



# BREAKFAST BRIEFING AUGUST 2024

# Protected Conversations & Settlement Agreements

# Settlement of employment claims



- Employment rights are usually based on statutory provisions
- They can generally only be settled/waived in a way that is legally binding using either
  - A COT3 Agreement negotiated with ACAS assistance;OR
  - A Settlement Agreement negotiated between parties and their representatives

# Why use a Settlement Agreement?



- Can be used before an employment dispute crystallises
- More suited to complex situations/termination of senior employees
- Suitable for use pre termination
  - Can be initiated via a Protected Conversation
- Permitted under [Section 111a Employment Rights Act 1996](#)

# Protected Conversations



- Purpose is to enable employer and employee to have a frank discussion about agreeing mutual terms and ending employment
- Protected conversation cannot subsequently be referred to in Employment Tribunal or court proceedings, unless
  - Employer acted improperly
  - Employer discriminated
- Neither employer or employee can waive the confidentiality provision if the conditions for a protected conversation are met

# Protected Conversations



- Employer will normally request a Protected Conversation and make a financial offer to end the employee's employment
- Employee is also able to request a Protected Conversation for the same purpose
- Employer cannot use conversation to dismiss employee so should always have an alternative eg continue disciplinary/PIP/grievance process and be clear outcome remains to be determined

# Protected Conversations – Top Tips



- Always have a Plan B – employee may not be willing to accept your proposal
- Consider whether there might be a discrimination risk or risk of an automatically unfair dismissal before embarking on a protected conversation
- Take advice beforehand
- Legal team can offer assistance with preparing a suitable script – contact one of our advisers

# ACAS Code on Settlement Agreements



- ACAS have a [Code of Practice on Settlement Agreements](#) which sets out best practice and also covers Protected Conversations
- Once you have had the protected conversation and then supplied the employee with the proposed Settlement Agreement in writing, the employee should be allowed a minimum period of 10 days to seek legal advice on the terms



# Settlement Agreements



- There are legal requirements which must be complied with to ensure that the Agreement is legally binding – [section 203\(3\) Employment Rights Act 1996](#)
  - Employee must take advice from a relevant independent advisor – usually a solicitor
  - Independent advisor must be named in the Agreement
  - Independent Advisor must confirm they have provided legal advice to the employee
  - Adviser must be insured against claims by the employee when the advice is given
  - Agreement must be in writing and state that it meets the legal conditions

# Settlement Agreements



- Typical clauses include
  - Notice/PILON, accrued holidays & contractual benefits (taxable)
  - Tax free termination payment of up to £30K (includes any redundancy payment)
  - Waiver of claims
  - Withdrawal of any live claims/grievances/subject access request
  - Resignation as office bearer
  - Return of company property
  - Confidentiality clauses/ restrictive covenants
  - Warranties, non disparagement, legal fees and reference

# Settlement Agreements – Top Tips



- Remember – this is a negotiation
- Take advice first, particularly if there is already a live dispute or it is complex
- If the termination date is more than a couple of weeks away, a two stage signing process will likely be required – Reaffirmation Letter