

UTILISATION OF COMPROMISE AGREEMENTS

REPORT OF THE COMPTROLLER AND AUDITOR GENERAL

MARCH 2012

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SECTION ONE – INTRODUCTION

1. This paper is the report of a review of compromise agreements entered into by the States during the past five years. The terms of reference for the review are set out in Appendix One.
2. The review was undertaken following a request from the Public Accounts Committee in the light of public concern about the limited information which had emerged concerning the existence of agreements and the payments made under them and in the light of Proposition P2/2012. Since the Committee made its request, the Chief Minister presented a report entitled: ‘Utilisation of Compromise Agreement’¹ and has disclosed certain information about two such agreements.
3. The work of this review involved:
 - (1) identifying all agreements of the sort described in the Chief Minister’s statement which were entered into by the States during the past five years;
 - (2) examining the documents relating to these agreements: to a large extent these documents represented the personal files recording the interaction between the States and the employees concerned during their employment;
 - (3) establishing the basis on which the decision to enter into each compromise agreement was justified;
 - (4) establishing whether in substance² the process set out in the Chief Minister’s statement was followed in respect of each agreement;
 - (5) confirming the information contained within the relevant personal files to the records of payments maintained by the Treasury and Resources Department;
 - (6) reviewing the practice adopted in respect of compromise agreements by the companies in which the States have substantial interests;
 - (7) reviewing the information appearing in the States’ financial accounting records of payments made under such agreements; and
 - (8) reviewing the outcome of this work and the nature of the agreements to identify issues which may require to be addressed.

¹ R27/2012/ Presented to the States on 28 February 2012.

² The procedure set out in the Chief Minister’s statement was not in force formally before the date of that statement although all of the key issues identified in that statement needed to be satisfied in the past in some way. Thus the extent of compliance was assessed ‘in substance’.

4. From this review, it became clear that one agreement, that concerning the termination of the employment of the former Chief Executive was exceptional in a number of respects. It seemed appropriate to provide detailed disclosure of the circumstances in which the States' obligations to the former Chief Executive came to be accepted and in which the agreement came to pass. Accordingly, that report is the subject of a separate report which is being published at the same time as this paper.
5. Of course, the Chief Minister has made a public statement concerning the amount paid under the agreement. The Chief Minister has also made a public statement of the amount paid under an agreement with another former Chief Officer. That agreement was also covered by this review; but displayed no exceptional characteristics which justified detailed disclosure of the circumstances.
6. The results of the review in respect of all the compromise agreements that were identified are set out in this paper (apart from that with the former Chief Executive) under the following headings:
 - (1) a summary of the terms of the agreements (Section Four);
 - (2) an explanation of the extent to which proper approval processes were followed (Section Five); and
 - (3) a description of the practice of companies in which the States have substantial interests (Section Six).
7. However, I will first set out a summary of my findings and recommendations (Section Two) and a description of the background to compromise agreements (Section Three).

Confidentiality

8. My normal approach to reporting would be to disclose appropriate details of transactions in which the States have been involved. In the course of my work I concluded that this approach would not be wise in this case.
9. Compromise agreements deal with the basis on which certain employees' employment by the States is terminated. They may be signed in circumstances which do not imply any failure or fault on the part of the employee (e.g. termination in the context of a management reorganisation or termination following a period of ill health). Whilst it is important that the States are transparent about the use of public money the duty of

transparency must be balanced against the personal rights to privacy of former employees who have signed compromise agreements.

10. I have therefore adopted the following approach:

- (1) my work was based solely upon the documents in the possession of the States (i.e. I have not interviewed either current officers of the States or former employees);
- (2) in this report, the information which I will provide is set out largely in summary form in a way that should not permit identification of the former employees concerned;
- (3) I have prepared a confidential paper which sets out a detailed analysis of each of the agreements covered in summary in this report. That confidential paper has been provided to the Chief Minister, the Acting Chief Executive, the Chairman of the Public Accounts Committee, the Chairman of the Corporate Service Scrutiny Panel and the Deputy who proposed Proposition P2 /2012;
- (4) as the agreement with the former Chief Executive is exceptional in nature, that agreement is covered in detail in an accompanying report.

Acknowledgements

11. A number of officer of the States and companies in which the States hold substantial interests have been asked to provide information and documents very quickly to permit the speedy completion of this report.

12. I am most grateful for their assistance and good humour.

SECTION TWO – SUMMARY OF FINDINGS AND RECOMMENDATIONS

13. My recommendations may be summarised in the following way:

(1) Code of Conduct for Ministers

Consideration should be given to the development of the Code of Conduct for Ministers to deal explicitly with the relationship between Ministers and officers, taking appropriate account of the guidance currently available in other jurisdictions.

Comment: it is unrealistic to expect that a culture based on mutual respect can be created in the States if Ministers do not behave in a manner consistent with that culture. This is not to say that Ministers will not have cause from time to time to disagree with officers or to pressure them to improve performance.

(2) Independent oversight

Consideration should be given to establishing arrangements for independent oversight of the relationships between Ministers and officers.

Comment: it is best to attempt to improve relationships before they have broken down irretrievably. The current arrangement in which there has been no independent source of counsel or guidance has not worked satisfactorily.

(3) Performance management

Consideration should be given to reinforcing the importance of performance management and to ways of eliminating the behaviours which impede effective performance management.

Comment: the States should recognise and acknowledge both good and poor performance consistently.

(4) States Employment Board

Consideration should be given to amending the process set out in the Chief Minister's statements so that all compromise agreements entered into by the States are reported to the States Employment Board.

Comment: the Board should know of all such agreements so that it can ensure that the lessons that should be learned from failures in relationships are being recognised.

SECTION THREE – BACKGROUND TO COMPROMISE AGREEMENTS

What are they?

14. For the purpose of this report, I have adopted the definition set out in the recent statement by the Chief Minister:

“ . . . a legally binding agreement in which an employee (or ex-employee) agrees not to pursue particular claims in relation to his or her employment or its termination, which is usually accompanied by a financial settlement that is considered to be in full and final settlement of any claims that might have been pursued by either party. Such an agreement is normally mutually beneficial to both parties, employer and employee, and is accompanied by a confidentiality clause.”³

What from would the financial settlement usually take?

15. The form of the financial settlement will depend upon the negotiations between the parties and may take a number of forms: either being expressed as a single sum or as a number of different sums.

16. Typically, the financial settlement will recognise three elements:

- (1) payments due in respect of an unexpired notice period as specified in the employee’s contract of employment;
- (2) payments due in respect of any other provisions of the contract of employment (e.g. accrued holiday entitlements); and
- (3) where appropriate, compensation for loss of office.

How would compensation for loss of office be determined?

17. In some circumstances, it may be inappropriate to make any such payment. For example, where an employee’s employment is being terminated because of demonstrably poor performance, there should be no question of making such a payment.

18. However, in many other circumstances payment of compensation would be appropriate: e.g. where an employee leaves following a management reorganisation changing the terms of employment. In such cases, it should be remembered that public sector employees have rights under employment law as much as any private sector employees. Thus regard would often be paid to the level of award which an employment tribunal may

³ Page 2; R27/2012.

make if an application were to be made on the grounds of unfair dismissal. Such awards are typically limited to amounts equal to six months' salary.

How can the States justify entering into such agreements?

19. The States would be justified in entering into such an agreement if it permits the resolution of a situation that is undermining a department's performance but at a reasonable cost.

Are such agreements necessary?

20. Problems in relationships with staff occur and need to be resolved. Sometimes they can be resolved without an employee leaving the organisation but at other times this may not be possible. When this is the case, there is a need for a mechanism by which a conclusion can be reached.

21. Problems can occur not just because inter-personal relationships become difficult but also because the organisation wants to change itself in ways that an employee finds unacceptable. For example, a management reorganisation might change the circumstances of an individual's position in ways that the employee finds unacceptable even though the organisation hopes that the individual will stay in post. There is a need for a mechanism by which problems of this sort are resolved.

22. Quite apart from being able to resolve difficulties when they arise, organisations should also work to ensure that problems are avoided wherever possible. This why attention needs to be given to the internal culture of an organisation to ensure that staff work in as constructive a context as possible.

23. But where this breaks down, resolution is necessary and compromise agreements are a part of the means by which resolution can be achieved.

Are confidentiality provisions necessary?

24. All of the compromise agreements provide that parties to the agreement should regard information about the terms of the agreement as confidential to the parties unless required to make disclosure by some process of law.

25. As compromise agreements concern matters that are personal, such provisions appear a necessary condition of securing agreement to them. Attempting to conclude an agreement

without such a provision would be expected to make it more difficult for the parties to reach an agreement.

SECTION FOUR – THE AGREEMENTS

Introduction

26. In this Section of the report, I will summarise the terms of the agreements that were covered by the review. To assist in preserving the confidentiality of the information, they are here presented in outline and in random order.

<i>Contract No.</i>	<i>Grade of staff member</i>	<i>Reasons for termination and agreement</i>	<i>Termination payment</i>
1	Middle management	<p>Stress-related illness exacerbated/ caused by management criticism of poor performance.</p> <p>Agreement reached to bring the situation to a close and to permit replacement of the employee.</p>	Payment for notice period – no additional payment.
2	Middle management	<p>Stress-related illness related to the employee's working conditions. No alternative position available in States. Employee willing to return to work but his existing position offered little prospect of relief from stress. Impasse was becoming disruptive to the department.</p> <p>Agreement reached to bring impasse to a conclusion and avoid a tribunal hearing.</p>	Payment for notice period (three months); together with a termination payment (six months' salary).
3	Senior management	<p>Employee's position changed as a result of departmental reorganisation which he regarded as a significant demotion. Employee unhappy with change in circumstances which seemed a basis for an application to an employment tribunal.</p> <p>Agreement reached in recognition of the employee's case and to avoid the disruption of a tribunal hearing.</p>	Payment of approximately one year's salary (to include payment for the contractual notice period and compensation for loss of office).
4	Chief Officer	<p>Employee coming to the end of a fixed term contract decided not to accept a permanent appointment partly because of concern over the extent of ministerial pressure. Presented a problem to preserve management leadership and stability of the department.</p> <p>Agreement reached for a continuation of the existing term contract (against the initial preference of the employee) to permit continued leadership while a successor was recruited.</p>	Termination payment at the end of the period of the extension equal to one year's salary,

<i>Contract No.</i>	<i>Grade of staff member</i>	<i>Reasons for termination and agreement</i>	<i>Termination payment</i>
5	Senior management	<p>Ministerial dissatisfaction over the performance of the department for whose management the employee was responsible. However it was recognised that the employee had experienced a period of intense ministerial pressure and thus could marshal counter arguments in a case before an employment tribunal.</p> <p>Agreement reached to bring the situation to a close by termination of the employee's employment.</p>	Payment broadly equivalent to one year's salary to include any payment in lieu of notice and compensation for loss of office.
6	Chief Officer	<p>Stress-related illness connected with a period of ministerial pressure and allegations of weak performance. Employee ready and willing to return but States not convinced that this was wise. It was recognised that the employee had experienced a period of intense ministerial pressure and thus could marshal counter arguments in a case before an employment tribunal.</p> <p>Agreement reached in recognition of the employee's case and to avoid the disruption of a tribunal hearing.</p>	Payment in lieu of notice (six months); together with an ex gratia payment of compensation for loss of office (approx six months' salary).
7	Middle management	<p>Allegations of bullying and harassment against the employee and discontent on the part of senior management about the employee's management style.</p> <p>Agreement reached to bring the situation to a close and avoid tribunal hearings which would cause disruption.</p>	Payment in respect of voluntary redundancy of the employee calculated under the States' redundancy scheme rules.
8	Middle management	<p>Employee coming to an end of a fixed term contract. The employee's position was to be changed in a planned reorganisation which was being held up by waiting for the employee's contract to end.</p> <p>Agreement reached to bring the impasse to an end and to permit the reorganisation to be implemented.</p>	Payment of a lump sum equal to slightly less than the salary that would have been paid during the remainder of the contract (less than six months were outstanding).
9	Chief Officer	<p>Allegations of poor performance which was causing the department not to make progress. However it was recognised that the employee had experienced a period of intense ministerial pressure and thus could marshal counter arguments in a case before an employment tribunal.</p>	Payment broadly equal to one year's salary to include a payment in lieu of a notice period and compensation for loss of office.

<i>Contract No.</i>	<i>Grade of staff member</i>	<i>Reasons for termination and agreement</i>	<i>Termination payment</i>
		Agreement reached to bring the situation to a close especially in the light of the difficulty of any potential tribunal hearings.	
10	Middle management	Changes in staffing of the department changed the circumstances of the employee's employment. Opportunities to use employee became more limited. Agreement reached to resolve the difficulty through termination of employment.	Payment broadly equivalent to one year's salary to include a payment in lieu of notice and compensation for loss of office.

Observations

27. This summary of the circumstances of the cases covered by the review supports the following observations:

Relationships with Ministers

28. Difficulties in relationships with Ministers appear a common factor in the cases concerning Chief Officers. This may seem unsurprising. It cannot be wrong that Ministers express dissatisfaction with poor departmental performance or argue robustly for policies that they believe are in the Island's best interest. In this light, coping with political pressure is a necessary part of a Chief Officer's role.

29. However, the evidence of these cases suggests that what might be acceptable political pressure can easily become unreasonable pressure and in a number of these cases did become unreasonable pressure. In a number of cases, this may have reached a point at which there was no mutual respect between the Chief Officer and Minister.

30. This is unsatisfactory for a number of reasons. It cannot be conducive to the proper conduct of the States' business if policy discussions take place in an atmosphere of distrust. There are bound to be disagreements from time to time. That is unexceptionable. What matters is that disagreements can be argued and resolved in as rational a manner as possible. These cases suggest that the arrangements to secure this outcome are not working reliably.

31. Moreover, if relationships between Ministers and Chief Officers become abusive, they will in due course affect the general culture of a department. Staff who believe their efforts

will be abused will tend to manage their personal risks, and limit their personal exposures. The risk is that a department will tend to under-promise and under-achieve because of the risk of trying to over-achieve.

32. The States' Code of Ministerial Conduct is surprisingly silent on the way in which Ministers should conduct their relationships with Chief Officers although codes in other jurisdictions⁴ provide guidance on how these relationships should be conducted. It may be appropriate for the States to re-consider the existing code.

Recommendation

Consideration should be given to the development of the Code of Conduct for Ministers to deal explicitly with the relationship between Ministers and officers, taking appropriate account of the guidance currently available in other jurisdictions.

Oversight of relationships with Ministers

33. The mere introduction of guidance will not of itself do more than influence behaviour. Problems are likely still to arise from time to time. The cases covered by the review suggest not only that problems occur but also that there is no reliable process for spotting problems as they arise and for ensuring that attempts are made to mediate solutions. This seems a gap in the existing arrangements which might usefully be filled.

Recommendation

Consideration should be given to establishing arrangements for independent oversight of the relationships between Ministers and officers.

Scale of payments

34. There is some evidence from the agreements that were covered by the review, that the payments for which the agreements provide are assessed in the light of the circumstances of each agreement: i.e. there is no standard amount of compensation that is thought appropriate to every case. As can be seen from the summary set out above, in one instance no compensation was paid at all on the grounds that the employee's performance had been unsatisfactory and amounts varied in other cases. This is as it should be.

Performance management

35. It is evident from the cases covered by the review that the States' systems for monitoring and reviewing the performance of staff are not being followed consistently. In a number of

⁴ For example see the 'The Government Code' published by the Isle of Man Government.

the cases, this resulted in staff not being given clear messages about weaknesses in performance and in problems not being identified at a stage when they could possibly have been resolved. In the cases covered by the review, the outcome was that the States expected that providing proof that an employee had been warned of poor performance would be difficult.

36. These observations are consistent with anecdotal evidence of poor performance management within the States, and the evidence of staff surveys. It is not satisfactory that the States appear to be an organisation in which good and poor performance are not consistently recognised.

Recommendation

Consideration should be given to reinforcing the importance of performance management and to ways of eliminating the behaviours which impede effective performance management.

SECTION FIVE – APPROVAL OF COMPROMISE AGREEMENTS

Introduction

37. The process set out in the Chief Minister's recent statement obviously did not apply to the compromise agreements covered by this paper: it did not exist. However, for agreements to be signed and payments to be made, it was necessary for some process to be followed. In this Section of the report, I will set out my findings on the extent to which what was done in the past met the requirements of the new process that has now been proposed.

Findings

38. My findings in respect of the process by which these agreements were are as follows:

- (1) in no instance was a formal business case prepared that justified the compromise agreement.
- (2) in a small number of cases, the relevant Chief Officer had prepared a formal record of the basis on which entering into the compromise agreement and the resulting payment had been justified.
- (3) in every case, it was possible to infer from the filed documents the nature of the justification for the agreement and the resulting payment.
- (4) in every case involving a Chief Officer, it was evident from the file that appropriate ministerial approval had been given for the agreements to be made and implemented.
- (5) in every case not involving a Chief Officer, it was evident from the file that the payment made under the agreement fell within the parameters set out in the recent statement by the Chief Minister.
- (6) in every case, the form of the agreement had been the subject of legal advice obtained either from a firm of lawyers or from the Jersey Arbitration and Conciliation Service.
- (7) in every case, it was evident from the file that the former employee concerned had received separate legal advice on the proposed agreement.
- (8) reporting of agreements to the States Employment Board was not consistent: most of the agreements covered by the review were not reported to the Board.

Observations

39. The agreements covered by the review and the circumstances in which they arose provide an insight into some aspects of the state of human resource management within the States. They are of course a biased sample since they all arise from a failure to retain the services of an employee for one reason or another: and they must be interpreted accordingly. Yet there may be advantage in reporting all such agreements to the States Employment Board so that the Board is aware of these failures in relationships and what can be learned from them.
40. Presumably the Board would then wish to make sure that appropriate actions are being taken on the basis of reports of these cases (and all other reports of the adequacy of the States' human resources management).
41. Recommendation
42. Consideration should be given to amending the process set out in the Chief Minister's statements so that all compromise agreements entered into by the States are reported to the States Employment Board.

SECTION SIX – COMPANIES IN WHICH THE STATES HAVE A SUBSTANTIAL INTEREST

Introduction

43. In the interest of completeness, I have enquired into the circumstances in which compromise agreements have been entered into by companies in which the States have substantial interests. These include:

- (1) Jersey Electricity;
- (2) JT;
- (3) Jersey Water;
- (4) Jersey Post; and
- (5) Jersey Development Company.

Findings

44. All of these companies are intended to operate with complete or substantial operational independence of the States of Jersey. In some cases (e.g. Jersey Electricity), the understanding that there should be operational independence is supported by the company's obligations to the Stock Exchange of which the company's shares are listed.

45. As such, company decisions in respect of the termination of the employment of a member of staff would be a matter for the company and not for the States. I have received confirmations that in practice this has been the case: i.e. that the States have not been involved in company decisions concerning compromise agreements.

46. I have enquired into a number of the compromise agreements into which the companies have entered and confirmed that, in general terms, they have adopted normal market practice which has been generally consistent with the parameters set out for such agreements within the States in the statement made recently by the Chief Minister.

47. Each of these companies is subject to the normal requirements for disclosure in annual reports and accounts of information concerning such agreements. I have confirmed that disclosures have been made in those companies' accounts. These disclosures are subject to confirmation by the companies' auditors in the normal course of events.

48. In short, as a result of these enquiries, I have uncovered no indication that the companies have failed to comply with best practice in respect of compromise agreements.

APPENDIX ONE – TERMS OF REFERENCE

App - 1. This review is commissioned in accordance with the powers of the Comptroller & Auditor General as set out in the Public Finance (Jersey) Law 2005 to take place in the light of:

- (1) the public concern over payments known informally as ‘golden handshakes’ made during recent years to officers leaving the employment of the States, and their related organisations;
- (2) the lack in the public domain of consistent and reliable information about the number and cost of such arrangements;
- (3) the lack in the public domain of reliable information about the mechanism for the approval of such arrangements; and
- (4) the significance to the maintenance of public confidence in the prudent management of such matters by the States of correcting any lack of reliable information.

App - 2. The purpose of the review is to examine:

- (1) the number and amount of ‘golden handshake’ and any similar payments made by the States and their related organisations (including payments under compromise agreements with senior staff) during recent years;
- (2) the nature of the contracts under which such payments became payable;
- (3) the circumstances in which such payments became payable;
- (4) in each case, the procedure for the negotiation and approval for the payment;
- (5) in each case, the nature of the formal agreement with the officer concerned surrounding the payment;
- (6) evidence for the processes followed in respect of such payments within the public sector of the United Kingdom;
- (7) where appropriate, areas in which the Island’s policies and procedures appear inconsistent with the highest standards practised in cognate jurisdictions; and

(8) any other relevant matters which come to attention in the course of the review.

App - 3. The outcome of the review will be a report prepared and published in accordance with the provisions of the Public Finance Jersey Law 2005 and the C&AG's normal practice.

App - 4. In view of the public concern over the issues, consideration will be given to the publication of an interim report at an early date.