

Consultation on distributing tips fairly draft statutory code of practice Acas response

22 February 2024

This is the Acas Council response to the government [consultation on distributing tips fairly: draft statutory code of practice](#).

Our response

1. Acas (the Advisory, Conciliation and Arbitration Service) welcomes the opportunity to respond to the government consultation on distributing tips fairly: draft statutory code of practice.

2. Acas is a statutory, non-departmental public body with a duty to improve employment relations in Great Britain. Acas has considerable practical experience of employment relations and of the issues that can be experienced by workers and employers across all areas of employment law and workplace practice.

3. In carrying out this duty [Acas offers a number of services \(PDF, 1964KB\)](#) including:

- a national helpline which in 2022 to 2023 handled some 649,000 calls from individuals and employers
- a website offering guidance and online training with approximately 14.4 million visits in 2022 to 2023
- conciliation services which in 2022 to 2023 handled more than 600 collective disputes and received nearly 105,000 early conciliation notifications, of which fewer than one in ten cases proceeded to an employment tribunal hearing
- training on a wide range of workplace-related topics, provided to around 41,000 delegates in 2022 to 2023

4. Acas welcomes the government's policy intention to assist employers and workers across affected sectors to understand and apply principles of fairness and transparency associated with tip allocation and distribution. Our response is based on our in-depth knowledge of fair and transparent workplace practices and our expertise in the prevention and resolution of disputes, including those associated with tips and pay. Our comments focus on the following areas:

- minimising potential for discrimination – there is a need for further attention in the Code to the risks of discrimination in selecting and applying factors for allocating and distributing tips
- promoting effective and meaningful workplace consultation – the Code should provide further guidance to help encourage effective and meaningful workplace consultation in both the development and review of fair and transparent tipping systems
- encouraging early resolution of disputes in the workplace – the Code should place greater emphasis on the value of early and effective resolution in the workplace of concerns around tipping
- providing clarity and consistency – the Code should be reviewed to ensure the language it uses is clear, accurate, accessible to all users, and used in a consistent way throughout.

Minimising potential for discrimination in selecting and applying factors for allocating and distributing tips

5. Acas very much welcomes that paragraph 24 of the draft Code emphasises that employers must take care to avoid any form of unlawful discrimination. We also welcome the government's commitment, at paragraph 23, to provide further detail on this in its accompanying non-statutory guidance.

6. However, in Acas's view, there is a significant risk that employers could engage in unintentional discrimination in selecting and applying certain factors for allocation and distribution of tips, including the factors suggested for these purposes at paragraph 22 of the Code. Acas recommends that the Code should do more to highlight and mitigate these risks.

7. In this regard, users of the Code would benefit from a clearer and stronger indication of how discrimination might unintentionally occur in the use of factors that the Code itself recommends. These include, for example:

- "basic pay (and how workers are engaged)" (paragraph 22(b)): this could be problematic as a factor in some instances where it results in differential treatment of certain categories of workers. For example:
 - where there are agency workers on a higher rate of basic pay compared to directly employed staff, employers will need to be mindful not to contravene the parity of pay provisions within the Agency Workers Regulations 2010
 - where basic pay is linked to performance, the fairness of allocating tips in this way may depend on whether the employer has a clear and objective performance appraisal system
 - differentiating on the basis of "how workers are engaged" could in some cases result in indirect discrimination. For instance, if zero-hour workers or part-time workers are allocated a smaller proportion of tips than full-time workers this might indirectly discriminate against certain demographic groups who are more likely to use these contracts, including women, ethnic minorities and younger workers
- "seniority or level of responsibility" (paragraph 22(d)): there may be a risk of age discrimination and/or sex discrimination in using this factor, for instance due to the relatively lower number on average of women in senior roles
- "length of time served with the employer" (paragraph 22(e)): there is a clearly established risk of age discrimination where "length of service" is not used appropriately. Schedule 9, paragraph 10 of the Equality Act sets out that length of service of more than 5 years may be used only where the employer reasonably believes that this difference in treatment fulfils a business need. Case law has confirmed the application of this principle in other areas of law (for example *Rolls Royce Plc v Unite the Union* [2010] in the context of redundancy selection criteria).

8. There is also a risk that a selected method of allocation that is lawful at one time may become unlawful by virtue of a change in staff personnel over time. For instance, a lawful allocation between front-of-house and backroom workers (as per paragraph 22(a) of the Code) might become discriminatory if the staff in those groups later become split on a gender basis, or on the basis of another protected characteristic under the Equality Act 2010. In this regard, we welcome the inclusion of the guidance, at paragraph 25 of the Code, that an employer's policy should be "reviewed on a regular basis in line with staff turnover and any wider changes to the organisation." However, we recommend this is strengthened with an additional explanation as to why such review is important, including the legal risks it may help avoid.

9. Paragraph 26 of the draft Code states that if a particular method of distributing tips is considered fair by the workers affected by it, that may help a tribunal to conclude it to be considered fair and reasonable, provided it does not encompass direct or indirect discrimination. Acas recommends that it is made clearer here that, even where workers themselves support a particular method of distribution, it remains the employer's legal responsibility to ensure that method is not discriminatory.

Promoting effective and meaningful workplace consultation

10. Acas recommends that the Code includes further guidance to help encourage effective and meaningful workplace consultation in both the development and review of systems for the allocation and distribution of tips.

11. Acas welcomes the current emphasis at paragraph 24 of the draft Code that employers should consult with workers to seek broad agreement that the system of allocation of tips is fair, reasonable and clear. We note, however, that the reference to consultation here is very brief and provides employers and workers with no further guidance as to why consultation is important, the benefits it can bring and the risks it can help to avoid. These include, for instance, understanding any relevant concerns or issues workers may have before decisions are taken, as well minimising the risks of discrimination as outlined above.

12. We welcome further the emphasis at paragraph 24 that employers must also consider whether there may be legal or contractual requirements to engage in formal collective consultation where there is a relevant collective agreement or agreement made under the Information and Consultation of Employees Regulations 2004. However, we note that the current phrasing of this paragraph could misleadingly suggest that consultation is only necessary in such circumstances, and we recommend the phrasing is made clearer in this respect.

Encouraging early resolution of disputes in the workplace

13. We note that the draft Code includes a substantial amount of guidance on options for recourse if workers wish to challenge the fairness and transparency of a tipping system. However, as currently drafted, the Code places much greater emphasis on recourse to the employment tribunal system (paragraphs 46-50) than it does on resolution within the workplace (covered only briefly at paragraph 45). In Acas's view, there is a risk that this might unintentionally drive users towards the employment tribunal system rather than informing and encouraging them to engage in early and effective resolution at work.

14. [Acas's evidence on the costs of workplace conflict](#) in UK organisations starkly highlights that the effective early resolution of disagreements in the workplace costs significantly less for organisations, impacting less both on management time and employee wellbeing. Early resolution is more likely to result in maintaining a positive working relationship, while recourse to formal procedures and to employment tribunals brings a greater likelihood of costs associated with resignations, sickness absence, working while ill, and loss of productivity.

15. Therefore, while Acas strongly agrees that it is important that employers are made aware of the potential consequences of non-compliance, and that workers are aware of their full range of options for seeking resolution and redress, we recommend the Code should do more to promote early resolution wherever possible. This should include encouraging parties to seek to resolve concerns informally before pursuing either a formal grievance procedure, conciliation or a tribunal complaint – an option which is not currently referenced in the draft Code.

16. While Acas welcomes the reference to our Code of Practice on disciplinary and grievance procedures at paragraph 45 of the Code, we recommend the following amendments here:

- our code is currently referred to as the 'Acas Code of Practice on disciplinary procedures', omitting the reference to 'grievance procedures'. The guidance on grievances is the operative part of the code in the circumstances covered by paragraph 45, that is, responding to and resolving concerns raised by workers. We recommend the full title of the Code is used here instead
- paragraph 45 states that the Acas code "can be a useful tool for employers and workers". In our view, this understates the importance of following the Acas code, which can be taken into consideration in relevant employment tribunal cases. We recommend strengthening the wording here to state that the Acas code "should be followed in making and handling any formal grievance"

17. Acas also welcomes the reference in the Code's Foreword to Acas's role in helping to resolve issues at work. However, the current wording refers only to "Acas mediation". While mediation may be appropriate in some circumstances, Acas recommends the Code describes a much broader representation of our services. This would help ensure all parties are aware of the advice and support we can provide to help prevent disputes arising as well to resolve them when they do. We recommend the wording below, or alternatively encourage the government to liaise with Acas officials on appropriate and effective wording for this purpose:

'It is recommended that all parties attempt to resolve issues in the workplace in the first instance. Acas (the Advisory, Conciliation and Arbitration Service) is an independent statutory body which offers impartial advice to employers, employees and/or their representatives on employment rights and obligations. It has expertise in helping parties to maintain good employment relations and resolving disputes where they arise. Acas may be contacted for advice by any party at any time.'

Clarity and consistency

18. Acas recommends that the language used throughout the Code is reviewed to ensure a consistent use of terminology that provides greater clarity around which provisions indicate legal obligations and which are good practice recommendations.

19. In its current draft, the Code uses a range of terminology – 'must', 'obliged to', 'required to' – to describe various legal obligations. More consistent terminology in this respect will make it easier for users to be certain about what is legally required. For this purpose, we recommend placing a section at the outset of the Code explaining definitively that the term 'must' denotes a legal requirement while 'should' denotes a recommendation or expectation of reasonableness. In Acas's experience, this will help minimise ambiguity and reduce the potential for misunderstandings and disputes about the provisions of the Code.

20. One important issue of clarity to address is that, at paragraph 21, the Code states: "Employers should use a clear and objective set of factors to determine the allocation and distribution of tips. The choice of factors should be fair and reasonable given the circumstances and the nature of the individual business." This might appear to contradict the provision in section 2 of the Tipping Act that an employer "must ensure that the total amount of the qualifying tips... is allocated fairly". Acas recommends strengthening the phrasing in the Code here to "must", and/or otherwise providing an unambiguous statement of the provision in section 2 of the Act. This would reduce the potential for user confusion as to the extent of the legal obligation here.

21. Finally, we note that there are numerous references to specific sections in legislation throughout the Code, including many instances where users are recommended to "see" those provisions. For example, paragraph 3 of the Code refers users to "see new section 27P of the 1996 Act". Such legalistic language and signposting assume of users a degree of familiarity with the law and an ability to interpret it. Moreover, it is not clear whether further reading of such legal provisions is required of users to understand what the Code expects of them, or if such references are optional reading. Acas recommends that all such references in the Code are reviewed and removed where unnecessary or otherwise explained in plain English for the benefit of the majority of the Code's users.