



Bar Council response to the Department for Business, Energy & Industrial Strategy consultation paper on Code of Practice on Dismissal and Re-engagement

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Business, Energy & Industrial Strategy (BEIS) consultation paper entitled Code of Practice on Dismissal and Re-engagement.¹

2. The Bar Council represents over 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

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?

4. Yes, subject to two points of clarification.

5. Firstly, it is right to identify that redundancy dismissals are different and to identify s.139(1) of the Employment Rights Act as being referable to a different set of circumstances. However, there is scope for ambiguity in a hybrid situation whereby (for example) an employer is in financial difficulty and is proposing to make redundancies but is also varying the terms and conditions of employees who remain in employment post selection. It is right to say that in those circumstances, the two potentially fair reasons are different, and the code

¹ Available here: <https://www.gov.uk/government/consultations/draft-code-of-practice-on-dismissal-and-re-engagement>

would probably apply to one reason and not the other, but it would help if the Code could address this potential issue explicitly.

6. Second of all, some contracts of employment stipulate that an employer has reserved to itself (or purported to reserve to itself) a unilateral right to vary the terms of the contract, sometimes by giving a requisite amount or notice or following some other procedural step, but sometimes not. Further, a variation is generally not considered to be effective without consideration along general principles of contract law. It may be useful for this Code to address these points which many employers will be concerned about and to address head on whether the Code applies in such circumstances.

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?

7. We consider it important that an employer meaningfully reassesses its objectives in light of factors raised, individually or collectively, by employees in consultation. Initial disagreement may have produced alternative solutions which could be applied by agreement. This step is necessary to ensure those alternative solutions are considered.

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

8. The statement that an employer “should consider” a factor “depending on the circumstances” renders it unclear whether the action is mandatory. Alternative wording might be “an employer should reassess its objectives in a manner which is meaningful, reasonable and proportionate in the circumstances. What is proportionate may depend on factors including the size and resources of the employer’s undertaking, the factors motivating the employer to seek change and the extent of the changes proposed. Factors to which it may have regard in its reassessment include [...]”.

9. All of the listed factors are appropriate to be listed in the Code as ones to which the employer may have regard. Additional factors might include, depending on the sector, risks to the employer’s ability to fulfil its external obligations or contracts and risks to safety and solvency.

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?

10. Consideration should be given to the ambiguity that arises from “as much information regarding the proposals as is reasonably possible, in order to enable employees and their representatives to understand the need for the changes, and to be able to ask questions and make counter proposals of their own.”

11. This also has to be read in the context of paragraph 32.
12. We would suggest that this section is ripe for subsequent interpretation. It will be difficult for advisers to advise correctly on the scope of this obligation as currently drafted.
13. The tension is between providing 'as much information' and 'in order to enable'. For example, employers should be able to assert without difficulty the broad basis for a proposal. The controversy arises from the level of detail that is needed in order to require engagement with that proposal. Employees could seek for example granular financial detail, which is commercially sensitive.
14. At present, Employment Tribunals seek to understand the basis for a decision, but they do not seek to substitute their own financial judgment for that of the employer. If the employer wishes to make a poor financial decision, it is entitled to do so.
15. There is a risk that the guidance as drafted requires greater disclosure than would be required in the Employment Tribunal.
16. Employer and employee representative groups already collectively consult within the framework of the Trade Union and Labour Relations (Consolidation) Act 1992 and in respect of TUPE. The Code should look to this pre-existing legislation and case law in respect of how to address the tension between disclosure of information and the ability to scrutinise.
17. If paragraphs 25 and 33 are supposed to be the constraints on paragraph 26, this could be made more explicit.

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?

18. Paragraphs 25 & 33 are quite modest in scope and do not sit well with the potentially broad nature of paragraph 26, which is discussed in the answer above.

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?

19. The third bullet point is designed to broadly identify a situation that could potentially breach the Equality Act 2010. We take the view that whilst there is nothing wrong with the sentence, something along the lines of "Employers should have regard to their obligations under the Equality Act 2010" should be included. At the very least it must be made explicitly clear at this point that the Equality Act applies in respect of these dismissals.

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?

20. We consider that whilst well-meaning, this proposal does have the scope to cause potential problems. In particular, the Code needs to have regard to the important principle of contractual certainty. Whilst it is possible to envisage a timetable of changes, with specific dates being used and for that scenario to work without difficulty, it is also possible to envisage a scenario whereby one of the parties does not at any one time understand which version of the contract is in force.

21. This proposal, if adopted would benefit from some basic guidance on how to implement contractual changes on a phased basis and also recognise the potential downsides as opposed to a single date of change.

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?

22. No. It is more likely than not that the Code will increase the number of cases that go to the Employment Tribunal as parties base their respective positions on an interpretation of the Code.

23. At present, whilst dismissal and re-engagement cases can go to the Employment Tribunal, a Judge will only occasionally encounter such a case.

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?

24. The difficulty is that the ambiguity in the draft code is likely to require litigation to resolve. It will then be that litigation rather than the Code which then strikes the balance between the competing groups.

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

25. We consider that there should be further consideration of situations in which the employer is required to act quickly in order to salvage a sinking business, preserve as many jobs as possible and to avoid or mitigate against the effects of insolvency. Further, the Code could usefully address the question of whether it should be taken into account in a TUPE transfer situation possibly in connection with insolvency. These are common scenarios in which rapid variations to terms and conditions are sought and / or necessary.

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² Prepared by the Law Reform Committee