

POLICY

**Protocol for entering into
Settlement Agreements with
Employees**

REVIEWED POLICY – June 2023

Wellhouse - The Place To Be

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1.	

1. Vision and values

Wellhouse – the Place to Be.

This simple statement is our vision of Wellhouse as an attractive place where people feel happy and safe, benefit from having a good home and an attractive environment and feel proud to be part of a vibrant community.

We believe that our values of Trust, Honesty and Integrity, Excellence, Accountability and Sustainability supported by a comprehensive policy framework will help make our vision a reality.

2. Governance

Wellhouse HA is a community controlled registered social landlord and is managed by a group of local people who are elected onto the Management Committee. Their role is to make sure that the Association is well run, meets the needs of the local area and is responsive to what is important to local people.

The Management Committee appoints senior staff, agrees all the Association's policies and takes all the key decisions. The Director and the senior team support the Committee in these responsibilities.

3. Policy Aims

This policy sets out the standard expected in which two parties, usually an employer and employee, record how the terms of employment will end or a dispute will be resolved.

4. Equalities & Human Rights statement.

We aim to ensure that all services, including the delivery of this policy, provide equality of opportunity.

We will respond to the different needs and service requirements of individuals. We will not discriminate against any individual for any reason, including age, disability, gender re-assignment, marriage, civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation, or other status.

5. Introduction

The purpose of this protocol is to provide guidance and information on pre-termination discussion and settlement agreements.

Wellhouse Housing Association Protocol for entering into Settlement Agreements with employees.

1. Background

- 1.1 Wellhouse Housing Association (WHA) has adopted an Entitlements, Payments & Benefits policy based on the Scottish Federation of Housing Associations model policy of July 2015. 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 WHA will permit, and to ensure that these arrangements demonstrate transparency, honesty and propriety.
- 1.2 This policy applies to everyone who works for WHA, who will be issued with a form of contract of employment when their employment commences.
- 1.3 Under this policy, all entitlements 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 WHA's policy that whenever a voluntary redundancy or other voluntary severance payment is proposed to be made, WHA 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 HR policies and procedures support the management of employment issues e.g., informal/formal discipline and grievance, performance management, absence and attendance, entitlements and leave management. However, on some occasions efforts to resolve situations fail.
- 1.6 The Employment Relations Act 1996 Section 111A provides scope for employers to have confidential pre-termination discussions with staff where the employment relationship is not working out. Contracts may be terminated by mutual agreement through discussions, which can reduce the substantial amount of management time and money paid on legal fees.
- 1.7 The purpose of this Protocol is to make the process for agreeing and making such payments, and for obtaining the necessary approvals, absolutely clear in order to avoid any recurrence of improperly authorised payments of this nature being made to any other WHA employees.
- 1.8 Settlement Agreements are "governance and organisational issues" as notifiable events under the SHR Regulator guidance of February 2019. (See appendix 2)

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:

- The payment arises directly from a decision to terminate the employee's contract of employment;
- The payment is specifically approved by a full meeting of the management committee;
- The total sum of the payment/benefit does not exceed, in the opinion of our 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 WHA to participate in the tribunal);
- Payment does not exceed the equivalent of one year's salary for the employee;
- 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 WHA 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 – 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 WHA may feel that it has lost trust and confidence in a senior member of staff, or an employee feels that their relationship with WHA 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 Director, 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 WHA'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 when considering whether they wish to authorise such an approach.
- 3.6 If the committee wish to initiate such discussions with the Director, they will be undertaken by the Chair and/or any other committee member, supported, if appropriate, by an employment advisor, after prior authorisation from the full management committee.
- 3.7 Where such discussions are initiated by the employee, the Director must 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.
- 3.8 In arranging and conducting such discussions, and confirming any agreements in writing, the Director should have regard to the guidance set out in the ACAS publication, "Settlement Agreements: A guide", and to any requirement for specific advice from WHA's employment 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 further details see ACAS guidance.

- 3.9 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.
- 3.10 Although not absolutely required to do so, WHA will provide an agreed reference for the employee as part of the settlement agreement. The Director has delegated authority to agree a suitable reference on behalf of WHA. The length and style of reference agreed will have regard to the circumstances in which the employment contract is being terminated.
- 3.11 If discussions end in agreement to conclude a settlement agreement, a formal written agreement will be required. External professional advice must always be taken about

the form of such agreements (either from EVH or the association's Employment Lawyers in most cases). 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. WHA will meet the reasonable costs of obtaining this independent advice, currently (March 2016) around £250.

3.12 WHA settlement agreements should always contain confidentiality clauses. If such provisions are not honoured, the remedy is usually to claim breach of contract and damages in the Sheriff Court.

3.13 A WHA settlement agreement can only be signed by authorised persons following a specific resolution of the management committee to that effect.

3.14 Please refer to the information note from EVH date May 2019 (appendix 1)

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

4.1 Voluntary redundancy

Where a proposed staff restructure or other efficiency measures will result in potential redundancy, the Director 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 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.

4.2 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.

4.3 Any offer of voluntary redundancy made to any groups of staff should indicate that a settlement agreement will need to be entered into between WHA 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 WHA will meet the reasonable costs of taking such advice.

4.4 WHA must take specialist professional 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 Director has delegated authority to complete the agreement on behalf of WHA, 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.

4.5 Other voluntary severance payments

Where either WHA 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 WHA, the following conditions must be met:

4.6 *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 WHA, 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 WHA to make such a payment and enter into a settlement agreement.

4.7 *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 Director, 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 prior 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.

4.8 *The total sum of any non-contractual payment and benefit does not exceed, in the opinion of our employment adviser, 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 WHA 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 a statement of opinion from our employment adviser – either EVH, provided that they are deemed competent to make such a statement, or a suitably experienced and qualified employment lawyer – that the proposed payment is within the levels of potential cost that WHA is at risk of incurring should a relevant Court or Tribunal hearing go ahead.

4.9 *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 Director must specifically

confirm that this is the case when submitting a report proposing approval of the payment.

4.10 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 Director 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.

- 4.11** 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. Review

- 5.1 This protocol was reviewed by the staffing committee in July 2019, and will be reviewed at least by July 2022, or sooner if circumstances require it.

6. Data Protection

The organisation will treat your personal data in line with our obligations under the current data protection regulations and our own GDPR Policy. Information regarding how your data will be used and the basis for processing your data is provided in Wellhouse HA's employee privacy notice.