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ACAS consultation on the Draft Code of Practice on Settlement Agreements

Response from the Employment Lawyers Association

9 April 2013

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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 not ELA's role to comment on the political merits or otherwise of proposed legislation, rather it is 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 ELA set up a sub-committee under the co-chairmanship of Stephen Levinson of RadcliffesLeBrasseur and Maeve Vickery of Pardoes to consider and comment on the consultation paper from ACAS on a Draft Code of Practice on Settlement Agreements published in February 2013. Its report is set out below. A full list of the members of the subcommittee is annexed to the report.

Our comments are divided according to the question numbers used in consultation paper.

Executive Summary

A The Code should be confined strictly to defining improper conduct.

B All guidance and examples of best practice should appear in the Guidance.

C The Code and Guidance should be cross-referenced on the basis that advisors and consumers would need to consult both documents on the same occasions.

D The template letters require considerable further attention (see paragraphs 15-18).

Question 1

Is it right that the Code should focus mainly on the new legal provisions regarding the inadmissibility of settlement agreement offers and discussions in unfair dismissal claims?

1. Yes we agree. As we stated in our response to the "Ending the Employment Relationship" consultation in November 2012. *"We think it is important, given the effect of a statutory Code that careful thought is given to exactly what material should be in a Code and what in guidance."*

2. The Code details the relatively limited set of circumstances where the inadmissibility of settlement agreement offers will apply. It would be helpful if the Code were to explain that it only covers the circumstances set out in the new legal provisions.

Question 2

Should the Code also include reference to the statutory requirements for drawing up a settlement agreement, e.g. putting the agreement in writing, and the employee receiving advice from an independent advisor? If not, should these be set out in accompanying guidance?

3. We do not think the Code should refer to the statutory requirements for drawing up a settlement.

4. Details of statutory requirements for drawing up a settlement should be included in guidance. However, we would like to suggest that the guidance should differentiate between sections which detail good practice and those, which explain detailed statutory requirements for settlement agreements. Readers may be confused if that distinction is not made within the guidance.

5. We suggest that the Code and the guidance are cross-referenced so that when reading the Code one is aware that there is guidance that provides further information and detail about settlement agreements.

Question 3

Should the Code contain good practice guidance on how settlement agreements are offered and discussed, in addition to this being covered in the non-statutory guidance?

6. We do not think the Code should include good practice guidance for the reasons given in the responses to Q1 and Q2. If good practice is included in the Code the employers and their representatives will feel duty-bound to follow the procedure as detailed. We think that employers and employees should have flexibility to discuss a proposed settlement agreement in a way that is suitable to their workplace and circumstances.

Question 4

What sort of information and good practice advice would you like to see included in the non-statutory guidance on settlement agreements?

The ELA previously responded to this question to a limited extent and that response is repeated below:

> 'It appears from the consultation paper that the Government intends that the proposed Code will do the following three things:
>
> - clarify the meaning of the word 'improper'
> - provide best/good practice guidance for those (particularly employers) seeking to engage in termination discussions
> - provide template documents to assist those who might wish to negotiate an agreed departure but who may not want to engage lawyers.

7. We are concerned that, in trying to achieve all of these aims in a single document, the distinction between behaviour that is 'improper' and that which merely does not accord with best/good practice, may become blurred. If so, the effect will be to

compound the uncertainty inherent in the current drafting of Clause 14 of the Enterprise and Regulatory Reform Bill.

8. An alternative approach would be to confine the Code's remit to clarifying what constitutes improper behaviour. Any additional good/best practice guidance and template documents could then be covered in supplementary, but separate, guidance. This would be similar to the approach taken by ACAS to discipline and grievance, where the Code of Practice is supplemented by separate guidance. We think it is important, given the effect of a statutory Code that careful thought is given to exactly what material should be in a Code and what in guidance.

9. It is not entirely clear if it is intended that a failure to follow the Code may expose employers to increased compensation in the event of a successful claim. This might be an unintended consequence of relying on section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") to give statutory force to the Code. Under section 207A of TULCRA a failure to follow the Code could leave an employer exposed to uplift in compensation of up to 25% in the event of a successful tribunal claim. The uplift regime applies where there had been an unreasonable failure to follow a Code which 'relates exclusively or primarily to procedure for the resolution of disputes'. If the term 'resolution of disputes' is broad enough to cover disciplinary action it could equally be said to cover the Code proposed by this consultation paper. If there is no intention for this to be the case, that should be made expressly clear.'

(Our current understanding is that this last point is not the intention of Government. If so we think this should be expressly stated.)

10. In addition to these views and more specifically, we make some suggested changes to, or comments on, the list of items that should be included in the guidance (proposed changes are in bold):

- **An understanding of when settlement agreements might be used by the employer and the employee.**
- The relationship between settlement agreements and broader processes for **managing people (for example** disciplinary, performance **management, grievance or complaints).**
- The relationship between the new confidentiality provisions and the without prejudice conversations associated with existing compromise agreements, and in particular reference to protected disclosures, discrimination and constructive dismissal.
- How the new confidentiality provisions will work in practice, including whether the fact or content of a settlement discussion becomes admissible.
- How the confidentiality provision will be handled in multiple claims.
- How the confidentiality provision will work with wrongful dismissal claims.
- How and when to use a template letter and the template settlement agreement.
- An explanation of when and how to add or remove clauses in the model agreement. **(This point needs clarifying, as the intention is unclear).**
- Things to consider when agreeing the terms of a settlement agreement: for example whether it constitutes dismissal or not, and the implications for Jobseeker's Allowance and **Statutory Maternity Pay**.
- How to manage meetings to discuss settlement, including that it will be good practice to allow the employee to be accompanied.
- That the employer may want to consider paying the individual's legal costs, and the possible process for doing so.
- Factors for consideration when offering/negotiating the financial settlement.

- What might be included in a reference if the employer decides to offer one **and, if it is appropriate in the circumstances, what might be included in a reference to a regulator or professional body, if applicable.**
- How settlement agreements fit with redundancy rules. **(This point needs clarifying, as the intention is unclear).**
- What happens if an offer is rejected?
- What happens if a settlement agreement is not honoured?
- Confirmation that a failure to follow the Code will not give rise to a 25% uplift on any award, if applicable.

In addition we refer to the tax issues set out in paragraph 18.

Question 5

Should the good practice recommendation to set out the initial details of an offer in writing be included in the statutory Code?

11. No. Our view is that this should be contained in the non-statutory guidance.

Question 6

If so, what might the likely impact be and how might the recommendation be perceived by employers and employment tribunals?

12. Not applicable: see our response to question 5.

Question 7

Having seen the draft of the new Code on settlement agreements, do you feel the template letters should be included in a) the Code or b) the non-statutory guidance?

13. We feel the template letters should be included in the non-statutory guidance because:

- including them in the non-statutory guidance reinforces their optional status;
- since employers are to be permitted not to use letters at all or to use letters of their own formulation without that being improper behaviour, we believe that including the templates in the non-statutory guidance will reduce the risk of creating a scenario similar to the '3-step process' for dismissal which existed between October 2004 and April 2009;
- for reasons already given we are concerned to confine the Code's remit to what constitutes improper behaviour only, and not to include the templates and other good practice. This is to avoid blurring the distinction between improper conduct and conduct which does not accord with good practice;
- the approach of keeping the Code deliberately short and concise, with good practice guidance and template documents in a separate document, was recently endorsed in the context of discipline and grievance (see positive feedback in the BIS dismissal consultation).

14. If the letters are to remain in the Code, to reinforce their optional status, we suggest amending paragraph 9 to add in the word "optional" as follows: "Employers and employees are free to draw up their own letters offering a settlement but some optional template letters …".

Question 8

Do you have any comments on the wording of the template letters?

We have previously noted that there is no template for the use of employees who wish to invoke the settlement process – we consider this should be addressed in the Guidance

15. BIS has already noted that some consultation respondents believe that there should be two separate letters, one inviting the employee to a meeting and another setting out the settlement offer (paragraph 84 of BIS document dated January 2013: Ending the Employment Relationship: Government Response to Consultation). This suggestion has not been adopted in the current draft of the template letters, but given the optional status of the letters; employers will not be prevented from issuing two letters if that is their preference. We consider that the non-statutory guidance should explain to employers why they might want to use two letters to avoid having to disclose the first letter when demonstrating that a proper procedure has been followed (should settlement negotiations fail).

16. Receipt of a letter, such as one of the current templates, may well be the first an employee knows that there is a serious risk to his or her employment. The first two paragraphs of the template letters set the scene for disciplinary or capability action which an employer could follow up. We therefore suggest that the templates, being somewhat of a 'bolt out of the blue', should include by way of a third paragraph, a reference to the fact that it is issued because the employer wishes to explore the use of the statutory scheme on Settlement Agreements. We consider that it would be useful to include in the templates a link to where the Code (or the equivalent Acas or government employee guidance) can be found or a suggestion that it can be found in local libraries.

17. This has the additional benefit of alerting courts and tribunals to the fact that the remaining contents of the letters are potentially inadmissible. However, we have also considered that it may be useful to include wording explaining paragraph 14 of the draft Code, along the lines that under the statutory scheme on Settlement Agreements the remainder of the letter, and any discussions about any agreement reached, cannot be used as evidence in any subsequent employment tribunal claim of unfair dismissal. We are conscious at the same time that some employees might regard this as oppressive so we simply offer the idea for further consideration.

18. As regards the wording setting out the terms of any offer within each template, we have the following comments:

- although any payment may be unlikely to exceed £30,000, the current wording imposes a contractual right on a payment of any size being free of tax and the wording also fails to take into account the fact that employers may make a payment in lieu of notice where there is a contractual provision, which also affects the tax treatment. There is no explanation in the draft Code or reminder to employers about the tax treatment and an employer who relies solely on the templates could therefore get into difficulties. This is particularly the case for those smaller employers who may not be taking professional advice. Unless it is the Government's intention to abolish the £30,000 limit (which seems unlikely) this wording should be amended and we suggest adding in square brackets that the payment is only free of tax if it is under £30,000 and it does not include an amount payable as a contractual payment in lieu of notice. If there is a reference to the tax exempt limit in the templates, this is a further reason to have them as

part of non-statutory guidance; any changes in the law can be more easily dealt with by updating the guidance;

- the current wording regarding the date employment ends is unclear*: "[insert date – suggest end of month, if still 3 weeks away]"* particularly if there is also to be a minimum period in which to consider the settlement offer. We believe the suggestion should be removed from the letter and that guidance on departure dates should be dealt with in the non-statutory guidance;

- the current wording in the letters concerning a reference gives the employer the option not to provide one, or to provide one which "*reflects your work...",* whereas many organisations prefer to limit references to factual matters but the option to do so is not clear in the current templates. Employers who do not take legal advice and who use the templates may prefer not to give any reference in these circumstances. We suggest that it would be better to amend the wording in the template to state *"You would receive a reference" [delete if you do not etc]"*

- the clause which refers to the minimum period for consideration of the offer should be amended to state whether or not the employee is required to come into work during that period, other than to attend any meetings to discuss the proposals further;

- the reference to all sums being payable **on** signing the agreement may be misleading, as most payments are made within a specified period **after** signing the agreement and there is nothing in the Code to suggest that the new Settlement Agreements must provide for immediate payments. Accordingly, we suggest the wording is amended to reflect this, for example "*All sums are payable after signing the agreement within the period specified within the agreement*".

Question 9

In referencing the importance of having a reasonable time to consider a settlement agreement offer, should the Code specify a minimum time period?

19. A majority of our sub-committee supported defining a time period in order to clarify what is a 'reasonable' period, to provide clarity and to reduce the risk of disputes. However, we are concerned that a more flexible approach should be capable of being taken to the minimum seven day period, given that there will be occasions when seven days is too long for both parties. While it is stated, in paragraph 14 of the Introduction, that the minimum period "would not prevent a party from accepting an offer more quickly should they wish to do so", this is not reflected in the current wording of the Code. In particular, in paragraph 10 of the Code, it uses the word "must" to describe the minimum seven working days and does not provide for employees to consent to this period being curtailed. We recommend inclusion of wording to that effect. There was a minority view on our sub-committee that there should be a specified time period that was fixed.

Question 10:

If so, how long should the period be?

20. See above in paragraph 19

Question 11

Do you think the statutory Code should contain a good practice recommendation that employees should be allowed to be accompanied at meetings to discuss settlement agreements?

21 We do not agree that the Code should contain a good practice recommendation that employees should be allowed to be accompanied at meetings to discuss settlement agreements. The reasons for this are explained in our answer to Question 12 below.

Question 12

What do you think are the implications of including such a reference to accompaniment in the statutory Code?

22 The implications of including such a reference in the statutory Code are, we believe, that it will create an expectation that the right will be granted (an expectation on employees that they should be given the right and an assumption by employers that they should offer it). Given the nature of the discussions to take place during such meetings, we are of the view that having a third party present would not facilitate agreement. Employers are likely to be nervous about making an offer of settlement which the accompanying person may see as setting a precedent which they can then use if they later find themselves (or another colleague) in a similar situation in future. Employees may also feel uncomfortable having discussions about a severance package in the presence of others.

Question 13

23 We believe that the list of improper behaviour in paragraph 16 of the draft Code is appropriate. We welcome reference to the fact that the examples listed are not exhaustive. With regard to paragraph 16(e) – "undue pressure" – we believe it would be helpful to state that that list of examples is also not exhaustive.

Question 14

Should the Code provide examples of what does not constitute improper behaviour or undue pressure?

24 Yes because there will be a lot of uncertainty when these procedures are introduced so this would help both employers and employees understand what is acceptable. We recognise however that because these issues are likely to be very fact specific that conduct that examples given may be oppressive on some occasions and not on others. Perhaps the Code should acknowledge this fact.

Question 15

If so, what examples would you like to see included?

25

- Setting out in a neutral manner the reasons conduct or performance has led to this proposal.

- Factually stating the likely alternatives if an agreement is not reached including the possibility of disciplinary procedures if relevant
- Explaining in a factual manner any other reasons why the proposal are being made.
- Setting out a reasonable timescale for a further meeting
- Refusing to provide a reference
- Encouraging an employee to reconsider a refusal
- Suspending the disciplinary and /or grievance process.
- Refusing to pay for legal advice
- Slight deviations from the Code.
- Stating that the terms of the offer are not negotiable.

5 April 2013

APPENDIX

Members of the Sub-Committee

Stephen Levinson	RadcliffesLeBrasseur (Co-Chair)
Maeve Vickery	Pardoes LLP (Co-Chair)

Emma Clark	Abbiss Cadres LLP
Felicia Epstein	Pattinson & Brewer
Andrew Firman	Carter Lemon Camerons LLP
David Green	Charles Russell LLP
Chris Goodwill	Clifford Chance LLP
Jo Hale	Collinson Grant SA
Alan Jones	Averta Employment Lawyers LLP
Anne Mannix	Kervin and Barnes Limited
Özlem Mehmet	Fox Williams LLP
Catherine Ridd	Morgan Denton Jones LLP
Tamsin Wallace	Eversheds LLP