

Settlement agreements, pre-termination negotiations and cooling off periods

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The ACAS guide on settlement agreements recommends that employers allow employees a minimum of 10 calendar days to

consider a settlement agreement and to receive legal advice. That is a lot longer than many employers would want to give staff, so the question is can this guidance be ignored?

Under the new regime, employers can now approach staff with a view to terminating their employment in exchange for a financial package with a greater degree of certainty that if the employee rejects the offer and is eventually dismissed and sues for unfair dismissal the tribunal will not find out about the offer. There are some exceptions to this, one of which being if an employee alleges the employer behaved improperly. Improper behaviour includes putting undue pressure on a party, for example, not giving the employee a reasonable period of time to consider the offer. Breach of the ACAS code is evidence of improper behaviour.

In short then, if you do not allow the employee ten days to consider but they ultimately accept an offer, there is no additional legal exposure. This is what will happen in most situations.

If the employee rejects the offer, does it matter if the Tribunal finds out that the offer was made? Our answer would be that it depends on how the offer is put. If you say to an employee *"take this offer or we will go through the disciplinary process and fire you for gross misconduct"* then yes it would matter, but then even if you gave the employee ten days to think about it you would still be applying improper pressure so the tribunal would find out about the conversation anyway.

If you put the offer along the lines of: *"if you do not take this offer, we will start the disciplinary process. We cannot prejudge the outcome but dismissal is one of the things that could happen but equally you may be found innocent and no action taken"* and give the employee five rather than ten days to think about it, it is unlikely this will make the difference between the tribunal finding the dismissal to be

fair or unfair.

To conclude then, other things being equal it is better to allow an employee ten days to think about the offer but other things are rarely equal when you are talking about introducing this length of delay. In most cases, the modest benefits of complying with the ACAS code will be outweighed by the cost and loss of momentum caused by this kind of delay. In many cases, you will be better off ignoring the guidance.

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