



Settlement Agreements- what's it worth?

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A Settlement Agreement is a legally binding contract allowing employers and employees to part company safely. It's legally binding and everyone knows where they stand but the sticking point often tends to be- *what's it worth?*

Common sense is a good place to start...tribunals are stressful and costly and full of risk whereas a Settlement Agreement gives immediate certainty allowing everyone to get on with their work.

What matters most is *net* benefit (*Pain to Gain*)...if the offer is £20,000, then what's the point in going for £35,000 if it takes a year, costs thousands of pounds and risks harming your next job with lost tax advantages? And what about litigation risk? You can of course lose at Tribunal!

For negotiations to be productive you must above all be *realistic*- no point assuming you'll get a 100% of what you want without suffering in some way... so I've prepared this note on the back of 30 years of advising both employers and employees and Employment Tribunal statistics with the maximum and average awards per type of case.

There is also a brief summary of the '*Vento*' guidelines (*Vento* is the case setting out the bands on injury to feelings awards in discrimination).

I hope you find this note helpful. You may wish to print it off and add your own notes and please feel free to contact me...

Unfair Dismissal

Unfair dismissals are the most common claims. An employee needs 2 years' service and will need a clear basis for asserting unfairness. The tribunal will look at all the circumstances before making a finding such as warnings, consistency. A tribunal will get a grasp of the 'bigger picture' to decide if the employer has behaved reasonably looking at the given the reason and all the circumstances.

A dismissal may be *procedurally* unfair but for a large monetary award there has to be a *substantive* unfairness. If the employee would've been dismissed anyway a procedural award might only be a couple of weeks' pay.

With an Unfair Dismissal claim there are 2 main awards: **Compensatory** and **Basic**. The *Compensatory Award* is for future lost earnings capped at one year's pay (overall cap **£89,493**). The cap doesn't apply to whistleblowing dismissals or discrimination.

The *Basic Award* is one week's pay for each year worked, with pay capped at **£544** for each year worked under the age of **41** and **£816** for each year worked over **41**. There is a total cap of **20 years'** service.

The Basic Award is the same as a redundancy payment so an employee paid for redundancy will not also get the Basic Award.

Some things to think about:

How long will it take to find a job? A tribunal will expect an employee to look for work (mitigation) and will depend on the type of work (secretarial and accounting jobs are always in high demand so an employee might find work in 3 months whereas Travel jobs may be harder to find at present). The *reason* for dismissal is also relevant... neutral reasons such as redundancy will not make it as hard to find work as *misconduct* or *capability* dismissals which damage reputations.

An older person or someone with a health condition or limited skills may also find it harder to find work.

Employers should be quick to help assisting the employee find another job. An employee needs to demonstrate-with facts and evidence- why finding work will be hard for them. The Settlement Agreement can overcome some of these problems by agreeing a reference, confidentiality and announcements.

Tax efficiency - genuine settlement offers can be made tax free up to **£30,000**.

Closure/reputations - Settlement Agreements have clauses to protect reputations (confidentiality, references etc.) whereas Tribunal decisions are now available online.

Contribution - if the employee has contributed to the dismissal a tribunal can reduce the award by anything up to 100%.

Polkey reductions - in the '*Polkey*' case compensation was limited as the employee would have been dismissed in any event (if a proper procedure had been followed). An example of this would be an employee dismissed for misconduct when the employer would have dismissed the employee in a large redundancy programme later. This can reduce awards to only few weeks' pay.

Legal costs – 'no win no fee lawyers' tend to charge 30% of money recovered. Hourly rates can easily run into thousands of pounds which are not recoverable if the employee wins. With a Settlement Agreement the employer pays your legal fee.

Average award - the average award for Unfair Dismissal in 2020 was **£10,812**.

Discrimination

There is no qualifying period for a discrimination claim (unlike the 2 years for unfair dismissal) and awards in discrimination cases (sex, race, disability, sexual orientation,

religion and belief or pregnancy) tend to be higher with no cap on lost earnings and additional awards for 'Injury to feelings' (including stress) and even 'Aggravated' damages (where an employer has acted very unfairly).

Settlement are particularly helpful with discrimination-by acting quickly, harm and upset to the employee can be kept to a minimum by practical steps. An apology/a good reference etc. can be included in the settlement as can referral to a stress counsellor.

Here is guidance from the tribunal on maximum and average discrimination awards in 2020:

Type of discrimination	Maximum £	Average £
Race	30,330	9801
Sex	73,619	17,420
Disability	265,719	27,043
Religion and belief	No awards	No awards
Age	243,636	38,794
Sexual orientation	96,645	27,936

Injury to feelings

In discrimination and 'whistleblowing' type cases an award can be made on top of lost earnings for the hurt or stress caused ,applying the *Vento* guidelines last updated on 6th April 2021.

Lower Band (less serious cases)	£900 to £9,100
Middle Band (for cases which do not merit the Upper Band)	£9,100 to £27,400
Upper Band (most serious cases)	£27,400 to £45,600

Things which might lead to higher awards:

- How seriously has the Claimant been treated/affected?
- Causing or worsening a medical condition (what medical evidence is there?)
- The nature of the employee's job and the effect on their career.
- How grievances have been addressed (an early apology might reduce the award but making the process painful for the employee would increase it).
- Was the incident a 'one off' or a course of conduct?
- Has the employee been subjected to humiliating conduct such as a fake disciplinary or victimisation... (treating the employee worse due to raising legal concerns) or trivialising their complaint?
- **PROTECTED CONVERSATIONS**

Discussions about a settlement can be held in a 'protected' conversation which cannot be used in a legal case. A good way to start this kind of discussion is to use generous terms such as 'dignified exit' whilst making the employee's rights during the conversation clear. It is

important to make sure that the process is fair and with no suggestion that the employee is being intimidated. You can download a copy of *ACAS' Code of Practice (4) on Settlement Agreements* here which sets out good practice.