

WIRRAL COUNCIL

CABINET

29 MARCH 2012

SUBJECT:	COMPROMISE CONTRACTS
WARD/S AFFECTED:	ALL
REPORT OF:	DIRECTOR OF LAW HR AND ASSET MANAGEMENT
RESPONSIBLE PORTFOLIO HOLDER:	CLLR TOM HARNEY
KEY DECISION?	NO

1.0 EXECUTIVE SUMMARY

1.1 The purpose of this report is to advise Cabinet about the purpose of compromise contracts, their use by the Council in different situations and sets out the options for their future use.

2.0 BACKGROUND AND KEY ISSUES

- 2.1 On 13 February 2012 Council passed a motion that that all future “compromise deals”, that include an element of financial or other incentive are subject to a full democratically accountable process. Council asked that The Employment and Appointments Committee are tasked with forming a Sub-Committee to assess and sign off any compromise deals before any such offer is made to employees, and the process and scope of reporting to be agreed by this Sub-Committee. Members for this Sub-Committee are to be co-opted from the list of Members available for the Appeals Sub-Committee with a proportionality of 1:1:1. The Chair for any such meeting can be decided by the agreement of the Sub-Committee.
- 2.2 Council also asked that all such “compromise deals”, once agreed by the Sub-Committee, are reported to the next meeting of The Employment and Appointments Committee, under exempt items if the details are of a sensitive nature.
- 2.3 A Compromise Contract (or agreement) is a statutory device authorised under s203 of The Employment Rights Act (1996) and Section 147 of The Equality Act 2010. It is one of only two mechanisms by which an employee can waive his/her statutory employment related claims. The other requires the involvement of ACAS using a COT 3 form (see Para 4.5).
- 2.4 The object of a compromise contract is to settle some or all of the claims rising out of the employment relationship or its termination.
- 2.5 It is a mutually agreed document and usually provides for a payment by the employer, in return for which the employee agrees not to pursue any claim they may have to an employment tribunal.
- 2.6 The most commonly included clauses within a compromise contract usually fall under the following headings:

- Definition of terms
- Termination of employment
- Accrued salary and benefits
- Confidentiality
- Return/retention of company property
- Restrictive covenants
- Legal fees
- Full and final settlement

2.7 A compromise contract is valid only if it satisfies the following conditions;

- It is in writing.
- It relates to 'particular complaints' or 'particular proceedings'.
- The employee has received advice on the terms and effect of the contract from a relevant independent adviser (usually a solicitor), who is identified in the contract.
- There is a contract of insurance covering the risk of the employee bringing a claim against the adviser in respect of their advice.
- The contract states that the conditions regulating compromise contracts under the relevant legislation are satisfied.

2.8 A compromise contract ensures that any specified employment related claims are settled. Any complaints outside of employment such as Whistleblowing concerns are not covered by such an agreement, unless the employee claims that he/she has been victimised because she/he raised such concerns and is willing to settle his/her claim, whilst raising concerns with the appropriate authority.

2.9 Compromise contracts are not the only instance where an employee can waive their statutory employment rights. There is also an ACAS conciliated settlement otherwise known as a "COT3". This contract is valid and binding in the same way as a compromise agreement.

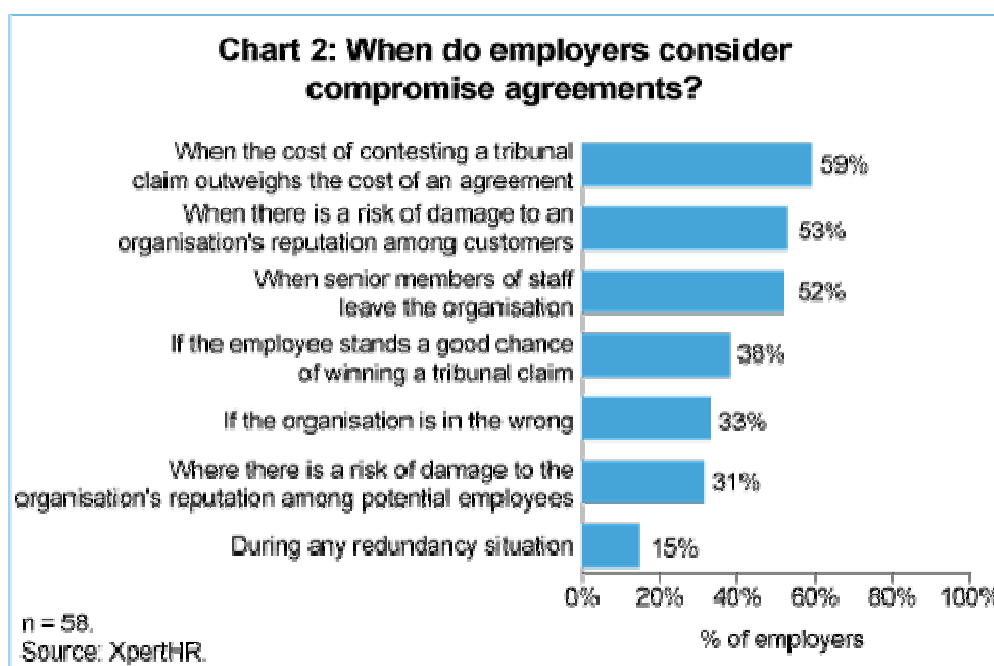
2.10 A COT3 contract is used where employment tribunal proceedings have commenced or are likely to commence and an ACAS conciliator is involved in helping parties involved reach a settlement. A COT3 contract does not necessarily include the provision that an employee's employment is to be terminated. It may relate simply to settlement of an employment claim in exchange for a financial sum.

2.11 A discussion with an employee about the compromise contract should be on a 'without prejudice' basis with a view to reaching a settlement. The understanding is that such discussions cannot be relied on in a later court or employment tribunal claim. This is because such discussions are 'privileged' so can't be used in a court or tribunal or even referred to. The privilege is given to such discussions by the courts so as to allow parties to negotiate openly without fearing that the discussions will be used against them if the negotiations fail.

2.12 For the "without prejudice" rule to apply there must be a dispute between the parties and the written or oral communications and the purpose of the without prejudice discussion must be a genuine attempt to compromise it.

3. USE OF COMPROMISE AGREEMENTS

- 3.1 In a 2010 survey for XpertHR, one-third (33%) of respondents stated that the use of compromise contracts has increased over the past few years at their organisation, 44% say there has been no change, and 16% say the frequency of their use has decreased.
- 3.2 A Chartered Institute of Personnel and Development (CIPD) Survey in 2011 found that seven out of ten employers (70%) use compromise contracts to avoid the risk of tribunal claims, with more than half (52%) saying that their use of compromise contracts has increased in the last two years.
- 3.3 Six in 10 (59%) respondents told XpertHR that they consider using a contract when the cost of contesting an employment tribunal claim outweighs the cost of an agreement, and a similar number (53%) do so when there is a risk of damage to the organisation's reputation among customers. Half the organisations (52%) consider using them when senior members of staff leave the organisation. One in six (15%) organisations routinely uses compromise contracts in redundancy situations. This is set out in the chart below:



- 3.4 The CIPD survey also found that major reasons for using the compromise contract (other than to settle an existing claim) are to remove an employee on the grounds of poor performance or misconduct (38.95), to avoid legal challenge in redundancy situations (25.75) and to make it easier to remove senior staff (24.3%).

4. THE COUNCIL'S USE OF COMPROMISE CONTRACTS

- 4.1 The Council enters into compromise contracts in the following circumstances.

a) Settlement of claims that have been lodged with an Employment Tribunal. This includes multi-equal pay claims, unfair dismissal and discrimination claims. It also includes potential claims not yet lodged.

- 4.2 In these circumstances, claims may be settled at any stage of the process right up to the day that proceedings are due to commence. This process often involves ACAS.
- 4.3 In determining whether to settle claims, the council's Legal and HR representatives, with counsel advice as appropriate, would consider the merits of the employee's claim, the financial and reputation risks to the council of defending and/or losing the case and whether settling a case for a smaller sum before other side potentially wins a case (if that is a risk), is in the economic interests of the council.
- 4.4 The employment tribunal process also now includes a Judicial Mediation scheme. Judicial Mediation involves bringing the parties together for a Mediation Case Management Discussion before a trained Employment Judge who remains neutral and tries to assist the parties in resolving their disputes. Over 65% of cases mediated reach a successful settlement on the day of mediation.
- 4.5 The judicial mediation process requires that representatives for both parties have appropriate 'authority' to make decisions in relation to any potential proposals reached on the day in settlement of the claims. This could include termination of employment if that is presented and agreed.

b) To bring an employment relationship to an end through mutual agreement.

- 4.6 The Council has entered into a small number of compromise contracts with employees where it has been considered to be in the interests of the Council and the employee for their employment to be terminated.
- 4.7 The Council has also used compromise contracts for all leavers under VS/EVR over the past couple of years. This mitigated any risks to the organisation arising from the VS/EVR process. A simplified version of the standard compromise contract was used, This did not include any provisions in relation to confidentiality.

5.0 RELEVANT RISKS

- 5.1 There are potential financial risks to the Council if the Council does not have a workable arrangement to allow decisions to be made quickly to offer or agree to settle claims and, by doing so enter into compromise contracts in response to Employment Tribunal proceedings.

4.0 OTHER OPTIONS CONSIDERED

- 4.1 The current arrangements under the Scheme of Delegation of Functions to Officers, (Part 3, Schedule 4, Page 111. Para 28), continues to allow Chief Officers to appoint, dismiss or transfer staff, or take any other action with regard to the employment of staff in accordance with the Employment Procedure rules. This includes authorisation to settle claims or potential claims against the Council at Employment Tribunal where it is in the interests of the Council to do so and which may involve use of a

compromise contract (or COT3). The Head of Legal Services has delegated powers to settle legal proceedings against the council (Para (40), Page 118).

4.2 In changing the current arrangements there are a number of options:

a) Adopt a process whereby any proposed termination of employment of officers **above SCP49** via compromise contract and which includes a payment or financial incentive as part of the termination arrangement must be pre-authorised by a sub-committee of The Employment and Appointments Committee.

b) Adopt a process whereby proposed termination of employment of any **Heads of Service/Chief Officers** via compromise contract and which includes a payment, or financial incentive as part of the termination arrangement must be pre-authorised by a sub-committee of The Employment and Appointments Committee.

c) Adopt a process whereby any termination of employment of any employees or officers via compromise contract and which includes a payment or financial incentive as part of the termination arrangement over **£50k** must be pre-authorised by a sub-committee of The Employment and Appointments Committee.

d) Adopt a process that any proposed termination of employment of **any employees** via compromise contract and which includes a payment or financial incentive as part of the termination arrangement must be pre-authorised by a sub-committee of The Employment and Appointments Committee.

4.3 The above procedures cannot apply to staff employed at Council maintained schools, where the governing body has the power to agree terms for the termination of such staff.

5.0 CONSULTATION

5.1 No consultation undertaken.

6.0 IMPLICATIONS FOR VOLUNTARY, COMMUNITY AND FAITH GROUPS

6.1 No implications

7.0 RESOURCE IMPLICATIONS: FINANCIAL; IT; STAFFING; AND ASSETS

7.1 No implications

8.0 LEGAL IMPLICATIONS

8.1 Legal implications are set out within main body of the report.

9.0 EQUALITIES IMPLICATIONS

9.1 Has the potential impact of your proposal(s) been reviewed with regard to equality?

(b) No because there is no relevance to equality.

10.0 CARBON REDUCTION IMPLICATIONS

10.1 No implications

11.0 PLANNING AND COMMUNITY SAFETY IMPLICATIONS

11.1 No implications

12.0 RECOMMENDATION/S

In view of the motion passed by the Council and, subject to endorsement by the Improvement Board –

12.1 The recommendation is to adopt a process whereby any proposed termination of employment of officers above SCP49 via compromise contract, which includes a payment or financial incentive as part of the termination arrangement, or where a payment or financial incentive as part of the termination arrangement is over £50k.

12.2 That a report is taken to The Employment and Appointments Committee to agree appropriate arrangements for authorisation which will allow such decisions to be taken in a timely manner.

13.0 REASON/S FOR RECOMMENDATION/S

13.1 To ensure that there is a clear understanding of circumstances in which it may be appropriate for the Council to enter into a compromise contract with an employee and that the appropriate authority is granted to do so.

13.2 To retain the authority and flexibility to enter into a compromise contract to settle claims and potential claims against the Council in an employment tribunal speedily and to the Council's potential advantage.

3.5 The introduction of a reporting for all compromise contracts, including termination of employment, would enable the Elected Members to have access to information, question the rationale for decisions and have the information to assess the review the effectiveness of the terms of reference of the sub-committee.

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APPENDICES

None

REFERENCE MATERIAL

There is no reference material.

SUBJECT HISTORY (last 3 years)

Council Meeting	Date
Council	13 February 2012

Equality Impact Toolkit (new version February 2012)

Section 1: Your details

Council officer:

Email address:

Head of Service:

Chief Officer:

Department:

Date:

Section 2: What Council function / proposal is being assessed?**Section 2b: Is this EIA being submitted to Cabinet or Overview & Scrutiny Committee?**

Yes / No

If 'yes' please state which meeting and what date

.....

And please add hyperlink to your published EIA on the Council's website

.....

Section 3: Will the Council function / proposal affect equality in? (please tick relevant boxes)

- Services**
- The workforce**
- Communities**
- Other** (please state)

If you have ticked one or more of above, please go to section 4.

- None** (please stop here and email this form to your Chief Officer who needs to email it to equalitywatch@wirral.gov.uk for publishing)

Section 4: Within the Equality Duty 2010, there are 3 legal requirements. Will the Council function / proposal support the way the Council(please tick relevant boxes)

- Eliminates unlawful discrimination, harassment and victimisation
- Advances equality of opportunity
- Fosters good relations between groups of people

If you have ticked one or more of above, please go to section 5.

- None** (please stop here and email this form to your Chief Officer who needs to email it to equalitywatch@wirral.gov.uk for publishing)

Section 5: Will the function / proposal have a positive or negative impact on any of the protected groups (race, gender, disability, gender reassignment, age, pregnancy and maternity, religion and belief, sexual orientation, marriage and civil partnership)?

You may also want to consider socio-economic status of individuals.

Please list in the table below and include actions required to mitigate any negative impact.

Protected characteristic	Positive or negative impact	Action required to mitigate any negative impact	Lead person	Timescale	Resource implications

Section 5a: Where and how will the above actions be monitored?

Section 5b: If you think there is no negative impact, what is your reasoning behind this?

Section 6: **What research / data / information have you used in support of this process?**

Section 7: **Are you intending to carry out any consultation with regard to this Council function / policy?**

Yes / No – (please delete as appropriate)

If 'yes' please continue to section 8.

If 'no' please state your reason(s) why:

(please stop here and email this form to your Chief Officer who needs to email it to equalitywatch@wirral.gov.uk for publishing)

Section 8: **How will consultation take place?**

Before you complete your consultation, please email your 'incomplete' EIA to equalitywatch@wirral.gov.uk via your Chief Officer in order for the Council to ensure it is meeting it's legal requirements. The EIA will be published with a note saying we are awaiting outcomes from a consultation exercise.

Once you have completed your consultation, please review your actions in section 5. Then email this form to your Chief Officer who needs to email it to equalitywatch@wirral.gov.uk for re-publishing.

Section 9: Have you remembered to:

- a) Add a hyperlink to your published EIA on the Council website? (section 2b)
- b) Include any positive impacts as well as negative impacts? (section 5)
- c) Send this EIA to equalitywatch@wirral.gov.uk via your Chief Officer?
- d) Review section 5 once consultation has taken place and sent your completed EIA to equalitywatch@wirral.gov.uk via your Chief Officer for re-publishing?

Before you finalise this report, please delete section 9