ASCL Association of School and College Leaders

Code of Practice on Dismissal and Re-engagement Consultation

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 Code in that it seeks to set out a clear and consistent process to be followed in what should be the wholly exceptional circumstances where an employer finds themselves having to consider the dismissal and re-engagement of employees.

5. However, the Code, as currently drafted, is too weighted towards employer flexibility, to the detriment of the employee. We believe it would benefit from amendments to ensure that engagement between the employer and employee are meaningful. Also, that the current lack of consideration of the effect on employees will see workers lost not only to the employer concerned but also to the wider workforce (as they may permanently leave employment).

C. Answers to specific questions

Question 1: Paragraphs 6-10 of the Code set out the situations in which it will apply. Do you think these are the right circumstances?

6. Yes, it's important that the Code applies irrespective of the number of employees affected or the business reasons behind the proposed change.

7. Whilst it is appropriate for the Code not to apply where the reason for dismissal is envisaged as being a redundancy, we believe it would be worth giving express reference within the draft code to situations which initially arise under paragraph 8, but subsequently evolve into those as set out under paragraph 6. This would have the advantage of plugging any potential loophole which may arise. Furthermore, for the avoidance of doubt, we suggest precisely identifying the point at which the Code would take effect in such a situation. An example of this is where a redundancy situation is envisaged but where, during consultation, it becomes clear that redundancies may be avoidable but that this would require an alteration to existing contractual terms that may require dismissal and re-engagement.

Question 2: If employees make clear they are not prepared to accept contractual changes, the Code requires the employer to re-examine its business strategy and plans taking account of feedback received and suggested factors. (Steps 3 – 4 in table A and paragraphs 20 – 23 of the Code). Do you agree this is a necessary step?

8. We agree that employers should be required to re-examine their business strategy. This, in our view, is imperative and in accordance with the spirit of good faith and seeking to resolve potential disputes. However, we would also suggest that any proposed re-examination is 'meaningful'. We would suggest the wording here is reviewed to ensure it doesn't result in practice in a 'tick box' exercise.

9. It is sensible for the employer to reconsider, on an ongoing basis (as set out in paragraph 23), the business strategy in light of the discussions that have already taken place with the employees / their representatives. Otherwise, consultation would arguably not be meaningful.

10. We would suggest consideration is given within the draft code to making it mandatory for the employer to consider proposals put forward by the employee – as opposed to the current position which makes it a duty to consider why the changes to the contracts are needed (as current set out in paragraph 22).

11. We have concerns with the example cited in the final bullet point of paragraph 21, which suggests it may be legitimate for an employer to offer less flexibility to established workers in order to offer more flexibility to newer workers. We would like the wording of this section to be reviewed as we are concerned it could lead to equality issues.

Question 3: Do you have any comments on the list of factors which an employer should consider, depending on the circumstances, in paragraph 22 in the Code?

12. The list of factors which an employer should consider should also include the impact on employees on their current terms and conditions, flexible working opportunities, well-being, family life, etc; and not just the discriminatory impacts. We would also suggest the addition of the wording "*the effect on employees*": this is an important factor for consultation to be meaningful.

13. In addition, where the relevant employees belong to a trade or profession that has a standard or nationally agreed set of terms and conditions, the employer must consider the wider impact of undermining these, particularly where national recruitment and retention for this trade/profession is problematic (for example no longer offering teachers access to the teachers' pension scheme but offering a less favourable scheme that has lower employer contributions).

Question 4: The Code requires employers to share as much information as possible with employees, suggests appropriate information to consider, and requires

employers to answer any questions or explain the reasons for not doing so. (Steps 5 and 6 in table A and paragraphs 24 – 42 of the Code). Do you agree this is a necessary step?

14. Yes, it is essential that employers are transparent and share as much information with employees / their representatives as possible, and the Code should make clear that employers should meet with the relevant union representatives at an early stage to agree what information should be provided. By requiring employers to share as much information as possible, it should ensure the employer acts in good faith. Also, the more that each party understands about the situation and options, the more likely that the consultation will be meaningful.

15. We think that paragraph 32 is unnecessary. In all eventualities, employers must have a considered and evidence-based approach to making changes.

Question 5: Is the information suggested for employers to share with employees at paragraphs 25 and 33 of the Code the right material which is likely to be appropriate in most circumstances?

16. On a practical note, it would be more helpful if all the information that the employer needs to share was in one place in the Code rather than across two separate paragraphs.

17. As to the nature of the material, employers should also share financial information about the change, including costs and savings to the employer. We would also expect there to be both an equality impact assessment and a workload impact assessment.

18. The employer should also share with employees what the proposed changes would mean to them in terms of any changes to flexible working opportunities, well-being, family life, etc.

19. The employer should also set out the rationale for why there is a need for the proposed changes *at this time*, any other options that have been considered, and why any options/alternatives proposed by the employee/s and/or their representatives have been rejected.

20. We would also expect provision for a reasonable request to be made by an employee for information that falls outside of the suggested information, to ensure what is provided is not confined. To support this, the Code should make clear, once it has brought the two paragraphs together, that the list is not exhaustive by adding "any other information which the employees or their representatives consider necessary".

Question 6: Before making a decision to dismiss staff, the Code requires the employer to reassess its analysis and carefully consider suggested factors. (Step 13 in table D and paragraphs 57 – 59 of the Code). Do you agree with the list of factors employers should take into consideration before making a decision to dismiss?

21. We think the list of factors that employers should take into consideration needs to be widened to include having to risk assess the cost of industrial action against the cost of alternatives to dismissal. Where that cost is likely to be almost the same or greater, they should not proceed.

22. In addition, employers should also have to weigh up the detrimental impact on employees against any potential benefits to the employer. If there is significant disparity between the two, then the employer should not proceed.

Question 7: The Code requires employers to consider phasing in changes, and consider providing practical support to employees. (Step 15 in table D and paragraphs 61 - 63 of the Code). Do you agree?

23. Yes, this is a welcome part of the Code. To add further support, the Code should state that employers cannot unreasonably refuse any requests for support made by employees. Specifically, it would be beneficial for those staff who are struggling to accommodate the adjustments to see a requirement to allow paid time off for interviews with external organisations (as with redundancy situations).

D. Answers to general questions

Question 8: Do you think the Code will promote improvements in industrial relations when managing conflict and resolving disputes over changing contractual terms?

24. The Code is helpful in parts. Factors such as the size of the employer, the extent of their resources, whether they have a HR function, and whether their staff are part of a union are likely to affect if/how the Code is implemented. We believe it will help smaller employers to understand the process to be followed and will enable employees to better understand it too. We do not believe that the Code will make any significant difference to workplaces with a strong union representation as many of the process and practices outlined are already well embedded.

25. If the Code is applied and implemented, in a meaningful manner by employers, we do envisage some improvement to the present position (it goes without saying that this is dependent on genuine compliance). However, a conformity of practice is welcome.

26. We believe the biggest problem with the Code is that employers won't be required to follow it. We do not think that the risk of a 25% uplift, should they be found wanting in an employment tribunal, is a sufficient deterrent/incentive. This is because, in our view, employers are only likely to pursue these practices when they're confident about the "rehire" part or taking a calculated risk. It may also be the case that the employers who choose to follow it will be the ones who are least in need of it, and the employers who do need guidance are those who will ignore it.

27. There are also some specific parts of the Code that we think have the potential to cause conflict:

    a. Section G is misleading and will increase conflict where an employer decides to unilaterally impose a change.
    b. Paragraph 48 refers to some contracts granting the right to change a contract. However, as this is the only way a contract can be lawfully changed unilaterally, we believe that it is incorrect to suggest that an imposed change is an option in other circumstances.
    c. Whilst Section G is helpful in setting out the options for an employee when a change is imposed, it would be much better if the Code made it clear that the only way a change can be imposed is if there is a variation clause. It should then be made clear to employees what actions were open to them if an employer imposes a change in any other circumstance.
    d. It should be made clear in the Code that a contract with a flexibility clause is being "varied" (within defined terms) and not "changed".

28. Finally, it is disappointing that the remit for the Code was not extended to provide a comprehensive guide for employers on their obligations to consult in a variety of scenarios and merely refers to other legislation.

Question 9: Does the Code strike an appropriate balance between protecting employees who are subject to dismissal and re-engagement practices, whilst retaining business flexibility to change terms and conditions when this is a necessary last resort?

29. We do not believe that the Code, as currently drafted, does strike the right balance between protecting employees and retaining business flexibility. There is a distinction between an appropriate balance and a fair balance. In light of the impact that such a change has on the workforce, one would expect a greater balance of power in favour of the employee than has been provided for within the draft Code.

30. The Code does not create a separate cause of action for employees: the only way it is enforceable is by virtue of an employee having a distinct cause of action related to the process (in connection with which any compensation awarded can be uplifted). This is, in our view, a limitation to the Code.

31. Although tribunals will have the ability to apply a 25% uplift to compensation, this might not be meaningful to employees in reality. For example, employees might not have the resources to bring a claim against the employer in the first place (such as those on low incomes, or those who do not have English as their first language, meaning there is a risk of discrimination). If a claim is made, it can take months/years for a final hearing and remedy to be awarded, by which time the employer might no longer exist.

32. Whilst the Code is useful in providing a framework for consultation and a standard process to follow, there are no barriers to employers to dismissing and rehiring. The scales are weighted too heavily on the side of the employer flexibility because not enough weight/consideration has been given to the impact of the changes on employees.

33. We believe that this is not only to the detriment of the Code but to economic growth and the wider economy. We know that economic inactivity following Covid remains stubbornly high and there is a significant risk that workers who are subjected to dismissal and re-engagement practices will fall out of the workforce. It is therefore essential the Code gives more weight to the impact on employees as they may not just be lost to a specific employer but also to the wider workforce.

Question 10: Do you have any other comments about the Code?

34. We have two specific additional comments.

35. Firstly, it would be helpful if paragraph 18 were explicit about other legislation. As a minimum it should cover the circumstances under which there is the need to notify the Secretary of State and trade unions under Section 188.

36. Secondly, para 38 includes "*It is also important that the employer is honest and transparent about the fact that it is prepared, if negotiations fail and agreement cannot be reached, to attempt to unilaterally impose changes or to dismiss employees in order to force changes through.*" This feels like the very "*threat of dismissal and re-engagement*" that the code is seeking to move away from. A better form of wording would be along the lines of "*It is also important that the employer is honest and transparent that the gravity of the situation may create a need to unilaterally impose*

changes or dismiss employees in the event that negotiations fail and agreement cannot be reached'.

37. In addition, we believe there is merit in setting out fixed time periods for the employee information and consultation exercise or having minimum timeframes. We also strongly advocate that once the Code is launched it will need to be widely publicised so that organisations are made aware of its existence and the importance of following it, as well as the implications of not doing so.

38. Finally, for the Code to be truly meaningful, the relevant changes should be made to require all employers to treat instances of dismissal and re-engagement as attracting statutory or contractual redundancy payments, whichever are the greater. This would be more likely to ensure that due consideration and process were more meaningful and that employees were better valued and less likely to be lost from the workforce.

E. Conclusion

39. The draft Code lays out some important principles and a consistent process. It could be strengthened to ensure meaningful engagement and consultation. However, even then, as currently drafted, it is too weighted in the favour of employer flexibility which is not only to the detriment of the employee but ultimately to economic growth.

40. 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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