



Debra MacLeod  
Labour Market Directorate  
Department for Business, Innovation and Skills  
1 Victoria Street  
London, SW1H 0ET

23 November 2012

Dear Madam,

**Re: BVCA response to BIS consultation on Ending the Employment Relationship**

This response is submitted on behalf of the Legal and Technical Committee of the British Private Equity and Venture Capital Association ("BVCA").

The BVCA is the industry body and public body advocate for the private equity and venture capital industry in the UK. More than 500 firms make up the BVCA membership, including more than 250 private equity, mid market, venture capital firms and angel investors, together with 250 professional advisory firms, including legal, accounting, regulatory and tax advisers, corporate financiers, due diligence professionals, environmental advisers, transaction services providers, and placement agents. Additional members include international investors and funds-of-funds, secondary purchasers, university teams and academics and fellow national private equity and venture capital associations globally.

The BVCA Legal and Technical Committee includes amongst its objectives the shaping of policy and the implementation of policy to ensure that it accommodates the needs of the British venture capital and private equity community.

This response sets out, on behalf of the BVCA, the answers to those questions which are considered to be most pertinent to BVCA members.

**Question 1: Do you agree that these are the correct principles to underpin the use of a settlement agreement which is inadmissible in unfair dismissal cases?**

In principle, we do. However, the BVCA would welcome further clarity on certain aspects of the proposals.

We are unclear how the settlement offer process would interact with the existing without prejudice regime where multiple claims are brought as part of the same proceedings. In practice, claims are, for example, often brought simultaneously for unfair dismissal and discrimination. The content of the offer will therefore be inadmissible for the former but potentially would be admissible for the latter. This is likely to give rise to situations where employers who believe they have made a "protected" offer find the content of the offer unexpectedly exposed. This issue could also militate against the cost savings anticipated by the consultation paper, if significant legal costs have to be incurred in hearings determining whether the contents of conversations are admissible or not.

We would welcome greater clarity in the Code's drafting on what will constitute "improper" behaviour. Particularly, guidance would be welcome on whether impropriety will only be ascribed to discriminatory behaviour (which is the BVCA's preference) or will extend to other types of behaviour.

The BVCA would welcome greater clarity as to whether settlement offers under the Code need to be followed by an "open" disciplinary / dismissal process in the event that a settlement offer is rejected, or whether an employer be permitted not to progress with a formal open process and still benefit from the settlement offer. The BVCA considers that not being required to progress with an "open" disciplinary / dismissal process would allow an employer greater flexibility and reduce the administrative costs involved.



**Question 2: Do you agree that model letters proposing settlement and a template for producing a settlement agreement should be included in a Statutory Code?**

Yes.

**Question 3: If you currently use settlement or compromise agreements, what impact would these templates have on the costs to your organisation of using agreements?**

We are unable to answer that question because we do not know how many of our members would adopt the templates.

**Question 4: Would model letters proposing settlement and a template for producing a settlement agreement be likely to change your use (increase / decrease / stay the same) - please give reasons**

We think that model letters proposing settlement may increase the number of settlement agreements if the process made employers more confident in making offers to employees.

**Question 5: Do you have comments on the content of the model letters?**

The BVCA considers that the model letters should refer to the fact that the letters are sent in accordance with the statutory regime. The letters should also be clear that they contain an offer which cannot be referred to. These amendments would make it apparent that the letters do not contain a traditional offer.

We understand that the model letters are necessarily limited to a few situations (misconduct, performance and attendance). However, we would welcome confirmation that further scenarios would be covered by the letters. In particular, the BVCA considers that a model letter for an employee who wishes to initiate a protected conversation should be included.

It is our view that employers should be wary about using the model letters, particularly for example in cases of "unsatisfactory attendance", unless the underlying disability had been fully explored.

As currently drafted, the open and protected parts of the letter are confused with one another. The BVCA would welcome greater clarity as to whether the entire letter may be protected (the BVCA's preferred option) or if not, that the "open" and protected parts of the letter are clearly separated.

The BVCA appreciates that the letters need to remain brief but would welcome further provisions on standard matters such as notice and holiday pay.

The model letter currently includes a proposal for a meeting with the employee in its second paragraph. The BVCA considers that this is a particularly robust opening to the letter which might be to the detriment of the spirit of settlement.

A suggested mark up of the model letters is attached to this response which envisages the entire letter being protected. If it turns out that the letters are to retain both "open" and "protected" elements then as stated above, BVCA considers that these different elements should be completely separated (e.g. by being on separate pages) and labelled so there can be no doubt as to what is protected.



**Question 6: Do you have comments on the content of the model settlement agreement and guidance?**

The independent adviser's certificate should ideally confirm that the adviser has not acted for the employer in relation to this matter.

We note that, in regard to Annex A to the settlement agreement, employers will have the option to include all the detail listed, or delete everything except point 27 (and deleting "other" from it, so that it is just a stand alone sweep clause). Whilst listing all the claims is fine in principle, we think that it may lead to extra costs for the employee's advisor when considering all the options and we believe that it would be helpful to explain this in the guidance notes.

Furthermore, it will be important for whoever has control of the model agreement to ensure that the list of options is updated regularly as other laws change.

**Question 7: Do you agree that the use of templates should not be compulsory?**

Yes.

**Question 8: Do you think it would be helpful if the Government set a guideline tariff for settlement agreements?**

The BVCA is not in favour of the Government setting a guideline tariff for settlement agreements.

The BVCA considers that principles underpinning settlement amounts would be more useful than actual tariffs.

**Question 9: What would you expect to be the impact of having a guideline tariff?**

The BVCA considers that guideline tariffs would raise false expectations for employees.

**Question 10: If you do favour a guideline tariff for settlement agreements, do you have a view on the approach or formula that should be used?**

Please see response to Question 8.

**Question 11: Do you have a view on what level of tariff would be appropriate?**

Please see response to Question 8.

**Question 12: Do you have ideas for other ways to help effectively disseminate the guidance and materials?**

A webpage linking to the documents so they can be viewed online or downloaded would presumably be one of the simpler and cheaper methods to disseminate materials. Linking to such a webpage from other related websites (e.g. ACAS or the Employment Tribunal) could assist too.

**Question 13: Would the introduction of a cap of 12 months' pay lead to more realistic perceptions of tribunal awards for both employers and employees?**

The BVCA considers that whilst a 12 month cap may lead to more realistic perceptions of tribunal awards, equally there may be unintended consequences such as setting a minimum expectation of what a tribunal award would be. Educating the workforce about how losses are calculated in terms of the compensatory award may be a more effective way of changing perceptions.



**Question 14: Would the introduction of a cap of 12 months' pay encourage earlier resolution of disputes?**

The BVCA considers that whilst a cap of 12 months' pay may mean that settlement discussions are pitched more realistically and therefore earlier resolution of disputes is possible, it may simply encourage employees to seek settlement of no less than 12 months' pay rather than by reference to a realistic assessment of their loss. Further, it may encourage more employees to proliferate issues (for example raising discrimination or whistleblowing arguments) in order to try to avoid the cap altogether.

**Question 15: Would the introduction of a cap of 12 months' pay provide greater certainty to employers of the costs of a dispute?**

The BVCA considers that the introduction of a cap of 12 months' pay would provide greater certainty to employers of the potential exposure to damages in relation to unfair dismissal claims. However, it could also see employees raising more discrimination and whistleblowing issues to try to avoid the cap, which would create uncertainty for employers in terms of potential exposure to damages, as well as increasing the costs to employers of dealing with such issues.

**Question 16: Do you support the introduction of a cap on compensation of 12 months' pay?**

Yes, on balance – although it would be helpful to consider how the potential negative consequences referred to above could be avoided.

**Question 17: Do you have any comments on the impact of this proposal on claimants?**

It may encourage more employees to proliferate issues (for example raising discrimination or whistleblowing arguments) in order to try and avoid the cap altogether

**Question 18: Do you have any comments about the impact of this proposal on employers?**

Please see response to question 15.

**Question 19: Do you have any other comments on the proposal?**

No.

**Question 20: Do you consider that the overall cap on compensation for unfair dismissal is currently set at an appropriate level (£72,300)?**

If the overall cap is used as proposed in the consultation paper, i.e. that the cap of 12 months' pay is imposed if less than the overall cap, then the BVCA considers that the overall cap is currently set at an appropriate level. A lower overall cap would have a disproportionate impact on higher earners who may then be driven to raising discrimination or whistleblowing arguments to try and avoid the cap.

**Question 21: What do you consider an appropriate level for the overall cap, within the constraints of full-time annual median earnings (c£26,000) and three times full-time annual median earnings (c£78,000)?**

Please see our response to question 20.



**Question 22: Do you have any other comments on the level of the overall cap?**

No.

Yours faithfully,

Simon Witney  
Chairman, Legal & Technical Committee  
The British Private Equity and Venture Capital Association



## Annex 1: Draft letters to send to employees offering a voluntary severance package

Draft letter to send to employees offering a voluntary severance package on grounds of **unsatisfactory performance**

Dear [ ] Private and Confidential  
Dear [ ]

### **Your employment**

Without Prejudice and Subject to Contract  
Proposal regarding your employment under [INSERT STATUTORY REFERENCE PERMITTING PRE-TERMINATION NEGOTIATIONS]

This letter and its contents are “without prejudice” which means they cannot be referred to in a tribunal or court.

We are writing to inform you that we have reached a preliminary view that we may have to terminate ~~you~~your employment as a result of your unsatisfactory performance. [Add brief details]

We ~~propose meeting~~would need to meet with you on [ ] at [ ] in [ ] ~~[about 10 days time] so that we can~~in due course in order to formally discuss our concerns ~~fully with you. You have the right to bring a work colleague or a trade union official with you to this meeting. You will be given opportunity~~with you and appropriate ways to improve your performance ~~to meet the required standard before we reach a final decision. If we do decide to~~However one possible outcome of such formal process is that we would terminate your employment.

If we terminated your employment you would receive [link to provide advice on statutory ~~minimum~~/contractual notice] weeks’ notice [and any untaken holiday pay].

You would not receive any other payment.

### **Offer to leave on agreed terms**

~~In the meantime~~As an alternative to going ahead with the formal process referred to above, you may wish to consider the following offer to leave on agreed terms.

~~[You]~~In addition to the payments referred to above, you would receive a [lump sum] payment free of tax of [£x.] ~~[If appropriate link to the guideline tariff]~~ [Link to explain the tax treatment and its limits]

[Your employment would end on [insert date ~~— suggest end of month, if still 3 weeks away-~~ link to provide advice on statutory/contractual notice, payment in lieu of notice, and related tax issues]



[You would receive a factual reference to reflect your ~~work during your~~ dates of employment with us and job title.] [~~delete if you do not wish to offer a reference.~~]

This offer is open for you to accept until ~~5pm on [day prior to proposed meeting to discuss employment]~~ the expiry date which is [time] on [date within a reasonable time period, for example 7 days]. If you wish to accept, then we would ask you to enter an agreement in full and final settlement. You will need to seek legal advice on the terms of this agreement [and we would give you a further sum of [£x] so that you can seek advice]. ~~[All~~ The sums ~~are~~ would only become payable ~~on signing~~ after you sign the agreement.

You are under no obligation to accept this offer. If you do not wish to accept it, or we do not hear from you by the expiry date, then we will ~~proceed to hold the meeting as set out in paragraph 2.~~ write to you separately in due course if we decide to progress with the formal process.

Yours sincerely,



Draft letter to send to employees offering a voluntary severance package on grounds of **conduct**

Dear [ ] Private and Confidential

Dear [ ]

**Your employment**

Without Prejudice and Subject to Contract

Proposal regarding your employment under [INSERT STATUTORY REFERENCE PERMITTING PRE-TERMINATION NEGOTIATIONS]

This letter and its contents are “without prejudice” which means they cannot be referred to in a tribunal or court.

We are writing to inform you of serious concerns over your recent conduct [*insert explanation here*].

We ~~propose meeting~~would need to meet with you on [ ] at [ ] in [ ] [~~about 10 days time~~]so that we can in due course in order to formally discuss our concerns fully with you. ~~You have the right to bring a work colleague or a trade union official with you to this meeting. We will not reach a decision until you have had a full opportunity to have your say. However, it is~~with you regarding your conduct. ~~However one~~ possible outcome of such formal process is that ~~at the end of the meeting we will reach a decision to~~we would terminate your employment.

If we ~~do decide to terminate~~terminated your employment you would receive [*link to provide advice on statutory*–*minimum/contractual* notice] weeks’ notice [and any untaken holiday pay].

You would not receive any other payment.

**Offer to leave on agreed terms**

~~In the meantime~~As an alternative to going ahead with the formal process referred to above, you may wish to consider the following offer to leave on agreed terms.

[~~You~~In addition to the payments referred to above, you would receive a [lump sum] payment free of tax of [~~if appropriate a link to the guideline tariff.~~–*£x.*] [*Link to explain the tax treatment and its limits*]

[Your employment would end on [*insert date* –~~suggest end of month, if still 3 weeks away~~– *link to provide advice on statutory/contractual notice, payment in lieu of notice, and related tax issues*]

[You would receive a factual reference to reflect your ~~work during your~~dates of employment ~~with us~~and job title.] [*delete if you do not wish to offer a reference.*]

This offer is open for you to accept until ~~5pm on [day prior to proposed meeting to discuss employment]~~the expiry date which is [time] on [date within a reasonable time period, for example 7 days]. If you wish to accept, then we would ask you to enter an agreement in full and final settlement. You will need to seek legal advice on the terms





of this agreement [and we would give you a further sum of [£x] so that you can seek advice]. ~~All~~The sums ~~are~~would only become payable ~~on signing~~after you sign the agreement.

You are under no obligation to accept this offer. If you do not wish to accept it, or we do not hear from you by the expiry date, then we will ~~proceed to hold the meeting as set out in paragraph 2.~~write to you separately in due course if we decide to progress with the formal process.

Yours sincerely,



Draft letter to send to employees offering a voluntary severance package on grounds of **unsatisfactory attendance**

Dear [ ] **Private and Confidential**

Dear [ ]

**Your employment**

**Without Prejudice and Subject to Contract**

**Proposal regarding your employment under [INSERT STATUTORY REFERENCE PERMITTING PRE-TERMINATION NEGOTIATIONS]**

This letter and its contents are “without prejudice” which means they cannot be referred to in a tribunal or court.

We are writing to inform you that we have reached a preliminary view that we may have to terminate your employment as a result of your unsatisfactory attendance record. *[Add brief details]*

We ~~propose meeting~~would need to meet with you ~~on [ ] at [ ] in [ ]~~ ~~[about 10 days time]~~in due course in order to formally discuss our concerns fully with you. You have the right to bring a work colleague or a trade union official with you to this meeting. You will be given opportunity with you and appropriate ways to improve your attendance ~~before we reach a final decision. If we do decide to~~ However one possible outcome of such formal process is that we would terminate your employment.

If we terminated your employment you would receive *[link to provide advice on statutory-~~minimum~~/contractual notice]* weeks' notice [and any untaken holiday pay].

You would not receive any other payment.

**Offer to leave on agreed terms**

~~In the meantime~~As an alternative to going ahead with the formal process referred to above, you may wish to consider the following offer to leave on agreed terms.

~~[You]~~In addition to the payments referred to above, you would receive a [lump sum] payment free of tax of ~~[if appropriate a link to the guideline tariff.] £x.]]~~ [Link to explain the tax treatment and its limits]

[Your employment would end on [insert date ~~— suggest end of month, if still 3 weeks away~~]- link to provide advice on statutory/ contractual notice, payment in lieu of notice, and related tax issues]

[You would receive a factual reference to reflect your ~~work during your~~ dates of employment with us and job title.] *[delete if you do not wish to offer a reference.]*

This offer is open for you to accept until ~~5pm on [day prior to proposed meeting to discuss employment]~~the expiry date which is [time] on [date within a reasonable time period, for example 7 days]. If you wish to accept, then we would ask you to enter an agreement in full and final settlement. You will need to seek legal advice on the terms



of this agreement [and we would give you a further sum of [£x] so that you can seek advice]. The sums would only become payable after you sign the agreement.

You are under no obligation to accept this offer. If you do not wish to accept it, or we do not hear from you by the expiry date, then we will write to you separately in due course if we decide to progress with the formal process.

Yours sincerely,



Draft letter to send to employees offering a voluntary severance package on grounds of some other substantial reason

Private and Confidential

Dear [ ]

Without Prejudice and Subject to Contract  
Proposal regarding your employment under [INSERT STATUTORY REFERENCE  
PERMITTING PRE-TERMINATION NEGOTIATIONS]

This letter and its contents are “without prejudice” which means they cannot be referred to in a tribunal or court.

We are writing to inform you that we have reached a preliminary view that we may have to terminate your employment because [some other substantial reason<sup>1</sup> - add brief details]. We would need to meet with you in due course in order to formally discuss our concerns with you. However one possible outcome of such formal process is that we would terminate your employment.

If we terminated your employment you would receive [link to provide advice on statutory/contractual notice] weeks’ notice [and any untaken holiday pay].

You would not receive any other payment.

Offer to leave on agreed terms

As an alternative to going ahead with the formal process referred to above, you may wish to consider the following offer to leave on agreed terms.

[In addition to the payments referred to above, you would receive a [lump sum] payment free of tax of [£x.]] [Link to explain the tax treatment and its limits]

[Your employment would end on [insert date - link to provide advice on statutory/contractual notice, payment in lieu of notice, and related tax issues]

[You would receive a factual reference to reflect your dates of employment and job title.] [delete if you do not wish to offer a reference]

This offer is open for you to accept until the expiry date which is [time] on [date within a reasonable time period, for example 7 days]. If you wish to accept, then we would ask you to enter an agreement in full and final settlement. You will need to seek legal advice on the terms of this agreement [and we would give you a further sum of [£x] so that you can seek advice]. ~~All~~The sums ~~are~~would only become payable ~~on signing~~after you sign the agreement.

You are under no obligation to accept this offer. If you do not wish to accept it, ~~or we do not hear from you by the expiry date,~~ then we will ~~proceed to hold the meeting as set~~

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<sup>1</sup> [Link to explanatory guidance (i.e. that this would need to be a reason that does not easily fit into the framework provided by the other letters (e.g. because of a personality clash) and must not be for a discriminatory or automatically unfair reason).]



~~out in paragraph 2.~~ write to you separately in due course if we decide to progress with the formal process.

Yours sincerely,



Draft letter to send to employees offering a voluntary **redundancy**<sup>2</sup> package

Private and Confidential

Dear [ ]

Without Prejudice and Subject to Contract

Proposal regarding your employment under [INSERT STATUTORY REFERENCE PERMITTING PRE-TERMINATION NEGOTIATIONS]

This letter and its contents are “without prejudice” which means they cannot be referred to in a tribunal or court.

We are writing to inform you that we have reached a preliminary view that we may have to terminate your employment by reason of redundancy. [Add brief details]

We would need to meet with you in due course in order to consult with you about your possible redundancy. However one outcome of such formal process is that we would terminate your employment by reason of redundancy.

If we terminated your employment you would receive [link to provide advice on statutory /contractual notice] weeks’ notice [any untaken holiday pay] [and a statutory redundancy payment calculated as follows]: [Insert calculation]

You would not receive any other payment.

Offer to leave on agreed terms

As an alternative to going ahead with the formal process referred to above, you may wish to consider the following offer to leave on agreed terms.

[In addition to the payments referred to above, you would receive a [lump sum] payment free of tax of [£x.]] [Link to explain the tax treatment and its limits]

[Your employment would end on [insert date - link to provide advice on statutory/ contractual notice, payment in lieu of notice, and related tax issues]

[You would receive a factual reference to reflect your dates of employment and job title.] [delete if you do not wish to offer a reference.]

This offer is open for you to accept until the expiry date which is [time] on [date within a reasonable time period, for example 7 days]. If you wish to accept, then we would ask you to enter an agreement in full and final settlement. You will need to seek legal advice on the terms of this agreement [and we would give you a further sum of [£x] so that you can seek advice]. The sums would only become payable after you sign the agreement.

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<sup>2</sup> We assume that use in the context of a collective consultation exercise is not contemplated and is not going to be provided for under the Trade Union and Labour Relations (Consolidation) Act 1992.



You are under no obligation to accept this offer. If you do not wish to accept it, or we do not hear from you by the expiry date, then we will write to you separately in due course if we decide to progress with the formal process.

Yours sincerely,