CALL FOR EVIDENCE ON DEALING WITH DISMISSAL AND ‘COMPENSATED NO FAULT DISMISSAL’ FOR MICRO BUSINESSES

Acas welcomes the opportunity to contribute to your call for evidence on dismissal processes, particularly as our Code of Practice on Discipline and Grievance features so prominently in the document. As you know Acas’ aim is to improve organisations and working lives through better employment relations. Every year we interact with literally millions of people who are experiencing problems in the workplace, many to do with dismissal. We also undertake and commission relevant research. We therefore have much that we can offer the government in helping them understand the way employment dismissals are currently dealt with.

The specific questions in the call for evidence are aimed primarily at the business community and as such we are not proposing to answer them individually. Rather we would like to offer some general observations drawing on Acas’ unique breadth and depth of experiential knowledge and the representative findings of relevant research studies.

Code of Practice on discipline and grievance

The Acas Code of Practice on discipline and grievance has been offering guidance on handling workplace dismissals for nearly forty years. Acas has the statutory power to issue codes of practice for the purpose of promoting the improvement of industrial relations and the latest version of the code was approved by Parliament and published in 2009. It is one of the most important documents Acas produces and is also one of the most downloaded publications from the Acas website; over 75,000 copies were downloaded in the last year. In addition a further 2,000 hard copies were sold during 2011/12. Awareness of the Code reflects this – almost half of all private sector managers polled by BDRC Continental in 2011 confirmed having already heard of the Code and/or its accompanying guidance. Awareness among smaller businesses was also in evidence; 43 per cent of those with fewer than 10 employees polled had heard of the Code and/or the guide (Williams, 2011). Other, qualitative, research by the National Centre for Social Research (NatCen) has also pointed to especially high levels of awareness and understanding of the Code among HR staff and employee representatives (Rahim et al., 2011).
The Acas Council has consistently felt a strong sense of ownership of the Code and the guidance it contains. Indeed, one of the great strengths of the Code is that its content and production is overseen by the Council whose members are drawn from a wide range of interests including employer groups, small firms, trade unions, academia and the legal profession. This involvement has ensured the impartiality of the Code and gives it credibility.

The Code is about good practice but it also helps organisations understand what is regarded as reasonable behaviour which is one of the aspects that an employment tribunal considers when deciding whether a dismissal is fair or unfair. If the Code and its definitions of reasonable behaviour are to be accepted however it has to work within the grain of what the wider employment and business community generally regard as good and reasonable practice. Over its near forty year life we feel that this balance has been maintained.

It will of course be interesting to see what your call for evidence reveals about individual experiences and views. However, I have to say that the Acas Council feels there is little scope for any reduction in the basic good practice guidance set out in the code. Our own research on the Code reveals no real dissatisfaction. Indeed, the principles enshrined in the Code – such as increased flexibility and clear and transparent communication with employees – have been welcomed, particularly by employers. Findings from a study undertaken by the National Centre for Social Research (NatCen) suggest that the revised Code has gone some way to redressing what was perceived by some to have been an earlier imbalance, and has increased awareness and use of earlier resolution (Rahim et al, 2011). Interviewees’ experiences of working with the Code reflected a number of clear benefits of its principles-based approach. Employers judged the Code as striking a balance in providing guidance without being overly prescriptive – importantly, it was said to have freed them from unnecessarily imposing disproportionate formality and using unnecessary senior staff time to do so. However, there were concerns among some trade union representatives that employers had interpreted the move away from mandatory processes as an opportunity to ‘weaken’ the employee position (ibid).

Above all, research has shown the Code to have been a key trigger in prompting organisations to review their disciplinary and grievance policies. Interviewees in the Rahim study reported having referred to the Code and guidance when carrying out reviews of disciplinary and grievance policies, checking existing policies against them and, where a written policy did not yet exist, developing one from scratch using the Code as a framework. Moreover, organisations that had revised their policies and procedures in line with the Code reported an increased procedural emphasis on early resolution before formal grievance or disciplinary procedures were used. This was described as a key impact of the Code. Where organisational policies and procedures were said to have changed for the better, this was reflected in more positive handling of cases and in faster resolution of issues (Rahim et al, 2011) A thematic review of the nature and effectiveness of workplace and conflict management by Saundry and Willerbey (2012), which is due to be published shortly, similarly found that the introduction of the revised Acas Code of Practice had prompted organisations to revise their policies and procedures: stripping out unnecessary layers, giving a greater decision making role to line managers, placing more emphasis on mediation, and on informal handling of conflict, and overall, helping inculcate less formal approaches to disciplinary and grievance issues.

Since it was first published in 1976 as a Code of Practice on discipline only, the Code has undergone a number of revisions, all of which were brought about by a change in employment law. Any change takes time for employers to come to terms with and for practice to change. The mandatory three step dismissal procedure introduced in 2004 was repealed only in 2009 and Acas feels that organisations are still coming to terms
with this change and the fact that they do not have to follow the formal procedures it set out. It is likely that the current Code on Discipline and Grievance will equally take time to become established and any changes to it at this point in time might only lead to greater confusion. Brought into operation just three years ago, there is evidence that the Code is still ‘bedding-in’. NatCen’s qualitative evaluation of the Acas Code pointed to the fact that adoption in practice has been most comprehensive in organisations with cultures amenable to early dispute resolution and where relations with employees are positive – for others, gaps in comprehension as to the legal status and procedural content of the Code are still being filled (partly via uptake of a range of sources of training, advice and information). Nevertheless some line managers still seem to be adjusting to using a now principles-based Code to review policy (Rahim et al, 2011).

In amending the Code Acas has always been very conscious of the needs of the small firm sector. For instance, in 2004, for the first time, we introduced the idea that where a case of misconduct or poor performance was having a serious impact on the business, it would be appropriate to issue a single warning prior to any dismissal. We made this change in recognition of the fact that a disciplinary problem that in a large business would be relatively minor could in, a small firm, have serious consequences, and therefore needed to be handled in a speedy fashion. A significant proportion of small firms would seem to have responded positively to the most recent Acas Code. In a 2011 BDRC Continental poll for Acas organisations that had both formal grievance and disciplinary procedures were asked independently whether these procedures had been introduced or amended since April 2009 – in both cases more than a third of organisations with fewer than 10 employees confirmed having done so, with a large majority of both saying that this had been as a result of the revised Code (Williams, 2011).

In changing the 2009 Code to a principles based guide, we were specifically asked by the government of the day to keep it short. This we did and the current Code is 45 paragraphs long compared to its predecessor which ran to 116 paragraphs. In keeping the Code short, some of the guidance that was in the previous Code, particularly around the handling of poor performance as opposed to misconduct, was not included. This can always be re-instated. However, it is important to bear in mind that the non statutory guide that accompanies the Code does offer guidance on dealing with poor performance. The Code is only one element in a suite of help and support that Acas provides on discipline and grievance handling. For instance, in addition to the Code and non statutory guidance Acas provides a range of web based information including on-line training and runs an extensive nationwide programme of training events on discipline and grievance.

The call for evidence focuses very much on the Code of Practice and we recognise that this is a vital element in the process. However, it is only a part of the process of responding fairly and effectively to workplace disputes. We often find that employers run into problems not because they are unaware of, or lack, disciplinary procedures, but rather because they do not have the confidence to talk with an employee about a problem. Acas services are designed to address this very important dimension of day to day dispute handling; to ensuring that supervisors and first line managers are skilled in holding the difficult conversations that are necessary to effectively handle disciplinary problems in the workplace. Any review of the Code should be mindful of the importance of addressing these wider conflict management challenges.

In the call for evidence we note that you refer to the Australian Small Business Fair Dismissal Code. As you will know this Code together with other aspects of the Australian Fair Work Act is currently being reviewed and you will no doubt wish to await the outcome of this review before considering whether any similar Code might be introduced in Britain.
There are currently a considerable number of changes either underway or planned in the employment relations field all of which employers will have to understand and react to. The extension of the qualifying period for unfair dismissal has just been increased to two years; significant changes to employment tribunals and the way they handle cases are also on the stocks including the new Acas early conciliation process, and there will also be a new Acas code of practice on requesting flexible working. In view of all these changes we query whether now is the best time to be adding to issues employers need to get to grips with by changing the code of practice on discipline and grievance. We wonder whether it might not be better to carry out a full review of the code when the situation is a little quieter, say in 2015. Employers would then have a much better chance of absorbing any changes that were felt necessary to the code.

**Compensated no fault dismissal**

We are not aware of any representative research evidence which would provide a reliable guide to the likely impact of this proposal on micro business. Legislative change would be required to introduce such a system and any such change would have to be reflected in Acas guidance and our Code of Practice.

Yours sincerely

Ed Sweeney