Question 1: Do you agree that these are the correct principles to underpin the use of a settlement agreement which is inadmissible in unfair dismissal cases?

Yes ☒ No ☐ Not sure ☐

Comments:

Answer: In general terms yes, although we have a number of comments:
1.1 It is not always helpful for an employer to have to spell out the reasons for the settlement offer being made. We accept that providing a reason counters the suggestion of discrimination. Often however employers deliberately don't want to discuss performance issues as that may heighten tensions and make settlement more difficult to achieve. Further, in specifying a reason it should not be limited to the reasons set out in s98 of the ERA. The fact there is very often not a good reason is the whole point of using a settlement agreement e.g. an employee's attitude is not right. If the employer had a valid reason for dismissal they would not always need the mechanics of a settlement agreement.
1.2 The principles refer to a breach of the code potentially giving rise to a constructive dismissal claim. The code should therefore be light touch and simple so that it in itself does not become a cause for argument in the same way as the Statutory Disciplinary and Grievance Procedures did.
1.3 There should be no obligation to set out "what the next steps are" if the individual does not accept the offer. If there is a valid process (with a s98 reason for dismissal) that could be followed the employer may not be using a settlement agreement. There may not therefore be "next steps". If settlement is not possible it should be open to the employer to do nothing.
1.4 The meeting should only be admissible in discrimination proceedings if it is alleged that the fact of the meeting or the content of the meeting were themselves acts of discrimination.

Question 2: Do you agree that model letters proposing settlement and a template for producing a settlement agreement should be included in a Statutory Code?

Yes ☒ No ☐ Not sure ☐

Comments:

We feel that letters would be helpful subject to our comments on content. It is also considered that a template settlement agreement would be helpful to the parties. We are concerned that letters inviting an employee to a meeting may lead to unnecessary stress and absence for employees that could potentially unduly delay the process. A better process maybe to provide a model letter for handing out at the meeting, confirming the offer made and inviting the employee to a follow up meeting at which the companion can be present at which the agreement can be discussed. The employee has the protection that they have to have independent advice on the agreement in any event.

Question 3: If you currently use settlement or compromise agreements, what impact would these templates have on the costs to your organisation of using agreements?

Comments:

Answer: Minimal. Provided the agreements are a minimum and it is designed so they can be can be adapted to the needs of an organisation organisations will continue to use the current templates they operate adapting them to make sure they comply with the proposed template.

Question 4: Would model letters proposing settlement and a template for producing a settlement agreement be likely to change your use?

Increase ☒ Decrease ☐ Stay the same ☐

Comments:

Answer: The availability of the model documents themselves is unlikely to change the number of settlement agreements. The fact that a process is recognised to reach a settlement agreement is likely to increase the use of a settlement agreement for employers who were previously nervous about suggesting a without prejudice meeting. They may previously have been concerned the meeting would not be protected where there may not have been a dispute in contemplation.

Question 5: Do you have comments on the content of the model letter?

Yes ☒ No ☐ Not sure ☐

Comments:

Answer: We have a series of observations.
5.1 As previously mentioned, it may be easier not to specify, in writing, the areas of concern (whether it be conduct, performance, attendance or whatever) although we accept, inevitably, there will be discussion about the reasons. To raise this in the first lines of the letter when they may not have been discussed previously may hamper settlement and a "softer" opening should be considered.
5.2 Often the reason for termination is a combination of factors or a feeling that the employee is "not the right person for the job". As above, we feel that is probably not best expressed in the letter.
5.3 We were divided as to the requirement for a letter inviting employees to e meeting. On the one hand there were concerns that if a meeting is fixed with prior notice, it is possible that the employee would take a (possibly extended) period of absence for real or perceived stress. On the other hand it was accpeted that if there was to be a right to be accompanied by a colleague or trade union official, and therefore advance notice, a letter was probably necessary. The critical question is therefore whether a representative is needed at this meeting or whether the fact the individual has to have independent advice on any agreement is sufficient protection.

5.4 We do not think it appropriate, or necessary, to talk about the opportunity to improve performance etc, or if employment is terminated other than under the auspices of a settlement agreement.
5.5 The focus of a draft letter should be on the terms on offer, the benefits of accepting, the need to take legal advice, and unequivocal confirmation that the employee is under no obligation to accept this offer. Also that it is not admissible in court or tribunal proceedings if settlement fails.
5.6 Although we can see practical difficulties, it would be useful if government websites and/or ACAS could have a standard letter from an employee inviting a voluntary severance package, which could be very simple and straight forward, but nevertheless would be a useful tool to promote amicable resolution.

Question 6: Do you have comments on the content of the model settlement agreement and guidance?

Yes ☒ No ☐ Not sure ☐

Comments:

Answer: Yes, we have a series of observations.
6.1 The Guidance makes no reference to a properly trained trade union representative being able to sign off on settlement agreements;
6.2 Holiday Pay should not be rolled up with the Settlement Figure as the taxation treatment of this payment will be different;
6.3 It is not clear whether the second sentence of 5.2 is intended as the employee being responsible for any tax if the tax treatment is incorrect or for tax on the balance over £30,000. If the latter there should be no reference to NICs.
6.4 It would be helpful to include a counterparts clause as very often these agreements are conclude by scanned email signature in England and Wales.
6.5 Employers should be warned at Clause 8.1 in England and Wales that consideration may be necessary in order for any restatement of the covenants to be valid, for instance if there has been any suggestion that the contract has been breached.
6.6 Clause 9.1.3 is potentially too wide. The adviser is only advising on the terms and effects of the agreement not whether the Employee has any other claims. That will involve very often a much more considered view of the facts which will not always be cost effective or productive.

Question 7: Do you agree that the use of templates should not be compulsory?

Yes ☒ No ☐ Not sure ☐

Comments:

Answer: Completely agree. The template should be a useful guide and no more than that.

Question 8: Do you think it would be helpful if the Government set a guideline tariff for settlement agreements?

Yes ☐ No ☒ Not sure ☐

Comments:

Answer: We do not feel it would be helpful to set a tariff, at least in financial terms. We have several reasons for this opinion. Firstly, setting a tariff too low would be a disincentive to settlement, whilst setting a tariff too high might discourage employers. Furthermore, each case is very fact specific. Some employees may have long service for example and arguably their entitlement to a settlement payment would be greater than somebody of short service. Furthermore to have a tariff for different types of behaviour would be to set a "price" on certain behaviours so that would also be bad practise for the purposes of good industrial relations.

Question 9: What would you expect to be the impact of having a guideline tariff?

Comments:

Answer: See 6 above.

Question 10: If you do favour a guideline tariff for settlement agreements, do you have a view on the approach or formula that should be used?

Comments:

Answer: Whilst we do not favour a financial tariff, we do see an advantage in publishing a list of relevant factors, as set out in the consultation papers. The list should not be exhaustive and should not necessarily be legally binding, but broadly speaking, the factors identified in the consultation papers are the sort of factors that seasoned employment practitioners would take into account, in negotiating a compromise either on behalf of the employer or the employee.

Question 11: Do you have a view on what level of tariff would be appropriate?

Comments:

Answer: In light of our comments above, we do not have a view on the appropriate level of tariff and would urge most strongly that a tariff is not imposed.

Question 12: Do you have ideas for other ways to help effectively disseminate the guidance and materials?

Comments:

Answer: The Law Society website would be useful as would gov.co.uk and ACAS. Publicity as such needs to be carefully handled however, because there is a danger that the message would be interpreted as a licence to shortcut or avoid proper processes, and therefore undermine the integrity of HR departments in companies with well-established processes and procedures. We see the use of settlement agreements more as a way for SME's and smaller companies, without established practices and procedures, and perhaps with a small or under resourced HR department to manage departures in this way, to avoid lengthy and costly tribunal case, rather than larger companies with well-established procedures. Any publicity therefore needs to be aimed at the user, rather than the market generally.

Question 13: Would the introduction of cap of 12 months' pay lead to more realistic perceptions of tribunal awards for both employers and employees?

Yes ☐ No ☒ Not sure ☐

Comments:

Answer: We are opposed to the introduction of a cap. In certain cases such as an employee approaching retirement a limit of 12 months' would be unjust. Further the risk of imposing a cap is that rather than limiting perception it will lead to an unrealistic expectation from Claimants that they will receive 12 months in all cases. This may actually impede settlement discussions and not help them. A better route to achieving this goal would be to publish more widely the average awards made and some specific examples.

Question 14: Would the introduction of cap of 12 months' pay encourage earlier resolution of disputes?

Yes ☐ No ☐ Not sure ☐

Comments:

Answer: No, see above.

Question 15: Would the introduction of cap of 12 months' pay provide greater certainty to employers of the costs of a dispute?

Yes ☒ No ☐ Not sure ☐

Comments:

Answer: Probably, yes. For an employer who does not have access to employment law advice it will allow them to predict with greater certainty the downside they are facing.

Question 16: Do you support the introduction of a cap on compensation of 12 months' pay?

Yes ☐ No ☒ Not sure ☐

Comments:

Answer: No as it will lead to cases of injustice.

Question 17: Do you have any comments on the impact of this proposal on claimants?

Comments:

Answer: It will be unfair. We have concerns it will lead to unfair outcomes. The obvious example is an older employee who is dismissed unfairly at age 62 and cannot find another role before his retirement. Equally a younger employee may not always find it possible to find another role in a 12 month period, particularly if it's in a specialist occupation or if the nature of the dismissal has caused the employee to fall ill limiting their ability to find alternative work.

Question 18: Do you have any comments about the impact of this proposal on employers?

Comments:

Answer: No other than that as detailed above, that it may have the opposite effect of that desired by raising claimants' expectations. It may also lead to an increase in discrimination claims with Claimants trying to find inventive ways to avoid the cap.

Question 19: Do you have any other comments on the proposal?

Comments:

Answer: Yes. One alternative route of achieving this goal may be for Judges to provide clearer advice to unrepresented Claimants at CMDs on the likely award that would be made and/or for ACAS to be empowered to provide advice/guidance on the likely levels of award to Claimants.

Question 20: Do you consider that the overall cap on compensation for unfair dismissal is currently set at an appropriate level (£72,300)?

Comments:

Answer: The Committee has tried to look at this from a variety of perspectives, and from experienced employment lawyers who act for employers and for employees. We can see the argument for reducing compensation (in that it would help to manage expectations), but feel that would create unjust and inequitable outturns in certain cases. The reality is that high value claims and payouts tend to be in the field of discrimination, such as to attract headline coverage in the Daily Mail or Daily Express. Not only are high payouts for unfair dismissal not very interesting, they are distinctly unusual, and therefore there is little real concern that a cap at £72,300 would set a level of expectation that might inhibit settlement for example. We note the range of tribunal awards is generally low.

Question 21: What do you consider an appropriate level for the overall cap, within the constraints of full time annual median earnings (c£26,000) and three times full time annual median earnings (c£78,000)?

Comments:

Answer: We feel the cap is set at an appropriate level at present and no adjustment is required.

Question 22: Do you have any other comments on the level of the overall cap?

Comments:

Answer: We acknowledge the reality that an employee is likely to be on above average wages to achieve compensation at or near the current cap. However, as the workforce ages generally, or as it becomes more and more difficult for older (not to mention all) employees to find alternative employment, so it would be unfair and unjust to reduce the cap for compensation in such cases. An employer will have the option of the "settlement agreement" route, and of course if it handles the dismissal process fairly, it will not have to pay any compensation at all. However to reduce the cap on compensation would be to disqualify a worthy claimant from proper compensation in the face of a badly handled dismissal.
As an additional point it seems inherently unfair that compensation for discrimination awards should be without cap, and unfair dismissal claims reduced to a fraction of the current cap. Inevitably that will encourage discrimination based claims and may also have the unfortunate consequence of encouraging employers to adopt extremely poor industrial relation practices, safe in the knowledge that compensation would be extremely curtailed.

Question 23: Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

☐ **Please acknowledge this reply**

Question 24: At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes ☒ No ☐

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