

## Clydesdale Housing Association

<b>Policy:</b>	Protocol for entering into settlement agreements with employees
<b>Date:</b>	17 June 2020
<b>Lead Officer:</b>	Chief Executive
<b>Review Date:</b>	June 2023 (Section 3.13 updated on 25 August 2021 to fully comply with Regulatory Guidance 5.8)
<b>Regulatory Standard:</b>	<b>Standard 5</b> The RSL conducts its affairs with honesty and integrity.

### Regulatory Guidance:

- 5.7 Severance payments are only made in accordance with a clear policy which is approved by the governing body, is consistently applied and is in accordance with contractual obligations. Such payments are monitored by the governing body to ensure the payment represents value for money. The RSL has considered alternatives to severance, including redeployment.
- 5.8 Where a severance payment is accompanied by a settlement agreement the RSL does not use this to limit public accountability or whistleblowing. The RSL has taken professional legal advice before entering into a settlement agreement.

**Clydesdale Housing Association will provide this policy on request at no cost, in large print, in Braille, in audio or other non-written format, and in a variety of languages.**



## **1. Background**

- 1.1 Clydesdale Housing Association (CHA) has adopted an Entitlements, Payments & Benefits policy based on the Scottish Federation of Housing Associations' model policy of December 2016. This model policy is endorsed by the Scottish Housing Regulator (SHR) as meeting its requirements to have a policy that sets out what payments and benefits CHA will permit, and to ensure that these arrangements demonstrate transparency, honesty and propriety.
- 1.2 This policy applies to all Committee members, and everyone who works for CHA. All CHA employees will be issued with a form of contract of employment when their employment commences.
- 1.3 Under this policy, all entitlements, payments and benefits arising from the contract of employment are permitted. Conversely, payments proposed to be made to employees that are outside the terms of their contract of employment are not normally permitted. Some such payments, such as voluntary severance payments, can be approved, provided that certain conditions are met.
- 1.4 It is CHA's policy that whenever a voluntary redundancy or other voluntary severance payment is proposed to be made, CHA will require the employee to whom the payment is proposed to be made to enter into a Settlement Agreement with the Association, in order to protect its interests.
- 1.5 The purpose of this Protocol is to make the process for agreeing and making such payments, and for obtaining the necessary approvals, absolutely clear and thus avoiding any improperly authorised payments being made.

## **2. Conditions for making voluntary severance payments**

- 2.1 A voluntary severance payment can be made to an employee outside the terms of their contract of employment provided that the following conditions are met:
  - 2.1.1 The payment arises directly from a decision to terminate the employee's contract of employment.
  - 2.1.2 The payment is specifically approved by a full meeting of the Management Committee.
  - 2.1.3 The total sum of the non-contractual payment/benefit does not exceed, in the opinion of our specialist legal/employment advisor, the total cost of a successful application by the employee to a Court or Tribunal (including the likely level of compensation that might be awarded by a court or tribunal and associated costs to CHA to participate in the tribunal).
  - 2.1.4 Payment does not exceed the equivalent of one year's salary for the employee
  - 2.1.5 That this payment is instead of (rather than additional to) any redundancy entitlement.

More details of the process for ensuring that these conditions are met are given in section 4.

### **3. Nature and use of Settlement Agreements**

- 3.1 A Settlement Agreement is a legally binding contract entered into between CHA on the one hand, and an employee, or former employee (or in exceptional circumstances, an unsuccessful job applicant who feels they were discriminated against) on the other hand, when they agree to settle a potential employment tribunal claim, or other court proceedings. Such an agreement can only be signed by two parties: the person to whom a payment is proposed to be made, and CHA. It cannot be signed, for instance, by a group of employees.
- 3.2 Such agreements will waive the employee's rights to bring any potential claims covered by the agreement, effectively in return for the payment that is agreed to be made under the agreement. The terms of such agreements are mutually agreed through discussion and negotiation, and are normally confidential, so that if agreement is not reached following discussion, and an employment tribunal or other court proceedings follow, the negotiations are not normally admissible as evidence in these hearings.
- 3.3 Settlement Agreements are normally used to bring an employment relationship to an end in a mutually agreed way, for instance when CHA may feel that it has lost trust and confidence in a senior member of staff, or an employee feels that their relationship with CHA has broken down, and a clean break is desirable. They can provide a swift and dignified end to an employment relationship that is not working, and avoid the time, cost and stress involved for both parties in a tribunal claim.
- 3.4 Only the Chief Executive, after receiving prior authorisation from the Management Committee, may initiate discussions with an employee about a possible Settlement Agreement. Settlement Agreements are not to be proposed as an alternative to effective staff management and good practice in resolving disputes with employees. Poor performance or inappropriate behaviour or workplace disputes are expected to be dealt with by effective performance management by the line manager, including regular one-to-one supervision meetings between the employee and their line manager, and appropriate use of CHA's disciplinary and grievance policies and procedures.
- 3.5 Entering into discussions about such agreements is not without risk, including: payment of what might be regarded as excessive costs; risk to the ongoing employment relationship with the individual concerned if settlement is not agreed; and risk to employment relations in the wider workforce if used inappropriately or as a substitute for good management. The Management Committee will have regard to such risks and obtain professional legal advice in this regard when considering whether they wish to authorise such an approach.
- 3.6 If the Committee wish to initiate such discussions with the Chief Executive, they will be undertaken usually by the Chair of the Staffing Sub-Committee or any other Committee member(s) delegated authority to do so by the Management Committee. Committee Members initiating such discussions will always be supported by professional legal advisors appointed by the Management Committee.
- 3.7 Where the Chief Executive is the subject of the protected conversation then the Scottish Housing Regulator (SHR) should be notified ahead of any conversation taking place, in order to comply with their Notifiable Event Guidance.

- 3.8 Where such discussions are initiated by the employee, the Chief Executive must seek professional legal advice then seek guidance from the Committee (under urgency procedures if waiting for a full Committee meeting would result in undue delay) about whether to engage, and agreed parameters, including potential cost settlements, before entering into such discussions.
- 3.9 In arranging and conducting such discussions, and confirming any agreements in writing, the Chief Executive should have regard to the guidance set out in the 2018 ACAS publication, "Settlement Agreements: A guide"<sup>1</sup>, and to any requirement for specific advice from CHA's professional legal advisors. In particular, at the start of any such meeting, it should be made clear that such discussions are confidential and "without prejudice", and are expected to be inadmissible in any subsequent legal proceedings that may occur. Any potentially "unambiguous impropriety", which would invalidate the "without prejudice" nature of the discussions, should be scrupulously avoided. This includes:
- All forms of harassment;
  - All forms of discrimination;
  - Victimisation (e.g. as a result of utilising whistle-blowing processes);
  - Physical assault and other criminal behaviours;
  - Putting undue pressure on the employee to make a decision (for instance, not giving the employee sufficient time to consider any offer – seven days would normally be appropriate).
- 3.10 Where such discussions are through face to face meetings, the employee may be accompanied by a work colleague or trade union representative, should they so wish.
- 3.11 Although not absolutely required to do so, CHA will provide an agreed reference for the employee as part of the Settlement Agreement. The Chief Executive has delegated authority to agree a suitable reference on behalf of CHA. The length and style of reference agreed will have regard to the circumstances in which the employment contract is being terminated and professional legal advice will be considered when finalising this.
- 3.12 If discussions end in agreement to conclude a Settlement Agreement, a formal written agreement will be required. Professional legal advice must always be taken about the form of such agreements. In order to be valid, the employee must have received their own independent legal advice; this adviser must be named in the agreement, and have current indemnity insurance covering the risk of a claim by the employee. CHA will meet the reasonable costs of obtaining this independent advice up to a maximum of £350.
- 3.13 We will also include the expected provisions confirming that both parties will maintain suitable confidentiality in relation to the terms of the agreement and the requirement not to disclose these. However, we will restrict such provisions to cover those matters that are normally confidential within an industrial relations framework; or those that are otherwise specifically contained within the spirit of the General Data Protection

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<sup>1</sup> Available at: [https://archive.acas.org.uk/media/3736/Settlement-Agreements-A-guide/pdf/Settlement\\_agreements\\_Dec\\_18.pdf](https://archive.acas.org.uk/media/3736/Settlement-Agreements-A-guide/pdf/Settlement_agreements_Dec_18.pdf)

Regulations framework. We will not include restrictions on disclosing matters beyond – particularly such issues that are undeniably of wider public interest/whistleblowing.

3.14 A CHA Settlement Agreement can only be signed by authorised persons following a specific resolution of the Management Committee to that effect.

#### **4. Process for complying with conditions for making voluntary severance payments**

##### **4.1 Voluntary redundancy**

4.1.1 Where a proposed staff restructure or other efficiency measures will result in potential redundancy, the Chief Executive will, in the first instance, submit a business case proposal to the Management Committee, and seek approval to commence the necessary consultation process. Thereafter the Employers in Voluntary Housing (EVH) redundancy policy, set out in its Statement of Terms and Conditions of Employment, will be followed in order to seek to avoid any compulsory redundancy, including, where appropriate, offering the opportunity for voluntary redundancy.

4.1.2 The offer of voluntary redundancy may include enhanced payments above the contractual level set out in the EVH terms and conditions of employment, and/or payment in lieu of notice (PILON). The terms of any such offer require prior Committee-level approval before it is made to staff.

4.1.3 Any offer of voluntary redundancy made to any groups of staff should indicate that a Settlement Agreement will need to be entered into between CHA and the employee prior to payment of any agreed voluntary redundancy settlement being authorised. It should also indicate that employees will be required to take their own independent legal advice, and that CHA will meet the reasonable costs of taking such advice.

4.1.4 CHA must take professional legal advice about the terms of the Settlement Agreement to be completed. Provided this has been done, and the terms agreed are within the offer level approved by the Committee, the Chief Executive will have delegated authority to complete the agreement on behalf of CHA, with the agreement signed by an authorised signatory. The outcome and final details of any payment must be reported back to the Management Committee at the first opportunity.

##### **4.2 Other voluntary severance payments**

4.2.1 Where either CHA wishes to discuss and agree a voluntary severance payment with an employee, or an employee, or former employee, wishes to discuss such a payment with CHA, the following conditions must be met:

4.2.2 *It arises directly from a decision to terminate the employee's contract of employment:* Prior to any formal discussions taking place, the Management Committee must have agreed that it wishes the result to be the termination of the employee's contract of employment. The Committee must accept that any dispute or breakdown in relationship with CHA, or perceived poor behaviour or performance is not best dealt with by sound management and application of agreed policies and procedures. Such discussions may take place before, during or after any serious disciplinary process involving the employee, and in exceptional circumstances, after dismissal has taken

place, provided it is clearly in the best interests of CHA to make such a payment and enter into a Settlement Agreement.

- 4.2.3 *Payment is approved by the governing body:* Discussions about agreeing a voluntary severance payment, and entering into a Settlement Agreement, will always be a form of negotiation. Regardless of whether this negotiation is conducted by the Chief Executive, Committee members who are part of a disciplinary process, or via solicitors, once an agreed outcome has been reached, it must be referred to the Management Committee for approval of the proposed payment, and other terms of the proposed Settlement Agreement, before any such agreement is entered into and signed. On every occasion when a voluntary severance payment is proposed, it can only be paid as part of a Settlement Agreement.
- 4.2.4 *The total sum of any non-contractual payment and benefit does not exceed, in the opinion of our professional legal advisor, the total cost of a successful application by the employee to a Court or Tribunal, including both the likely level of award and associated costs to CHA of participation in the hearing:* As part of the report to the Management Committee seeking approval to enter into a Settlement Agreement in order to make such a payment, the report must include confirmation from a professional legal advisor that the proposed payment is within the levels of potential cost that CHA is at risk of incurring should a relevant Court or Tribunal hearing go ahead.
- 4.2.5 *Payment does not exceed the equivalent of one year's salary for the employee:* The proposed severance payment in compensation for loss of employment, etc must not exceed the current annual salary of the employee, and the Chief Executive must specifically confirm that this is the case when submitting a report proposing approval of the payment.
- 4.2.6 *The payment is instead of (rather than additional to) any redundancy entitlement:* If a redundancy payment would otherwise have been payable in the circumstances of the termination of the contract of employment, it will be relevant for the contractual amount that would have been payable to be reported to the Committee. The Chief Executive must ensure that the proposed payment is not calculated as including any sum in respect of redundancy entitlement. Other payments related to contractual entitlement (e.g. for outstanding leave entitlement, or notice entitlement) can be made in addition to the proposed severance payment.
- 4.2.7 The requirements of the process for entering into a Settlement Agreement, as set out in section 3 of this protocol, will be followed as part of the process of agreeing and making a voluntary severance payment.

## **5. Regulatory Requirements**

- 5.1 Any severance payment to and/or settlement agreement with a staff member must be reported to the Scottish Housing Regulator, as detailed in their Statutory Guidance on Notifiable Events (February 2019). The process on how to make such a report are also contained within CHA's Notifiable Events Policy.

## **6. Review**

- 6.1 This protocol was first approved by the Management Committee in June 2020, and will be reviewed at least by June 2023, or sooner if circumstances require it.