Devonshires

Consultation Response: Draft Code of Practice on Dismissal and Re-engagement

Our Response

References in our response to the '*Draft Code*' are references to the draft code proposed by the Government in the consultation documents, references to '*the Code*' are references to the Code of Practice in what we suggest becomes its final form.

1. Paragraphs 6-10 of the Code set out the situations in which it will apply. Do you think these are the right circumstances?

We agree that the Code should not apply where the reason the employer envisages dismissing an employee is redundancy. However, this exemption should be extended so that the Code does not apply to changes to terms and conditions that are being made to avoid a redundancy situation from arising in the first place. For example, those changes imposed by an administrator to save a business. Paragraph 21 of the Draft Code rightly recognises that businesses will need to act swiftly in such circumstances and, whilst employers should still act as reasonably as possible, complying with the Draft Code fully will restrict their capacity to make such swift decisions which could risk the employment of more employees in the long run.

We consider that the Code should only apply where the employer envisages that it will dismiss 20 or more employees if they do not agree to the contractual changes. If the Code applies regardless of the number of employees affected, this will disproportionately affect the resources of smaller and medium sized businesses. Equally, applying the Code to 20 or more employees ensures a fair and consistent approach with employers' collective consultation obligations.

2. If employees make clear they are not prepared to accept contractual changes, the Code requires the employer to re-examine its business strategy and plans taking account of feedback received and suggested factors. (Steps 3 – 4 in table A and paragraphs 20 – 23 of the Code). Do you agree this is a necessary step?

Whilst we agree that it is necessary for employers to re-examine their reasons and consider any feedback and alternative options presented by employees or their representatives, this should take place after all the information has been provided to the employees (Section D of the Draft Code) and after the consultation has concluded (Section E of the Draft Code).

The Draft Code seems to suggest that employers need to carry out this reconsideration exercise twice (firstly in Section C/Step 4/paragraph 20, and secondly in Section H/Step 13/paragraph 57). It is disproportionately burdensome to require employers to carry out this exercise twice, and will unnecessarily elongate the process. After the consultation, employees and their representatives will be better informed and better placed to put forward well informed alternatives. Employers will in turn be better placed to carry out one meaningful re-examination of their strategy and plans before deciding how best to proceed.

3. Do you have any comments on the list of factors which an employer should consider, depending on the circumstances, in paragraph 22 in the Code?

We agree with the list of factors outlined in paragraph 22 of the Draft Code, subject to the following: -

- we would not want the third bullet point (i.e. whether the plans carry any risk of discriminatory impacts) to effectively introduce an obligation to undertake (and share) a formal Equality Impact Assessment. And if this is to be a factor which the Code determines should be considered, then there ought to be recognition that the employer may decide that any discriminatory impact is objectively justifiable.

- we suggest that the 'reasonableness' aspect of the fourth bullet point is brought forward i.e. *"whether there*

are any reasonable alternative ways of achieving…."

- the list of factors should include "'the consequences of not making the proposed changes." This would demonstrate the importance of the employer's objectives.

4. The Code requires employers to share as much information as possible with employees, suggests appropriate information to consider, and requires employers to answer any questions or explain the reasons for not doing so. (Steps 5 and 6 in table A and paragraphs 24 – 42 of the Code). Do you agree this is a necessary step?

We agree that employers should properly inform and consult with their employees (or their representatives) prior to imposing any changes or to dismissing and re-engaging any employees, and do not have any comments to add.

5. Is the information suggested for employers to share with employees at paragraphs 25 and 33 of the Code the right material which is likely to be appropriate in most circumstances?

We agree that the information in paragraphs 25 and 33 of the Draft Code is the right material and likely to be appropriate in most circumstances.

However, paragraphs 32 and 35 of the Draft Code should be retained in the final version of the Code. We consider it very important that the Code recognises that there may be circumstances where employers cannot share certain information where it is commercially sensitive or confidential, or the business is suffering a financial crisis.

6. Before making a decision to dismiss staff, the Code requires the employer to reassess its analysis and carefully consider suggested factors. (Step 13 in table D and paragraphs 57 – 59 of the Code). Do you agree with the list of factors employers should take into consideration before making a decision to dismiss?

Whilst we agree that dismissal and re-engagement should be an option of last resort, the Code should recognise that there may be circumstances where there are alternatives to dismissal and re-engagement that could achieve the same objectives, but those alternatives are more detrimental to the business or create greater risk. For example, unilateral variation would be an alternative to dismissal but would give rise to the added risk of breach of contract claims.

We believe that the reference in paragraph 58 to whether the new terms are "truly necessary" introduces too high a threshold. As an inter-related point, the second bullet point should be framed in terms of whether there are any "reasonable" alternative options, which should also flow through into paragraph 59 which we consider should be amended as follows:

"The decision to dismiss and re-engage the employees should be treated by the employer as an option of last resort, if the employer considers it cannot achieve its objectives in any other reasonable way."

The introduction of a "reasonable" caveat in this section would be consistent with paragraph 4 of the Draft Code.

The third bullet point under paragraph 58 should recognise that a greater impact on one group of employees may be objectively justifiable.

7. The Code requires employers to consider phasing in changes, and consider providing practical support to employees. (Step 15 in table D and paragraphs 61 - 63 of the Code). Do you agree?

Phased implementation:

Whether contractual changes can be phased in depends on the nature of the changes being implemented. For example, where an employer is making changes to the terms and conditions of employment that relate to pensions, it is unlikely to be possible to phase in these changes over time.

A phased implementation of the changes could result in further disruption to the business and the employees. For employees, a phased implementation could make the process unnecessarily drawn out and risk further damaging the employer/employee relationship. For employers, phasing in the changes risks undermining (in the employees' eyes) the business rationale or the need for the change in the first place.

As indicated above, paragraph 21 of the Draft Code recognises that businesses may need to implement changes swiftly in order to protect the business or the efficacy of its services. In such circumstances, it is impractical to expect an employer to phase in the contractual changes without it being unduly detrimental to the business.

Whilst we agree that employers should consider whether it is suitable to phase the contractual changes in over time, the Code should recognise that there may be circumstances where this may not be practical or suitable for either the employee or the employer.

Practical Support:

We consider that the Code should stop short of requiring employers to consider whether there is any further practical support it could offer its employees.

The Draft Code does not indicate how far employers are expected to go in offering support, nor does it limit the support to only what an employer can reasonably provide given its resources. This requirement to consider practical

support will likely create unreasonable expectations on employers in terms of what support it can reasonably offer, which in turn will be detrimental to industrial relations by increasing the prospect of disputes.

During a consultation process to change the terms and conditions of employment, employers are already under a positive obligation to make reasonable adjustments to support any disabled employees who are placed at a substantial disadvantage by the process. There are therefore already protections in place to support the most vulnerable employees in circumstances like these. To extend the obligation to offer practical support to all employees involved in the process, will create an unnecessary financial and bureaucratic burden on small or medium sized businesses.

In the event that the requirement to consider practical support is retained in the Code, the requirement should be limited to only that practical support that an employer can reasonably offer given its resources, and offered only where an employer reasonably considers that the employees might benefit from it.

8. Do you think the Code will promote improvements in industrial relations when managing conflict and resolving disputes over changing contractual terms?

In preparing our response to this consultation we hosted a focus group of employers, almost all of which confirmed they (broadly) practice the Draft Code already in that they take steps to inform, consult and reconsider before implementing contractual changes. For such employers, the Draft Code will not materially change their industrial relations or assist in resolving disputes.

However, we acknowledge that a small number of employers who use aggressive tactics to implement contractual changes do exist and for whom, the implementation of the Code will add value as it should improve their industrial relations and assist in resolving disputes.

9. Does the Code strike an appropriate balance between protecting employees who are subject to dismissal and re-engagement practices, whilst retaining business flexibility to change terms and conditions when this is a necessary last resort?

Whilst some employers do act unreasonably when changing their employees' terms and conditions of employment, including some well publicised examples in the media, it is imperative that the Code does not unduly restrict the flexibility of the vast majority of businesses who already follow the principles and spirit of the Draft Code.

Whilst we generally agree that the right balance has been struck between the parties, we are concerned that the Draft Code may restrict an employer's ability to implement changes swiftly, and a risk that employee representatives may use the Code as a mechanism to unnecessarily prolong the process. This reiterates the importance of ensuring that the Code is not applied to situations where the changes are designed to prevent redundancy situations from arising, or to protect the business from a financial crisis.

10. Do you have any other comments about the Code?

Paragraphs 18 and 28 (other information and consultation obligations):

It would be helpful if these paragraphs made clear that a single process could be implemented to comply, at the same time, with the Code and other specific legal information and consultation obligations which may apply.

Paragraphs 55 and 66 (monitoring the changes):

Once the employer has assessed the necessity for the change and implemented it (either by imposing it or through dismissal and re-engagement), the Draft Code goes a step too far in requiring employers to continue monitoring whether the change remains necessary after it has been implemented.

Employers should be trusted to monitor their businesses and assess its needs without a specific requirement being imposed on them to do so. Such a requirement could give employees false hope that the contractual changes might not be genuine or permanent; it imposes an unnecessary administrative burden on employers; and (having gone through a thorough and extensive consultation process to implement the changes) it is impractical and unrealistic to expect employers to immediately consider whether to undo them.

In any event, whilst we appreciate that practically it would be difficult for the Code to set out a specific period over which the employer is required to continue assessing the need for the change, the fact that there is no specific time period means that an employer could be found to breach this element of the Code a significant period of time after the contractual changes were implemented.

Paragraph 61 (requirement to give notice):

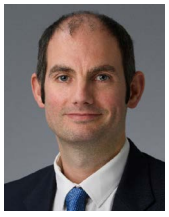
This paragraph of the Draft Code requires employers to give employees as much notice as possible of a dismissal, giving a minimum of their contractual notice. We agree that employees should be given at least the period of notice they are entitled to under their employment contracts (or under statute if greater), and given an increased period of notice where an employer can reasonably do so. However, a positive requirement to give "as much notice as possible" is both too wide and too vague and increases the prospect of disagreements between an employer and its employees/ their representatives. Where an employer has given its employees the opportunity to have continued employment with it (albeit on different terms) it shouldn't be expected

to give extended notice periods in order to tide employees over until they secure alternative work with someone else where they don't want to accept the new terms for whatever reason.

Furthermore, the Code should not restrict an employer's contractual right (where one exists) to pay in lieu of notice. Where an employee confirms they will not be accepting the offer of re-engagement, often the parties will benefit from a clean break rather than the employee working their notice period. For example, where an employee is likely to be disruptive or unproductive in their notice period, or where the employer would like to protect its confidential information. In such circumstances, the employer should retain any contractual right to pay in lieu of notice.

Finally, paragraphs 21 and 32 of the Draft Code rightly recognise that there are circumstances where a business may need to make decisions quickly. An obligation to "give as much notice as possible," and a separate obligation to consider phasing in the contractual changes, is overly onerous and restricts a business' capacity to incorporate changes quickly.

For more information, please contact Chris Cuckney or Melissa Chuttur.



Chris Cuckney
Solicitor
020 7065 1853
chris.cuckney@devonshires.co.uk

Melissa Chuttur
Solicitor
020 7880 4432
melissa.chuttur@devonshires.co.uk