

REGULATORY INTELLIGENCE

Developments in UK financial services settlement agreements

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Monica Kurnatowska, Gillian Parnell and Annabel Mackay, Baker McKenzie

Every settlement agreement involves a delicate negotiation, with each party weighing up the value of the settlement against the concessions that they must make to secure agreement. Settlement agreements in the financial services sector are particularly complex because regulatory rules operate to restrict the employer's freedom in relation to the settlement amount, deferred remuneration and post-termination matters.

In turn, regulated employees do not want to give up their right to dispute decision-making in relation to deferred remuneration and/or the content of regulatory references. This regulatory context can make it challenging to reach agreement, particularly where the reasons for termination are disputed.

This article focuses on Financial Conduct Authority (FCA)-regulated banks, but similar principles will apply to other categories of financial services firm. It will be necessary to consider the precise regulatory regime applicable to the relevant employer as there can be some deviations.

Settlement amount

The settlement amount must not reward failure or misconduct. The employer and employee may, however, disagree about whether there have been performance failings or misconduct and an employee may challenge the legitimacy of their dismissal in the Employment Tribunal.

In recent years, regulated employees have been increasingly prepared to bring unfair dismissal claims, and even seek reinstatement, where they have been dismissed for historic misconduct and are left with no other options in a regulated sector. In some cases, their dismissals are found to be unfair because they have been disciplined for historic misconduct but judged against contemporary standards.

Where an employer reaches a financial settlement in the context of litigation involving regulatory issues, it is prudent to document the reasons for making a payment and to inform the relevant regulator of the fact of settlement. The employer should also keep a record of the steps that have been taken to ensure that the amount paid is appropriate to the circumstances (including how the sums paid relate to the issues in dispute, both from a liability and remedy perspective). Each component of the settlement payment has to be justified.

Care should be taken to ensure that the ability to mitigate is taken into account and staged payments should be considered. The treatment of deferred remuneration should remain consistent with the principle that it will only be paid or vest if this aligns with the performance of the firm, business unit and individual.

Deferred remuneration

Deferred remuneration usually represents a significant part of a departing employee's financial package. The circumstances of the departure are likely to affect the treatment of outstanding awards. Again, depending on how the terms of the awards are drafted, there might be disagreements about how the outstanding awards are treated. The employer should be cautious about exercising any positive discretion as they need to be able to justify that decision.

In addition, in a regulated context, the employer must retain the ability to apply malus to unvested awards or claw back all or part of awards that have been paid or vested. Firms are expected to consider performance adjustment even where the misconduct does not occur in the year of departure.

The circumstances in which a performance adjustment is appropriate extend beyond those who are directly culpable. Employers need to consider whether adjustments should be applied where employees were aware or could reasonably have been expected to be aware of the relevant failure or misconduct. The departing employee's role and responsibility, i.e., whether they were responsible for setting the culture or strategy or failings in systems and controls will also be relevant.

The settlement agreement must not restrict the ability to operate malus and claw back in line with the firm's remuneration policies. To avoid dispute and manage expectations, the settlement agreement should identify which awards may be subject to a performance adjustment and should avoid promising any particular type of treatment, particularly where the decision of the remuneration committee (or other determining body) remains outstanding.

Where a performance adjustment may be applied in the future, employees will want to secure an opportunity to comment and a commitment from the employer that all relevant factors will be taken into account before such an assessment is made. This is



consistent with how an employer should exercise its discretion, in the light of the case law post-Braganza, but may be the subject of some negotiation to arrive at a mutually acceptable form of wording.

If an employee is moving between Prudential Regulation Authority (PRA)-regulated firms, the rules on buy-out awards would also need to be considered.

References

In addition to the financial terms, employees will focus on preserving their ability to secure new employment in a regulated environment. As employees may be leaving, or have left, in circumstances where they challenge the reasons for termination, regulatory references can prove a frequent source of contention.

The employer cannot enter into any arrangements or agreements that would limit its ability to comply with its obligations in relation to regulatory references. Nor can the employer give undertakings to suppress or omit relevant information to reach a settlement.

If the employer annexes the form of regulatory reference that it intends to use, the agreement needs to preserve the employer's ability to comply with its obligation to update or amend the reference at a later date, if required.

Where the agreement does not annex a form of reference, the employee may seek reassurance that the employer will act with due skill and care in the preparation of the reference and will afford the employee an opportunity to comment on any allegations that may feature in the reference.

In the event that the employer were prepared to give contractual effect to the guidance contained in [SYSC 22.5](#), the employer would need to ensure that it retained sufficient flexibility to discharge its regulatory and legal obligations. Where an employer is not prepared to offer such reassurances, the employee may request a carve-out from the waiver of claims to allow them to pursue claims in respect of misrepresentation.

Non-disparagement

Non-disparagement clauses can also be an area where there is a reasonable degree of negotiation. Employer and employee will want to avoid the circumstances of departure being played out in the press. In each case, however, care needs to be taken to ensure that the non-disparagement provisions are realistic and appropriate.

The employer must not include any provisions that would prevent the employee from making a protected disclosure or cooperating with regulators or law enforcement agencies. Nor should they offer mutual non-disparagement that is impossible for them to police. A written instruction to a small group of individuals is usually appropriate.

In each case, the non-disparagement provision must not restrict the ability to comply with legal or regulatory obligations.

Investigation and legal proceedings

As firms are increasingly faced with having to investigate past matters, it can be important to ensure that a regulated employee will assist with regulatory investigations or legal proceedings. This is particularly important where settlement agreements are reached with senior managers.

The departing employee may wish to include provisions to ensure that such assistance is time-limited and does not interfere with their obligations to any new employer.

Summary

Employers should consider the following:

- Ensure that the reasons for payment and the criteria used to determine the amount of any settlement are documented and justifiable.
- Check that the treatment of deferred remuneration is consistent with the circumstances of termination.
- Consider whether a malus adjustment is appropriate and preserve the right to apply claw back.
- Do not include any provisions in the settlement agreement that restrict the employee's ability to make protected disclosures.
- Do not fetter the employer's ability to discharge its obligations in respect of regulatory references.
- Ensure that a departing employee will cooperate with future regulatory investigations and/or legal proceedings.

Monica Kurnatowska (partner), Gillian Parnell (senior associate) and Annabel Mackay (of counsel), [Baker McKenzie](#)

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