

# **WEST DUNBARTONSHIRE COUNCIL**

## **Report by the Executive Director of Corporate Services**

**Corporate and Efficient Governance Committee : 29 October 2008**

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**Subject: Use of Compromise Agreement when ending Employee/Employer relationships**

### **1. Purpose**

**1.1** On 20 March 2008 the JCF agreed that:

- a) a report be submitted to committee on the use of compromise agreements for voluntary severance, early retirement packages and mutually agreed termination of an employment relationship; and
- b) the costs of independent legal advice be met by the Council.

This report considers these issues. It should be noted that the report does not relate to the use of such agreements in the context of single status/ equal pay – it only relates to situations where to employee/employer relationship is to be permanently terminated.

### **2. Background**

**2.1** Country wide, over the last ten years there has been an increase in employment rights and entitlements. Consequently, there has been an increase in the number of areas/reasons why an employee can raise pre and post employment tribunal cases against the Council. Unless an employee actively resigns their post and shows clear intention of leaving, it may be unsafe and unwise for the Council to treat the employee actions as a resignation. If the position is unclear, and the Council ends the employment relationship a dismissal has occurred and the Council could be liable to the employee for the termination of their employment.

**2.2** In recent years, the Council has offered voluntary severance and early retirement packages, as a mechanism to manage staffing levels and as a cost saving exercise. Employees apply for these packages and the Council as employer decides who should be selected.

### **3. Main Issues**

**3.1** Where an employee applies to be selected for voluntary severance/early retirement, the ultimate decision on whether or not an employee is to be

released is made by the Employer, assessing amongst other matters the total cost of the package to the and future risks position to the Council. There is no clear resignation by the employee however they note an interest in these packages. In terms of employment law and fair practice, the employee has confirmed an intention, but has not made a resignation, therefore any action by the Council to end the relationship is technically a dismissal and there is a risk that despite a severance package being arranged, the employee would be able to seek additional amounts from an employment tribunal.

### Past and Current practice

- 3.2** Upon selection for a voluntary severance/ early retirement package, an employee will be asked to sign and date a mandate before any final payments are made. While this practice has been adopted by the Council, it does not legally prevent the employee from then raising employment proceedings against the Council for any alleged contractual or employment rights breaches occasioned when the relationship ends.
- 3.3** As the relevant case law and practice has developed, it has become clear that in a limited number of cases, the Council would not be acting in its best interest to choose to make unsecured payments in this manner, when for the most part, these voluntary severance and early retirement packages are offered with a view to achieving cost savings for the Council.

### Compromise agreements

- 3.4** This form of agreement allows the Council and employees to clearly end the relationship. The agreement is used to define any potential employment rights or contractual issues between the parties and to clearly define the end of the relationship. This agreement allows the Council to make any agreed or legally required payments to the employee and removes matters reflected in the agreement from legal challenge at a later date. As such, the ability to obtain a compromise agreement may be a material factor in determining whether or not an employee can be offered a package.

### Nature and Benefits of a compromise agreement

- 3.5** Compromise agreements are, as the name suggests, the result of a joint process. The terms of this form of agreement cannot be unilaterally imposed upon either party and this involves a process of negotiation.
- 3.6** The benefit to the Council is that where there may be claimed employment issues such as discrimination, contractual disputes, they can be reflected in the agreement, the parties can avoid the time, cost and expense of dealing with an employment tribunal case.

- 3.7** Final payments and entitlements are clearly identified in the agreement, so there can be no later dispute about any payments due.
- 3.8** Most compromise agreements including a confidentiality clause, which allows the terms of the agreement to be restricted to a small number of people involved in the agreement.
- 3.9** The benefit to the employee is they have an individual negotiated package. It is also common practice for “no fault” clauses to be requested by employees, making it clear to future employers that their termination of employment was not in fact dismissal.
- 3.10** In order that the employee is not disadvantaged and to be binding on both parties, the employee must have received Independent Legal Advice from either a Solicitor, suitably Certificated Trade Union Official or Advice Centre Official. The advisor will discuss with the employee the terms of the agreement and what rights are being removed by signing the agreement. The person providing the advice must provide verification of their right to provide the service and ensure that they are suitably insured to provide the advice. A certificate requires to be signed by the person providing Independent Legal Advice which, with the signed agreement, binds the employee and Council to the terms.
- 3.11** Accordingly, it is the case that the employee, will by necessity, have to consider the whole impact of any decision to terminate their employment, and they should not be left in any doubt as to the nature and extent of any rights that they may have before considering whether to proceed with their decision to leave the Authority’s employment.

#### Disadvantages of Compromise agreements

- 3.12** Compromise agreements only bind parties to the matters identified and agreed within the signed agreement; they do not have a retrospective effect on all claims. The agreement is only binding to rights associated with employment. Pensions entitlements cannot be addressed under this form of agreement.
- 3.13** Compromise agreements take longer to negotiate and time requires to be factored into the process for seeking Independent Legal Advice. Further, unless specifically capped the cost of such legal advice can be significant. Overall however, the costs and delay should be weighed up against the risks associated with the individual employee’s rights and the time and costs saved avoiding future litigation. There may also be an expectation that a small financial contribution will be made by the Council towards the employee’s fees for seeking independent legal advice, however this is not a statutory requirement and is by no means a universal approach.
- 3.14** Agreements without an Independent Legal Advisor’s certificate are not legally binding or enforceable.

### Costs of Compromise agreements

- 3.15** The original report to the Joint Consultative Forum noted that, subject to available budget, a contribution to the employees legal costs may be appropriate. Having considered the report and representations made by Trade Unions, the Forum was minded to recommend to Council or Committee that the whole such fees of advice be met, without limitation.
- 3.16** It is the opinion of the Executive Director of Corporate Services that an unlimited commitment to meet such costs is contrary to the Council's best interests and would in certain cases be likely to influence whether or not the employee's departure was approved.
- 3.17** As noted in Paragraph 2.3 cost is a key element in deciding whether voluntary severance or early retirement packages are to be offered. If it is considered that a compromise agreement is necessary, the costs of entering into such an agreement would require to be factored into the overall costs. If unlimited, it is possible for the costs of the independent advice to run to thousands of pounds here being no incentive on the employee's solicitors to limit costs if payment is guaranteed by the other party.
- 3.18** It should also be noted that that in the majority of cases where a member is a member of Trade Union., their union dues include an element for legal expenses for just such a situation. It is presumed that it would not be considered desirable, were an employee refused the option to leave, on the basis that the cost, or potential cost of the legal advice outweighed the financial benefit to the Council from the release of the employee, or alternatively, that any discretionary element is reduced to be the cost of the fees.
- 3.19** To date, a contribution of approximately £250 has been accepted as being sufficient to offer towards employees costs, and in recognition of the desire of the Joint Consultative Forum to have a uniform approach to the independent adviser fees, it may be an option to offer this sum in all situations where a compromise agreement is being proposed, where proof is provided that independent legal advice has been provided and that at least £250 has been justified as a fee. This figure could be kept under review on a year by year basis to reflect inflationary increases in relevant services.

## **4. Personnel Issues**

- 4.1** The use of compromise agreements will impact, initially upon the workload of Human Resources as additional training may be required in order to assess risks associated with individual packages and prepare suitable documentation. The Council's Legal team may also need to review its use of

available resources to accommodate additional work involved in the preparation of documentation and liaising with external parties, should there be continued escalating use of such agreements.

- 4.2** Employees considering termination of their employment through voluntary severance, early retirement or mutually agreed termination may find it is a Council requirement that a Compromise Agreement is entered into to protect both their own and the Council's rights.
- 4.3** Excessive costs involved in meeting the cost of independent legal advice may impact on sums received by employees, or indeed whether a package can be offered.

## **5. Financial Implications**

- 5.1** There are few direct financial implications. However, the increasing use of compromise agreements may indirectly reduce the costs and number of employment cases to be defended by the Council, especially where there are allegations of potential discrimination issues, where the award levels are for the tribunal to decide.
- 5.2** Unless a cap is placed on the scale of fees to be met in each case, or the possible level of fees incorporated into the decision making process on whether or not to release an employee, substantial unbudgeted expenditure could arise.

## **6. Risk Analysis**

- 6.1** The risk associated with not continuing with the use of Compromise agreements in certain circumstances are identified throughout this report, and in particular in Paragraphs 3.3 to 3.19.

## **7. Conclusions**

- 7.1** In the current employment climate it would be imprudent to adopt a practice which is contrary to recognised good legal practice and exposes the Council to unnecessary risks associated with ending employment relationships, by failing to continue utilise Compromise Agreements where appropriate.
- 7.2** It is recognised that the costs of the independent legal advice is reasonably considered an issue which the Council could be expected to address. The guaranteed provision of a capped contribution to the fees is considered to be an appropriate response to this expectation.

## **8. Recommendations**

- 8.1** To note the current and likely future use of compromise agreements for voluntary severance, early retirement packages and mutually agreed termination of an employment relationship in the limited circumstances where such is deemed appropriate.
- 8.2** To agree that a guaranteed contribution of £250 against justified and evidenced independent legal advice costs will be made where compromise agreements are to be entered into. This figure will be subject to review on an annual basis, having regard to inflationary increases in the appropriate market.

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### **Appendices:**

**Background Papers:** Report to the Joint Consultative Forum, 20<sup>th</sup> March 2008

**Wards Affected:** All council Wards are affected.