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BIS Call for Evidence:

ACAS Code of Practice on Discipline and Grievance Procedures

Response from the Employment Lawyers Association

8 June 2012

CALL FOR EVIDENCE DEALING WITH DISMISSAL AND "COMPENSATED NO FAULT DISMISSALS"

ACAS CODE OF PRACTICE ON DISCIPLINE AND GRIEVANCE PROCEDURES

RESPONSE FROM THE EMPLOYMENT LAWYERS ASSOCIATION

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent both Claimants and Respondents in the Courts and Employment Tribunals. It is not, therefore, 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 & 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.

A working party was set up by ELA's Legislative & Policy Committee to respond to the Call for Evidence on Dealing with Dismissal. A separate ELA working party has considered "Compensated No Fault Dismissal" for Micro Businesses.

A full list of the members of the working party is annexed to the report.

RESPONSE

ELA has been involved throughout in responding to consultation papers concerning disciplinary and grievance procedures, in particular, on the repealed statutory procedures, and the consultation that took place in the summer of 2008 when the new revised Code of Practice was proposed.

As employment lawyers we regularly advise clients on how to apply the ACAS Code (the Code) in practice. Many of us also have experience of the statutory procedures which were introduced in 2004 and repealed in 2009 and indeed experience of the pre- 2004 regime. Members of our working group also sought the views of their clients for their response to the questions posed by this Call for Evidence but of course we cannot speak for those businesses whose resources are so limited that they unable to seek legal advice. We have answered only those questions which it is appropriate for us to address and on occasion grouped the questions together to avoid repetition.

In summary, our view is that the current Code and the accompanying Guidance are among the best available and the most easily understood by businesses without access to legal advice. They are not too unwieldy to prove any real help to small businesses struggling with limited resources. The Code (and indeed the legislation which it interprets) have in-built flexibility for smaller businesses in terms of the standards which they are required to meet. Any additional guidance could perhaps emphasise this existing flexibility. We are opposed to the creation of a multiplicity of codes and guidance which could lead to confusion in terms of their application

and the potential of satellite litigation. Of course, there is always room for improvement and we have made some limited suggestions as we go along as to how greater clarity could be achieved if the Code is to be reviewed by ACAS.

Q7:

Do you find the language of the Code appropriate for dealing with performance dismissals?

The Code is sufficiently flexible to deal with poor performance although in certain circumstances the terminology of the Code ("warnings" and "disciplinary") does create a level of discomfort in that it can seem insensitive or inappropriate for certain circumstances.

The Guide reflects this sensitivity by referring to warnings related to performance as "performance notes".

If the Code is revised following this Call for Evidence so that it continues to apply to performance dismissals but seeks to address concerns over the insensitivity of the language used then ELA would be in favour of retaining a single adaptable Code. This is preferable for businesses who do not have access to expert guidance. A multiplicity of standards creates the potential for confusion and in some situations it can be difficult to determine at the outset which process to apply. By way of example, an employer who needs to address the performance of an employee who is also abusive to his manager should only have to apply one process to address both the misconduct and the performance concerns. A similar dilemma would present itself where an employee frequently attends work under the influence of alcohol, and has intermittent absences which are arguably related to his drinking habits.

Of greater concern therefore in practice is to achieve clarity around the application of the Code to certain circumstances rather than the terminology used (please see below).

Q10, 11, 12, 13, 21:

Do you find the disciplinary steps to be burdensome/ does it provide sufficient flexibility in dealing with Disciplinary and Grievance issues? Does it provide sufficient clarity?

The Code is relatively flexible and can be adapted to most situations. It is infinitely preferable to the statutory disciplinary and grievance procedures that it replaced.

For those employers with relatively large and sophisticated HR departments, or the resources to access expert legal advice, the Code poses no major difficulties. It is perceived as being a good compromise, i.e. it is easier to discipline/dismiss employees than in certain other jurisdictions whilst giving employees a reasonable amount of protection.

However, from time to time, for the lay person there are difficulties presented by certain aspects of the Code. If the Government's aim is to reduce burden on business by making the Code easier to apply then the following should be addressed:

Clarifying the application of the Code

If the Government implements the proposals for compensated no fault dismissals (CNFD) then this will not address confusion concerning the application of the Code for those who remain subject to it.

These concerns include:

The Code expressly does not apply to sickness issues for example, although at Appendix 4 guidance is provided to employers on how to handle such issues. Where sickness leads to poor performance what should the employer do then?

It is also unclear whether the Code applies to dismissals for "some other substantial reason" ("SOSR"). The recent case of *Cummings v Siemens Communications Ltd ET/3500013/10* indicates that it does. The facts of this case suggest that the Code should not have applied (it was case involving collective dismissals). The problem in practice is that the "SOSR" permitted reason for dismissal under s98 (1) (b) ERA covers a wide range of situations from those which do not relate to the individual at all but relate to the operation of the business, to those situations which are related to the individual and are closer to misconduct situations. An example would be where a personality clash between two employees leads to a total breakdown in the working relationship. If the employer chooses to dismiss one party because of the fact of the breakdown in the relationship, then this is not a misconduct dismissal but a SOSR. If he chooses instead to dismiss the same individual because of his conduct in bringing about the breakdown in the relationship then this is a misconduct dismissal. Should the Code remain applicable to both scenarios? If so then it should expressly exclude those SOSR situations which are not connected with the behaviour of capability of the individual.

Although the Code suggests that it may be appropriate to have separate procedures for cases of bullying and harassment, in our experience, the majority of employers will have a separate Bullying and Harassment policy but will deal with process around the complaints under the standard grievance procedure. We question whether there would be any real benefit in having a separate Code for these kinds of scenarios which would potentially unnecessarily complicate matters.

Application of the Code to Performance Dismissals

There is clearly concern about protracted procedures which apply in the case of performance related dismissals. Many employers will follow a performance improvement plan ("PIP") prior to invoking the Code. This means that the process can become protracted and as a result, burdensome, particularly for smaller employers, but it is also a concern for all employers. (A PIP is a process whereby the employee is given a formal plan, including specific objectives and deadlines by which those objectives should be met, against a background of underperformance. If the employee's performance fails to improve, the disciplinary procedure is invoked with a

series of escalating warnings, culminating in dismissal where the desired improvement is not achieved).

There appears to be some confusion amongst employers as to the point when the Code is triggered for performance management. This is in part explained by the fact that each employer's PIP may have different features. The Guide to the Code (see paragraphs 76- 78) suggests that the PIP and the formal warning process are synonymous, but the general assumption in practice seems to be that at the point at which a PIP is being proposed, the Code would not apply (so there would be no right to be accompanied, no right of appeal, etc). Therefore the Code only becomes applicable if the employee's performance fails to improve, and the employer envisages that a sanction is potentially necessary at the end of the period during which performance had been monitored. If the Code is to continue to apply to performance issues, then it would be preferable if the trigger for the formal process could be clarified expressly.

The applicable standard for the development of internal procedures

The Code currently provides that: "Employees and where appropriate, their representatives, should be involved in the development of rules and procedures" (paragraph 2). In practice, this does not seem to happen save in unionised environments. Most employers would be reluctant to start involving employees in discussions over the terms of its disciplinary and grievance procedures and seek to preserve the non contractual nature of such processes. The requirement to "involve" is also nebulous. It would be preferable if the Code went on to state that this is just a recommendation and that an uplift will not follow as a result of any failure to observe it. Alternatively this requirement should be removed from the Code altogether.

Clarifying the interpretation of the Code

There is a lack of consistency between sections of the Code in addressing similar concepts, for example the phrase "where practical" is used in paragraph 6 (disciplinaries) in the context of the same person not being both investigator and judge. When discussing whether the appeal should be to a more senior manager however, the Code says "wherever possible". Similarly when providing guidance on the above provisions of the Code, the ACAS Guide states that "As far as reasonably practicable..." the appeal should be with a more senior manager then the one who dealt with the original grievance, (see for example paragraph 160, The Guide). Are these different standards? An experienced lawyer knows not to read these phrases too literally, notwithstanding that this is a statutory code of practice where the consequences of a failure to follow the Code unreasonably can result in an uplift. This could however easily confuse a less experienced lay person.

Paragraph 4 of the Introduction to the Code states that issues should be dealt with and raised "promptly" whereas throughout the rest of the Code the phrase used is "without unreasonable delay". It would be better to use this phrase in paragraph 4 also, because in practice that is what

promptly means although again, it could be construed differently by someone without experience trying to apply the Code.

If the Government wishes to give clarity to businesses it could perhaps give more guidance as to how an employer is supposed to address a recurring problem of the employee who goes off sick while the employer is trying to discipline the employee. It could deal with questions such as in what kinds of scenarios may the employer proceed, and when should they be expected to wait? At the moment at paragraph 24, for example, the Code states that it may be appropriate to proceed "where the employee is persistently unable ....to attend..." There is no clarification of what persistent means in this context.

There is also a lack of detail in the ACAS Code and the Guide regarding what happens if the employee refuses to attend. The Guide states that "Employers will need to consider all the facts and come to a reasonable decision on how to proceed" (paragraph 20) which is of limited assistance. It might be helpful to have a case study giving examples of ways in which the employer may proceed with a disciplinary process, despite having an employee who refuses to attend a hearing e.g. by conducting the hearing by telephone; proceeding in the employee's absence but allowing the employee to make written submissions; holding the hearing at a neutral venue close to the employee's home etc.

The Code talks about the need for impartiality, see for example paragraph 26. This can be confusing and should be explained. For example management will obviously seek guidance from HR when discussing procedure and appropriate sanctions. In a large HR function, it may be possible to have separate people dealing with the investigation and hearing, but in a smaller function this is unrealistic. Also, there will be occasions when it is appropriate for the person who is conducting the hearing to carry out his/her own investigation following the hearing. Inevitably there does tend to be some overlap between the two aspects of the hearing and it would be useful to have some clarity as to the extent to which that is permissible.

The ACAS Code provides that: "The employee should also be given reasonable opportunity to […] call relevant witnesses" (paragraph 12). The Guide does not elaborate on this but it was an aspect of the ACAS Code which caused great consternation at the time it was introduced. In practice, it does not seem to have been a major issue and has not to our knowledge led to any uplifts for non compliance. Employers tend to take the view that it is not reasonable for the management witnesses to be called by the employee, but arguably this is not the same as affording a reasonable opportunity to call witnesses. This right only affords the employee the opportunity to call their own witnesses not to cross examine management's witnesses. ELA proposes that this is addressed by changing the Code to affording the employee a reasonable opportunity to put evidence to the decision maker rather than "calling witnesses". If this right to call witnesses is to remain however, clarity as to when it is appropriate for an employer to refuse a request would be helpful.

In practice we find that employers struggle to know how much detail should be provided in the disciplinary invite letter. This letter can often be the undoing of an employer in a subsequent unfair dismissal claim (e.g. if the employer has forgotten to mention what the maximum sanction could be). A more detailed template letter might be helpful. It would also be helpful if the Guide could clarify that it is acceptable for the allegations to change during the course of a disciplinary process (as can happen as evidence unfolds), provided that the employee is clear as to the allegations he/she is facing and is afforded a reasonable opportunity to respond to them.

Greater clarity over what to do in the event of expired warnings would be beneficial. The Guide states that "except in agreed special circumstances, any disciplinary action taken should be disregarded for disciplinary purposes after a specified period of satisfactory conduct or performance" (paragraph 33). It is not clear what those special circumstances would be nor who has to agree (surely not the employee who is likely to withhold their agreement). It would be preferable if guidance could be provided to employers about the circumstances in which expired warning can be taken into account. (*Airbus UK Limited v Webb [2008] EWCA Civ 49* was the case which established that an employer could take into account a previous expired warning.) Employers also commonly express frustration that an employee's performance will improve for as long as a warning is live, but will then deteriorate as soon as, or shortly after, it expires. The Code does not appear to preclude indefinite warnings (see for example paragraph 20). It would be helpful if this were express.

Employers would appreciate guidance as to what to do in the situation where an employee who gives a statement in connection with a disciplinary matter, requests that his/her identity remains confidential. The Guide simply states: "be careful when dealing with evidence from a person who wishes to remain anonymous" (paragraph 19). Redacted statements can be a way round this problem although even then, it can be relatively easy to work out the identity of the witness. The case of *Linfood Cash & Carry Ltd v Thomson [1989] ICR 518* provides helpful guidance as to how an employer should proceed when faced with an informant, who fearing reprisals, wishes to remain anonymous. We recommend that the principles set out in this case could be expressly referred to in the Guide.

Grievances

In our experience, employers are generally satisfied that the Code provides clear and helpful guidelines for dealing with grievances and prescribes a manageable format for dealing with grievances. Employers consider that since the repeal of the statutory procedures the grievance procedure has become less of a box-ticking exercise due to the greater flexibility in determining when a grievance has been raised and the possibility of dealing with matters informally. The Code is not generally considered to be overly prescriptive or burdensome to follow. However, there are a few points which it is considered would benefit from additional clarification and/or guidance:

The Code provides no guidance on the practicality of investigating grievances in such a way as to preserve confidentiality to those who give evidence in a grievance investigation. Full disclosure can cause problems in practice when people have to continue working together. Many employers have simply adopted the approach that witness statements should not be provided to employees raising the grievance at the hearing or appeal. This can often be a source of complaint from the person raising the grievance when they come to make their appeal and the subsequent substance of complaints in tribunal proceedings. There is mention of withholding witness statements in the Guide. However, this clarification could usefully be transposed to the Code.

A common occurrence is when employees go on sick leave having raised a grievance (often about a disciplinary matter) or raise a grievance while on sick leave. The employer is then in a difficult position as to how to deal with the grievance as the employee is on sick leave, and either is not well enough to deal with the grievance they have raised or, often, refuses to deal with the grievance because it will cause them additional stress. If a grievance relates to a disciplinary matter, this is particularly problematic, as the employer may need to suspend the disciplinary proceedings to address the grievance if this is the alleged source of stress. The process can become extremely protracted and it is difficult for an employer to know the best way to deal with this. The experience of respondent employment lawyers tends to be that employees will often try to drag the process out, particularly where there is a generous sick leave entitlement, to avoid disciplinary proceedings which may result in dismissal, or to force the employer into a position where they have to settle with the employee.

The Code does not provide any guidance on handling grievances where an employee refuses or fails to attend a grievance or appeal meeting.

A further issue which is not dealt with in the Code is where a grievance is raised during a redundancy consultation process (generally about the redundancy or the process). The Code does not apply to redundancy dismissals. It is not clear whether an employer must suspend the redundancy consultation to deal with the grievance, or whether this can be dealt with concurrently. Under the old statutory procedures it was clear that the grievance could be dealt with by way of an appeal against redundancy. However, now that there is no right of appeal against redundancy, it is not clear how these grievances should be dealt with, and they can significantly delay redundancy consultations. (Strictly speaking paragraph 44 of the Code does not apply but could be extended to cover such a situation).

There is currently no guidance on how to deal with employees who raise grievances which repeat grievances that were raised historically and which the employer considers to have been addressed or employees who bring a series of overlapping grievances. There are no provisions which deal with grievances brought by former employees either. It may be useful to indicate that employers may deal with such issues proportionately.

As stated above, the recommendation of impartiality in a grievance and appeal can be challenging for small businesses which have insufficient employees to conduct independent

grievance and appeal hearings. In addition, international companies which perhaps employ only a small number of people in the UK may have difficulty dealing with grievances in person. If separate rules as to the conduct of grievances are not introduced in respect of small or micro businesses, further guidance should be provided in respect of concessions which will be made to smaller businesses. For example, it may be appropriate for hearings to be done by teleconference or video link or for the recommendation that a manager not previously involved in the case should hear an appeal hearing. The same issues can arise in disciplinaries.

A further observation is that the Guide does not contain any template letters in respect of grievances. It may be useful to have a couple of basic precedent examples of these.

We consider that it would be helpful to have additional guidance in circumstances where two parties raise a grievance about each other because they are not getting on. This is typical in cases where one employee (A) raises a grievance about another employee (B) to say that A is being bullied by B, and then B subsequently raises a grievance saying that B is being bullied by A. The following questions arise:-

- Obviously there need to be separate grievance hearings for each of employee A and B but can the same person hear both hearings?
- Can the investigation be joint (as there will clearly be a significant overlap in facts between the two)?
- Should employee A see employee B's grievance letter (and vice versa)?

Uplifts/reductions

Having canvassed views, the most common experience is that uplifts were rarely awarded. No-one had any experience of a deduction being made.

The experience of the three Tribunal Judges to whom the ELA spoke was that this was always considered in relevant cases and an uplift awarded from time to time where it was appropriate (bearing in mind it must be an "unreasonable " failure to follow the Code). None had ever awarded a decrease in compensation under this provision.

The conclusion is that uplifts are relatively rare in practice, and decreases are almost never awarded. There is clearly little inclination to penalise employees.

This begs the question why such awards are relatively rare. Is it that uplifts/decreases are not being made when they could be, perhaps because they are not considered where appropriate or because the failure is considered to be a "reasonable" failure; that employers are following the code but still dismissing unfairly, for example the investigation doesn't satisfy the Burchell test; or that it is often irrelevant because it comes "below" Polkey contribution and "just and equitable" in the pecking order of deductions?

By way of example, if an ET decides that the real reason for dismissal was not, say, redundancy but was in fact conduct, inevitably the Code will not have been followed because the employer

has pleaded redundancy as the reason for dismissal and the Code does not apply to redundancies. Is it appropriate to award an uplift in those circumstances if the employer genuinely believed that the circumstances amounted to a redundancy? An ET will have to consider whether or not the failure to follow the Code was reasonable. This allows a great deal of discretion for ET Judges. There are few EAT decisions on the point.

In our limited experience, uplifts are considered by tribunals where appropriate. It follows that uplifts are not being awarded regularly because of one of the latter two reasons or because the failure to follow the Code is not unreasonable.

An amended Code/two tier system should not impact on uplifts and reductions. The relevant provisions could apply equally to either system. It would not be appropriate, for example, to make small employers exempt from this provision given that it is about assessing reasonable conduct, provided that the size of the employer is properly taken into account in assessing what is required of them. In the event that a two tier system is introduced, it would be very clear what the requirements of a small employer were and whether there was a breach of those requirements.

We also considered any possible interaction with the possibility of financial penalties on employers which the government has committed to introduce. We assume that any such penalty will be greater if an uplift has been awarded as the penalty will reflect the total value of any award made by an Employment Tribunal. There will however be some discretion as to whether judges award a financial penalty and their willingness or reluctance to award the penalty may be affected by their decision on whether the employer has been penalised for its failure to follow the Code.

Qs 14 and 15

Should the requirements of the Code be different for micro and/or small businesses? If so, please explain how you think the requirements should differ for micro and/or small businesses.

This was a subject which provoked considerable debate amongst the members of the working party and where it is quite clear that compliance with the Code is considered to be burdensome by micro employers and thus by those who represent them. If the Government proceed with proposals to exempt smaller employers from complying in relation to performance dismissals (CNFD) there will remain a concern for small employers handling grievances and misconduct issues.

On balance it is ELA's view however, that while on the face of it, it may be attractive to say that smaller employers should be subject to different "less onerous" Code requirements, any flexibility in terms of the Code may create significant confusion between the Code and the underlying legislation and jurisprudence. Changes to the Code alone would not, in practice,

excuse the smaller employer from complying with the established principles of fairness which exist under the general law.

In relation to misconduct cases therefore, it would be necessary to exempt smaller employers from the unfair dismissal regime altogether in order to create less burdensome conditions. This is because when the Code is analysed closely it reflects the legal standards of unfair dismissal law.

If a new less onerous version of the Code is to be created then it should be crystal clear as to the classes of dismissal/ other sanction to which it is applicable. This is because confusion could ensue as to whether the issue was a performance related one or whether misconduct, SOSR or sickness related. As stated above it can sometimes prove difficult to draw clear lines between the different categories of dismissal. If this is unclear there will be considerable potential for litigation about whether the Code should have applied.

ELA's view is the current regime already permits considerable flexibility, but perhaps this flexibility is overlooked or misunderstood and therefore more could be done to emphasise the flexibility which is already built into the system in the form of providing fuller guidance to employers generally about the relevance of the employer's size and administrative resources to the fairness of the dismissal.

The relevance of the size of the employer under the Employment Rights Act 1996

If the employer establishes a fair reason for the dismissal then an Employment Tribunal needs to consider whether the dismissal was fair or unfair in the circumstances (including the size and administrative resources of the employer's undertaking), s98(4), ERA. Thus the legislation itself has an in-built mechanism for the Tribunal to consider the resources at the employer's disposal.

These standards to which the employer is held import concepts of reasonableness: the Tribunal will consider whether the employer acted reasonably or unreasonably in treating the reason for the dismissal as sufficient reason for dismissing the employee. The Tribunal must approach this question not by reference to their own judgement of what they would have done had they been the employer, but by reference to the band of reasonable responses, in other words recognising that different employers may reasonably react in different ways to a particular situation. The employer must also carry out an adequate investigation and what is reasonable will depend on the circumstances.

The relevance of the size of the employer under the Code

The employer must also adopt a fair procedure in dismissing the employee. The ACAS Code "provides basic practical guidance". The Code requires the employer to:

- Establish the facts of the case
- Inform the employee of the problem
- Hold a meeting with the employee to discuss the problem
- Allow the employee to be accompanied at the meeting

- Decide on appropriate action
- Provide the employee with an opportunity to appeal

These standards are not onerous.

The Code reiterates that " where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment Tribunals will take the size and resources of an employer into account...."

Smaller employers do report however that they encounter real difficulties in that they have fewer resources at their disposal. They may not have internal HR advisors to provide advice on the Code, and they do face challenges in finding different people to investigate and then hold a disciplinary or grievance meeting. This is certainly a concern expressed by those acting for small employers where the management team is very small. One area which can be challenging for small businesses is the requirement to provide a right of appeal. In a micro employer this may be impossible. The employer may then need to look outside the organisation to find someone capable of holding the appeal.

There is flexibility built into the Code however to address these concerns. See for example, paragraph 6 of the Code, "*In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing"*. This leaves it open to the smaller employer to argue that it was not practicable for him to find a different person because the management team is too small. In a similar vein, the Code does not expressly require that a different person should be found to investigate someone's poor performance from the person who will make a decision in respect of it although it is a common misconception that this distinction should be maintained. In fact to maintain that distinction makes no practical sense because the individual's line manger is aware of the ways in which the employee's performance is falling short and is the one best placed to discuss this with the employee and determine the remedial action which is necessary.

Going forward, there would certainly seem to be the case for concerns to be met by fuller guidance indicating, for example, that it is only an unreasonable failure to follow the Code which will result in an uplift and one circumstance where it would not be considered an unreasonable failure would be where there is no-one within the organisation who could hear an appeal.

Another issue which faces small employers is the disruption to the business which handling such issues entails. Unless a certain category of employer is removed from the unfair dismissal regime altogether however, any "lite" version of the Code which is subsequently introduced (whether for misconduct dismissals or for performance dismissals as well) should not remove a requirement to investigate, give sufficient information to the employee for them to know what they are accused of doing in terms of misconduct, or the ways in which their performance falls short, nor should it absolve the employer from the requirement to hold a meeting with the employee to discuss the issue.

Small employers also face potentially disproportionate consequences where margins are tight in terms of the costs of the lost management time, or the risk of repetition of misconduct or a failure to improve on the bottom line, or the disproportionate impact of a compensation award made by an Employment Tribunal for the costs of a failure to follow a fair procedure. If the Code is relaxed in respect of these difficulties then small employers would also have to be exempted from the application of unfair dismissal legislation, which may be the case in respect of performance issues if proposals for CNFD proceed.

Addressing what constitutes a micro/ small employer

Should the Government be minded to introduce a version of the Code for small or micro employers then careful thought needs to be given to how micro/ small businesses should be defined. The first issue is how the number employed should be calculated. The second issue is the date on which that calculation should be performed. It is important to define these concepts with precision otherwise there will be a raft of satellite litigation over determining whether the employer is in or out of the regime.

Even with precise definition it is possible that an individual's employee's rights may fluctuate, with them flipping in and out of the regime. This could create confusion for employers as to whether they are obligated to follow a particular process or not.

There are various ways of assessing employee numbers but the following should be considered:

- Part timers/ flexible workers
- Agency staff
- Secondees (in and out)
- Employees on family leave

The easiest way to assess this would be to take headcount rather than say to require the calculation of "full time equivalents" to avoid overly complex calculations. Consistent with case law the rules should only apply to employees (rather than Agency staff), although in practice it may be difficult to determine employment status as many cases demonstrate. This would be an area where fuller guidance could be made readily available to smaller businesses.

In terms of the date of assessment there is no simple answer to the issue of whether employees flip in and out of eligibility. To fix the date of assessment at say the date of termination would leave scope for abuse but at the same time may have the inadvertent consequence that if an employer has had to dismiss other employees for genuine business reasons shortly before a particular employee's dismissal for performance reasons/ misconduct then they would lose the protection of the unfair dismissal regime. If the numbers are averaged over a longer period then this may be fairer but of course more complex for the employer to ascertain.

Other options for simplifying or improving the procedure for SMEs and Micros are to provide guidance in the form of a 'tick box' approach that might be easier for SMEs and Micros to follow,

to make clear to such businesses the consequences of failing to follow the code, to consider removing the employee's right to appeal a decision

Question 16 and 17 - The Australian Small Business Fair Dismissal Code (the Australian Small Business Code).

ELA does not believe that this constitutes a useful model for adoption in the UK. The principal reason for our belief is that having discussed this with Australian practitioners it is quite clear that the regime in Australia relies far less on procedural fairness whereas, as stated above, the Tribunal here has to consider not only whether the employer had a fair reason for dismissing the employee but also whether he followed a fair procedure in dismissing for that reason. The relevant test under Australian law is whether the dismissal was harsh, unjust or unreasonable in all the circumstances. While the requirement to consider all of the circumstances does mean that procedure is a relevant consideration it does not occupy centre stage as it does here.

Those Australian lawyers that ELA spoke to about this issue also questioned whether certainty was achieved by the Australian Small Business Code. An employer does not get home by having simply ticked all the boxes on the Checklist appended to the Small Business Code. Its existence can in practice mislead employers however as to their prospects of successfully defending claims.

Responses to evidence topics for the Code

B: Access to relevant advice (including HR/legal advice) for businesses, particularly SMEs and Micros, and whether such advice is accurate and helpful.

1.1 The experience of members of this ELA working party suggests that SMEs and Micros often have no internal HR resource at their disposal and have limited resources to seek external advice. Employers in SMEs and Micros often attempt to carry out their own research or seek advice from friends or fellow business owners and the advice obtained is often not tailored to their specific circumstances or is inaccurate. Alternatively advice is frequently sought retrospectively following receipt of a claim when liability may have already arisen. We have identified some of the areas where further guidance would be useful above.

2. F: Differences in practices amongst employers, particularly SMEs and Micros, and whether the impact of employment disputes is greater on smaller businesses.

2.1 Members of this ELA working party consider that the impact of employment disputes is greater on smaller businesses as they are more vulnerable as a result of having limited HR and financial resources to manage and settle claims. Costs incurred in managing such procedures can often have a significant impact on the cash flow of a SME or Micro. The impact is likely to be greater where businesses are labour intensive.

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