ACAS DRAFT CODE OF PRACTICE ON SETTLEMENT AGREEMENTS

Response by Thompsons Solicitors

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About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

Our response

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?

Yes. The process of negotiation and settlement will be familiar to many, whereas the protected conversation element is novel. Parties will both need and welcome guidance on this issue. Thompsons believes that it is important to focus on that area especially because of the jurisdictional bar which is the natural consequence of that process. Such a fundamental issue needs the most appropriate and careful explanation.

Q2. 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?

Thompsons is currently unclear where this Code of Practice will sit in the broader context of other guidance and precedent material. Without knowing that it is very hard to answer this question. That information certainly needs to appear somewhere, but perhaps the Guide is the better location. Placing it there may also encourage the parties to look at the Guide as well as the Code. The eventual precedents could mark the compulsory sections in the same way as the ET1 is currently marked: a '●' for compulsory information, and a '*' for desirable information.

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?

Thompsons firmly believes that it should be included in the Code as well.

What we must not lose sight of is that the secrecy afforded by these provisions removes the events they cover from public scrutiny. The quid pro quo of this must be that the standards applied are robust.

Furthermore, there is a presumption that this secrecy applies, and it is for the claimant to rebut that. Although the most serious abuses, arguably, will be improper behaviour, many will not be. Thompsons can envisage circumstances where a breach of mutual trust and confidence occurs

during the meeting, but which does not offend impropriety, but nevertheless negates any hope of a constructive dismissal argument.

The twin elements of secrecy and the removal of remedy leads Thompsons to the conclusion that the guidance contained in the Code of Practice is vital to ensure fair play in a way which is simply not so in other situations where Codes exist. All the other Codes cover subject matter which is always open to judicial scrutiny, and the Codes assist in determining liability. For these protected conversations the Code will assist in determining jurisdiction and thus marks a key departure in the nature of these documents.

Thompsons considers that ACAS is honour bound to produce a Code which protects employers from making inadvertent transgressions, and their employees from the adverse effects of them. All the research shows that small and micro employers (which are the bulk of employers in the UK) do not tend to inform themselves well about employment law.[1] We believe that this simple factor is why the 88 pages of the ACAS Guide to Discipline and Grievances at Work (Nov 2009) is as under utilised as it is.

Thompsons considers that in order to increase the likelihood of employers reading the Code, and of it influencing their behaviour, then it should be shorter than the Guidance and should focus on the key advice.

Thompsons does not suggest that the Code seeks to be as comprehensive on this issue as the Guide, but key aspects need to be, and we consider that the current draft does not go as far as it ought to.

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

Thompsons notes the matters listed at page 4 of the consultation, and agrees that all should be included.

We make the additional comments:

1. Many employers will be using settlement agreements for the first time, and thus will risk making all the time-honoured mistakes afresh. 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 has suggested "that the employer may want to consider paying the individual's legal costs". The phraseology of this is unhelpful. There is no obligation here, but the harsh truth is that a compromise agreement format benefits only the employer and the best way to ensure that the employee gets the necessary advice is to contribute to their legal fees. If an employer does not then they actually impede the process, delay the protection they get, and risk the deal entirely by unnecessarily creating a potential source of resentment and dispute. As the raison d'etre for settlement agreements is a consensual and hassle-free parting of the waves such an error is self-defeating.

2. We would like to see the inclusion of a provision that encourages the employer to draw the Code and Guide to the employee's attention at the beginning of the process. This will assist both parties (and the companion) to become properly informed about the process embarked upon, and will assist them in adopting appropriate behaviours. Thompsons would like to see this in both the Code and the Guide.

3. We would like to see an extensive discussion of what might constitute impropriety, especially behaviour which might be considered to be at the fringes. By way of example:

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

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 departures far 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. Examples (individually or cumulatively) may include: 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 stage.[4]

4. Thompsons welcomes the Code's inclusion of being accompanied as best practice. However, we are acutely aware that despite being urged to do so the government has not amended s.10 *Employment Relations Act 1999* to adopt 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.

Thompsons refers to the excellent blog piece "Dear Michael" by Michael Reed at the Free Representation Unit.[5] We conducted a similar exercise amongst volunteer staff using the letter at Annex 1. The feedback contained the following consistent themes:

- That receiving the letter out of the blue caused feelings of anxiety and panic. The employer may find that that it merely prompts the employee to go off with stress;
- That it left the strong impression that a final decision had already been made, that the employee's days were numbered and that there was therefore a *fait accompli*;
- That no explanation of how the offer was calculated meant that assessing it was done without a context and that this hindered consideration of it;
- That it undermined mutual trust and confidence regardless of whether it was accepted or not;

[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 Corpn [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] Thompsons has 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] Thompsons has 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.

[5] at http://workingtheory.co.uk/2013/dear-michael.html

- 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 it values, but who do not value the employer's use of this process; and
- There was confusion about whether a formal process had begun or not.

Thompsons therefore suggests that the Guide might usefully address these collateral issues as being relevant to the employer's decision as to whether they wish to adopt the process at all.

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

Definitely.

It is vital to remember the crushing impact of being told by your employer that you are no longer wanted. Employees in receipt of this news will have their ability to listen, understand and retain oral information significantly impaired. For many this will impair an already limited starting position anyway. Part of the quid pro quo referred to above must be that details of any offer are committed to writing so that the employee, and their advisor, can consider them properly. To do otherwise risks sabotaging the process with misunderstanding and rancour.

We would also anticipate that the act of committing the details to writing builds in a degree of accountability which will help guard against impropriety. The lack of a paper trail without good cause is surely behaviour which is indicative of impropriety. As any offer must be committed to writing to comply with s.203 *Employment Rights Act 1996* and s.147 *Equality Act 2010* anyway, it may as well be done as soon as possible.

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

Existing ACAS Codes of Practice require paper records and so this is not a new concept. It is merely a consistent approach which has been adopted since ACAS's earliest involvement. Employers should not be afraid of this measure. Although it may impact upon those with limited written skills, this is not a good reason to absent it from the Code. The tail must not be allowed to wag the dog.

Employment Tribunals will no doubt welcome this as it provides written evidence in disputes which otherwise would be limited to one person's word against another.

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?

For the reasons given below we consider that the templates remain flawed. However, they are so vital to the process that we consider that they should remain in the Code.

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

If settlement is reached it is likely to be either because the employee sees the writing on the wall, or because there is a genuine and open discussion about 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. This process should not be a game of poker with the employee being forced to guess what the employer thinks it knows, or indeed the employee having a false sense of security from a belief that the employer is just bluffing. 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.

Furthermore, although the drafts say 'Add brief details if appropriate' we do not think that this adequately addresses this issue. We consider that if the employer is going to refer to [serious] concerns it should always explain them, and the basis of them. If they are little more than a hunch, or supported by evidence already, this should be stated.

Thompsons continues to have concerns about the scope for confusing the initial negotiation meeting with the employee with the start of the disciplinary or capability process proper. The first main paragraph of the letters is ambiguous on this. The obvious danger is that the employer combines the two and if their offer is rejected at the meeting launches straight into 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 they complied with their various obligations. The 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 Act [6], Thompsons wonders whether a more readily accessible phrase might 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 any deadline 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?

Yes.

Thompsons has very great experience of employers placing unreasonably short deadlines upon employees in order to force through compromise agreement offers with minimum consideration. This is an abuse and we strongly feel should be considered to be impropriety.

We feel that a minimum period of 2 weeks should be applied. Obviously if the employee willingly consents to a shorter period then that should be acceptable. Clearly forcing parties to wait for longer when neither wishes to would be inappropriate. Thompsons would like to see this as a type of 'cooling off period'. Some pressure is always present, and often considered acceptable (particularly in the world of commerce). We consider that a cooling off period would be a neutral way of avoiding that problem. Nothing would be considered binding until the settlement agreement was executed.

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

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

A two week period should be adequate to seek advice, get an appointment, consider the draft agreement, seek further information etc.

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 settlement agreements?

Definitely. See our response to Question 4 for details.

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

We believe that it would be an important safeguard against impropriety, and would facilitate any agreement which is likely to be achieved. See our response to Question 4 for further details.

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?

Thompsons is concerned about the distinction which has been drawn between 'improper behaviour' and 'undue pressure'. They seem to be indivisible elements of the same concept and we are unsure that there is a real benefit in separating out the two. We note that this split is not reflected in the draft statute.

We are also particularly concerned about the apparently high threshold informed by the use of the word 'improper' and the examples given. The examples of improper behaviour imply 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'. While we agree that such behaviour would undoubtedly be improper, we are concerned that impropriety covers a far broader and more subtle range of conduct. As we have already noted, the quid pro quo of secrecy and a jurisdictional bar must be high standards of probity.

Thompsons considers that the threshold for improper behaviour should not be set too high. Our 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*'. As we note above, vulnerability is arguably enhanced when an individual employee is discussing the possible termination of employment. We would, therefore, advocate 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 might be helpful to consider impropriety as being broadly equivalent 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 (objective) reasonableness when deeming something to be 'improper' should be sufficient to ensure that any grievance is justified, but reinforces the fact that impropriety should be judged from the (subjective) position of the party with the weaker bargaining power.

In taking this line we feel that the test would be more relevant as it is able to take in nuance and context in a way which a simple threshold test cannot. It may therefore be more useful for the Code to give illustrations of 'indicative behaviour'. Consider these examples dealing with the proposition that allowing the employee to be accompanied should be good practice. All deal with the situation

where the employee's representative cannot attend on the specified date and the employer refuses to adjourn. Another representative is available and can attend that day.

- Example A - The reality is that one representative is as good as the other and there is no good reason to delay. In these circumstances the employer's position is reasonable.
- Example B – the alternate representative is known by the staff to be incompetent. They have a record of poor advice. In these circumstances the employer's position is perhaps unreasonable as the employee is placed 'between the Devil and the deep blue sea'
- Example C – the settlement offer comes at the end of a very long and difficult process. The employee was supported throughout by the representative. They provide the employee with emotional and practical support and are trusted. The employee has no relationship with the alternate representative who has no prior involvement, and cannot reasonably bring themselves up to speed before the meeting. In these circumstances the employer's position is probably unreasonable.
- Example D – the employee's first language is Urdu. The replacement representative does not speak Urdu, but the unavailable representative does. In these circumstances the employer's position is probably unreasonable.

In all four examples the employer would be able to show compliance with a best practice rule which simply says that they should allow the employee to be accompanied. However, in three of them the manner of it is unreasonable.

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

No.

It is said that there are no 'good machines' or 'bad machines', merely machines which can be put to good or bad uses. Thompsons feels that the same can be true of various managerial behaviours, as the examples in the previous reply show. We feel that such examples would quickly become an 'approved list' and might inadvertently excuse behaviour which was never intended to be excused. We fear too that because the Employment Tribunal is required by statute to consider the Code it would feel limited in its ability to correct any aberrations.

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

Not applicable

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