



EMPLOYMENT LAW FOCUS – COMPROMISE AGREEMENTS

Philip Henson, partner, and head of employment law in the award winning City of London (UK) law firm **Bargate Murray** discusses compromise agreements, confidentiality clauses and Andy Coulson.

Compromise agreements, confidentiality clauses and Andy Coulson

Tom Watson (Member of Parliament for West Bromwich East) has recently written to Mr. Peter Wardle, the Chief Executive of the [Electoral Standards Commission](#) asking him to investigate alleged potential breaches of the Political Parties Elections and Referenda Act 2000 (the Act) in respect of payments allegedly received by former News of the World Editor, and former Conservative party director of communications, Andy Coulson. Mr Watson specifically refers to sections 50 and 51 of the Act, which relate to sponsorship. Mr Watson's letter has been reproduced in full on his [blog](#).

Mr Watson's letter came about following a [report](#) by Robert Peston (BBC Business Editor) which alleged that Andy Coulson received "several hundred thousand pounds after starting work as the Conservative Party's Director of Communications in July 2007"; and that he was allowed certain benefits – presumably as part of a negotiated settlement, recorded in a compromise agreement, from News International.

The purpose of a Compromise Agreement

Many employers, particularly large employers and professional organisations, request that departing employees enter into a compromise agreement as a matter of course. Indeed drafting compromise agreements for employers, or negotiating the terms of compromise agreements for employees, is something that I do almost every day as part of my busy practice at [Bargate Murray](#).

In a nutshell by entering into a compromise agreement the employee (or former employee) effectively waives all of their statutory employment related claims (although there are some statutory exemptions that cannot be settled by means of a compromise agreement) and sets out the payments to be made to the employee, and when such payments will be made.

Requirements for a valid compromise agreement

In order for the compromise agreement to be valid, it has to meet the following criteria:

- It must be in writing;
- it must stipulate the particular proceedings, or particular complaints;
- the employee (or ex-employee) must obtain independent legal advice from a relevant independent legal adviser as to the terms of the compromise agreement, and its effect on their ability to pursue their rights before an employment tribunal;
- The independent adviser should be identified in the agreement;
- The usual procedure is for the independent legal adviser, (usually a "qualified lawyer" - solicitor, barrister - although it can be a certified officer of an independent trade union) to sign a separate schedule to the compromise agreement to confirm that they have given the employee independent legal advice, and that they are independent (essentially that they have not represented the employer, or any associated, group or subsidiary companies, and are not employed by the employer; and are not themselves the employer), and that they hold professional insurance in respect of the advice that they have given the employee; and,
- The agreement must also state that the relevant conditions regulating compromise agreements have been satisfied.

Staggered Payments

It is common for very large payments paid pursuant to a compromise agreement to be spread out over a period of several months – indeed some employers liaise with accountants, tax advisors, and HMRC in an effort to spread such payments over two tax years. They may also take specialist advice as to how payments can be structured to be more tax efficient, for example by making a payment of part of the monies directly into the employee's pension.

Some lawyers recommend that employers ask the employee (or ex-employee) to enter into two compromise agreements: one to be signed before the expiration of the statutory limit on bringing an employment claim (which is usually three months less one day from the Termination Date, or discriminatory act complained of); and then sign a second compromise agreement after the expiration of the statutory limit to confirm, and undertake, that they have not issued a claim against the employer, or arranged for a third party to do so on their behalf in the intervening period.

Confidentiality Clauses

Compromise agreements almost always include a clause setting out the, often stringent, confidentiality obligations imposed on the employee (there are sometimes mutual obligations on both the employee and employer) to keep the terms of the compromise agreement confidential; the circumstances leading up to the compromise agreement confidential; and sometimes the existence of the compromise agreement itself confidential. As consideration for entering into such confidentiality obligations it would be

usual to pay the employee an additional amount; although this is often very small, such as £100, upon which the employee would be taxed.

One can ordinarily expect to find a carve out provision within a compromise agreement allowing the employee to tell their "immediate family", "professional advisers" and possibly insurers about the terms of the agreement, if they in turn agree to keep the terms confidential.

Piercing the veil?

One can also expect to find a clause permitting disclosures to HMRC, or as "required by law".

Example wording of a standard boiler plate clause would be as follows (my emphasis):

"The Employee and the Company confirm that they have kept and agree to keep the existence and terms of this agreement and the circumstances concerning the termination of the Employee's employment confidential, save where such disclosure is to HM Revenue & Customs, or required by law"

If there is such a provision in Andy Coulson's compromise agreement (if indeed he has entered into one), I wonder whether the Select Committee could request disclosure of that agreement? I would submit that such a distinction would depend upon the constitution and rules of the Select Committee, its powers and its specific ability to request disclosure.

P45

Mr Watson will be keen to establish if any payments were made to Mr Coulson, and whether senior Conservative party figures were aware of any such payments. It may be that Mr Coulson's [P45](#) from when he left News International (which he would have provided to his new employer – presumably Conservative head office, and later 10 Downing Street) sets out more detail of monies received?

By Philip Henson, partner and head of employment law at award-winning London law firm, [Bargate Murray](#).

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