

Consultation on minimum service levels Code of Practice on reasonable steps Acas response

5 October 2023

This is the Acas Council response to the [government's consultation on minimum service levels: Code of Practice on reasonable steps](#).

Our response

1. Acas (the Advisory, Conciliation and Arbitration Service) welcomes the opportunity to respond to the government's consultation on minimum service levels: Code of Practice on reasonable steps.

2. Acas is an independent and impartial non-departmental public body with a statutory duty to promote the improvement of industrial relations in Great Britain. In carrying out this duty, Acas offers conciliation in both individual and collective disputes, good practice advisory services for employers, and a website and national helpline which assist millions of employers and employees each year. Our work gives us unique insight into what is and is not conducive to good industrial relations.

3. In 2022 to 2023:

- Acas handled approximately 649,000 calls to our national helpline from individuals, employers and representatives
- our website received 14.4 million visits from users seeking advice and support
- we provided conciliation in more than 600 collective disputes and received nearly 105,000 early conciliation notifications
- around 41,000 delegates were trained by us on a wide range of workplace-related topics

4. Acas also has longstanding and in-depth experience in the creation and implementation of statutory Codes of Practice and associated non-statutory guidance.

5. Acas observes that the regulations that will specify and provide detail on the minimum service levels for relevant sectors have yet to be made. In the absence of that detail, it is not possible to fully assess how reasonable and pragmatic the steps set out in this draft Code may be in practice.

6. Reviewing the draft Code in this context, our comments focus on areas which, in Acas's view, require further consideration if the Code of Practice is to provide clear, practical and fair guidance to all relevant parties:

- balance – the need for balance in setting out what is required of all parties so that there are clear and reasonable expectations on all sides
- clarity and consistency – the need for the information and language in the Code to be clear, accurate and unambiguous in setting out obligations and expectations
- practicality – the need for the expectations and recommendations in the Code to be pragmatic and feasible so that the Code is workable in practice

7. The corresponding sections below set out these considerations in more detail with reference to some key examples from the draft Code. The Acas Council encourages the government to liaise further with Acas officials to discuss these issues, and how they might

be addressed, in more detail.

Balance

8. The consultation document states that the government intends the Code to help "all parties" to achieve minimum service levels where these are applied. In this regard, Acas notes that the steps currently set out in the Code form just one part of a wider sequence of steps which will need to function together as a whole to achieve the government's goal of ensuring minimum service levels. These include not only the reasonable steps that a union should take to implement an employer's work notice, but also the reasonable steps that an employer should take in providing, and potentially varying, a work notice.

9. It is not clear from the consultation document why a difference of approach has been adopted in providing statutory guidance on all the reasonable steps for unions while other necessary parts of the process required of employers are either omitted or only partly included.

10. In Acas's view, the current approach of the Code in this respect is likely to result in gaps in understanding and to present challenges in practice for both employers and unions. For example:

- while the 'work notice' is referenced throughout the Code and plays a key role in enabling a union to take the reasonable steps that are required of it, the Code does not make clear the statutory obligation on the employer that a work notice must not identify more persons than are "reasonably necessary" for the purpose of providing minimum service levels
- the Code does not set out whether or how a union might seek clarification as to whether the numbers specified on a work notice are "reasonably necessary", or the process a union should follow if it otherwise reasonably believes a work notice contains inaccurate or incomplete information

11. In the absence of guidance on such matters, the potential for tensions and disputes around the sufficiency of the work notice is likely to be increased. This in turn has the potential to create confusion about whether the requirements of the Code apply to the union in a given situation.

12. While the government has indicated that it intends to set out recommendations for employers separately in non-statutory guidance, in Acas's view setting out all reasonable expectations for all parties in one statutory Code is likely to provide a simpler and easier point of reference, reduce misunderstandings and generate a clearer set of mutual responsibilities and expectations.

13. For the above reasons, Acas recommends including in the Code the relevant legal obligations for employers as well as guidance to help employers and unions understand how they should engage in reasonable discussion about their mutual responsibilities. In Acas's view, this would help encourage more constructive engagement between the parties in ensuring minimum service levels.

Clarity and consistency

14. Clarity and consistency of information and language in the Code is of paramount importance to make it easy to understand for all its intended users, minimise ambiguity around obligations and expectations, and reduce the potential for misunderstandings and disputes.

15. In Acas's view there needs to be greater clarity in the Code around what is a clear recommendation or expectation and those areas where parties may have more discretion with respect to following what the Code sets out. Acas recommends that the government should review the language in the Code to ensure that all its terms and their meaning are clear and consistently used throughout.

16. For example, while the distinction between 'must' and 'should' is defined in paragraph 8 of the Code, the current draft also uses a range of other terms – 'could', 'can', 'may wish to', 'will need to', etc – to variously describe different steps. It is not clear whether these indicate a further level of discretion and, if so, to what degree discretion may be applied to the steps described in these different terms, the factors that may be useful to consider in exercising that discretion, or what the consequences might be of not following such guidance.

Examples here include:

- paragraph 16: "the trade union will need to consider who is best placed within the union to identify their members on the work notice."
- paragraph 19: "The union may wish to inform members who have been removed from the work notice to disregard any earlier communications or other reasonable steps which the union may have taken to encourage them to comply with the work notice."
- paragraph 22: "there is an option for an employer to notify the union that it will not vary the work notice, but no further detail as to how, or the circumstances in which, such notification should be made."

17. Such phrasing is ambiguous and leaves the Code open to interpretation. It is likely to generate confusion about expectations of parties and to widen scope for further disagreement and dispute.

Practicality

18. It is critical that the expectations and recommendations in the Code, as in any code of practice, are practical and feasible. This includes providing sufficient time and opportunity to enable steps to be carried out effectively, and to allow the parties to try to resolve any queries or uncertainties that may arise during the process.

19. It is not clear whether the stipulated steps and timeframes in the current draft Code will be realistic for both unions and employers in every instance. For example, it is not clear:

- whether the Code takes sufficient account of the time and resources required for employers to complete all relevant processes and activities prior to the issuing of the work notice, given that this might have to happen within a 7-day window (in cases where the employer is informed 14 days before the industrial action is due to start) during which the employer is required to consult the union(s) about the details to be specified in the work notice
- whether it is realistic to expect a union to "ensure" they have all their members' details up to date so it can identify those members specified in a work notice (paragraph 16), given that contact details could change on a daily basis where a list of thousands of members is involved
- how practical it will be for a union to carry out all required actions under Steps 1-3 in circumstances where they have the shortest allowable length of time available, that is 4 days before the first strike day where a varied work notice is given at the latest possible date

20. Acas notes that the consultation document does not make clear the basis on which current timescales in the Code have been determined. Acas recommends that the government seeks relevant data from employers and unions to ensure the timeframes set out in the Code are practical and reasonable.

21. Acas observes further that, in the period leading up to any industrial action, tensions will be high. This can bring scope for additional flashpoints in a dispute. As noted throughout this response, in the context of this Code a number of such flashpoints might potentially arise in relation to whether the steps required of each party have been sufficiently completed at different stages.

22. Acas recommends therefore that the Code includes appropriate steps for employers and unions to raise matters of disagreement and to seek to resolve these with each other where possible. Time and opportunity should be built into the timeframes elsewhere in the Code to enable the parties to make effective use of this. In Acas's view, this would minimise the potential for costly and disruptive litigation for both parties.