Draft Code of Practice on dismissal and re-engagement Acas response

18 April 2023

This is the Acas Council response to the government's consultation on a draft Code of Practice on dismissal and re-engagement.

Our response

1. Acas (the Advisory, Conciliation and Arbitration Service) welcomes the opportunity to respond to the government's consultation on its draft Code of Practice on dismissal and re-engagement.

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. Each year Acas engages with millions of employers and employees through its website, offering on-line advice and guidance, individual and collective conciliation work, in-depth advisory services and joint-working with employers and employee representatives to help resolve issues in the workplace. Acas also runs a national helpline which between April 2022 and February 2023 dealt with some 580,000 calls on a wide range of workplace issues.

3. Acas has a wealth of experience and insight on what is and is not conducive to good industrial relations in contexts within the scope of the government's draft Code. In June 2021, in response to a government request, Acas published a fact-finding report on dismissal and re-engagement. Following a further government request, Acas published in November 2021 enhanced good practice guidance on changing employment contracts which included guidance on dismissal and re-engagement.

4. Acas very much welcomes and supports the policy objective stated in the government's consultation document, 'to ensure that an employer takes all reasonable steps to explore alternatives to dismissal and engages in meaningful consultation with trade unions, other employee representatives or individual employees in good faith, with an open mind, and does not use threats of dismissal to put undue pressure on employees to accept new terms'.

5. Acas notes that, in drafting this Code, the government has clearly paid close attention to the principles of good practice set out in Acas's non-statutory guidance on changing employment contracts. While non-statutory guidance is useful in highlighting and encouraging good employment relations practices, a code of practice must set out standards of conduct that must be taken into account by courts and tribunals in relevant cases. Those standards must be sufficiently clear to enable judges to identify failures to comply and to hold relevant parties to account. For this reason, the regulatory nature of a statutory code requires a different set of considerations than those involved in setting out non-statutory guidance.

6. Acas recognises that good practice guidance around dismissal and re-engagement is a difficult issue to codify, and that the Code must be made to work alongside a complex set of existing legal principles, including certain statutory obligations, the common law of contracts, and collective agreements between employers and recognised trade unions where those apply.

Acas appreciates the efforts the government has made thus far to address these issues in its draft Code. However, we do have a number of significant concerns about the workability of the current draft of the Code and its capacity to achieve the government's policy objectives.

Acas recommends, in particular, that the government gives further close attention to the following concerns:

- the Code does not yet adequately address the key issue of appropriate standards of reasonableness at the earliest and final stages of a dismissal and re-engagement process
- there are some significant uncertainties around the intended scope of the Code that require further clarification
- the order of the steps set out in the Code do not reflect in several important respects the real-world realities of consultation and negotiation and may unintentionally result in encouraging poor practice
- the length, complexity and much of the language used in the Code is likely to result in it being inaccessible to many of its intended users
- there is a need for greater clarity around certain expectations and the consequences of certain actions that are set out in the Code

7. The corresponding headings below set out these concerns 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 concerns, and how they might be addressed, in more detail.

Standards of reasonableness at the earliest and final stages of dismissal and re-engagement

8. Acas's fact-finding report found concerns that the prospect of dismissal and re-engagement can sometimes be held out to employees at a very early stage of a consultation and negotiation process.

The report also found that such early notice may sometimes be required, for instance where circumstances are pressing and there is a need to comply with the notice requirements of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992).

However, there are circumstances where the prospect of dismissal and re-engagement can be held out to employees at an unnecessary and unreasonably early stage of discussions.

9. Where this occurs, this can bring significant imbalance to a consultation and negotiation process. It also carries risks of deep and long-term damage to employment relations, wellbeing and productivity within organisations. This is because, as Acas's report and guidance emphasise, the prospect of 'fire and rehire' can be a highly corrosive factor once it enters into discussions, with a negative impact on the attitudes and behaviours of those involved and on the chances of a constructive outcome.

10. This potential for using the practice at an unreasonably early stage is, in Acas's view, closely linked to what the draft Code describes (at paragraph 5) as the use of 'threats' of dismissal to put 'undue pressure' on employees to accept new terms. It is an issue that therefore requires focused attention in the Code if it is to achieve its stated purpose to deter such practices.

11. In Acas's view, however, the current draft of the Code does not yet adequately grasp this key issue. On the contrary, paragraph 38 of the Code requires that an employer be 'honest and transparent about the fact that it is prepared' to dismiss and re-engage. This appears to require that an employer should communicate that prospect even at the very earliest stages of consultation or negotiation when the employer may have it in mind only as a very distant, and highly undesirable, potential outcome.

Similarly, paragraph 38 describes unacceptable 'negotiating tactics', not in terms of unreasonably early communication of the prospect, but only in terms of raising that prospect 'where the employer is not, in fact, contemplating dismissal as a means of achieving its objectives'.

12. In these respects, in Acas's view there is a risk that the current draft provisions in paragraph 38 might have the unintended consequence of driving employers to raise the prospect of 'fire and rehire' earlier, and indeed in more contractual discussions, than happens currently. Given Acas's insights noted at paragraph 9 above, in Acas's view this is an important consideration with regard to the Code's overarching statutory requirement to promote the improvement of industrial relations (s.203(1) TULR(C)A).

13. Acas has concerns also about the Code's provisions relating to the conclusion of the process. In Acas's view, the key consideration here is to strike the right balance between, on the one hand, discouraging unreasonable use of 'fire and rehire' and, on the other, the need for an employer to have ultimate prerogative to make a decision to dismiss in circumstances where it is reasonable to do so.

14. In this respect, Acas welcomes in broad terms the government's stated intention that dismissal and re-engagement 'should be treated by an employer as an option of last resort' (paragraph 59). However, further consideration needs to be given to how this is defined in the Code. The current draft requires an employer, before deciding to dismiss and re-engage, to have 'explored fully any alternative proposals', to have considered 'if it is truly necessary' to make the desired change and to have concluded that it can't achieve its objectives in any other way' (paragraphs 57-59).

15. As currently drafted, these requirements could prevent an employer from taking an otherwise reasonable decision to dismiss and re-engage if presented with any proposal at all, regardless of its reasonableness. This might include, for instance, a long and drawn-out series of unreasonable proposals put forward by even a single employee affected by a large-scale exercise. In Acas's view, such an expectation is not conducive to the reasonable interests of either employers, employees or employee representatives, and the aims of the Code require further consideration here.

Uncertainties around the intended scope of the Code

16. The consultation document asks whether the situations that the Code sets out (at paragraphs 6-10) are the right circumstances in which it should apply. In Acas's view, there are a number of significant uncertainties around the intended scope of the Code that first need to be addressed before this question can be answered.

17. The wording at paragraphs 6-10 appears to envisage the application of the Code to a very wide range of circumstances. These include dismissal and re-engagement scenarios affecting small numbers or even single employees where consultation with employees individually may need to take place (as per paragraph 17 of the Code). However, much of the language and concepts used throughout the Code are clearly written with a view to scenarios involving negotiation (rather than consultation) between an employer and a trade union recognised for collective bargaining purposes.

18. Examples here include a running assumption throughout the Code that employers need to seek the 'agreement' of employees before implementing contractual changes; and that Section C is stated to apply where employees are 'not prepared to accept without further negotiations the contractual changes which [the employer] has proposed'.

19. In these respects, much of the content of the Code is currently not addressed appropriately to the framework for dismissal and re-engagement that is applicable to the majority of employers and working people in Britain who are not engaged in collective bargaining relationships. (Acas notes that in 2021 only some 23% of UK employees were trade union members (Trade Union Statistics 2021 (ONS)).

20. In the absence of a collective bargaining relationship an employer's obligation, when it comes to changing contractual terms and conditions, is not to 'negotiate' and secure 'agreement' but rather to carry out genuine and meaningful 'consultation' about a proposed change, or options for change, before deciding on a course of action. In those scenarios, the legal framework provides that employees' agreement or disagreement need follow only later – potentially much later – and may be either express or tacit. It is not clear how the Code applies in such scenarios.

21. A further significant uncertainty is whether the Code is intended to apply only in those scenarios where employees 'indicate that they intend to rely upon their existing contractual terms' (paragraph 2). Reliance on 'existing' terms is far from the only scenario that could lead to dismissal and re-engagement. For example, it is common for employees to agree with some proposed changes to terms and to disagree about others, but to accept the overall rationale for change and be open to discussion about those other terms. It is not currently clear whether such common scenarios are covered by the Code.

22. Similarly, the Code defines its scope in terms of scenarios where the employer 'envisages that… it might dismiss' (paragraph 6). In this respect, it is unclear whether or how the Code is intended to apply to a 'constructive' dismissal and re-engagement where an

employer does not expressly envisage dismissal, but issues notice of a variation relying on a term of variation in the contract.

The possibility that such variation could, in some circumstances, constitute a constructive dismissal and re-engagement is noted at paragraph 46 of the Code; however, it is not made clear whether or how the Code should be taken into account by either employers or employment tribunals in such cases.

The order of the steps set out in the Code

23. Acas urges that further consideration is given to the order in which the envisaged procedural steps are set out in the Code.

24. In particular, the Code's good practice guidance on 'consulting in the right way' is provided only at a relatively late stage in Section E. While the earlier Section B draws attention to 'specific legal information and consultation obligations', the good practice guidance set out in Section E includes fundamental considerations that should be applied at all, including the earliest stages of consultation and negotiation.

25. Reserving such good practice guidance for a later stage of the Code, while pointing to legal obligations at the outset, risks conveying a message that such good practice need only be regarded as a secondary consideration in the event that adhering to the letter of the law has not initially produced the desired result. Such messaging risks undermining the stated intention of the Code to encourage good consultation and negotiation practices at all stages of these processes.

26. In Acas's view, since encouraging good practice lies at the very heart of achieving the government's intended policy objective, this should be afforded appropriate prominence and emphasis in the early sections of the Code.

27. Similarly, the order in which the Code's guidance on provision of information is set out may cause confusion for users and other unintended consequences. For instance, Section D provides details of 'further information' that employers should consider providing after having 'reconsidered the need for changes' (at Section C). However, the information listed there is fundamental to enabling employees to make informed decisions about proposals at the very earliest stages of consultation and negotiation.

28. Again, providing guidance on the provision of that information only at a relatively late stage in the Code might unintentionally suggest that the Code expects employers only to give the minimum required information about proposed changes at the outset. In Acas's view, the structure of the Code needs to be considered carefully to avoid any such inference by its users.

The accessibility of the Code to its intended users

29. As noted at paragraph 6 above, Acas recognises that good practice guidance around dismissal and re-engagement is a difficult issue to codify, not least because of the complexities of the existing legal framework within which the Code must sit.

30. In this regard, the Code's Preamble explains that the Code aims to explain within its text this legal framework within which it will operate. In Acas's view, this approach results in the Code being overly lengthy and complex and likely to appear confusing to many of its intended users.

31. Acas notes that the users of this Code will be wide ranging and will not consist only of large employers and trade unions who already have some familiarity with the existing legal framework. In Acas's view, the current length and complexity of the Code will present challenges for smaller employers, for those without established mechanisms for collective consultation or negotiation, and for both employers and individuals without ready access to professional legal advice.

32. The language in the Code is highly legalistic in many places and assumes a degree of familiarity with the law that is likely to be beyond most of its users. Examples of this include the lists of legal obligations set out at paragraphs 18 and 28, and in footnotes throughout, and the use of legal terminology such as 'without prejudice to any other legal obligations which might apply' (paragraph 29).

33. The approach to explaining the Code's requirements in terms of 18 potential steps may also present a risk of unintentionally driving a 'tick box' culture among some employers, shifting focus towards compliance with 'steps' and potential costs of non-compliance, but away from genuinely embracing the value of building trusting employment relations.

As Acas's non-statutory guidance emphasises, it is the latter which tends to underpin the best, most stable and long-lasting solutions. In this regard, Acas notes that a previous attempt to mandate a 'stepped' approach to good employment relations – namely, the 3-step statutory dismissal process which was introduced in 2004 – was found to have such unintended consequences and was withdrawn a few years later.

34. In Acas's view, careful consideration should therefore be given to the most effective balance between, on the one hand, setting out specific procedural steps and explanations of applicable law and, on the other, providing guidance on clear, unambiguous and easy-to-understand principles of reasonable conduct. In this respect, a shorter, principles-based Code may be more accessible and helpful in focusing users on those specific areas where the government wishes to encourage or discourage certain behaviours.

The need for greater clarity around certain expectations and the consequences of certain actions set out in the Code

35. The Code sets out many expectations in terms of actions and behaviours. However, the wording used to describe these is not always clear in terms of what is expected of parties, nor what should follow in consequence of certain actions being taken.

36. An important example of this relates to the question of who an employer should consult where there is no recognised trade union. The Code states only that, 'if there is an existing body of employee representatives who could appropriately be consulted on the employer's proposals… then it may be appropriate to consult that body' (paragraph 17).

It is left unclear whether, when or how employers 'should' consult such a body. Consequently, courts and tribunals may be unclear how to assess whether there has been compliance with or a breach or the Code in this respect, if an employer decides to consult or not to consult such a body.

37. Other examples of unclear expectations include several ambiguous time-related statements throughout the Code. For instance, that the employer should 'continue to consult and negotiate for as long as possible' (paragraph 16); 'maintain good communication with the affected employees over a period of time as they adapt to the new terms' (paragraph 47); ensure imposed terms 'are reviewed after a set period of time' (paragraph 53); 'continue to monitor the impact of the imposed changes over time' (paragraph 67).

38. A further feature of the current draft is its stipulation of many 'considerations' that employers should undertake without an indication of what should then follow in consequence of such considerations. Examples here include that employers should 'consider whether it would make sense to allow representatives to be chosen' (paragraph 17); 'consider carefully its analysis of why the changes to the contracts are thought to be needed' (paragraph 22); 'consider whether it has explained clearly its reasons for the changes … and be prepared to engage in a genuine exploration of alternative proposals' (paragraph 39).

39. Regarding these and other instances throughout the current draft, Acas urges that the expectations in the Code are reviewed with a view to providing greater clarity on expected actions, and clearer standards of reasonableness, on which parties can be clearly held to account in relevant cases in the courts and tribunals.

Further considerations on measures to discourage unreasonable use of dismissal and re-engagement

40. As with other statutory codes of practice, the incentivisation to comply with the Code is largely based on the possibility of an uplifted or decreased financial remedy in the courts and tribunals in relevant cases. Acas notes that there are some potential limitations to this approach in seeking to discourage unreasonable use of dismissal and re-engagement.

41. As Acas noted in its fact-finding report, the use of 'fire and rehire' can in some circumstances appear as a relatively attractive option to an employer in terms of purely financial considerations. In particular, dismissal and re-engagement can present a less costly

and quicker option than either a redundancy exercise or retaining employees on existing terms.

In that regard, the fact that the Code presents a risk of a 25% uplift to any later awards in the courts or tribunals may not always present a significant deterrent when calculated against the financial costs and risks of an alternative approach.

42. In Acas's view, this presents grounds for considering whether additional or alternative financial disincentives might help achieve the government's policy objectives. These might include, for instance: scope given to courts and tribunals to make greater uplifts of awards where this is just and equitable; and/or greater or uncapped awards for unfair dismissal where there are especially egregious breaches of the Code.

In deciding appropriate awards, courts and tribunals might be required to consider, for example, whether the employer must reasonably have known better than to breach the Code, the degree of legal advice that was readily available to it, as well as its financial resources.

43. A related concern expressed by some participants to Acas's fact-finding exercise was that the legal risks involved in a dismissal and re-engagement process can often be relatively easily managed by those employers with access to sound professional legal advice. This may well remain the case even if a Code introduces additional requirements. In Acas's view, this presents a potential limitation to the disincentivising effect of the 'post-fault' remedy that the government is proposing to introduce by means of the Code.

44. In this respect, Acas encourages the government to consider whether there may be value in requiring parties to consider engaging in Acas conciliation prior to dismissal and re-engagement, so that parties might benefit from the assistance of Acas in exploring the possibility of a mutually acceptable way forward that avoids that outcome.

While recognising that successful conciliation requires the voluntary engagement of both parties in the process, Acas would welcome discussions with the government as to how such a requirement might be made to work in practice.