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ACAS Consultation:

Draft Code of Practice on the extended right to request flexible working

Response from the Employment Lawyers Association

3 May 2013

ELA RESPONSE TO ACAS CONSULTATION

Draft Code of Practice on the extended right to request flexible working

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both barristers and solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

The Legislative and Policy Committee of the ELA set up a sub-committee under the chairmanship of Elaine Aarons of Withers to consider and comment on the ACAS consultation paper **Draft Code of Practice on the extended right to request flexible working.** Its report is set out below. A full list of the members of the sub-committee is annexed to the report.

Question 1

Do you think the Code gives you enough information on the principles involved in managing the extended right to request flexible working?

1. As a starting point, it is worth noting that it is difficult to give a definitive answer to this question without having sight of the "good practice" guide (the "**Guidance**") that will sit alongside the Code of Practice (the "**Code**"). There is no indication as to whether or not ACAS intends to consult on the contents of the Guidance.

2. A fundamental point of concern which we feel must be clarified is in relation to the status of the Code, particularly when compared with the status of other statutory ACAS Codes of Practice (the ACAS Code on Disciplinary and Grievance Procedures, for example, or the expected ACAS Code on Settlement Agreements). The draft Code simply states, at paragraph 2, that the guidance within it will be "*taken into account by employment tribunals*", but there is no indication of what that means in practice. We are of the view that this point should be clarified and that there should be consistency in the status of the statutory Codes currently being produced by ACAS (the Code on Settlement Agreements, for example). How, for example, will the Code be taken into account by Tribunals and how will a finding that they have not been adhered to affect the outcome of a particular case, or the level of compensation awarded? Will the Tribunals be expected/permitted to draw "adverse inferences" from an employer's failure to follow the Code in the same way that they are currently able to do when faced with a failure by an employer to provide adequate responses to statutory discrimination questionnaires?

3. We have two further concerns with regard to the status of the Code based on the fact that it refers to the "*guidance*" within it being taken into account by Tribunals. First, that wording raises a question as to the distinction between the status of the Code and the accompanying guidance yet to be published (are they both guidance only?). Second, it is a confusing statement in that the Code itself – in its current form – contains very little guidance at all.

4. Depending on the decision taken as to the status of the Code, we would advocate there being one document (a Code), rather than two (a Code and Guidance). If the Code is to stay in its current, very brief and simplistic format, there seems little merit in giving it any more legal force/teeth. It is not clear to us why it is proposed that there will be a "statutory" Code, supplemented by "non-statutory" Guidance. A preferable route, in our view, would be for the Guidance to be within the body of the Code in order to create more legal certainty and reduce the prospects of litigation.

5. It would be helpful to specify in the 'Introduction to the Code' that there is a statutory requirement to deal with requests in a reasonable manner and to address the potential sanctions which employers face for failing to deal with applications in such a manner (i.e. up to eight weeks' pay, subject to the applicable statutory cap on a week's pay). We also consider that the 'Introduction' should be firmer in highlighting the need not to discriminate. The reference to this in paragraph 8 is insufficiently explained.

6. Paragraph 1 of the Code should be amended to emphasise the fact that the right to request flexible working is open to <u>all</u> employees, provided they have at least 26 weeks' continuous service and not just those with certain care/childcare responsibilities. This would also assist in promoting the view that requests received from those with such responsibilities should not be given preferential treatment over requests received from employees without such responsibilities.

7. It would also be helpful to include specific reference to the Guidance and firm recommendation that it is referred to by employers when considering requests. We have a concern that some employers, especially small employers, will rely solely on the Code of Practice when responding to flexible working requests. We consider that, standing alone, the draft Code is insufficient to properly assist employers with the management of such requests.

8. The Code reflects the "principles-based" approach ACAS states it has been adopting (see page 3 of the Consultation Paper). Although this is intended to maximise flexibility, we consider that this creates uncertainty as to what is required, which could result in increased litigation. For example, what sort of timescales should apply in relation to each step of the process? (See recommendation at paragraph 12 below) What should the written request for flexible working from an employee contain? How is an employer expected to demonstrate that it has approached a given request from the presumption that it will be granted (as stated in paragraph 7 of the Code)? It would be helpful to have more information/details included in the Code.

9. It would also be helpful to include confirmation in the Code (perhaps within paragraph 1) that small companies/"micro-businesses" are not exempt from the extension to the right to request flexible working and are bound by the Code. It should also be emphasised (as mentioned above) that the right to request flexible working is open for all employees provided they meet the length of service requirement.

10. Although it has been indicated that guidance will be provided on how employers should handle conflicting requests from different employees which are received at the same time, and on the interaction between flexible working rights and discrimination legislation, no mention of this is made in the Code. We assume these matters will be addressed in the Guidance, but query whether some points of principle (consistency, for example – see below) should be included in the Code. For example, how employers faced with a flexible working request from an employee with children and one without should handle such requests whilst minimising their exposure to potential discrimination claims from either employee. This, in our view, is a large omission from the Code and should be addressed. We note, as mentioned above, that paragraph 8 states that employers should "*not discriminate against the employee*". This is a very broad statement which without any further detail does not help employers to comply with their legal obligations.

11. Query whether there should – at least in general terms – be a statement in the Code recommending employers to deal with flexible working requests consistently. In large organisations, for example, it is possible for a situation to arise in which managers in one business unit or division of an organisation approach requests for flexible working differently to managers in another business unit or division, thereby creating inconsistency within the organisation as a whole and increasing the exposure to potential claims.

12. The timeframes set out in the Code are very vague (except paragraph 13 of the Code which simply states that the whole process – including any appeal - must be completed within three months). Paragraphs 3 (arranging to talk to the employee) and 9 (informing the employee of the decision) refer to taking action "*as soon as possible*". That is very vague. We would suggest that consideration should be given whether to use the words "*without unreasonable delay*", which would be consistent with the wording in the ACAS Code on Disciplinary and Grievance

Procedures and is terminology legal practitioners are now familiar with. However, if the intention is for employers to be in a position to refer to the Code and meet their legal obligations without having to seek legal advice (on the meaning of what "*without unreasonable delay*" means, for example), that wording is also too onerous and thought should be given to clarifying this issue. It would be helpful, therefore, to have non-binding guidance included in relation to timeframes (perhaps with examples involving a few different scenarios), although we agree with the move away from having rigid timescales set out in current legislation on this issue .

13. Should employees be given notice in advance of the meeting to discuss their flexible working request? One would assume so, but that is not stated in the Code. The Code appears to suggest that the meeting does not need to be formal in nature. We believe that a formal meeting, held pursuant to a written invitation, is in both parties' best interests and would suggest that the Code should address this.

14. Possible topics which should potentially be discussed at the hearing and in respect of which clarification in the Code or Guidance would be helpful are: requests for temporary flexible working arrangements, whether or not a trial period is appropriate and timings for introducing flexible working arrangements.

15. Although the detail will/may be provided in the Guidance, consider whether reference should be made in the Code to employers considering whether to grant flexible working requests subject to a trial period and/or whether requests can be made for temporary changes to working patterns, as opposed to permanent changes (see also paragraph 26.6 below).

16. The Code should reflect the statutory rules as to when requests may be treated as withdrawn (i.e. if it is expressly withdrawn by an employee; or if an employee fails to attend a meeting or appeal meeting more than once without reasonable cause; or if the employee, without reasonable cause, refuses to give the employer information that it has requested in order to assess whether the employee's request should be granted) and the consequences of withdrawal (i.e. that a further application cannot be made for a period of 12 months from the date of the original application).

17. It would be helpful to specify the impact on the employee's employment contract of agreeing to the flexible working request. The obligation to record any changes to employment terms in writing (pursuant to Section 1 of the Employment Rights Act 1996 ("**ERA 1996**")) should be reiterated. It should be emphasised that all agreed arrangements should be recorded in writing – even if they are agreed on what appears to be an informal basis. (It is worth noting that some members of this working party have had to advise in litigation where there has been an issue surrounding what has or has not been agreed by way of an informal arrangement for flexible working).

18. The Code should specify that when rejecting a request, the employer must not only specify which of the statutory reasons applies, but also to give sufficient explanation as to why such reason applies. Also, we are of the view that the list of statutory grounds on which a request may be refused (as set out in Section 80G of ERA 1996) should reflect the list in statute (a few of them appear to be combined in a single bullet point in paragraph 11 of the current version of the Code). It would also be helpful to state that those statutory reasons are set out in Section 80G of the ERA 1996 to reiterate their statutory force.

19. More information could be provided in the Code on how appeals are handled. It would be helpful to make clear that employees should be notified in writing of their right to appeal and that they should be issued with a formal invitation to an appeal hearing. The Code does not state whether an appeal meeting should be held or whether an appeal can be handled through a paper exercise alone, for example (see paragraph 12). Also, information should be provided as to who should deal with the appeal.

20. In paragraph 13, there should be clarity on whether any agreement to extend the three month period should be recorded in writing.

21. As an aside, it is ELA's view that some form of monitoring should be put in place once the new law comes into force to ensure that those with childcare responsibilities, or who are seeking to

return to work following long term illness/disability (for example) are not disadvantaged when making flexible working requests. The impact of the changes being introduced should not, for example, be to make it more difficult for women to return to work following a period of maternity leave. Employers should be encouraged to consider such matters as part of ensuring that they have an appropriate talent pool in their workforce.

Question 2

Does the Code allow you to use your existing procedures to handle requests from employees who ask to work flexibly?

22. We believe that all employers should be encouraged to review their existing procedures in light of the new law and to consider whether they are "fit for purpose" given the changes. We would advocate there being publicity in this regard.

23. It seems to us that given the current (very brief) requirements of the Code, employers who already have detailed flexible working policies in place based on the prescriptive regime, will need to review and amend those policies in order to give themselves the same degree of flexibility provided under the Code.

24. Existing procedures will need to be amended to reflect the new, wider, right to request flexible working. That is, the fact that all employees – not just those with caring responsibilities and those with children under a certain age - will be able to make such requests provided they have at least 26 weeks' continuous service. Failure by an employer to update an existing policy (based on the old requirements) may be damaging in any subsequent litigation regarding a refusal to grant a flexible working request since such documents would be disclosed and no doubt referred to during litigation.

25. Query whether there should be a transitional period to allow employers to review and update their existing policies, particularly in light of the changes to the eligibility requirements.

Question 3

Are there any aspects of the Code you would like to see discussed in more detail in the good practice guide?

26. We would like to see the following discussed in more detail in the good practice guide:

    26.1 How to handle conflicting requests from different employees which are received at the same time and on the interaction between flexible working rights and discrimination legislation, along with examples. Confirmation of the required contents of a request, how a request is submitted and how employers should manage requests that do not fulfil the requirements of a formal request.

    26.2 Timeframes. We consider there should be indicative examples of what would amount to "reasonableness" in terms of handling/responding to requests. We consider that the question of what is reasonable will differ by situation, i.e. where the request involves an employee on maternity leave who seeks flexible working upon her return, the question of what is reasonable or not will be impacted upon by the intended return date and the date the request is submitted. It would be helpful to include example scenarios and what would constitute "reasonable" in certain situations in the Guidance. There should also be guidance for employees as to how far in advance of when they would like the requested changes to take effect should they submit their request (we believe that a sensible period would be three months given the fact that the employer effectively has three months in total to consider the request).

    26.3 Re-scheduling meetings, if the chosen companion cannot attend a meeting to consider/discuss an employee's flexible working request. On this point, we note that paragraph 4 of the Code states that employers should allow an employee to be

accompanied by a work colleague at any discussion regarding their request. However the statutory right to be accompanied at such hearings/meetings will be repealed as a result of the repeal of Section 80G(2) of the ERA 1996 (see Section 80G(2)(k) for specific reference to the right to be accompanied) and the Flexible Working (Procedural Requirements) Regulations 2002 (see Regulations 3 and 14). Under the current regime, an employee may bring a claim for failure by their employer to permit them to be accompanied, or for failure to postpone a meeting to allow a chosen companion to attend. This is a separate head of claim to a claim for failure to comply with the current procedural requirements, compensation for which may be up to two weeks' pay (subject to the statutory cap on a week's pay). Is the intention to remove this head of claim so that a failure to give an employee the right to be accompanied is considered as part of a claim for breach by an employer of its obligations under the Code generally?

26.4 Examples and more information on the reasons for rejecting a flexible working request (as listed in paragraph 11 of the Code), along with examples of the circumstances in which those reasons may/may not apply.

26.5 Topics for discussion at meetings (for example, nature of the request, reasons for the request, requests for temporary changes to working arrangements, timings for introducing new working arrangements).

26.6 Whether and, if so, when trial periods should be used. In our experience many employers use trial periods and it would be beneficial to have a clearer position on their use, either within the Code or the Guidance. Either the Code or the Guidance should specifically provide for a temporary change to terms and conditions to be requested, rather than simply referring to the need to specify the duration of the change. Our preferred approach would be for the Code to reinforce a recommendation that the employer should consider temporary requests whenever they are made by their employees and that there should be a lead in period of approximately three months in relation to all such changes (i.e. the changes should be implemented approximately three months after the date of the request), whether the changes requested are permanent or temporary. This should be used as guidance which will inform any tribunal considering the question whether, in refusing such a request, the employer has acted consistently with its obligations of trust and confidence to the individual employee. Where a trial period is put in place, the employer and employee should be strongly encouraged to agree fixed review points to consider between them whether the flexible working pattern is viable. We believe that it would be helpful for the Guidance to recommend review periods (for example, after the first three months, six months, etc) but that these should not be prescriptive.

26.7 Sanctions for failure to handle a flexible working request in a reasonable manner (i.e. a Tribunal order requiring the employer to reconsider the employee's application, and an award of up to eight weeks' pay (subject to the statutory cap on a week's pay)).

26.8 Examples and more information on how employers may evidence the presumption that they approached a request with the presumption that it would be granted as per paragraph 7 of the draft Code. We would recommend amending this requirement to a requirement (in the Code) that employers approach flexible working requests with an open mind and providing examples and further guidance (in the Guidance) on what that entails.

26.9 A sample flexible working request form for employees to complete which employers could use/adopt in their own policies could be included in the Guidance and would, in our view, be useful. It is appropriate for such a document to be provided in the Guidance rather than the Code so that it can be tailored by employers to meet their needs (or not used at all). The form should contain the information required by employers when considering such requests and also encourage the individual completing it to consider the impact of implementing their request on their employer's

organisation (and possible solutions to any problems). A sample form was included in our response to the Government Consultation on Modern Workplaces.

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