



Consultation Response

Acas consultation on the flexible working Code of Practice

September 2023



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: *flexible working Code of Practice*.¹ The sub-committee has the following comments to put forward for consideration.

General Comments

We have answered the consultation questions in section D of the consultation below. We have the following additional observations:

- The draft Code of Practice states that there is now a day 1 right to request flexible working. That is not yet the case as the day 1 right has not been included in the changes passed to the legislation. We understand that this change is to be brought in by Regulations, but those Regulations do not yet exist.
- Paragraph 8 states: “*Every request must be handled in a reasonable manner. This should include carefully assessing the effect of the requested change on the business and on the individual, including the potential benefits and impacts for both parties of accepting or rejecting it.*”

We understand that this paragraph is intended to apply to the employer only and this should be made clearer in the drafting, potentially starting this paragraph with “*Every request must be handled by the employer in a reasonable manner.*” We understand this to be an example of good practice, rather than a legal requirement.

Please note that Sections A to C of the consultation are addressed above and in our covering email.

¹ [Acas consultation on the draft Code of Practice on handling requests for flexible working | Acas](#)

Section D: Consultation questions

Question 1 of 11: In addition to updating the Code to reflect changes to the law, should Acas also reconsider the overall good practice principles in the Code?

We have no comments.

Question 2 of 11: Does the Foreword to the Code strike the right tone in encouraging an open-minded approach to flexible working, with a focus on what may be possible?

Don't know

Please explain the reasoning for your answer.

We consider that the foreword is weighted slightly too heavily towards employees. Whilst we recognise that it is important that the Code seeks to strike a balance between the relevant interests of employers and employees, it appears to impose obligations on employers which are quite significant and which do not exist in the legislation – for example by saying that employers should seek to build flexibility into job roles as part of their job design and recruitment processes. Given there are implications for employers who fail to comply with the Code, we would suggest that some of the content of the foreword would be better placed in Acas guidance.

Question 3 of 11: Do you think that it is helpful to include a definition of ‘flexible working’ within the Foreword to the Code?

Yes

If you answered ‘yes’, which definitions should the Foreword provide?

☐ **A definition of a statutory flexible working request, based on the Employment Rights Act 1996**

Please explain the reasoning for your answer.

The definition should be based on the statutory definition, with broader examples of types of flexible working included in guidance.

If you answered ‘no’ or ‘don’t know’ to question 3, please explain the reasoning for your answer.

Not applicable.

Question 4 of 11: Should the Code provide guidance on ‘consulting’ with employees about a request?

Don't know

Please explain the reasoning for your answer.

Generally and subject to our comments below, this section of the Code is well drafted and appropriate.

Paragraph 12 states that “*Employers must not reject a request without first consulting the employee. Employers should have a formal meeting with the employee after receiving the request. The meeting should be held without unreasonable delay. The person holding the meeting should have sufficient authority to make a decision.*”

In our view, it would be better and more logical to include, at this point, the point made later in the draft that employers are encouraged to meet with the employee where they will be accepting the request – i.e. it is more logical to say what should happen when the employer is going to accept the request before going on to say what should happen if the employer won't be agreeing to the request. Instead, the Code sets out what should happen if the employer is going to agree to the request much lower down in this section.

Additionally, if you answered 'yes', please outline any other issues the Code or non-statutory guidance should provide guidance on, to help employers and employees understand what is expected during consultation.

Not applicable.

Question 5 of 11: What is your opinion on the guidance in the Code about offering an employee a meeting, even when the employer plans to accept their request?

Please include your reasoning.

This seems to be sensible guidance, provided it is clear that parties can mutually agree that a meeting is not required in certain cases.

Question 6 of 11: Should the Code include a section on the protection from detriment and dismissal?

Yes

Please explain the reasoning for your answer.

In our view, this section of the draft Code adequately covers this.

Question 7 of 11: What are the advantages and disadvantages of the Code recommending that employees should be allowed to be accompanied at meetings to discuss flexible working?

Please include your reasoning.

Disadvantages: this could create confusion as the statutory right to be accompanied only applies where dismissal is a possible outcome of a meeting. There is no general right to be accompanied to investigation meetings or redundancy consultations so it is unclear why a flexible working request should be any different.

Advantages: builds in support for employee; in our experience most employers' usual practice is to allow employees to be accompanied to all meetings notwithstanding that there is no statutory right.

Question 8 of 11: 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.

Subject to our comments above, we agree that categories of person should be the same as discipline and grievance meetings.

Question 9 of 11: Should the Code recommend that employers provide any additional information as is reasonable to help explain why a request has been rejected?

Yes

Please explain the reasoning for your answer.

This seems sensible as it reflects most employers' usual practice.

Question 10 of 11: For larger organisations, what are the advantages and disadvantages of the Code stipulating that, where possible, an appeal should be handled by a manager not previously involved with a request?

Please include your reasoning.

Advantages: impartiality; this is the usual practice in most large employers.

Disadvantages: the appeal manager may not have a good enough working knowledge of the employee's team to allow them to make a proper judgment as to whether or not the flexible working request can reasonably be accommodated.

Question 11 of 11: Should the Code include a section about the right to request a predictable work pattern if that right is introduced?

Don't know.

Please explain the reasoning for your answer.

The draft Code (at paragraph 5) requires that, if an employee wishes to make a statutory request for flexible working, the request must state that it is a request for flexible working, and must also state: "if and when the employee has made a previous request for a predictable work pattern".

We understand that, in principle, the reference in paragraph 5 is included to allow the employer to identify whether the employee has exhausted their entitlement to a maximum of two requests per 12-month period. Paragraph 28 suggests that where a request is to "improve predictability" and "is made under the statutory right to request flexible working", it will count towards the flexible working limit and the predictable working pattern limit. However, as drafted, we do not think the Code makes it clear exactly when a request a) counts towards both limits, and b) should be dealt with under the flexible working Acas Code vs the predictable working Acas Code. In these circumstances, there is a risk that the inclusion of reference to the right to request a predictable working pattern may cause confusion.

If you answered 'yes' to question 11, do you believe that paragraphs 27 to 29 in the draft Code provide sufficiently clear guidance on the interaction between the 2 rights?

No

Please explain the reasoning for your answer.

See our comments above.

For further information, please contact:

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