

Settlement Agreements for Senior Executives - can they be used to resolve disputes*

In the case of senior executives and senior managers where there is a disagreement between them and their employer a settlement agreement can be used to bring an issue to an end to the mutual satisfaction of both parties.

The usual situation is where the relationship is not capable of being sustained and a clean break is required.

This is happening more often. We are certainly seeing situations where what is being talked about is a clean break or a "no fault" termination. The no fault termination is being proposed, more often now, to actually avoid addressing the reason why a senior executive or senior manager is being exited out of an organisation. We use the phrase "exited" out of an organisation when in effect the plain English word is "dismissed". However, the word dismissed is a "hard" word to use and therefore in many organisations we have now seen a situation of trying to sanitise the wording. The use of a no-fault dismissal avoids the employer company having to go through a disciplinary process. Invariably the senior executive or senior manager has done nothing wrong. It also avoids the employer facing the prospect of a significant equality claim under the Employment Equality Act 1998 (as amended). The reason we say that is that in a number of situations it is in fact the age of the senior executive or senior manager which is the reason behind the intention of the employer company to end the relationship. Equally the size of your remuneration package may be an issue. The no fault dismissal is being used as a way to try to minimise injunction claims or to minimise a claim to the WRC which could result in reinstatement. We have serious concerns that the no fault dismissal can be used other than to have a very strong case against the employer for reinstatement or at least, at a minimum, maximum compensation.

It is in those circumstances that employers recognise the risks that they are at if matters have to go to Court. At the same time senior executives and senior managers will be concerned about any reputational risk that they will have particularly as if you are in that

situation you will be looking to continue your career. While you might be concerned about the reputational risk to yourself our experience is that employers are equally concerned about the reputational risk to them. The reputational risk to the employer is that if the case goes for hearing their ability to attract and retain individuals will be undermined. Ireland is a small place. If an employer is seen as one who terminates employees at a senior level because of their age or because their remuneration package has grown too large, they are less likely to be able to attract sufficient quality candidates into the future.

It is those circumstances that it is in everybody's interest often to seek to have a Settlement Agreement.

Settlement Agreements reflect the result of negotiations between you and the employer. We will not seek in this note to generalise the details of every Settlement Agreement. Every single client who comes to us is unique. Every single senior executive or senior manager is unique in relation to their particular situation as is their employer. However, where a Settlement Agreement has been properly negotiated and accurately drafted it will normally provide for the following:

- The senior executive or senior manager agreeing to depart the organisation
- The senior executive or senior manager agreeing to waive any right to bring legal proceedings in the Courts or in an Employment Tribunal against their employer
- The employer company agreeing to provide the senior executive/senior Manager with compensation as part of the agreement
- Confidentiality on both sides and an agreed exit statement to preserve the position of both the senior Executive/senior Manager and the company

Negotiating a Settlement Agreement - what you should not do

In Ireland, unlike in the UK, there is no system of an "off the record" or "confidential" discussion between a senior executive/senior manager and the employer. Anything that is said can subsequently be used in any proceedings. That is not beneficial to either and is less likely to result in open negotiations taking place.

There is however a solution. Where the employer and the employee in any matter are represented by Solicitors then in those circumstances acting through their Solicitors that the parties can have "off the record" and "confidential" negotiations which cannot be disclosed. Very often this is done as part of a mediation. The great advantage of mediation is that it is absolutely confidential. Everybody attending the mediation will have signed up to a mediation agreement which will preserve confidentiality on a legal footing. In mediation nothing which is said as part of mediation can be disclosed outside the mediation process without the consent of both parties. There will be an independent mediator appointed who will be experienced in these issues. So, our advice is always that it is beneficial to have Solicitors involved simply to preserve confidentiality and to have a situation where there can be open and frank discussions without either party feeling constrained in what they can and cannot say.

When will the idea of a Settlement Agreement be raised?

The timing of Settlement Agreements is a matter of judgement. It is our approach that a Settlement Agreement is going to be raised as part of any negotiation and discussions in relation to the attempts to resolve differences.

Normally a Settlement Agreement will form part of a wider discussion and negotiations. In cases where both parties believe it is likely that the relationship will terminate then the idea of a settlement agreement will normally feature more prominently in the negotiations from the very start.

It is important in any negotiations that there is trust. The employer must have no suspicion that the employee is attempting to cheat the employer or to hold them to ransom and equally the employee must trust that the employer is not attempting to discriminate against the particular employee.

There are times when discussions arise relating to the termination of a senior executive or senior manager where properly conducted negotiations can result in the parties resolving difficulties. However, if that is likely to be the position it is more likely that the senior executive or senior manager will have seen this as an option at the

very start. In such circumstances it is still useful to have a Solicitor on board so that matters can go through mediation.

What is a Settlement Agreement?

A Settlement Agreement is in effect a contract.

Because it is a contract and involving senior executives and senior managers it is vital that both the employer and the senior executive/senior manager have received independent legal advice, that this is noted in any Settlement Agreement and that the Settlement Agreement normally will be witnessed by a Solicitor for each party.

It is vital that the legal consequences of agreeing to the terms of a Settlement Agreement are clearly set out and advised upon.

The settlement agreement will deal often with issues relating to not only the amount which the senior executive/senior manager will receive but also, as part of those negotiations, they will deal with issues such as non-compete clauses. For senior individuals within organisations there can be significant non-compete clauses and as part of any Settlement Agreement these need to be addressed. If the non-compete clauses are to remain then that is something that has to be taken account of in negotiating the termination package.

Getting proper legal advice from Solicitors with expertise in this area

We have significant expertise and specialist knowledge of working with senior executives and senior managers to resolve differences with employers. We have the expertise to deal with appropriate Settlement Agreements which reflect the specific circumstances of the senior executive/senior manager. It is not just a matter of us having specialist employment law experience and expertise. We have specialist employment law negotiating skills honed over many years. Our Solicitors have the expertise in drafting complex legal contracts through making sure that they are sufficiently clear and precise to record the agreement so as to avoid future issues arising into the future.

When it comes to senior executives/senior managers negotiating Settlement Agreements often arise in cases involving discrimination, equality issues and redundancies.

To say settlement agreements are complex legal contracts would be an understatement. They must be negotiated and created with the assistance of specialist employment law Solicitors.

We are not saying that we are the only firm which provide this service. There are many other brilliant employment law experts who can assist you. How we say we are unique is that this is a service which we only provide to senior executives and senior managers. We do not provide this service to employers. You may ask why. The reason is simple. Because of the issues which can arise relating to how matters are dealt with we believe that it is important that particular negotiating approaches are ones that we are free to use to the benefit of senior executives and senior managers without being concerned that taking that approach could have a negative impact if we were acting for an employer. Therefore, to avoid any issue that we would be concerned about raising a particular argument or taking a particular approach for fear of it having a negative impact in a future case for an employer that might approach us we resolve that dilemma easily by simply providing that we will not act for employers in such circumstances. Yes, we do act for employers in employment law cases but not when it comes to negotiating a Settlement Agreement with a senior executive or senior manager.

If you want to discuss any issue with us you can contact us on +353-1-9695781. You can email us at info@grogansolicitors.ie or you can visit our website being www.grogansolicitors.ie where you will find further guides on this issue and you can contact us on the contact form.

If contacting us please let us know that you are a senior executive or senior manager and furnish us with as much information as you can at the start. We can then make sure that the appropriate person in this firm contacts you. Everything which you send to us is absolutely confidential. In the alternative you can simply contact us for an initial discussion.

We are a solution-based law firm. We look to get the solution that best suits your position. That may be a Settlement Agreement. It may

instead be a mediated agreement for you to remain in the organisation on agreed terms. We seek to get the solution which best suits your position.

We are here to help.

In all cases of this type we will discuss our fees with you before we agree to take you on or you agree to engage us. We think that that is fair to you and to us.

***In contentious cases a Solicitor may not charge fees or expenses as a proportion of percentage of any award or settlement.**