



The Law Society

Draft Code of Practice on Settlement Agreements

Response to the Acas consultation

April 2013



The Law Society

The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 166,000 members, promoting the highest professional standards and the rule of law.

This response has been prepared by the Society's Employment Law Committee and reflects the expertise of solicitors with daily experience of putting employment law procedures into practice. Our interest in employment law and practice is to secure 'good law making', to provide clarity for employers and employees, and to avoid possible unintended consequences. We offer our expertise and experience to help government shape and tailor its policies accordingly.

Q1: 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 Code's focus should be wider. Acas Codes of Practice are widely respected, and it is very likely that employers and employees will view this Code as the authoritative source of information about how to act appropriately during settlement negotiations. Readers of the Code will not be concerned with specific legal provisions, but will be seeking advice in the round. If the Code is narrowly focused on the new provisions, there is a risk that the reader will not enquire further as to the fundamental requirements for a valid and enforceable settlement agreement.

An example of the potential confusion can be found in the final sentence of paragraph 8 of the draft Code:

'Ultimately, the final settlement agreement will need to be set out in writing and signed by the parties.'

The reader would be forgiven for mistakenly concluding that this sentence represents the only formal requirement for a settlement agreement to be valid.

The final phrase in paragraph 10 of the Code is also potentially misleading. The reference to the party being given time to receive any independent advice suggests that obtaining independent advice is optional. This ignores the fact that the employee having access to independent advice is a condition that must be satisfied if a settlement agreement is to be valid.

We suggest that a new section be introduced into the Code summarising the legal requirements (both statutory and case law) for a settlement agreement to be binding and enforceable.

Q2. Should the Code also include reference to the statutory requirements for drawing up a settlement agreement, e.g. putting the agreement writing, and the employee receiving advice from an independent advisor? If not, should these be set out in accompanying guidance?

Yes. These references are of such significance that they should be included in the Code and not simply set out in the accompanying guidance.

Q3. 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, because the current Draft does not contain enough detail to achieve the Code's purpose.

All the research shows that small employers, which are the bulk of employers in the UK, do not tend to fully inform themselves on employment law.¹ There is an onus on Acas to produce a Code which will protect employers from making inadvertent transgressions, and their employees from their adverse effects.

Crucially, the introduction of confidentiality into the negotiating process raises new risks which this Code should mitigate. Unlike other Codes of Practice, which cover subject matter that is open to judicial scrutiny, this Code will be vital to ensuring fair play in what will be secret (protected) conversations. That secrecy removes those conversations from judicial and public scrutiny – while, at the same time, removing the employee's access to remedy. There is a presumption that secrecy applies, and the onus is on the claimant to rebut that presumption.

For these protected conversations the Code will assist in determining jurisdiction and this marks a key departure in the nature of settlement agreements.

Although the most serious abuses can be easily defined as improper behaviour, more subtle intimidation may be harder to define. We comment on the examples of improper behavior set out in the draft in our answer to Question 13.

The best way to avoid further disputes is to include good practice guidance alongside the statutory requirements. It is right that the Code does not seek to be as comprehensive on settlement agreements as guidance but the Draft Code currently does not have the balance right. The Code must contain more key information, if for no better reason than that it is more likely to be read than longer guidance. (We believe that this is why the 88-page long Acas guide to Discipline and Grievances at Work (Nov 2009) is as under used as it is).

Q4. What sort of information and good practice advice would you like to see included in non-statutory guidance on settlement agreements?

Everything listed on page 4 of the consultation should be included. We would add the following information and advice:

Many employers will be using settlement agreements for the first time, and thus will risk making common mistakes. Conventions have arisen around compromise agreements because they work and assist the process. It would be useful for the Guide to touch on some of these.

By way of example, the consultation says BIS have suggested that the employer may want to consider paying the individual's legal costs. The phraseology is unhelpful. There is no obligation here, but there is often an imbalance of knowledge and access to resources between the employer and employee. The best way to ensure that the employee gets the necessary advice is to contribute to their legal fees. If an employer

¹ Most recently see BIS Employment Relations Research Series 123, *Employment Regulation Part A: Employer Perceptions and the Impact of Employment Regulation*, March 2013

does not then they potentially impede the process, either because the employee will need to take longer to grasp the situation or mistakes are made as the employee's rights are not properly understood. As the *raison d'être* for settlement agreements is that it is a consensual process, it benefits all parties if the employee can access independent legal advice. In practice the great majority of employers do pay, or at least make a contribution towards, the employee's legal costs.

A provision that encourages the employer to draw the Code and Guide to the employee's attention at the beginning of the process should be included. This will assist both parties to become properly informed about the process, and will encourage the adoption of appropriate behaviours. The Law Society would like to see this in both the Code and the Guide.

It would be healthy if there was an extensive discussion around what might constitute impropriety, especially behaviours that are not obviously improper. By way of example:

- a. making an offer which the employer knows cannot reasonably be accepted, in an attempt to prompt the employee's resignation in circumstances of minimal cost to the employer, and free from the risk of a constructive dismissal claim;
- b. seeking to evade redundancy payment obligations by hiding the fact of a redundancy situation, and trying to use the protected conversation process to secure a departure more cheaply;²
- c. the imposition of unreasonably short deadlines;³ or
- d. creating an environment which places the employee under significant disadvantage during the process. For example: meeting with night shift workers during the day; having the meeting at inconvenient or distant locations; inadequate notice of meetings; not providing a copy of the proposed settlement at an early stage⁴

The Law Society welcomes the highlighting of 'being accompanied' as best practice. The Government chose not to amend s.10 *Employment Relations Act 1999* to adopt

² On this point see the authorities of Caledonian Mining Co Ltd v Bassett and Steel [1987] IRLR 165, EAT (falsely inveigling a resignation to avoid a redundancy payment is a dismissal); Jenvey v Australian Broadcasting Corp'n [2002] IRLR 520, HCQBD (there is an implied term in a contract of employment that once an employer has determined that an employee will be dismissed by reason of redundancy, such that his dismissal for any other reason will defeat the employee's right to contractual benefits which accrue when the dismissal is by reason of redundancy, the employer may not lawfully dismiss the employee for any reason other than redundancy, unless the dismissal is for good cause); and Hartwell v Brand & Jones (1992) EAT/491/92 and EAT/506/92 (7th October 1993) (capability reasons subordinate to desire to avoid a redundancy payment as real reason for dismissal).

³ Committee members have experience of employers giving the employee 24 hours to both accept the offer, and produce a signed compromise agreement, or the offer is withdrawn.

⁴ Committee members have experience of settlement negotiations where employers get agreement and then require a compromise agreement which contains previously unmentioned provisions such as restraint of trade clauses, good behaviour clauses, repayment/penalty clauses etc. This is done deliberately in the hope that the employee will not reject those new elements since, in their mind, the negotiation is already over and they do not have the stomach to resume it.

this into law. That being so the companion cannot avail themselves of the detriment protections contained in s.12(1)(b). We therefore consider that:

- a. at least the Guide should warn the companion about this anomaly;
- b. the Code should say that any victimisation or harassment of the companion for taking on that role constitutes improper behaviour for the purposes of s.111A *Employment Rights Act 1996*; and
- c. at least the Guide says that the issue of accompaniment should be approached by the parties as if s.10 *Employment Relations Act 1999* did apply.

Q5. Should the good practice recommendation set out the details of an offer in writing be included in the statutory Code?

Yes. Setting out the detail of an offer provides all parties with greater clarity. This clarity helps to frame the negotiating process in a way all parties understand. Negotiations can become unnecessarily protracted when the details of a settlement are ambiguous.

By encouraging parties to put an offer in writing there will, in most cases, be a reduction of last minute disputes about the content of the Settlement Agreement. It also allows the employee to seek clarification of the proposed terms, helping to resolve unclear definitions before negotiations start. In our experience the risk of 'undue pressure' being applied diminishes where the initial offer is made in writing.

Q6. If so, what might be the likely impact and how might the recommendation be perceived by employers and employment tribunals?

Employers will be more likely to put offers in writing to employees. Offers might be made with more thought and consideration, which should mean that meetings are conducted in a better organised environment.

The employment tribunal may, in certain circumstances, be more likely to draw a negative inference from an employer's failure to put its offer in writing.

Q7. 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?

We understand the benefits that template letters may bring but Acas needs to make clear in the Code the status of the templates and the risks of relying solely on them.

If the letters are included in the Code, employers may feel compelled to always use them. There will be cases where the template letter will not be appropriate, for example, different considerations will apply where the employee is senior. Compulsory template letters may lead to more problems than they solve as employers will inevitably need to revise their letters to include specific details relevant to the case at hand.

It should be pointed out that employers will need to seek legal or HR advice in complex cases. The availability of generic letters may encourage employers to

unwisely avoid seeking appropriate advice. What may appear to be a short-cut could expose the employer to greater risks.

In relation to the template letters, the Law Society refers to the excellent blog piece 'Dear Michael' by Michael Reed at the Free Representation Unit.⁵ It would indeed be hardly surprising that for employees:

- receiving a letter out the blue causes anxiety and panic. The employer may find that that it merely prompts the employee to go off with stress;
- it gives the strong impression that a final decision had already been made, that the employee's days are numbered and that there is therefore a *fait accompli*;
- having no explanation of how the offer was calculated hinders proper consideration as the recipient has no context;
- it undermines mutual trust and confidence regardless of whether the offer was accepted or not;
- if colleagues heard about such a letter being sent it would adversely impact upon their working relationships as they would wonder 'who was next?'. It might also adversely effect the employer's ability to retain staff; and
- causes confusion about whether a formal process had begun or not.

We suggest that the Guide highlights consequences such as these because they are situations which the employer should consider before embarking on the process.

Our preference would be for template letters to be included in Acas non-statutory guidance. It would not be constructive for the impression to be created that ending any employment relationships can be reduced to an 'off-the-shelf' template. The reality is that careful thought needs to be applied to each situation on a case by case basis.

Q8. Do you have any comments on the wording of the template letters?

If settlement is reached it is likely to be either because there is a genuine and open discussion or the employee is resigned to the situation. In many cases we anticipate that this letter will predate any formal investigation stage into the '[serious] concerns' referred to in the opening paragraph. The employee must not be put in a position where they are being forced to guess what the employer knows, or indeed the employee having a false sense of security from a belief that the employer is going through a mandatory administration stage. Similarly, this wording should not give the employer false confidence that concerns that have not been investigated, commented upon or put to proof can be considered to be anything other than preliminary.

Although the drafts say 'Add brief details if appropriate' this does not adequately address this issue. If the employer is going to refer to 'serious concerns' it should always explain them, and the basis for them, and Acas should clearly state this. There is clearly scope for confusing the initial negotiation meeting with the employee with the start of the disciplinary or capability process. The first main paragraph of the letters is ambiguous on this. The obvious danger is that the employer combines the two and its offer is rejected at the meeting it commences the disciplinary hearing. Unless there is a clear distinction between the two, the employer risks being unable to refer to that first meeting to show that it complied with its various obligations. The

⁵ at <http://workingtheory.co.uk/2013/dear-michael.html>

current drafts do not make this adequately clear to either the employer writing the letter, or the employee receiving it.

The tenor of the first main paragraph is still that a final decision to dismiss has already been reached. This inference is dangerous, unhelpful and inappropriate in this letter.

The reference to 'trade union official' could be confusing. Although it accurately reflects the breadth given to that term in the 1992 Act⁶, a more readily accessible phrase would be 'trade union representative'.

The reference to giving a minimum of 7 days to respond is at odds with paragraph 14 of the consultation which refers to 7 working days. Aside from the fact that 7 working days is an odd time-frame, the use of the working days formulation could lead to confusion about when the period ends. By way of example, for someone working 2 days a week in a business that is open 6 days a week, would 7 working days be their working days (i.e. 3½ weeks), the employer's working week (i.e. 8 days), or the generally understood notion of Monday to Friday (i.e. 9 days). We would suggest that Acas make clear that any deadline should be reasonable and is identified by reference to a definite date and time to avoid confusion.

There is a typographical error in the first main paragraph of the Annex 1 letter where a word is omitted between 'given' and 'opportunity'.

Some indication of how the offer figure was arrived at may help consideration of it.

Q9. In referencing the importance of having a reasonable time to consider a settlement agreement offer, should the Code specify a minimum time period?

No. The reasonableness of any particular time period for an employee to consider a settlement agreement offer will vary depending on the circumstances. These may include the reason for the offer, the circumstances in which the offer is made, the seniority or juniority of the employee in question and the relative bargaining position of the parties.

The Government response to its consultation on Ending the Employment Relationship makes clear that the Government is keen that the Code does not become 'overly prescriptive'. However paragraph 10 of the draft Code states that 'parties must be given a reasonable period of time – a minimum of seven days – to consider an offer of a settlement agreement' and to receive independent advice. The Code then goes on in paragraph 16(e)(i) to cite, as an example of 'undue pressure' an employer, 'not allowing an employee a minimum of 7 working days to consider an offer'. The clear danger of this is that a failure by an employer to provide an employee with the specified period of time to consider a settlement agreement may not benefit from the confidentiality provisions being introduced.

⁶ S.119 *Trade Union and Labour Relations (Consolidation) Act 1992*

The Code as presently drafted creates unnecessary formality in the process of agreeing a settlement agreement, which may have unintended consequences. For example: -

1. There could be satellite litigation on exactly when time commences. Does it run from the time a verbal offer is made (and possibly accepted) or from the date of the employer's written communication of the offer? Alternatively, does it only run from the time the employee receives a copy of the proposed settlement agreement itself?
2. If an employee accepts an offer within 7 days of it having been communicated (without formally signing the Compromise Agreement) is the employer in breach of the Code if the employer does not confirm that the employee has 7 days to consider matters?
3. There may be legitimate business or commercial reasons why a minimum period is not appropriate – for example the imminent completion of a commercial transaction.
4. The Code assumes that it is always the employer who initiates discussion over a Compromise Agreement. This is true in the majority of cases but it is not always so. What of the situation where a proposal is made by an employee? Is it anticipated that the employer will, in these circumstances, still be obliged to allow the employee 7 days to consider a settlement agreement?

There is a danger of creating artificial formality where none is required, and creating red tape which does little to protect employees. It might be argued that the Code should set out a minimum time period as an example of best practice – for example, not as a matter which might automatically lead to a finding of improper behavior by an employer. The danger with any minimum period is that it becomes regarded as a norm which employers then feel obliged to follow. This would reduce the flexibility available to parties in concluding settlement agreements.

The draft Code does not deal, in any detail, with the requirement for employees to receive independent legal advice on any proposed settlement agreement. Although referred to in paragraph 11, in the context of a minimum time to consider, the reference to this important statutory safeguard for employees is brief.

Confusingly the Code moves (in paragraph 11) from the meeting between employer and employee to discuss the settlement offer, to (in paragraph 12) references to the employee's employment being terminated. The crucial stage in-between (the taking of independent legal advice) is not referred to at all.

The requirement for independent legal advice on a settlement agreement eliminates the need for any specific minimum time period.

Instead of referring to minimum time periods the Code should:

(a) state that an employee should be given a reasonable period of time to consider a proposed settlement agreement;

(b) the reasonableness of that period of time will depend on the circumstances, and

(c) underline the importance of independent legal advice without which a settlement agreement will not be binding.

Employment tribunals are well used to dealing with issues of reasonableness and are best placed to consider whether, in any particular situation, an employee was given adequate time to consider a settlement proposal.

Q10. If so, how long should the period be?

In the light of our response to question 9, time limits would not be applicable.

Q11. Do you think the statutory Code should contain a good practice recommendation that employees should be allowed to be accompanied at meetings to discuss settlements agreements?

No. We recommend that the guidance makes it clear that allowing an employee to be accompanied might be appropriate depending on the circumstances, but is not invariably so.

The difficulty with a good practice recommendation in the Code is that, although not mandatory, it becomes a norm or expected standard against which employers will be judged. However, we note that the Code as presently drafted includes a mandatory instruction to employers – paragraph 11, ‘employers should allow’.

Although it might be appropriate for an employee to be accompanied at a meeting to discuss a settlement agreement there are good reasons why this should not be assumed as being mandatory. Discussions which lead to settlement agreements can arise in a variety of different ways and in different contexts. For example:

1. They may be initiated by the employee, in which case it would be strange if the employer was thereby obliged to notify the employee of their right to be accompanied and possibly rearrange the meeting for that right to be exercised.
2. They often arise unexpectedly or at meetings (such as capability or investigation meetings) where the employee is not otherwise entitled to be accompanied.

There is a danger of creating unnecessary formality in the process which could be counter-productive. Many employers rightly adopt a softly-softly approach when first broaching the subject of a settlement agreement with an employee. The idea of writing to an employee to advise them of their right to be accompanied runs counter to this approach.

The Code makes only brief reference to the obligation to allow employees to take independent legal advice on a settlement agreement. As any settlement agreement will only be binding in the event that such advice has been received it is not obvious

what the right to be accompanied adds to this important, existing safeguard. A better approach is to deal with the right to representation in the non-statutory guidance.

Q12. What do you think are the implications of including such a reference to accompaniment in the statutory Code?

See answer above.

Q13. 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?

Our concerns are:

(a) the potential for confusion that may arise between the two concepts of ‘improper behaviour’ and ‘undue pressure’; and

(b) the apparently high threshold informed by the use of the word ‘improper’ and the examples given.

Confusion

On page 6 of the consultation questions, Acas states that examples of improper behaviour and undue pressure have been given. This suggests that there is a difference between these two concepts. At paragraph 14 of the draft Code, we are told only that section 111A will not apply where there is some improper behaviour, and this is supported by paragraph 17 of the draft Code.

Paragraphs 15 and 16 provide examples of conduct that would be defined *either* as improper behaviour or undue pressure, again suggesting a difference between the two ideas.

Our reading of paragraph 20 suggests that undue pressure will be construed as one particular form of improper behaviour, such that any undue pressure would also result in section 111A not applying. This is, however, unclear. If that is the intention, it would be helpful to clarify that undue pressure would be regarded as a particular category of improper behaviour.

Threshold

The examples of improper behaviour appear to suggest that a high threshold needs to be met. As currently drafted, examples of improper behaviour include ‘intimidation through the use of offensive words or aggressive behaviour’ and ‘physical assault’. Impropriety covers a far broader and more subtle range of conduct. The threshold for improper behaviour should not be set too high.

A good starting point is Lord Kerr’s comments in *Gisda Cyf v Barratt* [2010] IRLR 1073 that employees are ‘as a class in a more vulnerable position than employers’. This vulnerability is heightened when an individual employee finds themselves discussing the possible termination of their employment. The Code should allow a broad view of what might be ‘improper’, to take account of the likely inequality in bargaining power between the parties.

It is difficult to prescribe in advance the type of conduct that would fall into improper behaviour as much will depend on the circumstances of the parties. Instead, it would be helpful to consider impropriety as being similar to the test of detriment in *Shamoon* [2003] IRLR 285, which is to be assessed from the viewpoint of the reasonable worker. The requirement for reasonableness when deeming something to be 'improper' should be sufficient to ensure that a real grievance is justified, and reinforces the fact that impropriety should be judged from the position of the party with the weaker bargaining power. This test allows the law to catch subtle improper behaviour while also providing protection for an employer by requiring the employee's perception to be reasonable.

Examples

As impropriety may depend on the position of the parties it might be more helpful for the Code of Practice to suggest factors that might make impropriety more or less likely, rather than prescribe conduct that would always/never be improper.

The following examples highlight the nuances that may arise and why a test based on whether the worker reasonably considers the treatment to be improper is more workable:

- An employee is allowed to be accompanied to a meeting by a representative but the representative cannot attend on the specified date. The employer's refusal to adjourn might be improper if the representative has a long-standing relationship with the employee, has helped the employee throughout the dispute and an alternative meeting could be easily re-arranged. It may not be improper however if the representative has no such relationship with the employee and other equally qualified alternatives are available.
- An employee with an alcohol problem begins to demonstrate performance problems at work. At the first stage of the performance improvement programme, the employee's condition is discussed and the employer offers to support the employee through counselling. The employee does not want colleagues to know about his/her condition. Despite the employer's support, the employee's performance deteriorates. If the employer raises a settlement agreement as an alternative to continuing with the capability process, this might be welcomed by the employee. If the employee felt under pressure to settle as an alternative to his/her condition becoming known, it might however be regarded as 'undue pressure'.

Q14. Should the Code include examples of what does not constitute improper behaviour or undue pressure?

It would be more helpful to provide a list of factors which may make impropriety more likely to occur. These might include:

- employees who are vulnerable because of the nature of their work. For example, those engaged in fixed-term, precarious or low-paid work;
- employees whose characteristics make them more vulnerable to inequality in bargaining power, such as some migrants or those who may find it difficult to obtain alternative employment;

- disproportionately short time-scales to agree to the settlement agreement, particularly if the employee has long service; and
- a lack of suitably experienced representatives.

Q15. If so, what examples would you like to see included?

See above.