

The Government has issued the [response](#) to its 'Ending the Employment Relationship' consultation which sought views on its proposals to increase the use of settlement agreements and to change the cap on unfair dismissal compensation. Both of these proposals are dealt with in the Enterprise and Regulatory Reform Bill currently making its way through Parliament.

Settlement Agreements

The Bill amends the Employment Rights Act 1996 to provide that an offer of settlement (by either party) is inadmissible as evidence to an Employment Tribunal in any subsequent unfair dismissal claim. The proposal effectively extends the existing 'without prejudice' regime to situations where no formal dispute has yet arisen. The rule will not apply, however, to anything which in the Tribunal's opinion was "improper" or connected with "improper behaviour", though, rather worryingly, the Government has yet to get to grips with what that actually means. The new legislation will be underpinned by an Acas Statutory Code of Practice, currently under discussion with BIS and the CBI, and accompanying guidance.

Key points in the consultation response are:

- The definition of "improper behaviour" will be explained in the Statutory Code (good luck with that!) with illustrative examples included in the accompanying guidance. This concept has the potential to be a legislative minefield reminiscent of the much-derided and not at all missed Statutory Dispute Resolution Procedures. As a means of cutting down employment litigation, anything less than the clearest definition of improper behaviour seems doomed to fail. Either employers will be too nervous to use protected conversations in the first place, or there will be substantial satellite litigation around whether either of the parties' behaviour was improper before we even get to the merits of the case.

- Template letters to be used to initiate settlement agreement negotiations will be included in the Statutory Code – but their use will not be compulsory.
- A model Settlement Agreement will be included in the guidance accompanying the Statutory Code rather than within the Code itself, as this approach is deemed to facilitate updates to the model agreement.

The legislation, Statutory Code of Practice and guidance will all be in place by Summer 2013.

Cap on Unfair Dismissal Compensation

Unfair dismissal compensation is to be capped at 12 months' pay or the overall statutory cap (currently £72,300, increasing to £74,200 on 1 February), whichever is lowest. In the absence of any consensus for change in the form of the overall cap, the Government is leaving it unchanged. No doubt there is much debate still to be held in connection with what constitutes "pay", but if it is all taking place at a level below the existing cap, it is hard to see that this will take things very far in most cases.

The changes to the maximum unfair dismissal compensation award will also come into effect during Summer 2013.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

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