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**Response to the Consultation of the Department for Business, Energy and Industrial Strategy on The Code of Practice on Dismissal and Re-engagement**

**18 April 2023**

**Submission completed by the Employment Law Committee on behalf of the Birmingham Law Society**

**Introduction**

The Birmingham Law Society is the largest provincial local law society with a membership of some 5,500 representing solicitors, barristers and paralegals working in the West Midlands area.

This response has been prepared by the Society’s Employment Law Committee which is composed of lawyers from all branches of the legal profession who specialise in employment law acting for both employers and employees. The opinions expressed in this response represent the collective view of the Committee as a whole.

**Consultation questions Specific questions:**

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

* The situations in paragraph 6 are broadly appropriate.
* Paragraph 8 states that the Code does not apply where the reason for dismissal is redundancy. As redundancy can sometimes be an alternative option to dismissal and re-engagement, consideration needs to be given of the interplay between changes to terms and conditions and redundancy. The Code does not address this. We have addressed this point throughout this response.
* There will be circumstances in which an employer genuinely needs to carry out a restructure. If employees do not agree with the restructure proposals, one common and obvious consequence is that redundancies may be made and not dismissal and re-engagement. We do not propose that this Code applies to redundancies, but again thought needs to be given as to how this Code will apply alongside redundancies. See further comments below relating to this.
* Paragraph 9 makes it clear that the Code applies regardless of the number of potentially affected employees, but contains some onerous steps throughout. We consider that the process set out in the Code would be burdensome for micro-businesses, as well as for processes that involve a very small number of employees. We suggest that consideration is given as to whether the Code should instead apply to employers of a certain size or, alternatively only once a certain minimum number of employees are potentially at risk of dismissal, similar to collective redundancy situations, noting that the laws regarding unfair dismissal law already protect employees in this space. That said, we recognised that the Code benefits employees and that sometimes it is small and inexperienced businesses that fall foul of their obligations towards employees in this space.

**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?**

* The process of considering the proposals and the need for change, and considering employee feedback is something that most employers already ordinarily do in the absence of the Code. The introduction of the concept “in good faith” in paragraph 19 could require the Tribunal to make a decision on this. A better phrase and easier to determine may be “with an open mind”.
* If the Code is to include an obligation of ongoing monitoring and reconsideration of the proposed changes and business strategy, it is important that the language of the Code is more concise. For example, to what extent does an employer need to re-consider? If changes are made following a process, and circumstances change much later down the line, are employers expected to go back to the changes and undo them? The wording of the Code is vague in this respect. We have addressed this point further below.
* At the point it is clear that employees are not prepared to accept the changes without further negotiation (or sooner), redundancies may be a potential outcome of the process. This section (and the Code generally) does not address when an employer would be required to issue a section 188 notice under the Trade Union and Labour Relations (Consolidation) Act 1992 ("**S188 Notice**"). If a S188 Notice is served too late, employers face liability for failure to inform and consult which can be costly, but the Code does nothing to acknowledge this. See our further comments on this below.

**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?**

* The factors in paragraph 22 are things that would usually be taken into account by employers in these circumstances.
* Consideration of any discriminatory impacts is an important factor to consider.
* There is currently no reference in the Code to what the contract of employment sets out regarding changes to terms. This should be a factor that is taken into consideration throughout the process.
* Alternative options should be considered, but we consider the reference to mobility clause in the contract to be a peculiar example of alternative options available. If the Code will set out suggested alternative options, these should be expanded upon to assist both employers and employees.
* As a general point, it is difficult to see how the obligation in paragraph 20 differs from the factors in paragraph 22.

**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?**

* The requirement for employers to share as much information as possible is a high threshold, particularly when balancing the requirement not to use dismissal and re-engagement as a threat in negotiations. See further detail below.
* Paragraph 38 sets out a requirement to be honest and transparent about the potential dismissals. It also says that employers should not use the threat of dismissing employees as a negotiation tactic. This is going to be an extremely difficult line for employers to tread, taking into account the onerous steps that the employer should take under the Code, including the requirement to provide as much information as possible. In practice, it is appropriate to require employers to be transparent about its proposals, but this paragraph potentially conflicts with this. There is a real risk that employees/their representatives will allege that a threat has been made once an employer informs of the potential need to make dismissals. Whilst the threat of dismissal cannot be used *as a negotiation tactic* it will be extremely difficult for employers to distinguish between a negotiation tactic and a mere provision of information if they are challenged on this. This wording should be reconsidered and its intention made clearer.
* As a general comment, we consider that section D of the Code is misplaced. If an employer is considering dismissing and re-engaging, this information should be provided at the outset of the process to avoid the process being deemed defective. This section should therefore be moved further up the Code.

**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?**

* Subject to the comment made in relation to Question 4 in relation to information being provided at the outset of the process these appear appropriate on the face of it.
* Information that an employer is required to give should also include, where it is relevant, the fact that dismissal is a potential outcome. However, as set out above, this would likely be seen as a threat and therefore put employers in breach of the Code.
* Paragraph 33 seems to repeat the same factors set out in paragraph 25. We consider that the Code could be consolidated to avoid either duplication of information or ambiguity in certain areas, including here. Our recommendation is that there be an obligation at the outset to disclose information as set out in paragraph 25.
* It is difficult for employers to understand the extent of their obligations, and in particular in relation to the amount of information they should give. To this point, paragraph 32 appears to accept that a consultation process might be imperfect due to the seriousness of the position, but then goes on to reference the fact that "the more information they can share, generally the more productive the consultation process will be and the more likely it is that an agreement may be achieved". The messaging is confused - whilst the Code is to inform and direct employers as to good practice does paragraph 32 provide clarity as to circumstances where limited disclosure is accepted and/or is a defence to a claim or is it aspirational?

**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?**

* Paragraph 58 states that employers should consider if the changes are "truly necessary'". This wording suggests a high threshold, which is contrary to current case law in this area, which simply requires employers to demonstrate a sound business reason. The Code therefore goes too far in this respect and the wording “sound business reason” substituted.
* As a general comment, the steps set out in these paragraphs are repetitive of steps taken already in the process. These factors will have been taken into account throughout the process to date and employers should be expected to evidence consideration in their decision making. Requiring a formalised additional stage is unnecessary.

**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?**

* The Code includes some sensible suggestions, including varying practices to accommodate certain disadvantaged employees.
* The requirement to give "as much notice as possible complying with the employee's contractual notice period as a minimum" (paragraph 61) is extremely onerous. We find it difficult to understand why notice to dismiss and re-engage should be longer than the notice required if an employee were to dismiss but not re-engage the employee. This goes too far in protecting the employee and imposing an onerous obligation on the employer. We suggest this requirement is reconsidered, taking into account the rationale of the Code and what it is intended to address.
* Whilst it is sensible to assist employees with changes that may negatively impact them (if reasonably practicable), how changes are implemented, including the required notice periods, will depend on the type of change and this is not reflected in the Code. For business reasons, employers may need to implement some changes sooner than the required notice set out in the Code, and providing at least the employee's contractual notice period will not always be practicable or possible.
* The requirement to reconsider the changes in the future under paragraph 62 is unclear. To what extent does an employer need to keep monitoring the changes and for how long? Business circumstances change frequently, and it would not be reasonable or practical for companies to monitor the changes for an indefinite period of time. The Code needs to be clearer here. The requirement to review the changes in the future goes further than current legislation around consultation and redundancies or other circumstances where a variation is agreed (at which point it is binding on both sides) and we suggest this point is reconsidered.

**General questions:**

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

* In the absence of the Code, the vast majority of employers would always consult in these circumstances. The Code as drafted draws out the process and includes a number of repetitive steps that would prolong the process. This may negatively impact employer/employee relations.
* As above, the Code states that employers should not use dismissal and re-engagement as a threat in negotiations, but equally should be transparent at an early stage. With a focus on not using the process as a threat, there is a risk that, once an employer confirms that it will dismiss and re-engage in the event that an agreement cannot be reached, it may be perceived as a threat by employees or unions.
* We consider that it would help industrial relations if it is recognised that an employer has to issue a S188 Notice in certain circumstances, without this being perceived as a threat. This is simply a necessary process that employers need to undertake in relation to collective redundancies and should be acknowledged in the Code. See further detail below regarding S188 Notices.
* The majority of situations where dismissal and re-engagement may be contemplated relate to changing terms around pay or historic terms and conditions. These circumstances will not constitute a redundancy situation, but there will be genuine situations where employers need to make changes to avoid redundancies and this Code does not acknowledge that changing terms may be for the benefit of the wider workforce. If this were to be recognised in the Code it would assist with employee 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 majority if not all of the obligations in the Code fall on the employer, rather than the employee, meaning that the Code places employers at risk of a 25% uplift on compensation. It is difficult to see when the employee would face a 25% reduction. Other than refusing to engage in the consultation, there are limited circumstances in which the employee would fail to comply. The balance is therefore more in favour of the employee. Further, in most cases employers will not be engaging directly with employees regarding the changes, and will likely consult through unions or employee representatives, making it even more difficult to see how employees would be in breach.
* We consider that the Code provides employers with a lack of flexibility when making changes. As touched upon above, it is not clear how long the consultation process should last, and how long the requirement to reassess the proposals should continue. If the requirement to constantly reassess the proposals is to remain, we suggest there should be a time limit under the Code regarding the process to provide employers with some certainty. See further detail below regarding this point.

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

* There is a conflict between the Code and an employer's collective consultation obligations in a redundancy situation. As set out above, the Code requires that employers dismiss as a last resort and do not use the threat of dismissal to put undue pressure on employees to agree. However, if the employer has collective consultation obligations, but gives notice of the proposal to dismiss and re-engage at a late stage in the process to avoid being seen as threatening, this could impact the collective consultation process for redundancy. A S188 Notice needs to be given at a relatively early stage, which could conflict with the requirement under the Code not to use threat of dismissal. This is a crucially important point which has not been addressed anywhere in the Code. We suggest considering whether there should be a time limit or minimum period of consultation under the Code. This would assist in giving employers the ability to progress this without getting to the point where a S188 Notice needs to be served. As currently drafted, there is a risk that a collective consultation process for the purposes of redundancy could last 90 days (45 days under this Code and 45 days under redundancy laws), which is something that was expressly removed by the Government. The concerns as to the length of time that may be required is heightened by the reference at paragraph 16 of the Code to “as long as possible”.
* Due to the number of steps, and repetition of steps, it may be easy for employers to find themselves to be in breach of the Code. The Code goes too far in scrutinising the consultation process. If the Code is to proceed in its broad current form, it should be condensed and made more concise so that employers are absolutely clear as to their obligations.
* Paragraph 46 is not legally correct and refers to a situation which would not amount to a dismissal and re-engagement.
* As touched upon above, the Code should be reviewed to ensure the ordering of the sections are correct. For example, we consider that section D should precede section C, as the provision of information happens at an early stage and should be done throughout the process. Employees should first be informed of the proposals, these should be discussed with the employees, and then the employer should consider the responses and go back to their proposals. The current ordering of the Code does not reflect this order of events and is not sequential.
* Generally, we believe there is repetition in the Code and if this is removed the Code could be much more concise. Also section G is not directly relevant and could be removed.

**Signed: …………………………………..**

 **President**

**Dated: 18 April 2023**