

Flexible Working Code of Practice

Response of the Association of School and College Leaders

A. Introduction

1. The Association of School and College Leaders (ASCL) is a trade union and professional association representing over 24,000 education system leaders, heads, principals, deputies, vice-principals, assistant heads, business leaders and other senior staff of state-funded and independent schools and colleges throughout the UK. ASCL members are responsible for the education of more than four million children and young people across primary, secondary, post-16 and specialist education. This places the association in a strong position to consider this issue from the viewpoint of the leaders of schools and colleges of all types.
2. ASCL welcomes the opportunity to contribute to this consultation. Our response is based on the views of our members, obtained through discussions at ASCL Council, with relevant advisory groups, and prompted and unprompted emails and messages.
3. When considering the impact of any proposals on different groups, it is ASCL's policy to consider not only the nine protected characteristics included in the Equality Act 2010, but also other groups which might be disproportionately affected, particularly those who are socio-economically disadvantaged. We have answered any equality impact questions on this basis.

B. Key points

4. We welcome the updating of the Code to reflect the proposed changes in legislation and are very much of the view that it should also reflect best practice in order to support the adoption of flexible working arrangements.
5. Wherever possible the Code, or associated non-statutory guidance, should provide clear definitions and guidance for employers and employees. It should also ensure that employees have full clarity by requiring the reasons and factors behind decisions to be put in writing.
6. Employees should be supported in making requests for flexible working by being able to be accompanied to meetings and having clarity on why some or all of their request cannot be met. They should have access to a fair and transparent appeals process.
7. Greater clarity is required around the right to request a predictable work pattern and the separation between that right and the right to request flexible working.

C. Answers to specific questions

Question 1: In addition to updating the Code to reflect changes to the law, should Acas also reconsider the overall good practice principles in the Code?

8. Yes.
9. The existing Acas Code of Practice is primarily focused on the legal process/procedure applicable to flexible working requests. There has been a significant change in the way workplaces function since the 2014 Code of Practice was introduced, not least as a result of Covid-19. It is important that the new Code of Practice reflects these societal and cultural shifts. We are of the view that it would be beneficial for the new Code to go further than just the legal rules, and to highlight best practice. In doing so, it will also serve as a reminder of good practice to employers considering a flexible working request, thereby supporting better retention and recruitment.

Question 2: Does the Foreword to the Code strike the right tone in encouraging an open-minded approach to flexible working, with a focus on what may be possible?

10. Yes.
11. The proposed foreword goes some way in encouraging an open-minded approach to flexible working. However, we believe that it could be more robust by explicitly recommending that employers always follow best practice.
12. There should be a greater focus on what may be possible. For example, the text states:

'Where a request cannot be accepted, the reasons for the decision should be clearly explained to the employee. Clear communication helps maintain trust that a request has been handled reasonably. Further, being proactive in offering an appeal provides the opportunity for individuals to present any new information or raise any concerns relating to the way their request has been handled.'

There is no reference here to partially accepting a request, reaching a compromise or an alternative that the employee may still be happy to accept, rather than the presumption that request has been rejected in full.

Question 3: Do you think that it is helpful to include a definition of 'flexible working' within the Foreword to the Code?

If you answered 'yes', which definitions should the Foreword provide?

A definition of a statutory flexible working request, based on the Employment Rights Act 1996

A broader definition of flexible working

Both a definition of a statutory flexible working request and a broader definition of flexible working

13. Yes.
14. Both a definition of a statutory flexible working request and a broader definition of flexible working.
15. We believe it is important to set out the statutory definition of 'flexible working' in the Code. In addition, a broader definition as to what this may include would be helpful to

both employers and employees. This would be particularly helpful in assisting employers in thinking about how flexible working could be implemented in their workplace.

16. Whilst the Code is not intended to apply to non-statutory requests, it would be helpful to amend the following statement to explicitly state that Acas recommends that the processes and guidance contained in the Code are followed regardless: “...*though the processes it describes may be of use to employers in handling non-statutory requests as well.*”

Question 4: Should the Code provide guidance on ‘consulting’ with employees about a request?

Please explain the reasoning for your answer.

Additionally, if you answered ‘yes’, please outline any other issues the Code or non-statutory guidance should provide guidance on, to help employers and employees understand what is expected during consultation.

17. Yes.

18. This would be very helpful to employers and would ensure a consistent approach is taken regardless of the size or sector of the organisation. However, it might be the case that employers only look at the Code of Practice, rather than the supplementary guidance, so it would be beneficial to contain details of what is meant by ‘consultation’ in the Code of Practice. Also, as the Code of Practice is statutory and will be considered by tribunals, it would be sensible to explain what ‘consulting’ means within the Code of Practice itself. We believe that it is imperative that all involved understand what is meant by ‘consultation’.

19. We would suggest that paragraph 12 of the proposed Code explicitly covers the purpose of consultation and reiterates that the employer should keep an open mind when considering a request, including looking at all options. We note that it is unclear what the sanction will be (if any) for failing to consult.

20. In addition, we would like to see included in the guidance that it is good practice to encourage/allow employees to be accompanied by a trade union representative (or colleague), as outlined below.

Question 5: What is your opinion on the guidance in the Code about offering an employee a meeting, even when the employer plans to accept their request?

Please include your reasoning.

21. We note that it is only an obligation to *offer* a meeting, so the employee has the discretion to refuse a meeting. We agree that offering a meeting even when the employer plans to accept a request would be beneficial to both parties.
22. A meeting would allow the parties to discuss in detail how the request will be implemented practically. As such this would be good practice, which should only not happen in exceptional circumstances. We recognise that requiring a meeting to be held for all requests could have unintended consequences so have not argued for this to be a ‘must’, but where the employee believes the exceptional circumstances apply, there should be an audit trail outlining the rationale.

Question 6: Should the Code include a section on the protection from detriment and dismissal?

Please explain the reasoning for your answer.

23. Yes.

24. It is important to highlight this in the Code. It will help inform employers of their obligations when considering a flexible working request, and provide assurance to employees who are considering making a flexible working request.

Question 7: What are the advantages and disadvantages of the Code recommending that employees should be allowed to be accompanied at meetings to discuss flexible working?

Please include your reasoning.

25. We believe it is important that the employee making the request is able to feel supported in the meeting. Often the person best placed to provide that support will be a trade union officer.

26. Trade union officers have significant knowledge and experience in flexible working practices. They are able to provide support to the employee as necessary during the meeting and can help to iron out any queries or concerns, and often provide solutions or ways to overcome perceived barriers.

27. Where workforces have gender inequality (for example in schools, where the workforce is predominantly female, yet this is not reflected in school leadership) the trade union officer will be able to bring additional reassurance to the process. This is particularly important given women are statistically more likely to want to submit a flexible working request.

28. We do not see any disadvantages to allowing for this in the Code.

Question 8: What is your opinion on the Code recommending the same categories of companion as those that are allowed in discipline and grievance meetings?

Please include your reasoning.

29. We agree with this. It maintains consistency and signals to employers and employees that flexible working is important and taken seriously. Also, there appears to be no logical reason not to permit the right to be accompanied by a trade union representative or an official employed by a trade union.

Question 9: Should the Code recommend that employers provide any additional information as is reasonable to help explain why a request has been rejected?

Please explain the reasoning for your answer.

30. Yes.

31. Recommending this will encourage employers to give proper consideration to a request because the communication of their decision should not be limited to just the permitted reason for rejecting the request. We are aware that some employers take a default negative approach to flexible working, and some of the reasons our members have

been given to explain why their request has been rejected are very weak and not justifiable. This proposal would ensure that an employer has to seriously consider the request and provide a thorough explanation where they are genuinely not able to accept the request.

32. It is also important for the employee to understand what factors the employer has taken into consideration. This will assist the employee with any appeal they might wish to submit. It might also assist an employee in considering any possible alterations to their request for a future request which might then be successful – potentially securing the retention of that employee in the workplace.
33. It should be made clear in the Code that the reasons and factors have to be given in writing.

Question 10: For larger organisations, what are the advantages and disadvantages of the Code stipulating that, where possible, an appeal should be handled by a manager not previously involved with a request?

Please include your reasoning.

34. We would always consider an informal approach in the first instance to the decision-maker. Where this is unsuccessful, then an appeal to someone not involved in the request is a fair and recognised appeal process. Also, having another person consider the request would mean that there is a fresh pair of eyes on the request and how it could be practically implemented. The Code, or guidance, should be clear about whether the appeal would look solely at the original information or whether the appeal manager can ask for additional information in order to make their decision.
35. We recognise that having another manager deal with the appeal might mean that they are not within the same department/area as the employee making the request. In determining who deals with the appeal, wherever possible it would be desirable for that person to have knowledge of the department/area in which the employee works, their role, etc, so that they can make an informed decision.

Question 11: Should the Code include a section about the right to request a predictable work pattern if that right is introduced?

Please explain the reasoning for your answer.

36. Yes.
37. Many of our members are parents, and a predictable work pattern is crucial for them to be able to arrange childcare. Whilst in some circumstances it may not be possible to maintain the same working pattern year-on-year due to part-time working and timetabling constraints, the very least that should be afforded to them is a predictable pattern for each academic year.
38. As this will be a new right and therefore might not be widely known about, it would be helpful to include a section on it in the Code of Practice. This will enable employees to identify which right/process would best suit their situation. It will also assist employers in taking the best course of action to support employees making a request.

If you answered 'yes' to question 11, do you believe that paragraphs 27 to 29 in the draft Code provide sufficiently clear guidance on the interaction between the 2 rights?

Please explain the reasoning for your answer.

39. No.

40. Paragraphs 27 to 29, as currently drafted, do not provide enough detail on the differences between the two rights. It would be helpful if paragraph 28 could be expanded upon to explain what the right to request a predictable work pattern is, and how it differs from the separate right to request flexible working. Our concern is that, in practice, it will not always be straightforward to determine which right/process applies.

41. It would also be helpful to make it clearer that making a request under either right/process would be separate to the other for the purposes of calculating the number of requests made. We would not want to unnecessarily limit any future flexible working requests.

D. Conclusion

42. We are supportive of the strengthening of the Code and its role in supporting employees in making flexible working requests. Greater clarity is required around the right to request a predictable work pattern. We believe that the strengthened Code, and its adoption by employers, will best support the retention of employees in a challenging recruitment market.

43. I hope that this response is of value to your consultation. ASCL is willing to be further consulted and to assist in any way that it can.

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Association of School and College Leaders
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