which made them. It is subject to some limited exceptions; for example the evidence will be admissible where there has been fraud, undue influence or some other 'unambiguous impropriety' such as discrimination. Where the *without prejudice* principle applies, the fact that settlement negotiations took place and the contents of the negotiations will not be admissible as evidence in a subsequent employment tribunal case. .

14. Therefore, where the *without prejudice* principle applies, an employer proposing settlement in a dispute situation has some security in knowing that if settlement cannot be agreed and they then go on to dismiss the employee at a later date, the employee will not (subject to exceptions around discrimination) be able to argue to refer to the offer as evidence in an unfair dismissal case. But an employee is not prevented from presenting other evidence where they feel they have a case.

15. However, the *without prejudice* principle only applies where there is an existing dispute. We have anecdotal evidence that adding some employers/employees label communications as 'without prejudice' in all settlement agreements negotiations – even without the existence of a dispute - in the mistaken or inadvertent belief that the protection will always apply. This means that they can find themselves inadvertently exposed in a way they did not understand or expect.

[3] http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-1381-resolving-workplace-disputes-final-impact-assessment.pdf

16. An example is the case of *BNP Paribas v Mezzotero [2004] IRLR 508* where an employee raised a grievance which had not yet been dealt with. The employer raised the option of settlement and tried to argue this was on a *'without prejudice'* basis. However, the Employment Appeal Tribunal found that the offer was not covered by the without prejudice principle because at the point that the employer proposed settlement there was no dispute in existence; whilst the employee had submitted a grievance it had not yet been dealt with and could have been upheld or rejected, in whole or in part.

Use of Settlement Agreements

17. Settlement agreements usually include a confidentiality clause – neither party may make reference to the details of a settlement agreement, so by their very nature there is little available data on their use or content. There is no source of data that can tell us exactly how many are used in a given year for example. Sometimes settlement agreements are made before there is a threat of employment tribunal claim. In other cases, employers and employees may make a settlement agreement after a claim has entered the employment tribunal system. In these cases, the case will be withdrawn from the employment tribunal system.

18. Evidence from the Resolving Workplace Disputes consultation[4] suggested that the vast majority of the 268 respondents had used a compromise agreement. Similarly, evidence from the Chartered Institute of Personnel and Development (CIPD) [5] shows that many employers do make use of them, their 2011 Conflict Management Survey showed that 70 per cent of respondents had used them. These sources of evidence are based on responses from those that are more likely to be familiar with settlement (compromise) agreements, therefore all we can really infer is that they are used widely.

19. Of those that responded to the Resolving Workplace Disputes consultation[6], the main advantages of settlement agreements were seen as:
    - Providing certainty that the matter has been resolved and there will be no litigation to follow
    - Avoiding the cost, stress and time involved in an employment tribunal case
    - Allowing matters to be resolved quickly
    - Providing business protection such as confidentiality

20. Respondents also highlighted disadvantages to the use of compromise agreements. These included the cost in terms of drawing up the settlement itself. It also included the cost to the employee of the independent legal advice (which is often at least partially met by the employer).

21. There were a number of responses to the Resolving Workplace Disputes (RWD) consultation relating to the costs of a compromise agreement being drawn up (not the amount of money given in settlement). The costs consist of employer contribution to employee's legal costs and the employer's advice and drafting of documentation. Settlement agreements can only be used where the employee has had legal advice before signing, hence this cost, which we understand from consultation is often met by employers. Employers are not required by legislation to meet this cost, but they tend to as it is in their interests to do so. Acas noted in their response to the Resolving Workplace Disputes

[4] The Resolving Workplace Disputes Consultation ran from January to April 2011, and a Government response was published on 23 November 2011. The consultation and response documents, including impact assessments can be found at http://www.bis.gov.uk/Consultations/resolving-workplace-disputes?cat=closedwithresponse

[5] Conflict Management: CIPD Survey 2011

[6] See Resolving Workplace Disputes Government Response document, found at http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-1365-resolving-workplace-disputes-government-response.pdf

[7]: "Typically the charges reported to colleagues seem to be in the range of £250 - £500 for independent advice to the employee, plus between £500 and £1,000 for the employer's advice and the drafting of documentation."

22. CIPD also surveyed members on the costs of compromise agreements[8], and found that the median cost of management time for dealing with a typical compromise agreement is reported as £1,000. They found the median cost of legal advice was £750.

23. There is also the cost of compensation given to employees. It is very difficult to determine what the magnitude of this compensation is. Median settlement for unfair dismissal claims is £2000 (according to data from SETA 2008). The respondents to SETA had already made an employment tribunal claim, however, this may give some indication of the amount that employers and employees are prepared to settle for when they do agree settlement.

Employment Tribunal Claims

24. Compromise agreements can be a way of preventing further litigation (through employment tribunals) around a dispute. In the financial year 2010-11 there were a total of 218,100 employment tribunal claims accepted, of which 60,600 were single claims (one claimant) and 157,500 were multiple claims (a number of claims against the same employer). The number of multiple claims has risen from 63,100 in 2005-06 to 157,500 in the last financial year. It is important to note that the level of multiple claims can vary significantly year on year due to the varying nature of claims. Recent spikes have involved large numbers of multiple claims in specific industries so it is not clear whether recent increases will be sustained over the longer term. Claims for unfair dismissal have averaged around 50,000 per year as Chart 1 illustrates.

25. The average costs to employers, claimants and the exchequer of going through employment tribunals are illustrated in Table 1. These are the average costs by outcome, and individual conciliation refers to the current system where cases are referred to Acas (The conciliation service) for conciliation after an employment tribunal claim has been received.

Table 1: Summary of costs incurred per claim throughout employment tribunal process, by outcome

	Employment Tribunal Hearing	Individual Conciliation	Average across ET claim outcome
Employer	£4,200	£3,300	£3,700
Claimant	£1,500	£1,100	£1,300
Exchequer	c£4450*	£640	

Source: BIS estimates from Acas, HMCTS, SETA and ASHE data in 2011 prices. Figures are rounded. *Figure for exchequer costs covers costs for receiving a claim and hearing as set out in HMCTS consultation on the introduction of employment tribunal fees, at https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011

[7] The Acas response to the Resolving Workplace Disputes consultation can be found at: http://www.acas.org.uk/media/pdf/2/t/Resolving_workplace_disputes_-_a_consultation_response_-_accessible_version.pdf

[8] See CIPD response to Resolving Workplace Disputes consultation at: http://www.cipd.co.uk/NR/rdonlyres/86619BDF-65ED-4532-B0D0-8CB6E12FE721/0/CIPDresponsetoBISonresolvingworkplacedisputes.pdf

Problem under consideration

26. Feedback through the Employment Law Review and Red Tape Challenge processes highlighted concerns about employers' legal ability to have conversations about sensitive workforce issues with their staff. This was most notable in relation to discussions around ending the employment relationship where it was clear the relationship was not working out, which was brought out in online responses to the Red Tape Challenge, and discussions and focus groups involving busienss stakeholders.

27. It is already common practice for employers and employees to enter into a compromise or settlement agreement on termination of the employment relationship whereby the employee receives some level of compensatory payment in return for a waiver of their rights to bring employment tribunal claims.

28. As outlined in the background, the use of compromise agreements is seen as as a useful tool for a variety of reasons. However, consultation has identified problems with using compromise agreements. A number of respondents, including CBI, IoD and EEF, noted that employers feel unable to start discussions with an employee about ending their employment by means of a compromise agreement in the absence of a formal dispute[9] (because the *without prejudice* principle does not apply at this point).

29. Discussions with stakeholders reveal there is some uncertainty and confusion amongst some employers and employees about where "*without prejudice*" applies (i.e. at what point there is a dispute). This can lead to individuals or employers trying to claim – incorrectly – that negotiations are *without prejudice* and subsequently finding themselves exposed. Indeed, we have been given to understand by employers and practising lawyers that businesses are sometimes advised to begin a formal disciplinary process, where one might not otherwise have occurred, in order to be able to safely propose a settlement agreement on a *without prejudice* basis.

30. In focus groups with businesses, their representatives and lawyers, participants have given examples of where employers have been deterred from making a settlement offer in the absence of an exisiting dispute in poor performance cases for fear that it would lead to a claim of unfair or constructive dismissal. The Mezzotero case is often quoted by the legal and HR community as a barrier.

31. Under existing law, settlement discussions where no dispute exists are **not** covered by the *without prejudice* principle (so may be referred to in a subsequent tribunal claim). This means that employers may be put off making a settlement offer to an employee. This is because, if settlement (compromise agreement) cannot be agreed and the employer goes on to dismiss the employee at a later date, the employee may argue that the settlement offer was evidence that the dismissal was unfair. For example, the employee may try to argue the settlement offer was evidence that the employer had already made its mind up to dismiss before it taken the steps it was required to take to dismiss fairly (such as giving the employee a reasonable opportunity to improve). Alternatively, the employee may argue that proposing a settlement (compromise agreement) gave rise to grounds for the employee to resign and claim constructive dismissal on the grounds of the implied term of mutual trust and confidence being breached by the employer making a settlement offer. For example, if the employer indicates in the process of making the offer that they have 'lost confidence' in the employee before they have given the employee reasonable opportunity to improve then this might give rise to grounds for a claim. However, as the case law currently stands it is not

[9] See Resolving Workplace Disputes Government Response document, found at http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-1365-resolving-workplace-disputes-government-response.pdf

entirely clear when making an offer will be acceptable.

32. The Government intends to make clear in legislation that employers and employees can make a settlement offer without this being 'used against them' in a subsequent unfair dismissal case. And to provide clear guidance on how to safely put forward an offer of settlement. This will address the fact that there are those that do not currently use this tool, and could do to the employer and employee's benefit.

33. The Government is taking legislation through Parliament which aims to promote the use of compromise agreements by renaming them as settlement agreements to make them more attractive to both parties.

Rationale for Intervention

34. The Government intervenes in the labour market for a variety of efficiency and equity reasons. Individual employment rights are in place to avoid information asymmetries and market power problems that would arise in the absence of intervention. There is reason to believe that the form of this regulation could be improved to give a more efficient outcome for employers and employees whilst still protecting the rights of employees.

What are the policy objectives and the intended effects?

35. The policy objectives for taking this forward are to:
    - Make it easier for employers and employees to have open discussions with each other where the employment relationship is not working out without the concern that this could be used against them in the event of a tribunal claim.
    - Make it easier for parties to explore settlement agreements even where no formal dispute has arisen as a means of facilitating agreed separations while reducing the number of cases going to tribunal.
    - Give businesses greater clarity about the detail of what they can do and confidence in managing where the employment relationship is not working out.

36. This is a business-friendly measure aimed at helping them manage difficult workplace issues - ending the employment relationship more efficiently and effectively. However, the ability to request a settlement agreement will also be of benefit to individuals. The intended effect is to give employers and employees' confidence in negotiating settlement offers.

37. It should mean that employers/employees wishing to embark safely on settlement agreement negotiations no longer need to engineer a dispute to do so.

What policy options have been considered, including any alternatives to regulation?

Option 1: Amend the unfair dismissal rules in the Employment Rights Act 1996 so that, in effect, for the purposes of deciding whether a dismissal was fair, the fact that a settlement agreement was made is not relevant and is not admissible as evidence. The measure will also make provision for a statutory code underlying the principles for offering settlement.

38. In November 2012 the Government announced that it would consult on the introduction of a system of "protected conversations". The intention was to allow employers to discuss issues such as performance openly with their employees without fear of the conversation being used against them in the event of subsequent tribunal claim.

39. Since this announcement, BIS has held a number of discussions with stakeholders to discuss the case for change and the possible options. In light of these discussions and

further analysis, it has become apparent that the most appropriate way to meet the policy objective is not to create an entirely new concept of “protected conversations”.

40. Instead, it would be more proportionate and effective to amend the existing unfair dismissal regime to make it clear that it is acceptable to offer a settlement agreement. This would enable employers to put forward the option of a compromise or settlement agreement with an employee without this being used against them in a subsequent unfair dismissal tribunal claim. In addition, *employees* would be able to make a settlement offer (for example because they are not suited to the role and want to move on with some form of agreed reference) without this being used as evidence against them, for example to support an argument that the employee acknowledged themselves that they were not ‘up to the job’.

41. This would be done by amending the Employment Rights Act to say that, in determining the question of reasonableness in justifying a decision to dismiss an employee, a tribunal should not take into account the fact that the employer or employee made an offer to bring the employment relationship to an end under the terms of a settlement agreement. However, where an employee rejects the settlement offer, is later dismissed and brings a tribunal claim because s/he considers that their dismissal was based on discriminatory grounds, any discriminatory statements/comments should be relevant in determining the case and admissible in evidence.

42. Where an individual rejects an offer of settlement, the employer is not exempt from any of the usual processes e.g. undertake performance management proceedings in a genuine attempt to improve performance before making a dismissal. If they do not following the usual processes, they may still be subject to claims of unfair dismissal.

43. This approach effectively addresses the problem under consideration – it is tightly restricted to resolving situations where the employment relationship is not working out. It does not impact on an individual’s ability to bring a discrimination claim, or restrict the right of an individual to bring evidence of discrimination to a tribunal. It also avoids giving employers too broad a scope to engage in off the record discussions across the gamut of management situations, which could be open to misuse or abuse.

44. We plan to issue a statutory Code of Practice setting out the principles which employers (and employees) should follow if they want to make an offer which enjoys the ‘protection’ of the new provision and outline a model letter and template settlement agreement which an employer could use. Employment Tribunals should take into account whether the employer (or employee) complied with the Code of Practice when considering whether they can rely on the ‘protection’ of the new provision. This code will be subject to public consultation.

45. Employment law is a reserved matter in relation to Scotland and Wales and devolved in relation to Northern Ireland. The proposals would apply to England, Scotland and Wales.

Option 2: Do Nothing

46. In the Enterprise and Regulatory Reform Bill currently before Parliament, the Government has brought forward a clause to change the name of compromise agreements to settlement agreements in order to more accurately describe their purpose and to help people more readily understand what is being suggested. The term compromise could have negative connotations – ie both parties have a sub-optimal outcome, which may be a barrier to participating in an agreement.

47. There are also a number of other measures in the Bill aimed at reducing the number and length of employment tribunals cases, including offering early conciliation before cases are lodged with an ET, and a scheme to provide quicker and cheaper determinations for low value, straightforward employment tribunal claims – such as holiday pay – as an alternative

to the current employment tribunal process.

Rejected proposals

Non-legislative proposals

48. Under the existing regime it is possible for an employer to make a settlement offer an open basis (i.e. not *without prejudice*) without this giving rise to grounds for an unfair dismissal claim. However, this will depend on how the employer approaches making the settlement offer. For example, if the employer indicates in the process of making the offer that they have 'lost confidence' in the employee before they have given the employee reasonable opportunity to improve then this might give rise to grounds for a claim.

49. We have considered whether simply producing guidance and template letters (without changing the legislation as set out, and without producing a statutory code) would provide sufficient protection for employers using this approach and found it would not.

50. Within the preferred option is the commitment to produce guidance documents – a model letter proposing settlement and a template settlement agreement that employers can use with minimal tailoring as a means of agreeing settlement with an employee. However, without a basis in legislation – in particular setting the underlying policy principle that it is acceptable to offer settlement in unfair dismissal cases – there would be little change to employers' certainty in using settlement agreements. The issues surrounding use of settlement agreements in the absence of a dispute would not be solved. Ordinary guidance has no standing in law and although the Employment Tribunals can take it into account, it may have no impact on ET decisions. Employers would have some benefit in reduced time and effort deciding on an approach to follow, but no certainty that it would avoid successful tribunal claims. This would ultimately end in litigation testing the application of the guidance, and may lead to judgements which add to employers' uncertainty about how to safely offer settlement.

Creating a new system of off-the-record workplace conversations

51. We have considered whether it would be effective and proportionate to develop a legislative framework within which a broader range of workplace discussions were outside the scope of tribunal deliberations. Under this proposal, an employer and/or an employee would be able to instigate and engage in discussions about a range of management issues, including performance, and these conversations would be off the record and not admissible in tribunal evidence. This has been considered and rejected on the basis of legal analysis and discussions with stakeholders. A number of consequences and unintended impacts were identified.

52. Some stakeholders have suggested that providing protection to the content of discussions on a broader range of management and workforce planning issues, such as retirement, would be very helpful. It would not, however, be possible to give a broad safeguard without some notable limitations.

53. Given the requirement to comply with EU legislation on discrimination, it would not be possible, (nor desirable) to protect employers from discriminatory comments or actions. This could put businesses inadvertently at greater risk of an employment tribunal than the current position if they mistakenly believe that they are no longer bound by legislative requirements to avoid potentially discriminatory comments (although efforts would be made to be clear in guidance). To give themselves more certainty that they can demonstrate, if challenged, that they have acted appropriately and had not inadvertently discriminated, it is likely that many businesses will keep records of discussions, which, outside this legislative proposal they

might not have done.

54. There are other issues which would also need to be addressed about how the system would work in practice which have significant possibility to add increased complexity and scope for confusion. For example, setting out the parameters within which the off-the-record protection for a conversation exists requires some kind of trigger or process which would mark the start and finish of the protection. The system would also need to be flexible enough to allow employers to have conversations when they need them, but prevent an employer making all discussions off the record, or using the simple fact of repeated off-the-record discussions as a means of pressurising an employee out of the organisation.

55. Clearly, the system would need some underpinning rules and procedures to ensure fairness and prevent misuse by either party, but we are mindful of past experience of overly-procedural interventions, such as the 3-stage procedure for discipline and grievance.[10]

56. Given the above, there is a high risk of satellite litigation around whether a conversation, or elements of it are admissible or not, and whether the process was followed correctly which adds to uncertainty and places costs on the Exchequer and the parties involved in that litigation.

57. There is also a risk that this system of would encourage managers to avoid managing effectively, choosing to discuss any potentially difficult, or even run of the mill, situations in off-the-record discussions. This could undermine employee confidence, engagement, motivation and commitment. In our policy discussions, a number of stakeholders raised this risk, and if realised, such a measure would have the opposite of its intended effect. Instead of facilitating open conversations with staff it could encourage the use of regulation around off-the-record conversations in place of ordinary workplace discussions

58. Also, an entirely new concept and regime would require significantly more time and effort on the parts of employers, employees and the judiciary to understand and familiarise themselves with the requirements.

Codify and extend the common law principle of *"Without Prejudice"*

59. Given that much of the problem relates to employers' fears that they cannot raise the issue of a settlement agreement outside of a dispute without the risk that the offer will be used in an unfair dismissal claim, we have considered changes to the existing *without prejudice* regime.

60. As noted above (paragraphs 28 – 31) the *without prejudice* principle derives from common law and its boundaries have been further defined in case law. It is a principle that originally developed in the mainstream civil courts (in dealing with disputes such as contract disputes) but is applied in employment tribunals in the same way. It applies in England, Wales (and to a more limited extent Scotland).

61. In order to extend the principle we would first need to define the existing protections on the face of legislation, but this definition would need to be limited to employment cases and cases heard by an employment tribunal so as to avoid unintended consequences in other areas of law beyond the narrowly defined issue we are currently considering. This could be done by creating a definition in legislation to reflect the exact position of common law principle to maintain consistency across the judicial system. This in itself would not be

[10] The Employment Act 2002 (Dispute Resolution) Regulations 2004 established a statutory disciplinary, dismissal and grievance procedure that had to be followed when an employer undertook a dismissal. Under this "three-stage process", failure to follow the procedure (where it applied) made any dismissal automatically unfair regardless of the merits of the reasons for dismissal itself. These Regulations were repealed in 2009, and tribunals now decide cases on the basis of what is 'fair and reasonable'. The Acas Code of Practice and non-statutory guidance on disciplinary and grievance procedures establishes the principles of what an employer and employee should do.

straightforward.

62. The alternative would be to develop a slightly different definition of *without prejudice* which only exists in employment / employment tribunal cases. Stakeholders, particularly from the legal community, have told us that making changes to such a well established principle would be potentially confusing, adding to employer uncertainty not reducing it.

63. In extending the *without prejudice* principle, it would need to be very tightly and clearly restricted to employment and tribunal cases to minimise scope for confusion between employment and non-employment disputes where different levels of protection would apply. Furthermore, whilst the definition could be easily transposed across England and Wales, a variation would need to apply in Scotland where the without prejudice regime operates slightly differently.

64. Having different without prejudice regimes operating in different legal settings and locations increases the risk of confusion and does not meet the policy objective of giving businesses certainty.

65. Stakeholders have also told us that although the principle of *without prejudice* is well known and understood amongst the legal profession it is not a well known or understood principle amongst employers themselves. Extending the scope of *without prejudice* would not in of itself increase employers use of settlement agreements, or reduce their fear in doing so and they are no less likely - perhaps more likely given the new approach - to seek legal advice in doing so.

Formal statutory process for employers/employees to follow in making an offer of settlement

66. We considered whether it would be appropriate to introduce a compulsory statutory process that employers/employees wishing to gain the legislative protection would need to follow. This would, however, pose an administrative burden for employers, particularly where they had their own equally satisfactory systems and processes i.e. that complied with the principles set out in the Statutory Code, which would need to be modified to meet the prescribed approach.

67. As discussed in paragraph 57 above, employers and employees failing to follow the process (but whilst still complying with the principles) would inadvertently find themselves outside the protection of the measure. Instead, our proposed approach would give model letters and templates which could be used with safety, but would not be compulsory if an employer felt that it had an equally satisfactory process - meeting the principles to be set out in the statutory code - which they could use instead.

Impacts

Monetised and non-monetised costs and benefits

68. The impacts of implementing option 1 are compared to the status quo, option 2. Settlement agreements are voluntary for both employers and employees at the moment and would remain voluntary under our proposed option. Where both parties feel it will be beneficial to them is where they may be undertaken. Under the current situation, the opportunity to use this form of agreement is more limited than it could be.

69. There is likely to be some increase in the use of settlement agreements at the end of the employment relationship. This could have the effect of reducing the number of employment

tribunal claims made for unfair dismissal, but also a reduction in other claims as the rights to claim are waived by compromise (or settlement agreements). As set out in paragraph 19, a number of consultation responses highlighted a benefit of compromise agreements as providing certainty that the matter has been resolved and there is no litigation to follow. In practice it is impossible to predict how much of an effect this will have, although it is likely to be very small. Reductions in employment tribunal claims for unfair dismissal (as long as compliance with regulation is not affected) benefit all parties, due to the high costs (not just monetary) involved for employees, employers and the exchequer.

Impact on Employers

70. The use of settlement agreements is not mandatory; they are an option available to employers where they wish to end an employment relationship. This proposal should make their use easier through improving certainty and reducing costs. Employers are likely to benefit from:
    - More certainty around the use of an option for ending the employment relationship.
    - Possible reduction in the administrative and legal costs of compromise (settlement) agreements – so those that currently use these agreements may be able to do so at lower cost.
    - Reduced risk of unfair dismissal claims being made against them, and the associated costs because the fact a settlement had been offered would not be evidence that could be used in an Employment Tribunal.

71. More employers should feel able to use settlement agreements. It appears that due to the issues set out in paragraphs 28-31 with the need for a dispute to be in train at the moment, there are a number of employers who would use settlement agreements given more confidence to do so.

72. The main alternative to using settlement agreements is to follow full performance management procedures. Most employers have formal disciplinary and grievance procedures (83% of employers reported having a formal grievance procedure and 85% a formal disciplinary procedure in WERS 2004). The Acas code on disciplinary and grievance sets out further guidance to employers, although the law is not prescriptive. Evidence from CIPD's conflict management survey[11] shows that on average 20 days of Management, HR staff time and in-house lawyers are spent dealing with disciplinary cases and 15 on grievance cases. Costing around £3500 for disciplinary cases and £2600 for grievances (see Tables 2 and 3 below).

73. The estimated risk of an employment tribunal claim following a dismissal = 0.0625 (Number of UD claims / number of dismissals). The average cost to employers of an employment tribunal claim is £3700 not including the award. Once an employment tribunal claim has been made the probability that the claimant is successful is estimated to be 8%. The median award for successful claimants in financial year 2010/2011 was £4591[12].

[11] CIPD 2011

[12] Source HMCTS annual ET and EAT statistics 2010/2011

Table 2: Disciplinary Cases

	Time (Days)	Weekly wage (£)[13]	Non-wage labour costs[14]	Total cost (£)
Management time	7.8	614.60	16.40%	1,116
HR staff time	10.2	834.55	16.40%	1,982
In-house lawyers	2.2	862.42	16.40%	442
Total	*20.2*			*3,539*

Table 3: Grievance Cases

	Grievance	Weekly wage (£)	Non-wage labour costs	Total cost (£)
Management time	6.8	614.60	16.40%	973
HR staff time	7.6	834.55	16.40%	1,477
In-house lawyers	0.7	862.42	16.40%	141
Total	*15.1*			*2,590*

74. As well as the monetary costs of going to tribunal employers report reputational risk, and the impact on morale and increased stress levels as concerns related to employment tribunal claims (SETA 2008). Reponses to the Resolving Workplace Disputes Consultation highlighted the fear that employers face when going to tribunal, including the wider impact that the dispute can have on their business.

75. Settlement agreements offer an alternative to this already, but the proposed changes would allow current users more confidence to use them and encourage more to employ them. Furthermore, a statutory code accompanying this change in legislation is likely to make it simpler to follow procedures. It is anticipated that this will lead to a reduction in the costs of drawing up settlement agreements in the future. Consultation on the implementation of the statutory code will seek to understand whether indeed there will be a cost saving, and the magnitude of this saving.

76. As discussed earlier we have little evidence on the cost of settlement agreements, however we do have some related information. In response to Resolving Workplace Disputes consultation, Acas gave some estimates of the costs of admin and legal advice to arrange a compromise agreement. These were:
    - Legal advice to employees £250 - £500
    - Legal advice to the employer and drafting £500 - £1000

77. Taking the lowest values would give a total of £750 to arrange a settlement agreement, whilst the highest figures would give £1,500. Taking the mid-point of £1150 and adding the median settlement figure from SETA 2008 of £2,000, gives an estimated cost of settlement of around £3125.

78. There is some risk (though much lower than that of being subject to an unfair dismissal claim through following usual dismissal routes) that an employment tribunal claim could still be made. What we know about costs and risks of using settlement agreements suggests that they may not be significantly cheaper than the costs we are aware of with disciplinary

[13] Annual Survey of Hours and Earnings (ASHE) 2011

[14] Eurostat, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lc_an_struc_r2&lang=en)

procedures.

79. However, it is apparent from the weight of business feedback on the employment tribunal system that businesses act as though the threat of ET claims is greater than perhaps the data suggests. This may in part be due to the fact that some awards are particularly high, and due to non-monetary factors involved with ET claims such as stress and damage to business reputation. Furthermore, following disciplinary procedures to make a dismissal can take a long period of time (typically stakeholders say this is a year). Employers may be keen to move on to a more productive employment relationship.

80. The proposal reduces the risks of using settlement agreements (especially in the case where there is not currently a formal dispute), whilst the statutory code and associated measures would be expected to reduce the legal costs of drawing up a settlement agreement. This should allow more employers to take up the option of using settlement agreements.

81. Forthcoming public consultation on the content of a statutory code will help to establish in more detail how much costs might be affected. The increased certainty and reduced legal risks are likely to increase the use of settlement agreements on their own.

82. As settlement agreements would still be voluntary employers would be able to assess their own risk, both in terms of a claim being made, and the likely award if a claim was to be successful.

Impact on Employees

83. Employees are under no obligation to enter into a compromise (settlement) agreement. They are likely to do so where it is beneficial to them. In many cases leaving a job through a compromise (settlement) agreement will be beneficial to the employee relative to being dismissed. They are more likely to leave with a pay-off, an employment reference, and greater dignity. If the employment relationship ends under an employer-initiated agreement (either because of a redundancy situation or a dispute that might lead to dismissal), the employee will still be entitled to claim Job seeker's allowance (JSA). In some cases even if the employee initiates the agreement they could still be entitled to claim JSA.

84. Increased use of settlement agreements has potential benefits for individuals as well as businesses. A settlement agreement where there is a dispute may be less stressful for individuals than going to employment tribunal. In SETA (2008) 36 per cent of claimants said that the case had caused them stress and depression. These were the most common non-financial negative effects mentioned by claimants. 14 per cent of respondents to SETA (2008) withdrew their claim. Of these claimants, 19 per cent said that there was too much expense involved in continuing. One in nine (11 per cent) felt there would be too much stress involved and one in eleven (9 per cent) that there would be too much difficult or fuss involved in continuing.

Impact on Exchequer

85. This proposal is not expected to impact on Exchequer spending. There is some potential for a reduction in employment tribunal claims, however this effect would be limited and is uncertain. There is no anticipated impact on claims for job seeker's allowance.

Rationale and evidence that justify the level of analysis used in the IA (proportionality approach)

86. As outlined, there is a lack of evidence on the exact level of use of compromise agreements across the economy. This prevents full assessment of potential impacts. There will be consultation on the form of the statutory code and guidance that will be put in place for employers. During this consultation, evidence will be gathered on how the costs of using compromise (settlement) agreements may change.

Risks

87. There are potentially a number of risks in the use of compromise (settlement) agreements. However, they are mitigated by the existing legislation, which, for example sets out that employees need to have received legal advice before they sign such an agreement.

88. There is a small risk that if the agreements are easier to use, employees may lobby for settlement agreements where they previously resigned and moved on to another role. This is limited by the fact that where an employee is dismissed in the first two years of employment, they will not be able to claim unfair dismissal.

89. The risk is very limited for the following reasons. Firstly, whilst an employee can ask for a settlement agreement, the employer has to agree to it, the employer is free to turn down that request. Secondly, if this were then to lead to the employee underperforming, perhaps due to a break down in relations, the employer has the ability to dismiss that employee as now (under existing unfair dismissal law) as long as they have a fair reason (in this example perhaps misconduct or under-performance) and as long as they follow a fair procedure.

90. In many cases, an employee will not be interested in leaving their current job so have no desire to seek a settlement package. Where they do have a desire, it will generally not be in the employee's interests to push strongly for a settlement agreement (e.g. by under performing until they receive the offer they want) as this could damage their relationship with their current employer which could in turn damage their own future employment prospects. In order to move on to new employment, the employee is much better placed with a good reference and a good reason for leaving their previous employment.

91. That said, scenarios have been considered over how employees could potentially approach this. In the first scenario, the employee is performing well in their job but approaches their employer for a settlement agreement. The employer can choose to accept or turn down this approach. They are quite likely to turn down the approach given that the employee performs well for them. If that employee's performance subsequently became an issue, the employer would have the choice open to them of whether to deal with this through performance management procedures or offering a settlement agreement.

92. If the employee requesting a settlement agreement is already underperforming, the employer again has the choice of whether to enter into the settlement agreement or to follow performance management procedures. Option 1 will be accompanied by guidance, including a model letter and template settlement agreement, which should make the use of the settlement agreement an easier process.

Wider Impacts

93. An equality impact assessment is included at annex A.

94. All businesses are included in this measure. As it is effectively an option available to all businesses, which is not mandatory and is likely to be net beneficial, it is important that it is accessible to all businesses.

95. Having an additional tool to allow employers to end employment relationships in this way should be beneficial to employees and employers. If effective, this could lead to an increase in business confidence to hire staff. It could also facilitate a more flexible labour market, as employees may be in a better position to move on to alternative employment than if they have gone through a lengthy process with their employer and in the end been dismissed.

96. Although the use of settlement agreements is voluntary, if employers or employees do decide to enter into a settlement agreement.

Direct costs and benefits to business calculations (OIOO)

97. This measure is out of scope for one-in-one-out purposes. The use of settlement agreements is optional for employers, and whilst the measure should make it easier for employers to use, as there are still normal disciplinary, dismissal and redundancy procedures open to employers.

Post Implementation Review

98. This proposal will be reviewed as part of a broad review of the impact of changes introduced under the Enterprise and Regulatory Reform Bill. This will review the impact on employment tribunal claims of the reforms, as well as looking to understand the broader use of settlement agreements.

Summary and Conclusion

99. Option 1, amending the employment rights act to make the fact a settlement offer was made inadmissible as evidence in an employment tribunal case, together with a statutory code is seen as the best option to facilitate the use of settlement agreements as a better alternative option for employers, without introducing further risks or unintended consequences.

Annex A: Equality Impact Assessment

Equalities

In developing policy the Government is legally required by the Equality Act 2010 to consider the impact on individuals with protected characteristics: age, disability, gender, pregnancy and maternity, race and nationality, religion or belief, transgender and sexual orientation.

The purpose of the Equality Impact Assessment (EIA) is to identify the likely positive and negative impacts that the policy proposals may have on certain groups, and to estimate whether such impacts disproportionately affect such groups.

Scope of the EIA

This Equality Impact Assessment accompanies the clause in the Enterprise and Regulatory Reform Bill aimed at facilitating settlement agreements. The measure aims to make it easier for employers and individuals to engage in voluntary settlement agreements as a means of ending the employment relationship by making changes to the unfair dismissal rules in the Employment Rights Act 1996 to make it clear that it is an acceptable way of ending the relationship.

The unfair dismissal protections have a two year qualification period. So making it easier to affect a settlement agreement without attracting a claim of unfair dismissal rules potentially affect anyone who has been in employment for at least two years.

Description of the policy

As part of the Government's drive to give confidence and certainty to business, it is introducing a clause in the Enterprise and Regulatory Reform Bill which will make it easier to make an offer of a settlement agreement to end an employment relationship without fear that it could be used as evidence in an unfair dismissal claim in tribunal.

In effect, the measure will amend the unfair dismissal rules in the Employment Rights Act 1996 so that an offer of settlement will not be relevant in deciding the merits of an unfair dismissal case, nor would the offer of settlement be admissible in evidence submitted to a tribunal in an unfair dismissal claim.

It is our intention that this measure should not disproportionately affect any of the protected characteristics groups, and has been designed to ensure that discrimination and potential discrimination is outside the scope of the protection. Individuals who feel they have suffered discrimination in the offering of settlement will be able to take a claim under the Equality Act 2010.

We are conscious of the need to avoid a negative effect on 'vulnerable groups' (who may have particular protected characteristics). Giving employers more scope and legal certainty in offering settlement could lead to an increased possibility that 'vulnerable' employees will feel pressured into accepting an offer. However, we are clear that the policy has been developed in a way to mitigate against this risk and the necessary safeguards exist, as they do under the current regime of agreeing settlement. For example, before the employee can accept the offer, they will need to get independent legal advice to be clear what the agreement means.

The Assessment

There is no data available on the characteristics of individuals that use compromise agreements, but other data on employment tribunal claimants and those experiencing problems at work can provide an indication. This assessment uses data from the 2008 Survey of Employment Tribunal Applications (SETA) on claimants and compares it to the Labour Force Survey (LFS) data on all employees for 2008. Some additional information from the 2008 Fair Treatment at Work Survey is also used. Findings from the next SETA will be available in 2013.

This assessment finds that compared to the broader workforce, a greater proportion of claimants are male, older (aged 45+) or have a long standing illness, disability or infirmity that limits their activities in some way. A slightly smaller proportion of claimants are white compared to the workforce as a whole. Comparisons cannot be made for religion or belief, gender reassignment, marriage and civil partnership, pregnancy and maternity, or sexual orientation because of a lack of comparable claimant data on these characteristics.

Gender

BIS has published SETA in 2003 and more recently in 2008. In 2008 three-fifths (60 per cent) of claimants were men. This is similar to the proportion found in 2003 (61 per cent) but somewhat higher than the proportion of the employed workforce as a whole (51 per cent), as given in the LFS.

Men brought the majority of employment claims across most jurisdictions; however, 82 per cent of sex discrimination cases were brought by women. This pattern closely resembles that found in 2003, where men also brought the majority of employment claims across most jurisdictions. However in 2003, an even higher proportion of sex discrimination cases were brought by women (91 per cent).

Ethnicity

According to SETA 2008 86 per cent of claimants were white, a slightly lower proportion than in 2003 (90 per cent) and the workforce in general (91 per cent).

However, the proportion was much lower in race discrimination cases, where only 8 out of the 57 claimants (15 per cent) were white, with 20 black (34 per cent) and 20 Asian (34 per cent). This is a similar pattern to that found in 2003.

Disability

In SETA 2008 22 per cent of claimants had a long-standing illness, disability or infirmity at the time of their employment claim, which is the same as the proportion among employees in general (22 per cent) and is a slightly higher proportion than in 2003 (18 per cent). 15 per cent had a long-standing illness, disability or infirmity that limited their activities in some way, a higher proportion compared with the workforce as a whole (10 per cent) and in 2003 (10 per cent).

As in 2003, the proportion of claimants who had a long-term disability or limiting long-term disability was, as would be expected, considerably higher in Disability Discrimination Act (DDA) cases (84 per cent and 74 per cent respectively). Looking at primary jurisdictions the proportion of claimants who had a long-term disability was highest in discrimination cases (45 per cent) and lowest in Wages Act cases (10 per cent) and redundancy payment cases (8 per cent).

Age

47% of respondents on the SETA (2008) claimant survey were 45+, compared to 38% of respondents to the Labour Force Survey.

This varied by jurisdiction. The highest proportion of people of 45 and over was in Breach of Contract cases (74%) and the lowest was wages act jurisdiction claimants (35%).

Religion or belief

SETA 2008 results showed that 46 per cent of claimants regarded themselves as belonging to a religion which is in line with the findings from 2003. 40 per cent of all claimants regarded themselves as Christian. 6 per cent of all claimants regarded themselves as belonging to a religion other than Christianity (Muslim 2.4%, Hindu 1.2%, Sikh, Jewish, Buddhist and other answers were all under 1%). This figure was higher among those involved in discrimination cases generally (12%), and higher still (39%, although note that this is from a small sample size of just 57) among those involved in race discrimination cases.

Comparisons with LFS cannot be made because of the difference in phrasing of the questions about religion/religious beliefs between the two surveys.

Other protected characteristics

It is not possible to look at employment tribunal claimant characteristics in terms of gender reassignment, marriage and civil partnership, pregnancy and maternity, and sexual orientation.

Fair Treatment at Work Survey

The Fair Treatment at Work Survey, published by BIS in 2008, collects information from current and recent employees on, amongst other things, problems they experience in the workplace. It investigates which national, workplace, job and individual characteristics are more likely to be associated with problems to do with employment rights. It builds a model which finds that the following groups are significantly more likely to report employment problems than other groups:

- Members of trade unions or staff associations (66% more likely)
- Lower earners (69% more likely)
- The disabled and those with a long standing condition (96% more likely)

As these groups are more likely to report having problems at work, this may also indicate that they are more likely to be involved in a compromise agreement. However, business stakeholder groups assert that currently compromise agreements are predominantly used in larger businesses, amongst higher paid staff.

This publication is also available on our website at www.bis.gov.uk

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