



Comptroller and Auditor General

**Follow up of the Utilisation of
Compromise Agreements**

05 May 2016



JERSEY AUDIT OFFICE

Follow-up of the *Utilisation of Compromise Agreements*

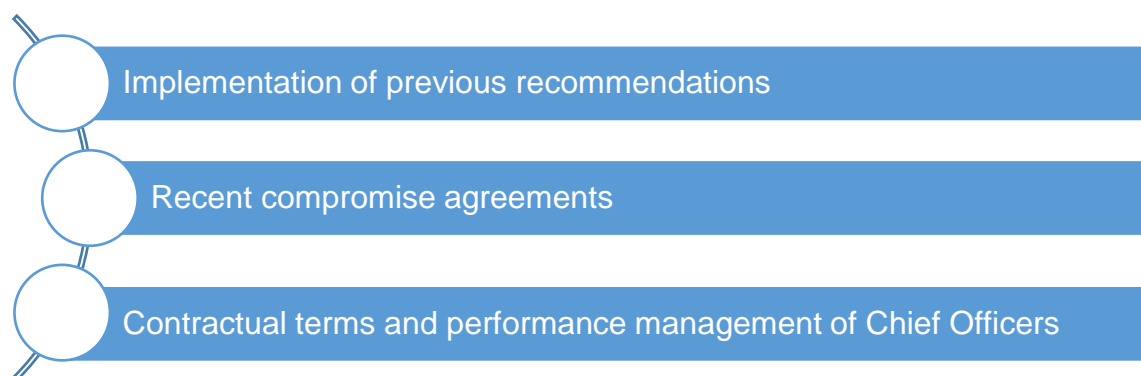
Introduction

- 1.1 Termination of employment may result in claims by the employee against the employer. One of the means of mitigating this risk is entering into agreements where a financial settlement is reached in return for the parties waiving any claims they might have against one another. In Jersey there are statutory provisions which require an employee to receive independent advice before entering into such an agreement.
- 1.2 Agreed termination of employment and the associated compromise agreements are a valid and important tool of management. Used properly they can be an effective way of managing risk and securing the change to which the States is committed:
 - in a political environment, and particularly one involving ministerial government, there may be circumstances where effective government is impossible because of strained relationships between politicians and senior civil servants. For that reason (rather than evidence of under-performance) change on a 'no fault' basis is required; and
 - changes in the model of delivery of public services may require different skills from those previously in place. In some instances, staff have performed well in the past but expectations of what is needed from them have altered and there is a need for a mechanism to secure change.
- 1.3 Payments made to departing staff, especially senior staff, understandably arouse public interest. To demonstrate value for money it is necessary to have robust:
 - internal arrangements to maintain effective working relationships between Ministers and senior staff;
 - performance management;
 - contractual employment terms; and
 - arrangements for demonstrating that termination on agreed terms is an appropriate use of public funds.
- 1.4 In 2012 the former Comptroller and Auditor General (C&AG) issued a report on the *Utilisation of Compromise Agreements* and a separate report *The Former Chief Executive – Compromise Agreement*. The reports identified a number of weaknesses in arrangements and made recommendations for improvement.
- 1.5 Subsequently further high profile departures have taken place, including that of the former Treasurer of the States. This remains an important area to keep under review.

Objectives, scope and approach

- 1.6 The objectives of the review are to evaluate:
- the adequacy of the arrangements put in place to manage and monitor the implementation of the recommendations made by the former C&AG;
 - the extent to which the actions taken or identified against each recommendation meet the intended purpose of the recommendation; and
 - the progress made in implementing agreed recommendations.
- 1.7 The report extends to all agreements entered into with employees in which one or other party agrees to waive claims against the other:
- whether described as a compromise agreement or not; and
 - whether entered into at or around the time of termination of employment or not.
- 1.8 PricewaterhouseCoopers provided me with guidance on relevant good practice in employment contracts for senior staff. This guidance was applicable to both the public and private sectors.
- 1.9 In undertaking the review, I looked at three distinct areas (Exhibit 1).

Exhibit 1: Focus of the review



I consider each of these areas in turn.

Implementation of previous recommendations

- 2.1 Audit recommendations are an important source of learning for organisations. They have maximum impact where there is structured consideration of the recommendations leading to agreed action plans and monitoring of the implementation of those action plans.
- 2.2 In the case of the recommendations made by the former C&AG, while action has been taken in most areas, there was no monitoring of implementation of an agreed action plan. This increased the risk that appropriate action in response to recommendations was not taken or not effective and that slippage in delivery was not identified.
- 2.3 Recommendations made related to effective management of some of the underlying causes of termination of employment, including:
- the political environment within which governments operate; and
 - performance management of employees.
- 2.4 As shown in Exhibit 2 below, action has been taken in response to some recommendations but others have yet to be fully implemented. In particular, whilst some work is in hand to develop performance evaluation for individual staff, the full benefits can only be secured in an environment where performance management is an integral and embedded part of the way in which the States operates, facilitated by the 'tone from the top'. Culture and behaviours throughout the organisation are driven by the Council of Ministers, Corporate Management Board (CMB) and States Employment Board.

Exhibit 2: Action in response to recommendations made

Recommendation	Action	Evaluation
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.	A Code of Conduct and Practice for Ministers and Assistant Ministers was presented to the States in February 2015. This deals with the relationship between Ministers, Assistant Ministers and officers: 'Ministers and Assistant Ministers have a duty to give fair consideration and weight to the advice of officers; must uphold the political impartiality of officers and not ask them to act in a way which would conflict with their responsibilities and obligations; and should act with courtesy and respect at all times toward officers, recognising their	Implemented but the new Code alone will not secure compliance with the principles contained in it.

Recommendation	Action	Evaluation
	<p>obligations as a good employer, for example, in promoting an environment that excludes bullying and discrimination and supports the open expression of views. In turn, officers have a duty to show the same consideration to Ministers and Assistant Ministers, recognising the authority of the ministerial office.'</p>	
<p>Consideration should be given to establishing arrangements for independent oversight of the relationships between Ministers and officers.</p>	<p>No statutory arrangements have been put in place. However, an independent advisor has been engaged on a non-statutory basis who facilitates the appraisal of the Chief Executive and is available to assist in any instances of relationship difficulties between Ministers and officers.</p>	<p>Partially implemented. The arrangements put in place are on a non-statutory basis and only cover the relationship between the Chief Minister and Chief Executive.</p>
<p>Consideration should be given to reinforcing the importance of performance management and to ways of eliminating the behaviours which impede effective performance management.</p>	<p>The Director of Human Resources recognises the weaknesses in the current performance management system. My review of Financial Management identified weaknesses in performance management, including a relatively high incidence of non-completion of appraisals. The existing performance management system does not facilitate cascading corporate objectives via CMB to individual members of staff, therefore weakening the levers for achievement of corporate objectives. A revised appraisal system is being piloted in the Social Security Department.</p>	<p>Not yet implemented.</p>
<p>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</p>	<p>There are no arrangements to ensure that all compromise agreements that do not require approval of the States Employment Board are systematically reported to the Board.</p>	<p>Not yet implemented.</p>

Recommendation	Action	Evaluation
States are reported to the States Employment Board.		
The duties of Ministers with regard to performance reviews and appraisals of Chief Officers (and of all senior officers with regard to the review and appraisal of others) should be re-stated and compliance reviewed regularly.	<p>An independent advisor facilitates the appraisal of the Chief Executive. The Chief Executive undertakes performance appraisals of other CMB members without a documented input from Ministers.</p> <p>The results of the review of appraisals undertaken are discussed below.</p>	Partially implemented. A structured Ministerial-led process is in place for the appraisal of the Chief Executive. There is no formal role for Ministers in the appraisal of other CMB members.
Consideration should be given to ways in which the difficulties surrounding the Chief Executive's position may best be addressed.	<p>The Employment of States of Jersey Employees (Amendment No 7) (Jersey) Regulations 2015 amended Article 3 of the Employment of States of Jersey Employees (Jersey) Law 2005. It enhanced the role of the Chief Executive of the States in respect of chief officers by establishing:</p> <ul style="list-style-type: none"> • a duty to lead chief officers, including in implementation of corporate and strategic priorities; • a power to require a chief officer to account for such matters; and • a power to direct a chief officer in respect of such matters. 	Implemented. However, whilst the new Regulations enhance the statutory powers of the Chief Executive, they do not secure the cultural change necessary to empower the Chief Executive to drive change at a corporate level. I consider the performance management of Chief Officers later in this report. The new Regulations strengthen the authority of the Chief Executive but changing culture takes time and arrangements between Ministers, Chief Officers and the Chief Executive are complex.

Recommendations

- R1** Routinely prepare action plans for implementation of Comptroller and Auditor General recommendations and monitor implementation against those plans.
- R2** Take steps to embed the Code of Conduct for Ministers, including through arrangements for formal mediation between officers and Ministers.
- R3** Adopt a clear timetable for the roll-out of revised performance management arrangements across the States.
- R4** Routinely report all compromise agreements to the States Employment Board.
- R5** Take steps to embed the revised and widened statutory responsibilities of the Chief Executive, informed by input from the Corporate Management Board.

Recent compromise agreements

- 3.1 I reviewed the compromise agreements entered into in 2014 and 2015, some of which were approved by the States Employment Board and some of which were approved by officers acting under delegated powers.
- 3.2 My objective was not to substitute my judgement for that of decision makers but to evaluate the adequacy of the evidence and documentation to support the decisions made. The key findings of my review of individual compromise agreements are detailed in Exhibit 3.

Exhibit 3: Review of individual compromise agreements

Finding	Implication
Case files were not maintained on a consistent basis and the scope and nature of documentation retained to support the terms of a proposed compromise agreement (e.g. discussions with employees or their representatives, legal advice received and evidence of checking calculations) varied.	Increased risk of inability to support the rationale for a specific compromise agreement entered into and payment made.
For decisions made by the States Employment Board, in instances the report did not set out the rationale for a specific payment proposed.	Increased risk of inability to demonstrate that the States Employment Board took into account relevant factors in determining a payment to be made.
For a decision where the States Employment Board was presented with a series of options on proposed terms, the rationale for the preferred option was not minuted.	Increased risk of inability to demonstrate the rationale for a specific payment made.
For decisions made by officers under delegated authority the rationale for the terms of the proposed payment were not always documented.	Increased risk of inability to demonstrate the rationale for a specific payment made.

- 3.3 The Director of Human Resources has reorganised the way in which his department delivers services, creating a dedicated case management team that will take on responsibility for, amongst other things, all cases that result in a negotiated exit under the terms of a compromise agreement. One of the priorities for the team is establishing common documentation standards for case files.

Recommendations

- R6** Ensure that the documentation standards for cases leading to compromise agreements include communications with employees or their representative, legal advice, checking of calculations and a clear rationale for the proposed terms of an agreement.

- R7** Ensure that reports to and minutes of the States Employment Board include a clear rationale for exit terms proposed and agreed.

Contractual terms and performance management of Chief Officers

4.1 Negotiated agreements for the termination of employment of senior staff are by their nature sensitive and may attract adverse public comment. But the very nature of the managerial and political environment in which senior staff work means that relationship breakdowns may lead to ‘no blame’ agreed exits. Such exits are not, of course, a substitute for effective management of individual staff.

4.2 I therefore focused my work on:

- reviewing the contractual terms of the Chief Executive and other members of CMB against established best practice; and
- reviewing the documentation for recent performance appraisals of members of CMB.

4.3 I evaluated the contractual terms of the full members of CMB (the chief officers of ministerial departments) against best practice for contracts for senior staff (see Exhibit 4). I identified some terms which are not included in the contracts that could usefully be included, easing the process of termination of employment and agreement of terms at the termination of employment.

Exhibit 4: Contractual terms for senior staff

Area	Best practice	Finding
Duration	A fixed term to provide appropriate flexibility to the employer and security to the employee.	With the exception of the Chief Executive, all members of CMB are on permanent contracts.
Probationary period	A probationary period during which termination of employment is easier.	A probationary period applies only for new States employees rather than those promoted internally.
‘Gardening leave’	Specific provisions about whether an employee is expected to work out their notice period where employment is terminated by the employer.	No provision in contracts for CMB members.

Area	Best practice	Finding
Termination without notice	Specific provision about the circumstances in which employment can be terminated without notice.	Termination for gross misconduct explicitly dealt with in some but not all contracts. Dealt with indirectly in most cases through references to Civil Service Terms and Conditions Agreement.
Calculation of Pay in Lieu of Notice	Specific provision about how Pay In Lieu of Notice would be calculated.	Dealt with indirectly through references to Civil Service Terms and Conditions Agreement.
Incapacity	Specific provision about termination of employment on grounds of incapacity.	Dealt with indirectly through references to Civil Service Terms and Conditions Agreement.
Notice period	Specific provision about notice period for employee and employer.	Specifically addressed.
Post-termination restrictions on employment	Specific provisions about nature and duration of restrictions on subsequent employment.	Not explicitly addressed.
Return of property	Specific requirement to return employer-provided equipment at the end of employment.	Not explicitly addressed.
Confidentiality	Specific requirement to maintain confidentiality expected as an employee after termination of employment.	Not explicitly addressed.

- 4.4 Appropriate targets and timely, comprehensive, evidence based and well documented appraisal of performance against those targets are key elements of effective performance management of staff. The absence of such performance management increases the risk that any under performance is not addressed in a timely manner and that the employment of under performing officers is terminated with higher payments in compensation.
- 4.5 In a system of ministerial government chief officers have complex accountability lines. There is an accountability both to their Minister and to the Chief Executive and they have accountability for both departmental and corporate objectives.

4.6 I reviewed appraisals for CMB members and identified that in all cases there were documented performance appraisals and in all cases these were thorough.

4.7 However:

- there is no structured, documented input from Ministers into objective setting or performance appraisals. A key part of the environment within which CMB members operate is therefore not explicitly recognised. This increases the risk of a disconnect between political expectations and the performance management system;
- there is no standard documentation for CMB members. As a result performance appraisals are entirely narrative without a systematic and standardised overall assessment;
- despite the corporate role of the CMB and the imperative for stronger corporate working across the States, there was no consistent roll-out of corporate objectives to CMB members covering key corporate priorities, such as eGovernment. In practice, there were relatively few corporate objectives for CMB members with the majority of objectives relating to departmental activity. If CMB members' performance is assessed predominantly on meeting departmental objectives, the emphasis on playing into the corporate change initiatives essential for Public Sector Reform is reduced. In addition, a low emphasis on corporate objectives for CMB members is likely to be reflected in a low emphasis on corporate objectives for those working for them;
- in some cases appraisals were not structured around the objectives making it difficult to understand the basis for the overall conclusions reached; and
- in some cases, officers have prepared their own evaluation of performance. In instances this is referred to but, despite forming part of the evidence to support the appraisal, is not included on the appraisal files.

Recommendations

R8 Review the scope of matters explicitly covered in the contracts for CMB members against the best practice set out in Exhibit 4 above.

R9 Introduce a formal input from Ministers into performance management for all CMB members.

R10 Strengthen performance management through:

- inclusion of corporate targets for all Chief Officers, linked to strategic objectives, the Corporate Plan (when available) and the Public Sector Reform Programme;
- cascade of corporate targets to other staff as appropriate; and
- adoption of a standardised approach to evaluation and documentation of performance of Chief Officers.

Conclusions and next steps

- 5.1 The ability to negotiate termination of employment within an agreed framework, and therefore the use of compromise agreements, is a vital tool of management, in both the public and private sectors. In the private sector it can be the result of changes in personality or business drivers at Board level; in the public sector it can be a result of changes in the political leadership of the organisation or simply driven by the need for change or reform. Ministerial government within the States leads to an increased emphasis on the relationships between senior officers and Ministers. In this context, the use of compromise agreements remains an important tool and effective arrangements associated with them are essential.
- 5.2 The States has taken action to implement some, but not all, of the recommendations made by my predecessor. However, the overall framework in place is not sufficiently robust to ensure that the incidence and value of payments is justified while at the same time allowing effective management and change to progress.
- 5.3 There remains work to do to ensure that the arrangements of the States are robust so that value for money can demonstrably be secured where compromise agreements are entered into. This report contains recommendations, a number of which are inter-related. In my opinion the priority areas for action should be:
- embedding arrangements to respond to the impact of ministerial government (and the complex relationship between an individual Minister, a Chief Officer and the Chief Executive) when driving corporate change and, at the same time, delivering departmental priorities;
 - reviewing contractual terms for senior staff when opportunities arise, taking into account the need for reform;
 - developing the system of performance management, including for CMB members, so that corporate priorities are clearly reflected and cultural change is clearly led from the top; and
 - developing and applying clear consistent documentation standards to support decisions to use compromise agreements.

Appendix 1: Summary of recommendations

Implementation of previous recommendations

- R1** Routinely prepare action plans for implementation of Comptroller and Auditor General recommendations and monitor implementation against those plans.
- R2** Take steps to embed the Code of Conduct for Ministers, including through arrangements for formal mediation between officers and Ministers.
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