Compromise Agreement Protocols

To be Issued by Personnel & Development and Legal Services.
DRAFT FOR DISCUSSION PURPOSES ONLY – Version 3

1. Introduction

A compromise agreement is a legally binding agreement made between an employer and employee (or ex-employee). Under a compromise agreement, an employee agrees not to pursue particular claims in relation to his or her employment or its termination, in consideration of, usually, a financial settlement provided by the employer.

A compromise agreement represents an alternative route for both an employer and employee to going through a formal staff procedure that is, or may expected to be, particularly problematic or unnecessarily time consuming. Examples of such procedures include the Kent County Council ('KCC') Disciplinary Procedure, the KCC Performance and Capability Procedure, the KCC Harassment Procedure or the KCC Redundancy and Redeployment Procedure.

They are also used by employers as a means of settling serious grievances. Examples would include unlawful discrimination, breach of contract or constructive dismissal claims. They can also be used to avoid the publicity and an uncertain outcome of an Employment Tribunal, County Court or High Court case.

If a dismissal is, or is expected to be, carried out fairly and following proper procedures, it may be that an employer will decide that there is no need for a compromise agreement. In KCC, they should only be considered in such cases where there is uncertainty as to the outcome and this represents a risk to KCC, either in financial or reputational terms.

2. Purpose and Scope of this Policy

Under KCC's Constitution, all compromise agreements can only be authorised by the Director of Law and Governance, who will be guided by the professional expertise of Personnel and Development and Legal Services. This policy has therefore been prepared to provide protocols for KCC staff in Personnel and Development and Legal Services who deal with matters where a compromise agreement is being contemplated.

This policy applies to all staff employed by KCC, including schools, but has no application to Foundation or Voluntary Aided schools unless the compensation is paid directly by KCC as opposed to it coming from the school's delegated budget.

This Protocol also applies to COT3 agreements (agreements negotiated through ACAS to settle employment disputes).

3. Structure of this Policy

This section describes the protocols (the ‘Protocols’) in detail.

Authorisations of Compromise Agreements

The KCC Constitution states that only the Director of Law & Governance can authorise a compromise agreement to be signed. All agreements, in addition to any other approval requirements noted below, therefore need to be approved by the Director of Law and Governance and will need to be signed off by a solicitor in Legal Services, who he/she has authorised to sign.

KCC is responsible for any decision at to whether to proceed on an individual severance. However, it is a recommendation of the Audit Commission that before compromise agreements of a significant financial value, (agreements where a ‘compensatory sum’ (see below) of £50,000 or more is payable by KCC), can be formally agreed and signed they must be approved by the following (collectively known as “the Advisers”):

- the Monitoring Officer; and
- the Director of Personnel and Development; and
- the Director of Finance

Agreements where a ‘compensatory sum’ of £50,000 or more is payable by KCC are known as ‘Large Sum Agreements’. Those below this threshold are known as ’Small Sum Agreements’.

In addition to being approved by the Advisers, Large Sum Agreements have additional requirements in order to comply with guidance from the Audit Commission and to meet governance requirements in KCC. These requirements are highlighted as appropriate in these Protocols and Appendix B. Small Sums Agreements fall outside the Audit Commission’s requirements.

In addition, where a proposed agreement concerns a Chief Officer or an M-Grade Manager, the final decision on whether an agreement should be entered into rests with the KCC Personnel Committee. If they are minded to approve an agreement, for Chief Officers and M-Grade Managers only, the Director of Finance should then consult with the Audit Commission in order to deal with any objections which may otherwise prevent the agreement from being finalised and provide the information in Appendix B.

A ‘compensatory sum’ is a sum of money to be paid in connection with the termination of an individual employee’s employment that is in excess of any payments that an employee is contractually entitled to (for example accrued holiday pay). Where the liability to pay a compensatory sum is split between KCC and the Governing Body of a community or voluntary controlled school, this protocol only applies to the element to be paid by KCC. For example, if the compensatory sum is £60,000 but £15,000 is to be paid by the Governing Body of a community or voluntary controlled school, then the parts of the Protocols relating to Small Sum Agreements only would apply.

Pre-drafting Steps Relating to a Compromise Agreement

3.1 All proposed agreements, until they are approved by either:

- the Advisers for Large Sum Agreements (and the KCC Personnel Committee for a Chief Officer or an M-Grade Manager);or
- the solicitor for Small Sum Agreements

must only be discussed on a ‘without prejudice and subject to contract’ basis. This means that the following must be headed “Without Prejudice and Subject to Contract”:

1. any meetings between management and the employee, and / or
2. any written communications arising from those meetings

The reason for this is that if negotiations are not done on a without prejudice basis then things said or offers made can themselves give rise to separate claims over and above those claims originally within the contemplation of the parties.

3.2 Decisions on redundancies and early retirements of Chief Officers and M-Grade Managers , including decisions to send them on ”gardening leave”, must be taken by the Managing Director and the Director of Personnel and Development, or the Chief Executive and the Director of Personnel and Development if it concerns a Managing Director. Where such a decision is contemplated, there should be consultation with the political group leaders, the Chief Executive (where applicable), the Director of Law and Governance and the Director of Finance. Any consultation on decisions on redundancies and early retirements must be completed within five working days.

3.3 All other redundancies and early retirements (other than ill health) are to be jointly agreed by the Director of Personnel and Development and the Managing Director. In addition, details of all early retirements with augmentation of pension or a charge for early release of scheme benefits to be borne by KCC only are to be reported to the Personnel Committee on a 6 monthly basis. All other terminations of employment, including decisions to send employees on “gardening leave” are to be agreed by the Managing Director or other Senior Manager delegated by him after taking advice from the relevant Personnel Business Support team, and consulting with the relevant approving manager and the relevant budget holder (if that person is not the manager).

3.4 The decision as to whether or not to approve a retirement or termination may need to take into account any augmentation of pension/early release of scheme benefit charge being borne by KCC/pay in lieu of notice/lump sum payments (as appropriate). Any award of augmentation of pension or early release of scheme benefits charges to be borne by KCC will require a joint recommendation from the Director of Personnel and Development or their nominee and the relevant Managing Director, following consultation with the Director of Finance and the relevant Cabinet member.

3.5 There is no contractual entitlement to any payment in lieu of notice (PILON). PILONs must only be made in exceptional circumstances and must demonstrate value for money. No PILON may be for a greater gross financial amount than the employee would have received had they worked their notice. In addition, for Chief Officers and M-Grade Managers, all PILONs must be approved by the Director of Personnel and Development, or their nominee, following consultation with the political group leaders, Chief Executive, Director of Law and Governance or their nominee and the Director of Finance or their nominee. This consultation must be completed within five working days.

Drafting Steps Relating to a Compromise Agreement

3.6 Once the decision to proceed with a retirement or termination has been taken in principle, a draft compromise agreement will be produced by agreement between Personnel and Development and Legal Services. A model compromise agreement template has been prepared by Legal Services for staff in Personnel and Development and is updated periodically. If a member of staff in Personnel and Development should, by agreement, prepare the first draft of a compromise agreement, the most recent version of this model should be used and is available from the Employment Strategy Group in Personnel and Development.

3.7 To obtain formal approval, the first draft of the agreement must be quality assured and approved by both Personnel and Development and Legal Services. The first draft of the agreement should then be agreed in principle (on a without prejudice and subject to contract basis) with the employee or his legal or union adviser, before seeking final formal approval.

3.8 For Small Sum Agreements, in order to quality assure the agreement the following information as detailed in Appendix A must be provided. For Large Sum Agreements, the information as detailed in Appendix B must be provided.

3.10 For governance reasons, the rationale provided in either Appendix A or Appendix B should address all of the issues including the strengths and weaknesses of the case. Additionally, the solicitor dealing should make a recommendation (with reasons) as to why the agreement does or does not represent good value for money. In the unlikely case of a disagreement between the solicitor dealing and the management side, which makes an agreed rationale not possible, the management may make its own submissions as to why the agreement should go ahead.

Steps for Agreeing and Finalising a Compromise Agreement

3.11 As noted in the 'Authorisation of Compromise Agreements' section, for Large Sum Agreements the Director of Finance will consult with the Audit Commission in order to deal with any objections which may otherwise prevent the agreement from being finalised and provide the information in Appendix B. The final decision as to whether or not to approve any particular agreement lies with the Advisers, or the KCC Personnel Committee for Chief Officers and M-Grade Managers. The report to Personnel Committee will follow Appendix B of this protocol. If Personnel Committee are minded to approve an agreement, for Chief Officers and M-Grade Managers only, the Director of Law and Governance will inform the solicitor dealing and the relevant manger of the final decision and also notify any modification which he/she requires to be made to the agreement.

3.12 For Small Sum Agreements, the Director of Law and Governance will inform the solicitor dealing and the relevant manger of the final decision and also notify any modification which he/she requires to be made to the agreement. If the agreement is approved with or without modifications, that approval will act as authority enabling the solicitor dealing to sign the agreement on behalf of Kent County Council when it is concluded.

3.13 The final version of the agreement can then be agreed with the employee and his/her advisers and the heading “Without Prejudice and Subject to Contract” can be dropped when final agreement has been reached.

3.14 The agreement should then be signed by the employee and (where appropriate his or her representative) and returned to KCC (usually the relevant Personnel Business Support team contact or Employee Relations manager contact).

3.15 For Large Sum Agreements, the solicitor dealing or a colleague will then seek the formal approval of the Director of Law & Governance to sign the agreement on behalf of KCC if not already obtained.

3.16 The relevant Personnel Business Support team contact or Employee Relations manager contact should then be informed of agreement.

3.17 Employee Services should be informed of termination of the contract and the amount to be paid or (for ex-employees) Accounts Payable notified to make payment within the agreed timescale by the relevant Personnel Business Support team contact or Employee Relations manager contact.

3.18 If a pension payment is part of agreement, the relevant Personnel Business Support team or Employee Relations manager contact will need to communicate with the relevant Pensions Section directly and complete a Pensions Early Retirement (PEN ER) form. Otherwise the normal leaver process will be followed by Employee Services.

3.19 Finally, a copy of the signed agreement should be retained on the employee’s personal file for a minimum of 6 years and a copy of that agreement should be retained by Legal Services. Where an agreed reference is part of the agreement, this must be retained on file indefinitely.

3.20 If no agreement can be reached, normal actions resume, e.g. action under the KCC Redundancy and Redeployment, Disciplinary or Performance and Capability Procedures.

Compromise Agreement Protocols
Appendix A – Details of Information to be Provided for 'Small Sum Agreements'

3.8.1 A copy of the draft compromise agreement together with any appendices.

Included ☐
Not Included ☐ (please say why if not)

3.8.2 A detailed factual background, including

a) a summary of reasons why a compromise agreement is thought to be desirable and necessary

b) an explanation of what potential legal claims the compromise agreement is seeking to avoid.

3.8.3 An analysis of the full financial cost to the Authority of the severance package contemplated in the agreement (including the cost to the Authority of augmentation of pension or a charge for early release of scheme benefits to be borne by KCC) must be disclosed:

3.8.4 An explanation as to why it is not possible or desirable to remove the employee from his/her employment in way that would lead to the employee receiving a sum of money less than the cost of the proposed agreement, e.g. making the employee redundant rather than awarding a large compensatory sum under a compromise agreement:

3.8.5 An explanation as to why augmentation of pension or a charge for early release of scheme benefits to be borne by KCC, is necessary or desirable given KCC's general policy is not to grant additional scheme membership, except in the case of overall benefit and with the approval of the Managing Director and the Director of Personnel & Development. Such approval must also be obtained.

3.8.6 Any other significant issues which should be taken into account.

Compromise Agreement Protocols
Appendix B – Details of Information to be Provided for 'Large Sum Agreements'

3.8.1 A copy of the draft compromise agreement together with any appendices (a signed version will also be required for Chief Officers or M-Grade Managers for Audit Commission review).

Included ☐
Not Included ☐ (please say why if not)

3.8.2 A copy of the employee's contract of employment including any variations, a copy of the latest job description and details of the employee's current salary and for Chief Officers or M-Grade Managers: salary increases over the last three years, copies of any financial advice, HR advice or other relevant advice obtained in the consideration of the decision, reports to and minutes of Council meetings at which decisions were taken including details of the assessment of the merits for the proposed severance (if not covered .elsewhere in this checklist)

Included ☐
Not Included ☐ (please say why if not)

3.8.3 An explanation as to why it is not possible or desirable to remove the employee from his/her employment in a way that would lead to the employee receiving a sum of money less than the cost of the proposed agreement, e.g. making the employee redundant rather than awarding a large compensatory sum under a compromise agreement:

3.8.4 An analysis of the full financial cost to the Authority of the severance package contemplated in the agreement (including the cost to the Authority of any augmentation of pension or a charge for early release of scheme benefits to be borne by KCC or Pay in Lieu of Notice (PILON)) must be disclosed:

3.8.5 A detailed factual background, including:

(a) reasons why a compromise agreement is thought to be desirable, necessary and value for money:

(b) an explanation of what potential legal claims the compromise agreement is seeking to avoid and for Chief Officers or M-Grade Managers: any legal advice obtained (including advice on Age Discrimination Regulations, the 2006, 2007 and 2008 Regulations and the Wednesbury principles on reasonableness:

(c) an explanation as to why it is felt that the employee is likely to bring such claims if the compromise agreement is not entered into:

(d) an assessment of why it is thought that such claims would be likely to succeed if they were to proceed to the Court or to the employment tribunal:

(e) copies of any key documents supporting the management's explanation, e.g. a copy of any grievance received from the employee:

Included ☐
Not Included ☐ (please say why if not)

3.8.6 An explanation as to why augmentation of pension or a charge for early release of scheme benefits to be borne by KCC, is necessary or desirable given KCC's general policy is not to grant additional scheme membership, except in the case of overall benefit and with the approval of the Managing Director and the Director of Personnel & Development. Such approval must also be obtained:

3.8.7 Detail of any "gardening leave" awarded and an explanation as to why this was thought to be necessary as opposed to either suspending the employee or keeping him or her at work and an explanation as to how the decision to send on "gardening leave" was approved:

3.8.8 Any other significant issues which should be taken into account, including for Chief Officers and M-Grade Managers full details of the consideration and/or decisions relating to Re-engagement (employed or consultancy):

3.8.9 Confirmation that all approvals and consultations required have been carried out together with copy reports, minutes and advices documenting the decision making process, if applicable and where available. For Chief Officers and M-Grade Managers: details of an calculations for all payments proposed or made which should separately identify any benefits in king; and details of any proposed special arrangement including the value of any discretionary enhancements and the grounds on which they were made.

Confirmed ☐
Not Confirmed ☐ (please say why if not)