Law Society of Scotland

Consultation Response

Predictable working pattern Code of Practice

January 2024

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the Acas consultation: *Predictable working pattern Code of Practice*.[1] The sub-committee has the following comments to put forward for consideration.

Your details

1. Your name (required): Jennifer Paton

2. Your email address (required): JenniferPaton@lawscot.org.uk

3. In what capacity are you responding to this consultation? (required)

> Other organisation – please describe: The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

About your organisation

1. Your organisation's name (required): The Law Society of Scotland

2. How many people does your organisation employ? Note: This is the number of people working in the whole organisation.

50 to 249

3. How would you classify your organisation?

Don't know

4. If you are an employer representative organisation, employer association or industry association, approximately how many organisations do you represent?

[1] Acas consultation on the draft Code of Practice on handling requests for a predictable working pattern | Acas

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

5. If you are a trade union or other employee representative organisation, approximately how many individual members do you represent?

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Consultation Questions

1. Should the Code be split into 2 sections: one dedicated to requests to employers, and another to requests to agencies or hirers?

Please explain the reasoning for your answer.

Yes – in our view, structuring the Code in this way makes it easier for non-legal readers to easily identify which category of worker they belong to or are advising and then to understand the criterial relevant to that category of worker.

2. Is the term ‘worker(s)’ and its associated meaning under the 2 separate sections of the Code sufficiently easy to understand?

If you answered ‘yes’ or ‘don’t know’, please explain the reasoning for your answer.

Yes. The expressions "employee" and "worker" for the purposes of determining employment status can be difficult to understand given the volume and complexity of caselaw in this area. Defining the terms in the straightforward way proposed in the Code will, we consider, be capable of being understood by lay/non-legally qualified people reading and applying the Code. The expression "agency worker" is also, in our view, one which is easily and widely understood irrespective of any statutory/regulatory definition. The only suggestion for further ease of understanding would be to add an example to illustrate the point. The accompanying guidance would be a more appropriate place for that than the Code itself. The Code clearly refers to the accompanying guidance so it would be easy for users of the Code to cross refer to examples if they were unsure of which definition (if any) applied to a particular set of circumstances.

If you answered ‘no’, how should the Code differentiate between (a) employees and workers who are not agency workers and (b) agency workers?

N/A

Please explain the reasoning for your answer, and where appropriate, please include any suitable alternative terminology that you would like to see.

N/A

3. Please set out any specific areas of the Code that you feel would benefit from further clarification.

Please include your reasoning and suggestions for improvement.

No additional comments.

4. Does the Foreword to the Code set the right tone in encouraging responsible and fair use of flexible contracts, while summarising the key principles of good practice included in the Code?

Please explain the reasoning for your answer.

Overall, yes – the Foreword sets the right tone which Acas is aiming for.

However, one might question the purpose of the Foreword given that it is not part of the Statutory Code. Although there is a clear statement in the opening paragraph that the Foreword does not form part of the Statutory Code, there is the potential for that to create confusion particularly because it includes notes on the distinction between "should" and "must". We question whether the more appropriate place for this text is in the guidance accompanying the Statutory Code. There is a risk, despite the clear statement, that the Foreword is mistakenly read/taken to have the same status as the Code.

That said, we agree that the text included in the foreword is well balanced between setting out a worker's right to make a request and the reasons why a worker might want more predictability, and acknowledging that organisations will not always be able to grant such requests. It is a good summary of the principles.

5. Should the Code include a section on protections from detriment and dismissal?

If you answered 'no' or 'don't know', please include your reasoning.

Yes the Code should include a section on protections from detriment and dismissal – that is an integral part of the right to make the request; for it to be handled in a reasonable manner; and for it to be granted unless there is a legitimate business reason for refusing it. Setting the protections out expressly in the Code will ensure that employees, workers, employers and agencies are all aware of the statutory protection. It also

helps employers and agencies to understand that there will potentially be consequences of not complying with the statutory requirements. Specifically, including reference to the protections from detriment and dismissal in the Code will ensure that employers and agencies are aware that the rights of employees and workers go beyond a right to request a more predictable work pattern and includes a right to have the request accepted unless there is a legitimate business reason for refusing it.

We consider that it would also be helpful to refer to the additional protections under the Equality Act 2010 when making and communicating decisions about a request for a predictable work pattern.

If you answered 'yes', should the example of ceasing or reducing hours, as a direct response to making a request for a predictable working pattern, be included in the Code? Or should this be included in the non-statutory guidance instead?

The non-statutory guidance

Please explain your reasoning.

The Code is intended to reflect what is legally required by the relevant statutory provisions. Our view is that examples should be included in the accompanying guidance rather that the statutory Code. The expression "detriment" is one which is very broad in an employment law context, covering a wide range of disadvantages. Whilst including an example in the Code helps bring the point to life, there is a danger, irrespective of the additional wording about reducing offers of work for legitimate business reasons not being caught by the definition of detriment, that workers will regard any reduction or cessation of offers following a request for flexibility as being unlawful. The reader could be referred to the accompanying guidance for examples of detriment at paragraph 42.

If you answered 'yes', please set out any other examples of detriment you would like to see included in either the Code or non-statutory guidance.

Other examples could include

- Continuing to make offers of work but offering fewer hours;
- Continuing to make offers of work at the same level but offering anti-social hours or at times which are known not to suit the worker;
- Continuing to make offers of work but at lower rates of pay or at different rates of pay from other employees or workers on more predictable work pattern;
- Generally behaving badly towards a worker who has made a request – bullying and harassment.

6. What are the advantages and disadvantages of the Code recommending that workers should be allowed to be accompanied at meetings to discuss a request for a predictable working pattern?

Please include your reasoning.

We have considered the advantages and disadvantages of recommending that workers be allowed to be accompanied at meetings to discuss a request for a predictable work pattern and these are set out below.

On balance, we do not believe that the Code should make such a recommendation. Such a meeting does not appear to fall within the definition of either a disciplinary or grievance meeting for which there is a statutory right to be accompanied under section 10 of the Employment Relations Act 1999. If Acas made such a recommendation in the Statutory Code, that might be construed as reflecting the legal position as set out in the legislation relating to predictable work patterns which would be misleading. It could nonetheless be included in the guidance accompanying the statutory Code.

Advantages

1. Allowing a worker to be accompanied by an appropriate person at a meeting to consider a request for a predictable work pattern could allow the worker to feel more comfortable and could facilitate a more constructive discussion with the employer.
2. The presence of a companion may also reduce the likelihood of disputes arising from miscommunication or misunderstandings in such meetings. It may also help increase the chances of the worker being able to clearly articulate the changes sought and their reasons for the pattern requested. Even although the latter is not required as part of the information to be provided in a statutory request, it would arguably help the employer to comply with its obligation to reasonably consider the request. This in turn might reduce the likelihood of a second request being made in the same 12 month period (if the request is refused) or an appeal being lodged. Both a second request and an appeal would almost certainly add to an employer's administrative burden which we assume most if not all employers would be keen to avoid. It may also reduce the risk of a worker becoming aggrieved and leaving – that also has a cost associated with it for employers.
3. The concept of a right to be accompanied to certain workplace meetings is well known. Arguably, recommending that a worker be allowed to be accompanied would be consistent with the Acas guidance on discipline and grievances at work which is well understood (but see comments under disadvantages).
4. In some cases, it may be appropriate for a worker to be allowed to bring a companion to a meeting to consider their request for a predictable work pattern as a reasonable adjustment where the worker is a disabled person for the purposes of the Equality Act 2010.
5. Whilst not all workers will choose to be represented by a trade union representative or official, this potential increases the chances of a union, particularly a recognised one, having a more holistic view on consistency of treatment and rationale given when either accepting or rejecting a request for predictable hours. This could allow unions to better support members or those requesting their attendance and monitor worker sentiment.

Disadvantages

1 In our view, notwithstanding the above, recommending that a worker be allowed to be accompanied at meetings to discuss a request for a predictable work pattern would not be consistent with the right to be accompanied in other work-related meetings. There is a statutory right to be accompanied to discipline and grievance meetings – that right is set out in section 10 of the Employment Relations Act 1999.

A meeting to discuss a request for a predictable work pattern is clearly not a disciplinary meeting.

We have considered whether it could be categorised as a "grievance" hearing such that the right to be accompanied would be engaged. In our view, it is not. Under the Employment Relations Act 1999 Act, a grievance hearing is one "which concerns the performance of a duty by an employer in relation to a worker" (section 13 (5)). At page 45 of the Acas guidance on discipline and grievances, it states that a "worker who has a formal grievance about a duty owed to them by their employer has the right to be accompanied". It goes on to explain that "duty" includes the "employer's legal and contractual obligations". In the context of a grievance, the right to be accompanied clearly extends only to a complaint relating to a breach by the employer of a legal duty. Applying the same principle to a request for a predictable work pattern, the right to be accompanied should only be engaged where a worker complains of a breach by the employer of its obligations under the relevant legislation (for example where a request is refused in circumstances where there does not appear to be a genuine business reason for refusal), and not for the meetings where the initial request will be considered by the employer.

2 If the right to be accompanied was recommended by Acas that might be understood by those reading the statutory Code to reflect the law. The Workers (Predictable Terms and Conditions) Act 2023 which is implemented through the Employment Rights Act 1996 does not provide for a right to be accompanied to meetings to consider requests for a predictable work pattern. The Code cannot expand current legal rights.

3 Rather than creating/adding to the list of circumstances in which an employer must allow a worker/employee to be accompanied to workplace meetings, this is a matter which could be addressed in the accompanying statutory guidance. All employers may have to consider whether they should allow it as a reasonable adjustment where a worker is disabled and has the protection of the Equality Act 2010. Separately and more generally, it should be open to individual employers to decide whether they are prepared to allow a worker to be accompanied to a meeting to consider a request for a predictable work pattern. Larger employers with greater resources at their disposal may be better placed to accommodate such a practice.

Notwithstanding 1-3 disadvantages mentioned above, which in our view support the removal of the recommendation to be accompanied from the Code, we have highlighted additional disadvantages should Acas decide to retain it:

4. Facilitating a companion’s attendance will be make it more difficult for employers to coordinate a meeting, including any appeal, within the very restrictive prescribed one-month period. This is a

particularly tight timescale which is likely to pose problems for large and small employers, hirers and agencies alike. Whilst employers, hirers and agencies will be experienced in assessing whether a request to be accompanied is reasonable – with regard to role, delay and availability – the concentrated nature of this process will exacerbate the need for more immediate availability. This is further exacerbated by the guidance to rearrange a meeting should the individual fail to attend because employers, hirers and agencies will need to forecast potentially two attempts to arrange a meeting, and potentially two attempts to arrange an appeal, as well as the guidance that a request to be accompanied does not need to be made "within a certain timeframe". It is likely that the timescale will be so onerous, in cases of diary management, that it will be unrealistic at times.

5. Whilst it is not absolute, it is more typical in a grievance and disciplinary situation for an employee to bring a worker or trade union representative/official who either has standing or an existing relationship within the employer's business. By comparison, in a situation that an agency worker is making a request to a hirer then this is less likely to arise. Question 8 below indicates a possibility that a "fellow worker" is capable of meaning someone from either the hirer or agency (even if that fellow worker does not originate from the same hirer or agency to which the request is being made) but this possibility is not clear from the Code itself. If a "fellow" worker can be from the agency, when a request is made to the hirer (or vice versa) then this is likely to cause confidentiality concerns where there are no agreements or expectations of confidentiality on the companion. Whilst the same could be said for a Trade Union representative or official, it is more likely that they will respect confidentiality because of their wider understanding of the role of a companion and the desire to preserve workplace relations. We think it sensible that a fellow worker must originate from the business to which the request is being made and that the guidance make that clear.
6. In contrast to the the Trade Union advantage above, there might also be a concern that where hirers depend on agency workers, and particularly those of a short-term nature, then there is a potential for trade unions to seek to capitalise on requests of many agency workers to try to inundate hirers with requests, and/or seek bargaining units based on those individuals becoming employees and having sufficient buy-in over time.
7. Disruptive companions can lead to breakdowns in communication. Whilst the Code provides clear guidance that employers, hirers and agencies must deal with request reasonably, there is no corresponding requirement on individuals or their companions. Furthermore, where companions become disruptive, which could result in delay, it could be clearer in the Code that an employer, hirer or agency should prioritise the requirement to comply with the one month timescale as opposed to accommodating delays caused by a disorganised or disruptive companion.

7. What is your opinion on the Code recommending the same categories of companion as those that are allowed in discipline and grievance meetings?

Please include your reasoning.

Our responses in this section are subject to our comments in response to Question 6 above and our conclusion that we do not agree with the suggestion of recommending that workers be allowed to be accompanied at meetings to discuss a request for a predictable working pattern.

If, despite our conclusion, that recommendation were included in the Code, we agree with the proposal that the Code recommend the same categories of companion as those allowed in discipline and grievance meetings.

The consistency of approach is likely to make it easier to implement because there will be familiarity with existing disciplinary and grievances practices in place to accommodate, validate and consider the reasonableness of a request.

In our view, the presence of a trade union representative may be helpful because they are likely to have a wider understanding of the reasons a request for flexible working may not be accepted, and may also be able to support the employee in considering alternative arrangements.

We also think that a colleague may be a suitable companion because they are likely to have a detailed understanding of the structure and operations of the business, insofar as that may impact the ability to accept a flexible working arrangement.

We have considered whether, because of the personal nature of requests for flexible working, it may be appropriate to extend the categories of companion to include close family members. Our experience is that flexible working requests are often prompted by circumstances which may be sensitive and personal to the individual , for example caring responsibilities or health difficulties. We have concluded that many of these factors apply also to certain discipline and grievances, and that there is therefore no reason to depart from the categories of companion allowed in those processes. In our view, it is simpler and clearer to align any recommendation in this context with the guidance on those processes.

It is however worth noting that the employment status of employees in a disciplinary and grievance situation is different to an agency worker in this situation and we draw your attention to our comments above re confidentiality and tactical representation in our response to Question 6. We believe that it should be clarified if a fellow worker must originate from the same business to which the request is being made – see response to Question 8 below.

We also refer to our comments throughout this response on the need to give broader consideration to the requirements of the Equality Act.

8. For agency workers, what are the practical considerations around the Code recommending that a companion may be a fellow worker from the agency, hirer or both?

Should it be the case that the Code retains a recommendation to be accompanied, then it is our view that the Code should make it clearer that a “fellow” worker must originate from the same agency or hirer to which the request is being made. Otherwise, we think it likely to raise confidentiality and practical issues for the hirer or agency dealing with a request as set out in our response to Question 6.

9. Should the Code recommend that employers, agencies and hirers provide any additional information which is reasonable to help explain why a request has been rejected?

Don’t know

Please explain the reasoning for your answer.

The Code makes it clear that the outcome and the reasons for a decision should be explained clearly to the worker in writing. The foreword (whether that be retained in the Code or moved to the Guidance) mentions the need for evidence-based decisions so employers, hirers and agencies ought to be aware that any challenge made will require objective and verifiable rationales to be provided. Should it be decided that employers, hirers or agencies ought to provide additional information, then we suggest that it be a choice for the employer, hirer and agency so as not to increase the administrative burden and process whilst enabling them to balance commercial sensitivities. It is likely that if the outcome is not clear to the individual who has requested it, then they will exercise their option to appeal, although we appreciate that this is not a statutory right.

10. What are the advantages and disadvantages of the Code stipulating that, wherever possible, an appeal should be handled by a manager not previously involved with a request?

Please include your reasoning.

The main advantage is that it creates separation between the original decision and the final outcome. This increases the internal visibility by the employer, agency or hirer and increases the overall accountability as a result. An appeal held by someone other than the original decision maker has become a staple of good employment practice in other processes so the logic of applying it here is evident.

However, the scope of applicant is wider in this Code than what employers, hirers and agencies have been used to. Employers, agency and hirers will be concerned about the volumes of requests they might

receive and if there are any differences between this process and a flexible working request (pending a new code on Flexible Working in 2024). The nature of flexible working and predictable working requests are different to disciplinary and grievance cases because there is likely to be more reliance on understanding the commercial needs and resources of an employer, hirer or agency which might be best understood by one manager at team or divisional level.

Furthermore, the need to coordinate another manager who does not have prior knowledge of the request could further exacerbate the difficulties that employers, agencies and hirers will have to complete a process, including an appeal, within the very restrictive prescribed one-month period.

11. Should the Code include a section about the right to request flexible working?

Yes

If you answered 'no' or 'don't know', please explain the reasoning for your answer.

Yes. The distinction between a request for predictable working hours and flexible working is likely to be misunderstood by a lay/non-legally qualified person so anything that draws the readers attention to the fact that there are two different processes which might apply to their situation, and the impact that one might have on the other, is important.

If you answered 'yes', do you believe that paragraphs 14 to 16 in the draft Code provide sufficiently clear guidance on the interaction between the 2 rights?

No

Please explain the reasoning for your answer.

Whilst these sections are helpful to understand how one request in one regime might impact another, it does direct readers to a separate code/guidance or spell out at an earlier stage in the Code that there might be a different option available to the individual. Earlier and more helpful links would make it easier for the reader to understand that they may want to consider this Code in tandem with any right to make a flexible working request.

12. Please set out any other areas that you feel should be included in the Code or non-statutory guidance.

Please include your reasoning.

Nothing beyond that contained in our answers above.

For further information, please contact:
Jennifer Paton
Policy Team
Law Society of Scotland
DD: 0131 476 8136
JenniferPaton@lawscot.org.uk