Draft Code of Practice on Settlement Agreements

TUC response to Acas consultation

Introduction

The Trades Union Congress (TUC) has 53 affiliated unions which represent approximately 6 million members working in a variety of sectors and occupations across the UK.

The TUC recognises that compromise agreements are widely used in workplaces to resolve disputes swiftly and to avoid potential employment tribunal claims. However, we are seriously concerned that the new legislative provisions on the admissibility of settlement offers and discussions in unfair dismissal cases will send a signal to employers that they are free to sack staff for arbitrary reasons without needing to follow a fair disciplinary procedure.

Employers will be free to initiate discussions about settlement agreements before a formal dispute exists, and even before employees are aware that they face problems at work. Whilst employees will have a theoretical right to turn the employer's offer down, many will consider they have no genuine choice other than to accept the sum of money and leave their job. Many employees will accept the offer simply because they assume it is a foregone conclusion they will be dismissed if they do not. Others will fear that they will be bullied or victimised if they remain in the job. The provisions are therefore open to abuse by employers and could have a detrimental effect on wider employment relations.

The TUC believes that it is important for the Acas Code of Practice to ameliorate some of these effects by combining clear guidance on the new legal provisions with best practice advice. In particular, the Code should:

- Highlight the limitations of the new provisions and caution employers not to presume that conversations or offers will remain confidential
- Advise employers to adopt best practice whenever communicating in the workplace and not to seek to use settlement agreements as a means of circumventing workplace procedures.
- Encourage employers to set out the details and reasons for the offer in writing.
- Advise that it is good practice for employers to allow employees to be accompanied by a trade union representative or colleague at any meeting to discuss settlement agreements.
- Include a broad definition of improper behaviour, including all forms of discrimination, bullying and victimisation.

Responses to consultation questions

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?

The TUC agrees that the Code should contain clear guidance on the new legal provisions. Many employers and trade union reps will be familiar with

negotiating compromise agreements. However the new statutory provisions could significantly expand the types of conversations and offers which will be deemed confidential and therefore inadmissible before an employment tribunal. It is essential that employers, employees and trade union representatives are alerted to these changes and to their implications for unfair dismissal claims.

It is important for the Code to emphasise the limitations of the new provisions and caution employers against presuming that conversations or offers will remain confidential and will not give rise to employment tribunal claims. The draft text rightly highlights that the new provisions only apply to unfair dismissal claims but will not affect claims relating to automatically unfair reasons for dismissal or discrimination. Paragraph 7 should however list a fuller range of jurisdictions which are not affected, including claims relating to breach of contract or wrongful dismissal, claims relating safeguards for trade union officers and members and other statutory rights. The Code should also include clear guidance that whilst the new provisions permit employers to initiate confidential conversations about a settlement agreement, this does not licence them to disregard their employees' wider employment rights.

Paragraphs 6 and 17 of the draft Code also rightly draw attention to the fact that, where the employer behaves improperly, the confidentiality rules will only apply to the extent the tribunal considers just. However the TUC believes that this section of the Code should more clearly state that if employers act in a bullying, intimidating or discriminatory manner or seek to pressurise the employee into agreeing a settlement agreement, then their conversations, actions or offers may be cited in, or form the basis of, an employment tribunal claim.

The new legal provisions are complex. It is widely anticipated they will be the subject of extensive satellite litigation. The provisions are therefore expected to generate significant uncertainty. The Code should therefore advise employers that the principal safeguard against employment tribunal claims is to adopt best practice whenever communicating with staff.

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?

Yes. The Code should refer to the statutory rules for drawing up a settlement agreement. This will help to ensure employers do not ignore or mistakenly presume that the new statutory provisions displace the established rules on settlement agreements.

It will also remind employers that they cannot expect or require employees to agree instantaneously to any offer made. Rather the process of reaching agreement is likely to involve a negotiation.

Question 3:

Should the Code contain good practice guidance on how settlement

agreements are offered and discussed, in addition to this being covered in non-statutory guidance?

Yes. The Code should include good practice guidance on *when* and *how* settlement agreements are offered and discussed. Paragraphs 8 to 12 already include some important advice in this respect.

However the TUC believes the text should be revised and strengthened. In particular, the TUC does not agree with the inclusion of the statement: *'The offer of a settlement agreement can be made at any stage of an employment relationship and it is not necessary to have gone through a disciplinary or grievance procedure, or even started one, before making an offer.'* In our opinion, this is not consistent with good management practice and will encourage some employers to use settlement agreements to circumvent workplace procedures.

The Code should actively deter employers from using settlement agreements to dismiss staff for arbitrary or discriminatory reasons. It should advise employers that they should only consider offering a settlement agreement if they have a potentially fair reason for dismissing the individual, i.e. established concerns relating to misconduct or performance. We recognise that this is already implied in Paragraph 9 which reads *'settlement agreements may be offered to cover a range of problems, e.g. poor performance, poor attendance or misconduct'*. In our opinion similar text should be retained even if the reference to template letters is removed.

The Code should also state that it is good practice for the employer to inform the employee in writing of the details of an offer and the reasons why it is being made. This would increase accountability and would deter employers from dismissing individuals for arbitrary or discriminatory reasons. The draft Code currently states that the reason for the offer should be given '*at an appropriate time*'. This is not sufficiently clear or precise. Instead the Code should encourage employers to alert employees informally to any concerns at an early stage, thereby giving the individual the opportunity to improve their conduct or performance. If the employer subsequently decides to offer a settlement agreement they should write to the employee giving the details of the offer and the reasons why it is being made.

The TUC agrees that some parties may find it helpful to meet to discuss an offer (paragraphs 11 & 12). For the reasons outlined in response to Questions 11 & 12, it is vital that employers allow employees to be accompanied at such meetings. It is also important that employers do not simply announce, once the meeting is underway, that the conversation will be confidential and without prejudice. Rather the Code should advise employers to inform the employee in advance that they propose to hold a confidential meeting to discuss the offer of a settlement agreement and the possibility of ending the employment relationship. Employers should also gain the express consent of the employee before the meeting.

It is also important the Code confirms that agreements must be voluntary and that the employee has the right to turn an offer down.

Question 4:

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

The TUC agrees that it will be important for Acas to develop clear non-statutory guidance. The TUC would welcome the opportunity to be consulted on the draft guidance and in particular to comment on advice relating to the right to be accompanied and how the confidentiality rules will apply to multiple claims.

In general, the TUC agrees that the guidance should cover the issues listed on page 4 of the consultation document. It should also include good practice advice on how employers should offer and discuss settlement agreements (see the response to Question 4). The guidance should also include the following points:

1) The guidance should deter employers from using settlement agreements to avoid the need for performance management systems and workplace procedures. Rather it should emphasise that problems in the workplace are best resolved via open conversations and where appropriate grievance and disciplinary procedures.

2) The guidance should advise employers only to offer a settlement agreement where they have potentially fair reason for dismissing the individual, i.e. concerns relating to misconduct or performance. The decision to make an offer should only be taken after the employer has investigated whether disciplinary action is justified and has given the employee the opportunity to improve.

3) The guidance should warn employers against using settlement agreements to pre-empt negotiations with recognised unions in collective redundancy or TUPE situations or in multiple claims. Such tactics would reduce the likelihood of a negotiated settlement and could lead to disputes.

4) Employers should be advised it is good practice to fund the costs of independent legal advice for employees. This is already normal practice for many employers who recognise that enabling employees to access independent advice can help to facilitate agreement, as well as ensuring a fairer outcome.

5) The guidance should encourage employers always to permit employees to be accompanied by a trade union representative or full time officer or colleague in all meetings to discuss settlement agreements. The guidance should explain the role which the companion should be allowed to play. As a minimum, this should reflect the requirements of section 10 of the Employment Relations Act 1999. The guidance should also note that in workplaces with established industrial relations arrangements, recognised union representatives will sometimes play a more active part in negotiating settlements.

6) The guidance should provide a full description of the types of behaviour which constitute improper behaviour. This should include a range of obvious and less apparent examples, such as:

- Where the employer acts in a discriminatory manner, for example, by telling the individual in a meeting – 'you are getting too old for this job. It's time for you to go.'
- Where shortly after an employee raises a grievance, the employer invites the

individual to a meeting discuss their performance. During the meeting the employer states that they believe the employee should leave the organisation and offers them a settlement agreement.

- Where an employer uses settlement agreements to avoid the cost of redundancy payments. The employer may fail to disclose there is a need for redundancies and seek to reduce staffing levels more cheaply by offering settlement agreements.
- Where the employer fails to disclose all the conditions relating to the settlement at an early stage (for example, gagging clauses, restraint of trade clauses, repayment/penalty clauses) in the hope that the employee will no longer have the appetite to reject the offer or to seek to renegotiate it.

7) The guidance should encourage employers should carry out an equality impact assessment to ensure that settlement agreements are not offered or used to discriminate against groups with protected characteristics.

Questions 5 & 6:

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

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

Yes. The Code should advise employers to set out the details of an offer in writing. Employers should also be expected to give written reasons for the offer.

Many employees will be deeply distressed if they are told they are no longer wanted by their employer and their ability to listen, understand and remember details of an offer will be seriously impaired. Receiving a written copy of the offer will help to avoid misunderstandings and uncertainties. It will also enable the employee and their adviser to assess the value of the offer and to decide whether to accept or reject it or to make a counter proposal.

Employers are already required to set out the details of the offer in writing under section 203 of the Employment Rights Act 1996 and section 147 of the Equality Act 2010 (relating to compromise agreements). Including a similar requirement in the Code will simply encourage the employer to do this at an earlier stage.

Employment tribunals would no doubt welcome this recommendation as it will provide written evidence in disputes which would otherwise need to be determined on the basis of one person's word against another's.

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?

The TUC believes that the template letters are seriously flawed and should not be included in the Code. The new provisions contained in section 111A are likely to be the subject of extensive litigation. Given the need for Parliamentary approval, it would be difficult to revise the Code to reflect evolving case law.

There may however be a case for including significantly revised templates in the non-statutory guidance.

Question 8:

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

The TUC believes that the draft templates will not serve their intended purpose – that of encouraging a settlement between the employer and the employee. Rather, on receiving such a letter, employees are likely to feel 'got at' and victimised.

The template letters are only likely to be successful in facilitating agreement if employees receive sufficient information about the detail of the offer and the reason why the employer is making it. This information will enable employees to assess whether the employer has sufficient grounds to dismiss them. If an employer only provides a brief explanation for their concerns, as suggested in the template, the employee may feel unduly confident that the employer is not in a position to take disciplinary action and will reject the offer.

Requiring only a brief explanation of reasons for concern will also give employers the impression they do not need to carry out an investigation before making an offer. This will give employers a false sense of security and could make them more vulnerable to litigation.

Other problems with the template letter include:

- They continue to confuse the opening stages of a disciplinary procedure with the offer of a settlement agreement. This will mislead employers and employees.
- It is disingenuous for the letters to state that the employee will be given the opportunity to improve before any final decision is taken on their employment. The fact that the employer is expressing serious concerns and is making the offer of a settlement agreement gives the clear impression employers have reached the foregone conclusion that the employee should be dismissed.
- The final paragraph of the letter implies that if the employee rejects the offer the employer will move straight into a disciplinary hearing, even though they will not have carried out a full investigation and the employee will not have been informed of the charges against them and the evidence on which they are based. Employers following this route are likely to face successful applications for unfair dismissal.

Questions 9 & 10:

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

Yes. It is important that employees are not pressurised into agreeing to a settlement agreement. Imposing short time limits may deter agreement and could amount to improper behaviour.

The TUC believes that 7 working days is insufficient time for an employee to consider an offer and to access independent advice. In our opinion, the minimum time period should be extended to 2 weeks.

Questions 11 & 12:

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?

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

Yes. This is vital. Workers have fundamental right to representation by union representatives, as safeguarded by Article 11 of the European Convention on Human Rights.

The TUC believes that the Code should also state that where an employer refuses to allow an employee to be accompanied, this will amount to improper behaviour.

Allowing employees to be accompanied is also likely to be beneficial for employers. Trade union reps have extensive experience in helping to resolve workplace disputes through negotiated outcomes. Allowing a trade union representative to accompany an employee is also likely to assist in moderating conversations and in facilitating agreement.

Question 13:

What do you think of the examples of improper behaviour and undue pressure set out in the draft Code and do you have any other examples that you feel might usefully be included?

It is essential that the Code to define improper behaviour in broad terms in order to protect employees from abuse and to prevents employer from misusing the new confidentiality rules.

The TUC agrees that the list set out in the draft Code will certainly amount to improper behaviour. However, in our opinion the examples provided are not broad enough and the threshold for what amounts to improper behaviour has been set too high.

The TUC agrees that *all forms* of harassment should amount to improper behaviour. However it is unhelpful that the only examples given are 'intimidation through offensive words or aggressive behaviour'. The definition of harassment should more closely reflect that used in equality legislation and should include unwanted conduct which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual.

The Code should expressly refer to bullying as a form of improper behaviour. Bullying should be characterised as offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient.

The definition of victimisation should be extended to include victimisation connected with trade union membership or activities. The Code should also state

that where an employer refuses to allow an employee to be accompanied, this will constitute improper behaviour.

The TUC agrees that undue pressure from the employer is a form of improper behaviour. The first three examples of undue pressure are helpful. However the TUC questions whether that a simple threat by an employee to undermine an organisation's public reputation would amount to improper behaviour or to sufficient grounds for confidentiality rules to be lifted.

We also question the distinction which is drawn in paragraph 20 between improper behaviour and undue pressure. In our opinion these are indivisible elements of the same concept. The advice provided in paragraph is confusing and should be removed.

The TUC also does not agree with the reference to the *'removal of legal protection'* in paragraph 16. Whilst the new provisions on confidentiality will undoubtedly provide employers with additional legal protection, the same cannot be said for employees. As the Code is designed for use by both employers and employees, this phrase needs to be replaced.

Question 14:

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

No. The inclusion of such examples would send a signal to employers that some forms of pressure or inappropriate behaviour are acceptable.

Ultimately it will be for the courts and tribunals to interpret what constitutes improper behaviour. The TUC does not believe it is appropriate for an Acas Code of Practice to seek to limit the protections afforded to employees.

Question 15:

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

Not applicable