



Law Society  
of Scotland

# Consultation response

Draft Code of Practice on dismissal and re-engagement

April 2023



## Introduction

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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 Department for Business, Energy and Industrial Strategy consultation: *Draft Code of Practice on dismissal and re-engagement*.<sup>1</sup> The sub-committee has the following comments to put forward for consideration.

## General Comments

The Draft Code of Practice on dismissal and re-engagement (the Code) largely re-enforces existing good practice by creating a process for employers and employees to follow. We are supportive of the aspirations of the Code and agree that meaningful consultation will help maintain or improve industrial relations when employers are facing into difficult decisions around contractual changes. We envisage some situations where it is not immediately apparent whether or not the Code ought to apply and this will likely turn on evidence of the employer's intentions, as well as complex legal arguments regarding the nature of the contractual change(s). However, as employers retain their ability to make a risk-based decision before progressing with any unilateral contractual change or express dismissal then this Code provides clarity about the expectations if they are found to have envisaged dismissal(s). We have made some observations where we consider the Code could be clarified further.

## Questions

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

Paragraph 6 makes it clear that the scope of the Code is intended to deal with 'fire and rehire' scenarios following an unsuccessful attempt to agree contractual changes, and we agree that the focus (paragraph

<sup>1</sup> [Code of Practice on Dismissal and Re-engagement Consultation \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/611111/code-of-practice-on-dismissal-and-re-engagement-consultation.pdf)

7), reach (paragraph 9) and employer triggers (paragraph 10) are appropriately worded to enable wide application.

However, we make the following observations:

- Our understanding from paragraph 6 is that the Code is not intended to apply to circumstances in which an employer does not envisage dismissing employees (paragraph 6). We can foresee situations whereby an employer proposes to make unilateral contractual changes whilst arguing that those could not reasonably be capable of amounting to a dismissal (constructive or otherwise), such that it could be said they had envisaged dismissal(s). This might be contrary to the opinion of the employee(s). In the absence of evidence that the employer was consciously envisaging dismissal - which practically may be difficult for employees to obtain despite Employment Tribunal disclosure requirements - then this is likely to lead to complex legal arguments about the contractual change itself when trying to establish whether or not the Code ought to apply.
- Notwithstanding the point above, it may be apparent that an employer has entered into a consultation process to change terms and conditions, with no intention to make a dismissal at that point in time. However, that same employer could feasibly contemplate dismissal as a potential at a later point. It is not clear whether any former consultation process can be relied upon by that employer to demonstrate compliance with the Code if it is subsequently established that it ought to apply.
- We agree that redundancy situations involve separate considerations and that this Code ought not to apply to those situations. However, we do note that there could be complex cases involving changes to location/workplace, particularly where employers and employees may have differing views around the enforceability of any given mobility clause. As such, further guidance may be helpful to users.

**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?**

We agree that it is a necessary part of any meaningful consultation that an employer demonstrates that it has listened to employee feedback, considered suggested alternatives and reassessed its proposals in light of such feedback. We also consider it important that the factors to be considered are non-exhaustive given the range of possible scenarios that could arise.

**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 have no comment.

**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 information will need to be provided to employees to enable meaningful consultation to take place. We also agree that the type and volume of information will vary depending on each scenario and the reasonableness of that will need to be assessed on a case-by-case basis. In the experience of our members, we believe that employers are likely to rely upon commercial sensitivity or confidentiality when refusing a request for further information.

It is also worth bearing in mind that some employers may receive deliberately obstructive requests, depending on industrial and colleague relations, and so it might be helpful to consider whether paragraph 36 should refer to reasonable requests of information by employees or their representatives. Further, it may be appropriate to include some provision in the Code requiring parties to treat confidential and other business information about the proposals with due care and sensitivity.

**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?**

Paragraphs 25 and 33 are similar but not identical and it is not immediately apparent as to why two separate lists are required. It might prevent confusion to consolidate the lists or use similar language in both.

**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?**

Yes.

**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?**

It is notable that it is for the employer to 'consider' whether or not it can phase changes or offer practical support. Whilst we agree with the intention of the Code to mitigate any detrimental impact on employees so

far as is reasonable, we consider it important to recognise that some employers will have limited resources and that these requirements ought to be assessed on a case-by-case basis.

With reference to paragraph 61, we agree that many of the examples provided would mitigate against detriment suffered by an employee who has a particularly short notice period, but consider that the requirement to extend a notice period to enable an employee to find alternative work is likely to be difficult to quantify and could be seen as being at odds to those employers who are already offering reengagement on new terms.

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

The Code encourages a consultative culture which we think is likely to improve industrial relations.

## **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?**

The Code is likely to educate employees better in relation to the risks the employer is taking by choosing to dismiss/re-engage but the Code largely does not alter existing good practice.

However, it was noted that Clause 59 is absolute regarding an employer only being able to dismiss and re-engage if 'it can't achieve its objectives in any other way'. This does not appear to acknowledge that there could be legitimate business factors that preclude alternatives, or which make it so commercially unviable that it would be either futile or otherwise in parties best interests for the employer to have only 'consider' all alternatives before progressing.

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

We have the following observations:

- The Code recognises that an employment contract can be verbal yet paragraph 44 requires that all changes be put in writing to each employee affected. Whilst we agree that this is good practice for the majority of situations, and section 4 of the Employment Rights Act 1996 would require it so far as it related to particulars, we can envisage situations where this is not seen as efficient or proportionate by an employer. This could arise for example if, after consultation an employer decides to make a relatively small change to a contractual policy in a handbook and that it would normally communicate that change via a central communication as opposed to writing to each individual employee. However, given that the scope of the Code makes clear that the catalyst for even a small unilateral change would be the

employer envisaging dismissal(s) then we consider this scenario to be less common than more fundamental contractual changes.

- There are a number of places where the Code refers to other statutory obligations, including saying that the employer 'must' comply with these. Unless it is otherwise intended, it would be helpful if the Code could be more explicit in confirming that compliance with these statutory obligations is outside the scope of the Code and therefore a breach of such statutory obligations would not, per se, result in an uplift in compensation.
- Whilst the example of parents with young children in clause 21 could be valid, it will depend on the circumstances as to whether or not that would be fair and legally compliant. We think the sentiment of clause 21 is clear without the bracketed section referring to that specific example.
- There are very few obligations on employees and employee representatives - only that they listen to the employer and respond in good faith to questions and concerns. Further we note that the reduction to compensation only applies where 'employees' have not followed it. It may be appropriate for the Code to impose wider duties on employees AND their representatives to act in good faith in their involvement in the consultation process more generally, otherwise there is no ability to reduce compensation where a representative acts in bad faith. This must also be seen in the context that, as currently drafted, there is little scope for a reduction given that most obligations rest with the employer.
- The Code could be perceived by employers to be onerous, particularly when there is a potential for an uplift. For example:
  - The reference to negotiating 'for as long as possible' in clause 16 is difficult for employers to navigate with commercial certainty.
  - Clause 66 is difficult to imagine in practice because an employer is unlikely to continually review something for an indefinite period. It could also be hard for an employer to evidence a review - particularly if it lacks resources - at a future point in time if a subsequent change is made which is when a later claim relating to the Code is likely to materialise.
  - Clause 68 appears to be circular and could cause confusion. If the employer must only dismiss and re-engage as a final option after exhausting attempts to agree the change, then we see little merit in requiring an ongoing obligation to seek agreement.
- Given the lack of obligations on the part of employees (and no option for compensation to be reduced if there is bad faith or malpractice on the part of a representative), in practice the impact of the Code in terms of the effect on compensation will predominantly fall to penalise employers. It was noted that where such a financial penalty has been used before, there are more balanced reciprocal duties between the parties which are capable of being more easily identified as a breach.



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of Scotland

**For further information, please contact:**

Jennifer Paton

Policy Team

Law Society of Scotland

DD: 0131 476 8136

[JenniferPaton@lawscot.org.uk](mailto:JenniferPaton@lawscot.org.uk)