A-Z Guide

FULL AND FINAL SETTLEMENTS

The term 'full and final' is often used to describe both in and out of Court settlements. It often refers to payments made to individuals as part of managed departures from organisations, and payments made to individuals to settle employment relationship problems such as personal grievances.

Before entering into a settlement intended to settle all claims arising out of an employment relationship, employers should have an understanding of the law in regard to these settlements.

The Employment Relations Act 2000 ('the Act') states that settlements may be reached between the parties to a dispute or grievance, without the matter proceeding to the Employment Relations Authority. Settlements may be reached between parties to problems at any time, up until the Employment Relations Authority makes a determination on the matter at the centre of the problem. Even after proceedings in the Authority have started, it is able to issue a determination recording the settlement, consented to by the parties, that disposes of the proceedings.

Procedural Requirements

The Act provides protections for settlements so long as they meet the procedural guidelines provided by the Act. If a settlement is reached between the parties by any means, only a person who is authorised by the Chief Executive of the Ministry of Business, Innovation and Employment ("the Ministry") may sign the settlement to bring it under the protections of the Act. This

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automatically includes mediators employed by the Ministry's Mediation Service. It is this protection that results in a truly full and final settlement.

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Bringing a settlement under the protections of the Act ensures that it becomes enforceable. Section 149 of the Act provides that if the terms of a settlement have been explained to the parties by the mediator, and the parties have affirmed to that person their request with the full understanding that the settlement becomes final, binding and enforceable, then the terms of settlement have this effect.

On signing, the person authorised to sign the settlement must be satisfied that, knowing the effect of his/her signature, the parties have affirmed their request.

The agreed terms of a settlement are incapable of being appealed or reviewed once they are signed by the mediator. These settlements can be enforced either by a compliance order issued by the Employment Relations Authority or the Employment Court, or by an enforcement order issued by a District Court.

'Without prejudice' conversations

Full and final settlements often follow 'without prejudice' conversations. These conversations are intended to enable open and honest discussions in an attempt to resolve a genuine problem ("dispute") without fear that any concessions or admissions made in the course of such discussions could later be used against you in potential litigation. In effect, genuine without prejudice conversations are completely confidential and can generally not be used in court.

In practice, employers frequently misconceive this concept in the belief that they can simply ask the employee to have a 'without prejudice' or 'off the record' conversation and, if the employee agrees, they are then safe to say whatever they like in order to bring about the employee's departure. However, this is not correct and can lead to constructive dismissal claims. Initiating a conversation or writing a letter asking your employee to resign or be dismissed will not attract the 'without prejudice' protection only because it is labelled as 'without prejudice' or 'off the record'. Rather, in order to attract the without prejudice privilege, such conversations must comply with the requirements set out in Section 57(1) of the Evidence Act 2006, which provides that "the communication was intended to be confidential, and was made in connection with an attempt to settle or mediate the dispute between the persons".

A 'dispute' can be any serious employment relationship problem or significant difference of views/opinion between employer and employee that may potentially result in litigation (Morgan v Whanganui College Board of Trustees 2014 NZCA 340). It does not necessarily have to be a personal grievance and it is not necessary for legal proceedings to already have been commenced. Having said that, however, a simple tension or general dissatisfaction at work does not amount to a 'dispute'.

Without prejudice conversations need to be handled with care in order for you to be protected. Therefore, it is strongly advised that you seek professional consultancy or legal advice before initiating without prejudice conversations and/or agreeing on settlement terms.

Some practical tips for initiating and conducting a without prejudice conversation

The following steps should be considered when initiating and conducting a without prejudice conversation or negotiation:

- You should not launch straight into a without prejudice conversation or negotiation. Should there be a performance or misconduct issue, you should commence the relevant process before attempting a without prejudice conversation. This could be the starting point that enables you to point to the existence of a 'dispute' and have this documented.
- When proposing to have a without prejudice conversation, you should invite the employee, in writing, to a without prejudice meeting and ensure that the employee understands the meaning of without prejudice. You should specifically

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request and record that the employee acknowledges their understanding that the conversation is confidential and cannot be referred to in any other forum. You should also advise that the employee can seek advice and bring a representative to the meeting.

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- You should obtain the employee's agreement that the conversation will be without prejudice before any comments are made.
- Employers must not say or do anything that may give rise to a claim in its own right. You cannot use the without prejudice label to threaten or unfairly pressure the employee to resign, or to discriminate or harass the employee. The intention must be to genuinely resolve a dispute. The Employment Relations Authority or Court can otherwise ignore the without prejudice protection.
- If unsure, the parties can attend mediation provided by the Ministry of Business, Innovation and Employment. Anything said in the course of such mediation meeting is confidential and cannot be used in subsequent litigation.

Refer to the A-Z Guides on Mediation for further information.

Recording a resolution in a record of settlement

Should the parties achieve are solution in the course of a without prejudice conversation, for example by agreeing to an exit package, it is recommended to record the agreement in a record of settlement that is signed by both parties and certified by a mediator from the Ministry of Business Innovation and Employment.

Important Points to Note

The parties must meet the execution requirements under s149 of the Act before the Authority has the power to enforce the settled terms. So, for example, where the settlement has not been signed by a mediator, the Authority will not have the authority to enforce terms of settlement.

However, the Authority does still have the power and jurisdiction to investigate and make determinations about this type of settlement if the settlement arose out of an employment relationship. The Authority can still hold that this type of settlement is full and final of all matters and refuse to hear any matters that relate to matters already settled under the agreement.

The wording of the settlement is very important. Case law has shown that situations where the document signed does not make it clear that the employee is receiving a payment in exchange for surrendering their right to take a personal grievance, it may not be considered to be a full and final settlement. Therefore, the Court may still be able to look into the dispute and make a determination on a grievance that you may have already believed was settled.

Matters discussed during the course of negotiations for a settlement, but which do not form part of the final settlement agreement, cannot be the subject of a later order from the Authority if the settlement is stated to be "in full and final settlement of all matters arising from the employment relationship". Where a full and final settlement includes a clause stipulating future conduct, and that clause is breached, the settlement can be enforced by a compliance order.

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- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

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