

Settlement Agreements

Summary

1. Recommendations from Audit and Governance (A&G) Committee in March 2019, an agreed process (shown in Annex 1) was confirmed by Staffing Matters and Urgency Committee (SMU), whereby an Executive member will be aware of, and, agree to progressing a settlement agreement with a member of staff. The business case will reflect the involvement of the Executive member and this will be included in the business case which is noted by Staffing Matters and Urgency
2. The process agreed was provided to A&G in December 2019, and as part of that process A&G would receive an annual report on the use of settlement agreements across the council and the associated money spent.
3. This report provides that annual update starting from October 2019 to March 2021. This is a longer period due to the commencement of the process and the impact of the pandemic, but future reports will be received in April each year.
4. Following work with the External Auditors over the past few months, we have identified the need to review the template business case used for such decisions where there is a financial impact on the Council and Value for Money assessment, therefore it is expected that the current template business that was agreed as part of the process will be amended. The current template business case as agreed is shown in Annex 2.

Recommendation

5. That the Report be noted.

6. To note that the business case template is being reviewed and updated and will be presented to a future meeting of Audit & Governance.
7. That Audit & Governance receive an annual report on the number of settlement agreements made across directorates throughout the financial year and the value each April.

Background

8. In March 2019 A&G committee considered a report from the Head of HR & OD with regards to Non-Disclosure Agreements. This report identified the difference between a settlement agreement and non-disclosure agreement. For clarity this is provided below for reference as there is often confusion about the two and members of the committee have changed since the previous discussion in March 2019.
9. A Non Disclosure Agreement (NDA) 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)
10. In an employment law context, an employer would rarely require an employee to enter into a stand-alone NDA.
11. When agreeing the mutual termination of an employment relationship however, an employer and employee can agree a “Settlement Agreement” that would include a confidentiality clause. Such a confidentiality clause is also commonly referred to as a NDA.
12. Typically the confidentiality clause (NDA) within a Settlement Agreement would only permit the employee to disclose its terms in limited situations, for example, to immediate family members and legal or professional advisers, or to make a protected disclosure.
13. “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.

14. 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.
15. There are existing legal safeguards in the use of Settlement Agreements as shown below.

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; and
 - The agreement must state that the conditions regulating settlement agreements under the relevant statutory provisions have been satisfied.
16. At CYC the Chief Officer approves and must seek the approval of the Executive Member, Finance Manager, HR Manager and the Councils Employment Lawyer to assess the suitability of use of a settlement agreement. Where a settlement agreement involves a Chief Officer then the Chief Operating Officer would consult with the Leader of the Council, and the appropriate decision making route identified as detailed in the constitution. Where the Executive Member has agreed to the parameters of the settlement agreement, then in line with the process shown at Annex 1, consultation can commence with the member of staff and their trade union representative.
 17. When a settlement agreement is considered in a school, the Headteacher seeks approval via the Governing Body.

18. Settlement agreements are not used in relation to safeguarding matters and cannot prevent future litigation in an employment tribunal on the grounds of discrimination or whistle blowing.
19. Whether a settlement agreement is appropriate in an employment situation is considered on a case by case basis by the relevant Chief 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.
20. 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.
21. 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.
22. 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).
23. In summary an Executive Member will be consulted and agree to the parameters of the settlement agreement through the business case outlined by the Chief Officer. Where agreement is given negotiations will commence and the process completed.
24. The business case will be presented to SMU for noting after the settlement agreement has been agreed.
25. On an annual basis the Audit & Governance committee should receive a report on the number of settlements agreements and cost across the financial year.

Consultation

26. This is an annual report for noting and is based on settlement agreements already made throughout the year. There is no requirement for consultation on this report. Consultation occurs at the time of any settlement agreement with the member of staff and trade unions.

Analysis

27. This section provides Audit & Governance with the number of settlements and total amounts paid. For reference I have included information for the past 5 years.
28. The table below shows the breakdown.

Financial year	CYC		Schools		Total	
	No.	Amount	No.	Amount	No.	Amount
2016/17	1	£38,000	8	110,602	9	£148,602
2017/18	2	£22,427	5	£40,271	7	£62,898
2018/19	3	£42,396	4	£18,060	7	£60,456
2019/20	5	£190,566	5	£60,905	10	£251,471
2020/21	1	£7,651	0	0	1	£7,651

29. The details of individual business cases from October 2019 are seen by SMU.

Next Steps

30. Following work with the External Auditors over the past few months, we have identified the need to review the template business case used for such decisions where there is a financial impact on the Council and Value for Money assessment.
31. We will therefore be reviewing and updating the template business case and will bring this back to a future meeting of Audit & Governance. The current template business case as agreed is shown in Annex 2.

Council Plan

32. The report is for noting and therefore not material to the Council Plan however the process is consistent with the required outcomes of the Organisational Development Plan.

Implications

33. There are no implications for the process as described. Any implication on individual cases will be detailed in the business case and considered at the time.

Risk Management Assessment

34. This approach manages the risk to the council and gives greater oversight and scrutiny whilst maintaining confidentiality in line with the settlement agreements.

Recommendation

35. It is recommended that Audit & Governance:
 - i. note the content of the report;
 - ii. note that the business case template is being reviewed and updated and will be presented to a future meeting of Audit & Governance; and
 - iii. receive an annual report on the number of settlement agreements made across directorates throughout the financial year and the value each April.

Reason

To provide assurance and oversight by Members.

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Approved

Specialist Implications Officer(s) List information for all

Janie Berry, Director of Governance & Monitoring Officer
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Wards Affected: List wards or tick box to indicate all **All**

For further information please contact the author of the report

Annexes

Annex 1 Process

Annex 2 Settlement Agreement Business Case

Background Papers

Previous reports to A&G

[Agenda for Audit and Governance Committee on Wednesday, 6 March 2019, 5.30 pm \(york.gov.uk\)](#)

[Agenda for Audit and Governance Committee on Wednesday, 4 December 2019, 5.30 pm \(york.gov.uk\)](#)

Previous Reports to SMU

[Agenda for Staffing Matters and Urgency Committee on Monday, 5 August 2019, 5.30 pm \(york.gov.uk\)](#)

Councils Constitution

<https://data.yorkopendata.org/dataset/cyc-s-constitution>