

## **Non-Disclosure Agreements**

### **Summary**

1. Following Members' request at the last Audit and Governance Committee, this Report provides an explanation of the concept and use of "non disclosure agreements" by CYC in the context of employment law.

### **Recommendation**

2. That the Report be noted.

### **Background**

3. At the last Audit and Governance Meeting Members' requested a Report explaining the concept and use of "Non-Disclosure Agreements" in the employment law context. Members also asked what involvement Councillors had in relation to such agreements.

### **What is a Non-Disclosure Agreement**

4. A Non Disclosure Agreement is defined as "a **contract** through which the parties agree not to **disclose** information covered by the **agreement**. A NDA creates a confidential relationship between the parties to protect any type of confidential and proprietary information or trade secrets. As such, a NDA protects **non**-public business information." (Wikipedia)
5. In an employment law context, in order to give effect to a mutual termination of employment, a "Settlement Agreement" will include a non-disclosure clause. (Appendix 1 shows an example). "Settlement agreements are legally binding contracts that waive an individual's rights to make a claim covered by the agreement to an employment tribunal or court." (ACAS) . The agreement is between the employer and the

employee. Payment made is made on a commercial basis, and is dependent upon risk and circumstances. The financial settlement is usually linked to what the employee would have received in notice entitlement.

6. Settlement Agreements are not used to “dismiss” employees (other than in a redundancy situation). They are an agreement to mutually terminate employment for particular reasons.

### **Existing Legal Safeguards in Use of Settlement Agreements**

7. The Employment Rights Act 1996 (inter alia), requires certain conditions to be met for a settlement agreement to be valid, including:
  - The agreement must be in writing.
  - The agreement must relate to a "particular complaint" or "particular proceedings".
  - The employee must have received legal advice from a relevant independent adviser on the terms and effect of the proposed agreement and its effect on the employee's ability to pursue any rights before an employment tribunal.
  - The independent adviser must have a current contract of insurance, or professional indemnity insurance, covering the risk of a claim against them by the employee in respect of the advice.
  - The agreement must identify the adviser.
  - The agreement must state that the conditions regulating settlement agreements under the relevant statutory provisions have been satisfied.
8. At CYC the Director approves and must seek the approval of the Section 151 Officer. Where a settlement agreement involves a Chief Officer then the Chief Executive would consult with the Leader.
9. When a settlement agreement is considered in a school, the Headteacher seeks approval via the Governing Body.
10. Prior to agreeing a settlement agreement there has been involvement of the relevant Manager, a HR Manager and the Councils Employment Lawyer to assess the suitability of use of a settlement agreement. Only where it is deemed appropriate and in the best interest of the Council will it progress to the Director and Section 151 Officer for approval. Where a Chief Officer is involved in addition to the above the Head of HR, Chief

Executive and Leader would also be involved before the settlement agreement is approved.

11. If the employee is a member of a trade union, their representative will be involved in the process. In York, trade union colleagues are very familiar with the practice and often propose this as a solution to the situation for their member and the organisation. This would then be duly considered. The employee must obtain legal advice prior to signing the legally binding document.
12. Settlement agreements are not used in relation to safeguarding matters.
13. Settlement agreements cannot prevent future litigation in an employment tribunal on the grounds of discrimination or whistle blowing.

### **Member Involvement in Settlement Agreements**

14. Whether a settlement agreement is appropriate in an employment situation is considered on a case by case basis by the relevant Officer tasked with the operational management of staff, with the benefit of professional legal and HR advice. The Head of Paid Service and Council Directors are responsible for all staffing matters other than for Chief Officers. Involvement by Members in general staffing matters would be inappropriate and likely to contravene the law relating to Members' access to information, which is set out at Part 5 to the Council's Constitution. It would also give rise to a significant risk of breach of confidentiality that could result in financial and reputational damage to the Council.
15. Directors have delegated responsibility for all of their functions, including staffing, provided such matters are not decisions which explicitly require Executive approval, for example where values exceed officer delegation, or where the decision is regarding Chief Officers.
16. Only where the employment situation concerns a Chief Officer would those Members specified within the processes set out in the Constitution be involved in any employment matter. (see Constitution: Intro 1.11.2 and Section 3C Page 17 Para 9).

### **Analysis of Settlement Agreements within the Council (Exc Schools)**

17. The table below shows the number of settlement agreements used since 2016.

Year	Schools	Council
2016	12	3
2017	5	1
2018	5	2

18. Business Cases for the agreements within the local authority were considered by the relevant officers as set out earlier in the report. Any decisions and subsequent payments made were based on the financial cost in conjunction with an assessment of risk and resource implications to the local authority.

### **Options**

19. Not relevant for the purpose of this Report.

### **Analysis**

20. Not relevant for the purpose of this Report.

### **Council Plan**

21. The explanation for Members of the concept and use of non-disclosure agreements helps support the overall aims and objectives of the Council by informing Members' understanding of the necessary separation of roles between Officers and Members where employment matters are concerned. Member involvement in employment matters is limited to that necessary in line with the Council's Constitution relating to Chief Officers.

### **Implications**

22. There are no implications to this Report in relation to:

- Finance
- Human Resources (HR)
- Equalities
- Legal
- Crime and Disorder
- Information Technology (IT)
- Property

23. There are no direct implications from this Report in relation to HR or legal matters. There are however wider implications for the Council in relation to any breach of a non-disclosure agreement. A breach of confidentiality

could result in the Council being sued and thus any sharing of information relating to non-disclosure agreements increases risk of serious financial and reputational damage to the Council.

## **Risk Management Assessment**

24. A clear distinction of the role of members and officers in relation to operational management of employees is important to understand. Only Members identified as having a role to play in the management of Chief Officers within the Council's Constitution can be concerned with employment decisions. All other operational HR management is outside the remit of Members. It is paramount that confidentiality is maintained in relation to non-disclosure agreements in the employment context and that information is not shared wider than is legally necessary within or outside the Organisation. Having clear guidance on the law in respect of the limitations on Member's access to information within the Council's Constitution is important in managing risk. This clear guidance is already contained within the Council's Constitution.

## **Recommendation**

25. That the report be noted

Reason: In accordance with the Committees responsibility to assess the effectiveness of the Council's guidance on Members' access to information and the distinction of the roles of Members and Officers in operational management of employees (other than Chief Officers), as set out in the Council's Constitution.

## Contact Details

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**Report**  **Date** 26 Feb 2019  
**Approved**

**Specialist Implications Officer(s)** List information for all

Peter Cairns, Senior Lawyer (Employment)

**Wards Affected:** List wards or tick box to indicate all **All**

**For further information please contact the author of the report**

## Annexes

Annex 1 Extract from CYC Settlement Agreement Template

## **Annex 1 Extract from CYC Settlement Agreement Template**

### **7. Confidentiality and other restrictions**

- 7.1 The parties confirm that they have kept and agree to keep the existence and terms of this agreement confidential, except where disclosure is to HM Revenue & Customs, their professional advisers, members of their immediate family (provided that they agree to keep the information confidential) or is required by law.
- 7.2 You shall not make any adverse or derogatory comment about us, our officers, employees or workers and we shall use reasonable endeavours to ensure that our officers, employees and workers shall not make any adverse or derogatory comment about you. You shall not do anything which shall, or may, bring us, our officers, employees or workers into disrepute and we shall use reasonable endeavours to ensure that our officers, employees and workers shall not do anything that shall, or may, bring you into disrepute.
- 7.3 The Employer agrees to provide a reference on letter headed paper in the terms agreed at Schedule 4 in respect of any request for a written reference from a prospective employer of the Employee. Such reference will be given within a reasonable period of a request being received. The Employer agrees not to materially depart from the terms of the said reference in respect of any oral enquiries. Where supplementary questions are asked by the prospective employer and/or a proforma request is received the Employer agrees to respond in terms no less favourable than those set out in the attached draft. The Employer agrees it will not in any circumstances use the term 'agreed reference' or infer that the reference was agreed as part of a settlement agreement.
- 7.4 If the Employer obtains information after the date of this agreement which would have affected its decision to provide a reference in the form in Schedule 4, it shall inform the Employee and may decline to give a reference.
- 7.5 Nothing in this Clause 7 shall prevent you from making a protected disclosure under section 43A of the Employment Rights Act 1996, making a disclosure to a regulator regarding any malpractice, reporting a criminal offence to any law enforcement agency or assisting with a criminal investigation or prosecution, and nothing in this clause shall prevent us from making such disclosure as we are required by law to make.