



# **Exit Strategies**

## **Guidance on the use of Settlement Agreements including Special Severance Payments**

---

## DOCUMENT INFORMATION & REVISION HISTORY

Title	Exit Strategies - Guidance on the use of Settlement Agreements including Special Severance Payments
Contact for Enquiries	Trudy Forster

Issue No	Issue Date	Author(s)	Nature of Amendment
V1	12/08/21	Trudy Forster	Original version written by Trudy Forster Changes made by Sam Healy (Barrister, Dere Street Barristers) – Accepted Changes Made by GMB – Accepted
V2	17/08/21	Trudy Forster	Changes made by Internal Audit
V3	19/08/21	Trudy Forster	Changes made by HR to item 4.4
V4	10/09/21	Trudy Forster	Changes made by Trudy Forster, Janie Berry and Debbie Mitchell following A&G Committee feedback Changes made by Sam Healy (Barrister, Dere Street Barristers)
V5	6/10/21	Trudy Forster	Changes made at 6.11 following A&G Feedback

**This guidance applies to all employees of CYC, including Chief Officers**

**1. Definitions:**

Settlement Agreements – (formerly known as Compromise Agreements)	A legally binding agreement signed by employer and employee resolving a dispute between them, such as the terms on which the employee’s employment is ended.
Special Severance Payments	Additional payments made to employees beyond what they are entitled to under their contracts of employment or statutory law.
Confidentiality Clause (often referred to as non-disclosure agreements or ‘NDAs’)	A clause in a Settlement Agreement that prevents the unauthorised disclosure by the employee of confidential information relating to their employment or its termination.
Statutory elements of pay	Those elements of pay that the employee is owed as a matter of statutory law applicable to all employees in the UK. For example, the right to be paid for annual leave or the right to receive a minimum amount when made redundant (so-called ‘statutory redundancy’)
Contractual Payments	Those elements of pay that the employee is owed under their contract of employment. For example, the normal remuneration paid for work done.
Best Value Duty	The best value duty, as set out in section 3 of the Local Government Act 1999 (“the 1999 Act”), provides that “ <i>A best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness</i> ”. The best value duty is relevant to local authority duties to deliver a balanced budget (Part 1 of the Local Government Finance Act 1992), provide statutory services (including adult social care and children’s services) and secure value for money in spending decisions. This will include decisions to make Special Severance Payments.

Chief Officer	Chief Officer at City of York Council are all staff on posts at Assistant Director, Director, Corporate Director and Chief Operating Officer
Statutory Officers	Head of Paid Service – Chief Operating Officer Monitoring Officer – Director of Governance Section 151 Officer – Chief Finance Officer/AD Finance
Legal Advice	Legal advice may come from within the council where the advice is for non-chief officers  Legal advice will be sought from external independent legal advisers where the payment is for a chief officer.

## 2. Reference docs

Cabinet Office Guidance on Settlement Agreements, Special Severance Payments on Termination of Employment and Confidentiality Clauses  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/817156/Cabinet-Office-guidance-on-settlement-agreements-special-severance-payments-on-termination-of-employment-and-confidentiality-clauses.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/817156/Cabinet-Office-guidance-on-settlement-agreements-special-severance-payments-on-termination-of-employment-and-confidentiality-clauses.pdf)

Guidance on Public Sector Exit Payments: Use of Special Severance Payments  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/989770/SPECIAL\\_SEVERANCE\\_GUIDANCE\\_v3\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/989770/SPECIAL_SEVERANCE_GUIDANCE_v3_FINAL.pdf)

### ***MHCLG Guidance***

Statutory guidance on the making and disclosure of Special Severance Payments by local authorities



SSPSG.pdf

## 3. Introduction

- 3.1 There are numerous reasons why people leave employment, from normal resignation by the employee through to dismissal of the employee by the employer.
  
- 3.2 The majority of the cases are straight forward, follow normal processes and do not result in any additional payments (Special Severance Payments).

However, there are a smaller number of cases where the contract of employment is terminated through dismissal by the employer or more complicated circumstances where the contract is terminated by mutual consent of the employer and employee.

- 3.3 It is in these cases where the council must ensure that any additional payments (Special Severance Payments) being made, over and above Contractual and statutory payments, are in line with legislation and the 'Best Value Duty'.
- 3.4 There are contractual and statutory elements of pay that have to be paid upon an exit, regardless of the reasons for the exit. Examples include outstanding annual leave and the minimum statutory redundancy payment, where the post held by the employee is being made redundant.
- 3.5 Special Severance Payments do not fall into the category of payments that the council is obliged to pay a departing employee and do not usually represent value for money. As such, they should only be used in truly exceptional circumstances and after following due process. The size of any Special Severance Payment must be kept as small as possible in order to provide value for money for the taxpayer and the economic rationale for the payment must be clear. Where a Special Severance Payment is made there must be complete transparency about that fact and the reasons why it is being made.
- 3.6 The council should not be using Special Severance Payments as a soft option. For example, to avoid management action or disciplinary processes against an employee, unwelcome publicity, embarrassment or reputational damage for the council
- 3.7 As a council we need to ensure that before making a Special Severance Payment we follow the correct approval process and that those making the decision have all the relevant the information upon which to make a properly informed decision.
- 3.8 Where a Special Severance Payment is to be made to an employee, the council will agree a written Settlement Agreement with that employee. Any Settlement Agreement may include a Confidentiality Clause, but only where legal advice is to the effect that it is proportionate, reasonably necessary and in the best interests of the council to do so. The precise contents of a Confidentiality Clause will vary from case to case. A Confidentiality Clause cannot be used to prevent an employee from making a protected disclosure (so-called 'whistleblowing').
- 3.9 The purpose of this guidance then is to:
  - Set out the Council's view that Special Severance Payments do not

usually represent value for money and should only be considered in truly exceptional circumstances

- Set out the criteria that the Head of Paid Service should consider in deciding if there are exceptional circumstances in which it may be appropriate to make a Special Severance Payment, in conjunction with the Section 151 Officer and Monitoring Officer.
- Clarify the approval process for making a Special Severance Payment
- Clarify the disclosure and reporting requirements where Special Severance Payments are made.

3.10 This guidance does not cover Special Severance Payments made in maintained schools. School Governing Bodies are responsible for those decisions.

#### **4. Reasons for Leaving**

4.1 Employees can leave employment through a number of routes, the primary one being resignation. However, there are occasions where staff will be dismissed by the employer or where there is a mutual agreement between employer and employee to end the employment relationship.

#### **4.2 Resignation**

Where an employee has resigned, this exit will be progressed through the completion of the leaver's paperwork, found at the following link: <https://colin.york.gov.uk/besupported/hr/leaving-the-council-1/leavers-procedure/>. In terms of payment, the employee will usually only be entitled to their normal earnings up to the date of their resignation and any outstanding holiday entitlement. Line Managers are encouraged to work with employees who are resigning to use their annual leave prior to their leave date. Payment of outstanding leave should be by exception.

#### **4.3 Retirement**

##### Normal Retirement

Where an employee retires and has access to their pension with no discretion, this exit will be progressed through the completion of the leaver's paperwork found here. As with a resignation, the employee is usually entitled to their normal earnings up to the date of their retirement and any outstanding holiday entitlement.

Where staff retire and have access to their pension with a discretion the Pension Discretion policy should be followed.

<https://colin.york.gov.uk/media/419742/cyc-pension-discretions-policy-statement-2021-final-published.pdf>

## Early Retirements in the efficiency of the service

These are early retirements that will facilitate an increase in the efficiency of the business unit in question, for example through the introduction of more effective working methods or the provision of an opportunity to introduce new skills into service delivery. Normally, the business case will demonstrate how the additional costs arising out of the early retirement can be met within the first five years from the date of retirement.

### 4.4 **Ill Health Retirement**

Where a member of staff retires through ill health, there is a discrete process to follow. This is explained in the Manager's Toolkit which is found in the Attendance Management page:

<https://colin.york.gov.uk/besupported/hr/absence-leave-and-flexible-working/attendance-management/>

### 4.5 **Dismissal**

Where an employee has been dismissed following a disciplinary/dismissal process hearing, the employee will usually receive all statutory and contractual pay elements. Where an employee is dismissed, it will usually be with notice although the employer may instead elect to make a payment in lieu of notice ('PILON'). This is where the employer pays the employee what they would have received during the notice period without the employee being required to work. Where the employee is dismissed for gross misconduct, they will not usually be entitled to be dismissed with notice or to receive PILON.

There may be instances following a dismissal where it is appropriate to enter into a Settlement Agreement with the employee. For example, to prevent the employee bringing a claim before an Employment Tribunal and receiving compensation from such. This may give rise to the making of a Special Severance Payment to the employee dependent upon the circumstances and the protection of the council.

### 4.6 **Redundancy**

Redundancies are a form of dismissal, and can happen when an employee's job no longer exists. This may be due to needing to reduce the workforce, close part of the business, or when certain work is no longer needed. If an employee is made redundant they may be eligible for redundancy pay and other certain rights such as time off to look for work. There are two forms of redundancy:

#### Compulsory Redundancy

This is where the employee does not agree to being made redundant and the decision is one taken by the employer. The Council will try to minimise the

need for compulsory redundancies but there may be occasions when this is unavoidable.

#### Voluntary Redundancy

Where redundancies are planned, one of the measures the council can take to avoid compulsory redundancies is to seek volunteers in the first instance. This is known as Voluntary Redundancy, where both employer and employee agree that the employment should be ended by way of redundancy. Where the council is running a specific voluntary redundancy programme it will be publicised and employees informed.

#### **4.7 *Mutual termination of contract of employment***

There are instances where both parties wish to terminate the contract of employment. In these cases of mutual termination there will usually be a Settlement Agreement reached between the parties and this may include the making of a Special Severance Payment. As part of a mutual termination the council is normally required to pay contractual and statutory pay elements to the employee.

### **5. Special Severance Payments**

5.1 Special Severance Payments are paid to employees outside of normal statutory or contractual entitlements when leaving employment in public service, whether they resign, are dismissed or there is a mutual termination of employment.

5.2 Special Severance Payments are any payments on termination of employment which do not correspond to an established contractual, statutory or other right. The types of payments which are Special Severance Payments will vary according to an employees' circumstances, and therefore the examples below are illustrative only. In the case of any doubt as to whether a payment constitutes a Special Severance Payment, approval should be sought from the Employment Law adviser

5.3 Any payment in respect of which the right to payment is disputed by the employer, in whole or in part, should be treated as a Special Severance Payment which requires approval.

5.4 The following types of payments are likely to constitute Special Severance Payments:

- Any payments reached under a Settlement Agreement other than those amounting to statutory elements of pay or contractual payments. For example, payments proposed to be made in return for the employee not bringing legal proceedings or discontinuing existing proceedings;
- The value of any employee benefits or allowances which are allowed to

continue beyond the employee's agreed exit date;

- Write-offs of any outstanding loans;
- Any paid special leave, such as gardening leave;
- Any honorarium payments or gifts;
- Any hardship payments;
- Any payments to employees for retraining related to their termination of employment.

5.5 The following types of payments may constitute Special Severance Payments, depending on the terms of the individual's contract, relevant statutory provisions, any non-statutory applicable schemes and other relevant terms and conditions:

- Pay in lieu of notice (PILON), depending on the contractual basis for the payment;
- Pension strain payments arising from employer discretions to enhance standard pension benefits.

5.6 The following do not constitute Special Severance Payments:

- Statutory redundancy payments;
- Contractual redundancy payments, whether applicable to voluntary or compulsory redundancy, and whether agreed by collective agreement or otherwise;
- Payment for untaken annual leave;
- Payments ordered by a court or tribunal.

## **6. CYC Approval Process**

6.1 Special Severance Payments when staff leave employment of the council should be exceptional. They require Statutory Officer (Head of Paid Service, Section 151 and Monitoring Officer) approval because they are novel, contentious and potentially repercussive.

6.2 Where the Special Severance Payment is being made for a Chief Officer, approval is required from the Statutory Officers mentioned above and from the Staffing Matters and Urgency Committee.

6.3 Where the Special Severance Payment is being made for the Head of Paid Service, the Monitoring Officer will lead through the process, seeking approval from the Section 151 and Staffing Matters and

Urgency Committee. Where the Special Severance payment is for the Monitoring Officer or Section 151 then the Head of Paid Service will lead through the process. In both cases supported by the Head of Human Resources, taking into account the JNC Handbook.

#### 6.4 ***Process for Approval***

It is important to ensure that Executive Member approval is sought before any offers of a Special Severance Payment, whether oral or in writing, are made to an employee. The process required to seek approval is as follows:

6.4.1 Chief Officer completes the Business Case at Annex A.

6.4.2 The form requires approval from of the relevant Executive Member and Officers, Finance Manager, HR Manager, Head of Paid Service, Chief Finance Officer and Monitoring Officer.

6.4.3 Where the Special Severance Payments relates to a Chief Officer, following the completion and approvals at Annex A, the form including the details upon which to make a decision is submitted to the Staffing Matters and Urgency Committee for its approval.

6.5 The council must ensure that Special Severance Payments are transparent and negotiated avoiding conflicts of interest. This is especially important in respect of Chief Officers.

#### 6.6 ***Criteria for the assessment of cases***

The Business Case (Annex A) must be completed in full before any approval and decision is made. This business case must be sufficiently strong to be subject to scrutiny and all relevant information included upon which a decision can be made.

#### 6.7 ***Completion of the Business Case (Annex A)***

The Business Case must include consideration of the matters set out below.

6.7.1 Overview of the department / team in which the individual works, including:

(a) Key deliverables

(b) Size of workforce

6.7.2 The terms of employment and any contractual clauses relevant to the proposed Special Severance Payment.

6.7.3 The business reasons for the proposed Special Severance Payment, e.g. to settle a grievance or employment tribunal claim.

6.7.4 Key dates and decisions that led to the need of a Special Severance Payment.

6.7.5 The total cost of the exit payment proposed to be made to the employee, clearly stating the Special Severance Payment separately to contractual and statutory elements of pay.

## 6.8 **Financial Considerations**

There must be evidence that the cost of the Special Severance Payment represents value for money and that the Best Value Duty will be fulfilled. The economic rationale for the Special Severance Payment should be clear and include consideration of:

- (a) Whether the departure of the employee from the council can be achieved at a lower cost to the council, including whether the employee would be prepared to leave receiving statutory and contractual payments only;
- (b) Any efficiency savings from workplace reform, such as reduction in posts etc.;
- (c) Associated repercussive risks / conduct issues to the delivery of the organisation's objectives.

6.9 Where relevant, independent legal assessment of an organisation's chances of winning or losing an employment tribunal claim and the potential value of any award that may be made.

## 6.10 **Non-financial considerations**

There must be evidence that all options other than Special Severance Payments have been exhausted including:

- (a) Evidence that, where relevant, a performance improvement plan in line with internal performance management processes has been considered and not unreasonably discounted. Special Severance Payments should not be used to avoid performance management processes.
- (b) Evidence of good performance of the individual if the exit is not performance related.
- (c) Evidence of other measures to prevent the exit, including full efforts made to perform reasonable adjustments or where relevant, redeployment within the council.

6.11 Consideration should be given to the circumstance and number of other Special Severance Payments agreed in the last 12 months and those the payment of which is pending.

## 6.12 ***Repercussive Risk***

There should be evidence of consideration of the wider impact on the council of the proposed Special Severance Payment and whether it is likely to set a precedent for future cases. For example:

- (a) Evidence that the Special Severance Payment represents a one-off cost (to resolve a specific issue);
- (b) Evidence of consideration of the impact of making a Special Severable Payment on the wider workforce, including whether such is likely to encourage further claims by employees;
- (c) Evidence of the completion of a lessons learnt exercise and measurable improvement plan (including dates) to reduce the risk of the council having to make further Special Severance Payments. This is linked with the action required in paragraph 6.15 (c).

## 6.13 ***Particular considerations for Special Severance Payments***

Any payment proposed as part of a Settlement Agreement in excess of contractual, statutory and other entitlements is a Special Severance Payment and authorisation must be given by Statutory Officers and/or the Staffing Matters & Urgency Committee before such a settlement is agreed.

- 6.14 Where there is a dispute between the council and employee or ex-employee, the council should consider, at an early stage, the likelihood of an employment tribunal or other claim and seek legal advice on the potential costs involved. The council must first consider non-financial avenues to resolve disputes in collaboration with the parties involved.
- 6.15 Proposals for Special Severance Payments, should consider the following (where appropriate):
- (a) Evidence of attempts to resolve a grievance before it escalates to an employment tribunal claim.
  - (b) Precedents from other parts of the public sector may not always be a reliable guide in any given case;
  - (c) Legal advice that a Special Severance Payment appears to offer good value for the council may not be conclusive since such advice may not take account of the wider public interest;
  - (d) Even if the cost to the council of defeating an apparently frivolous or vexatious claim will exceed the likely cost of the proposed exit payment to the employee, it may still be desirable to take the case to formal proceedings given :
    - Winning such cases will discourage frivolous or vexatious claims and demonstrate that the council does not reward such claims.
- 6.16 The council's default approach is not to settle, we must ensure Special Severance Payments are only made in exceptional

circumstances and represent value for money. Special Severance Payments will only be considered if: Attempts to settle the dispute without Special Severance Payments have been made and either

- (a) Legal advice has been sought and clearly recommends settling the claim with the making of the proposed Special Severance Payment; or
- (b) Where legal advice is finely balanced, there is a clearly evidenced value for money case and settling is clearly the best course of action, satisfying the best value duty.

6.17 It is especially important that those individuals within the council who are the subject of complaints brought by an employee play absolutely no role in deciding whether a Special Severance Payment should be made to that employee. Special Severance Payments must not be used to avoid the dealing with complaints/grievances or to avoid unwelcome publicity or embarrassment.

## **7.0 Recording of Special Severance Payments**

7.1 All approved Special Severance payments will be recorded within Finance. Any exit payment must be recorded and reported on an annual basis to central government.

## **8.0 Audits of Special Severance Payments**

8.1 Staffing Matters and Urgency will approve or not, via the Business Case (Annex A) any Special Severance Payment for Chief Officers

8.2 All approved Special Severance Payments for any employee, excluding Chief Officers, will be noted at Staffing Matters and Urgency. Staffing Matters and Urgency will receive in private session a copy of the Business Case, Annex A.

8.3 Internal Audit will carry out a six monthly review of the Special Severance Payments made in the council and will report their findings to Audit & Governance on an annual basis.

8.4 Audit & Governance will receive an annual report from Internal Audit on the council's compliance with this framework and therefore the use of Special Severance Payments by the council.

8.5 This guidance will be reviewed by the Corporate Consultation/Negotiating committee (CCNC) on an annual basis and any amendments will be reported to Staffing Matters and Urgency. This process will incorporate **consideration of the information mentioned above** collated by Internal Audit **and Audit and Governance**.

## Annex A

### Proforma for Special Severance Business Cases

Special Severance Business Case	
Chief Officer Responsible	
Directorate and Team	
Date case is submitted	
Date decision is needed and why	
Executive Member – Name and Approval Date	
Confirm notification to Internal Audit Name and Date	
For Chief Officers confirm notification to External Audit Name and Date	
Finance Manager Name , Approval and Date	
HR Manager Name , Approval and Date	
Monitoring Officer Approval and signature, Date	
Chief Finance Officer Approval and	

Signature, date	
Head of Paid Service Approval and Signature	
For Chief Officers Date of Staffing Matters & Urgency Committee	
<b>Circumstances of the Case</b>	
<b>Overview of the Case and Organisation</b>	
<p><i>Please provide a brief case history, with key dates, summarising how the situation has come about. Specify organisations key deliverables, size and previous use of severance payments</i></p>	
<b>Terms of employment</b>	
<p><i>What are individual's terms of employment (length of service, current salary, contractual notice period, type of contract (e.g. fixed term, part time)?)</i></p>	
<b>Breakdown of proposed exit payment</b>	
<p><i>Please list each type of payment separately e.g. Statutory redundancy, pay in lieu of notice, Special Severance Payment</i></p>	

Proposed ways of proceeding

*What is the individual's contractual entitlement, and why do you propose to make a Special Severance Payment? What is the scope for reference to tribunal (incl. summary of the legal assessment of the chances of winning or losing the case, potential consequences)? Other options considered?*

Financial Considerations

The value for money consideration underlying the proposed payment

*A Value for Money assessment is the process of comparing all the costs, including those of any alternative options, with potential efficiency savings from the proposal and any non-financial benefits, such as the impact on staff morale and the achievement of Council objectives. It is not possible to provide a comprehensive list of all the factors to take into account but some examples are provided below; break-down of costs, including legal costs; potential tribunal awards, efficiency savings from workplace reform and/or any associated repercussive risks e.g. conduct issues to the delivery of the organisation's objectives. It must provide a rationale for proposed level of settlement (with pay comparison i.e. x months' pay / y% of salary); costs of alternative options, and why a proposed settlement offer demonstrates the best value for money solution. When considering vfm, non-financial costs (i.e. effect on staff morale, achievement of business objectives, the impact of not agreeing the proposal, reputational risk and improving productivity) will also be considered.*

Non- Financial Considerations
Performance management
<i>Specify if performance has been an issue for the individual. Provide details of performance management procedures followed if applicable.</i>
Management procedures
<i>Specify measures taken to prevent the exit, including efforts to perform reasonable adjustments, resolve grievances or redeploy.</i>
Repercussive risk
Lessons learnt from this case
<i>Explain what lessons have been learned and how management systems have been/will be improved to avoid future occurrences of similar cases.</i>
Wider impact and potential precedents
<i>Explain whether this case might have an impact on or set a precedent for other existing or future cases.</i>
Any other useful information

