

STATES OF JERSEY



COMPROMISE AND NON-DISCLOSURE AGREEMENTS (P.76/2022): COMMENTS

Presented to the States on 21st April 2022
by the States Employment Board

STATES GREFFE

COMMENTS

Summary

The Report of P.76/2022 acknowledges that the use of compromise agreements has a legitimate, but limited place for an employer. We agree that they must only be used in restricted and specific circumstances that are justifiable, with due consideration for value for money.

The Comptroller and Auditor General already has unfettered access to compromise agreements and paperwork and routinely audits them as part of the Annual Report and Accounts for regularity and compliance with the Public Finance Manual.

However, the Proposition is asking the C&AG to become a decision-maker in determining compromise agreement, which we believe would result in a conflict of interest. The C&AG may, at any point, request information and evidence in relation to any compromise agreement and the SEB will at all times comply with such requests.

Comment

In 2021, there were 21 compromise agreements signed on behalf of the States Employment Board. This represents 0.27% of all employees. At all times, a decision-maker must consider whether or not they are in the public interest.

The Public Finance Manual places a duty on officers when considering payments within compromise agreements to ensure that the payments are either contractual – or constitute a ‘special payment’ which requires consultation with Treasury and Exchequer for approval.

The Board has introduced a standard operating procedure (SOP) for compromise agreements to ensure they are used and constructed appropriately. Explicitly, the SOP prohibits the use of compromise agreement when an employee is asserting a statutory right, carrying out trade union activities, or ‘whistleblowing’.

The procedure requires the approval of the relevant Director General (Accountable Officer), the Group Director for People and Corporate Services and advice from the Law Officers Department. Additionally, where a compromise agreement comprises of an element that may contain a special payment, as defined by the Public Finance Manual, the Treasurer must approve the terms. The Treasurer in turn may seek his own, independent legal advice on the matter.

Where the compromise agreement concerns senior employees, the States Employment Board must approve the arrangements.

Compromise agreements are the decision of the employer. The inclusion of a third party, in this case a statutory auditor, would insert a third party into the decision-making of the compromise agreement. As the C&AG is the auditor, she would essentially audit her own decision in the Annual Report and Accounts, which we believe would be a conflict of interest.

Should the C&AG, or any other body, be required to be involved in the determination of compromise agreements and NDA’s this will create additional burden and cost to all sides. For example, in 2020 the Jersey Advisory and Conciliation Service (JACS)

reported 78 claims were settled. Many of these would require a review. Additionally, here would be many more that had not reached JACS that would require review and approval. A significant undertaking.

Should the working relationship between an organisation and an employee break down, there will be additional delay by the insertion of a third-party review and agreement, who in turn may require their own legal advice. This will only increase the number of claims to the Tribunal.

Add to this, the number of NDA's required for commercial purposes, contractors, security, consultancies and interim workers – all for legitimate reasons – then the system becomes bureaucratic and unworkable in the way proposed.

The proposition seeks to prohibit the States Employment Board or any other body controlled or funded by the Government of Jersey entering into a compromise agreement unless there is additional approval.

As it is written, this includes those who are controlled and funded, including state owned entities, arm's length organisations or those funded by grants and possibly contracts through the Government. This significantly limits the ability of organisations to manage their own risks and administration of employees.

Additionally, the use of non-disclosure agreements is routine in commercial organisations (some of whom are covered by this proposition). This includes NDA's for contactors who have access to sensitive, commercial or security information. It is not for any third party, including the C&AG, to determine the level of risk for an organisation that would require an NDA.

In short, this Proposition increases both the risk and the overhead to many organisations, and removes their ability to manage and control the risks they hold. It is unworkable, requires significant additional resources and ultimately, contrary to effective administration.

Comment under Standing Order 37A

This comment was provided late to the States Greffe due to an administrative delay.