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Response to the ACAS Consultation on a Draft Code of Practice on Discipline and Grievance

The City of London Law Society (CLLS) represents over 13,000 City lawyers, through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response to the ACAS consultation on a Draft Code of Practice on discipline and grievance has been prepared by the CLLS Employment Law Committee. The Committee is made up of a number of solicitors from City of London firms who specialise in employment law matters. The Committee's purpose is to represent the interests of those members of the CLLS involved in this area.

Clause 3 of the Employment Bill

It is appreciated that the Consultation is not about Clause 3 of the Employment Bill. However, any consideration of the draft Code has to be by reference to Clause 3 for so long as Clause 3 remains.

It is our view that Clause 3 is a retrograde step. As the Gibbons Report has confirmed, the introduction of the Statutory Dismissal/Disciplinary and Grievance Procedures (the "**Statutory Procedures**") has not been a success. They have converted disciplinary and grievance procedures into a legal battlefield where the aim of the parties is to tick the statutory boxes rather than resolve a problem. Further, they have spawned satellite litigation which is more about "catching the other party out" and inflicting a penalty on the opponent, than justice. This serves neither the legitimate interests of claimants nor respondents.

The resolution to this problem would be to revert to the 2004 situation by repealing Sections 29 to 33 of the Employment Act 2002. While the Government proposes to do this, unfortunately the Government, by introducing Clause 3 of the Employment Bill, repeats the folly of Sections 29 to 33. This is because there is a real danger that the Statutory Procedures will arise phoenix-like in the guise of the ACAS Code of Practice (the "**Code**"). By reason of Clause 3 (if enacted) a failure to comply with the Code will permit Employment Tribunals to increase/decrease Tribunal awards by up to 25%. As a result we predict compliance with the Code is in danger of becoming the new battleground between claimants or respondents spurred on by the prospect of inflicting a penal award on the other side. Looked at from the perspective of respondents, the Code will present a double-jeopardy. For example, not only will a failure to comply with the Code most likely be treated as unfair dismissal, but also Tribunals will be able to adjust the compensatory award by up to 25%. As the claimant will have been compensated for

financial loss through the compensatory award for unfair dismissal, the adjustment of up to 25% can only be penal. Therefore, respondents will have incurred a double penalty for one act of non-compliance. This is not even-handed because the same cannot happen to a claimant who has not complied with the Code. The claimant may have an adjustment made to an award but non-compliance cannot prevent, for example, a finding of unfair dismissal against the employer.

We recognise that it is unrealistic to expect the Government to recognise the error of Clause 3. Therefore, it becomes imperative that the Code does not make a bad situation worse. We believe the key to this is to ensure that the Code is a model of clarity. It is right that employers should comply with the Code or face, for example, a risk of unfair dismissal. It is equally right that employers should know what they have to do. But, importantly, what they have to do to comply with the Code must recognise the diversity of situations that employers have to deal with. The Code should not be over-proscriptive or fail to recognise there is not a "one size fits all" fair approach to discipline and grievance. Having a principles-based Code risks uncertainty. Thus the "principles" must be clear and flexible. The success of the Code will be judged by the amount of satellite litigation it generates. It should not generate any.

Yet another problem with Clause 3 is that Tribunals have to rule on whether a departure from the Code was an "unreasonable failure". Is this a subjective or objective test or a mixture of the two? Is this notion of "reasonableness" to be tested by case law related to the "traditional" ACAS Code and the Statutory Procedures? This uncertainty is another reason for flexibility in the Code. The Code itself should reflect norms of "reasonableness".

Against this background, we set out some general comments and then comment on a number of sections of the Code. Extracts from the draft Code appear in bold italics. The numbering is that used in the draft Code.

GENERAL COMMENTS ON THE CODE

The Guidance

1. Our response does not consider the ACAS draft guidance. However, we think the Code and the guidance need to make plain that the guidance does not form part of the Code. Moreover, it should not be used to interpret the Code, otherwise it in effect becomes part of the Code. Put another way, the Code should be self-explanatory and stand on its own.

Status of the Code

2. Employment Tribunals are well able to determine the reasonableness of actions taken by employers and employees. They do not need the Code to assist them in this task. As we have noted above, there is double jeopardy if the Code is to determine, say, the fairness of a dismissal for unfair dismissal purposes. The Code is a creature of Clause 3 of the Employment Bill and therefore its status should be limited to that role. Our view is that the Code should state it is solely to be used to determine whether an adjustment should be made to an award (and not whether an award should be made in the first place). In other words, the Code should <u>not</u> fulfil the same function as the ACAS Code of 2004 which is designed to be used when testing the procedural fairness of a dismissal - see section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992.

Interpretation of the Code

3. At present there is no reference to the Code being "principles based". This should be included and it should be made clear that employers have flexibility to apply the principles as appropriate to the relevant circumstances.

PRELIMINARY COMMENTS ON THE CODE

INTRODUCTION

1 This code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.

1.1 No definition is provided of what constitutes a "disciplinary" or "grievance" situation. The parties need to understand when the Code is applicable. Does it cover a redundancy dismissal? An ill-health dismissal? Expiry of a fixed-term contract?

1.2 Equally, the Code does not make clear what constitutes "disciplinary" action subject to the Code. Is it intended to go beyond the Statutory Procedures by including all warnings? This would seem a backward step. It would also be beyond the current law of unfair dismissal. To have a right of appeal (see paragraph 25) for an informal verbal warning is burdensome, especially for small employers. Is counselling guidance discipline?

2 Many potential disciplinary or grievance issues can be resolved informally. A quiet word is often all that is required to resolve a problem. However, where informality does not work the matter may be pursued formally.

2.1 Is this paragraph suggesting that informal matters are not within the ambit of the Code? Does this mean verbal warnings are excluded from the Code? Verbal warnings are excluded from the Statutory Procedures. Does the same apply to the Code?

2.2 It seems to us that a further issue may also arise, which is at what stage does informal action become formal? When should employers comply with the Code in order to avoid an uplift? For example, if an employee submits a written complaint can this be dealt with informally initially? Or should written complaints always be dealt with formally in accordance with the principles of the Code?

3 Fairness and transparency are promoted by developing rules and procedures for handling disciplinary and grievance situations. These should be set down in writing, be specific and clear and be agreed wherever applicable with trade unions or employee representatives. It is also important to ensure that employees and managers understand how they are to be used.

3.1 It is over-prescriptive to require written rules. As a matter of custom and practice, employees will often be aware of what is impermissible at the workplace without having to have this set down in writing. Certainly having written rules is good practice but should an award of unfair dismissal be increased by 25% because, for example, an employer did not have a written rule that punching the boss was a disciplinary matter?

3.2 In the second sentence it is stated that rules and procedures are to be agreed "wherever applicable" with trade unions or employee representatives. It is unclear whether this means (a) that agreement is not required where there are no trade unions or employee representatives, or (b) "applicability" depends upon other factors. We assume it is the former and this should be stated.

3.3 Why should an employer's failure to "agree" a set of rules/procedure be non-compliance with the Code and therefore put an employer at risk of a 25% award adjustment?

3.4 More fundamentally, why should an employer be under an obligation to "agree". "Consultation" is more appropriate.

3.5 It is unclear as to how employers are "to ensure" that employees "understand how they are to be used". Does "they" refer to rules and/or procedures? What is an employer required to do more than provide employees with self-explanatory rules and procedures? We can see the advantage in training managers how to operate procedures when they are likely to take part in the process. But training employees seems to be overkill.

4 Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. The size and resources of the employer should always be taken into account. In small organisations it may sometimes not be practicable to take all of the steps set out in this Code. However, the key elements of good practice that employers and employees should work to are set out in the paragraphs that follow.

4.1 The reference to "small" organisations begs the question of the test for "small". Is this defined by reference to number of employees, turnover, resources or something else?

4.2 The final sentence then contradicts flexibility for "small" organisations suggested by the third sentence, by saying the rest of the Code is what employers and employees should do. This might be better expressed as follows: "*However, in small organisations it may sometimes not be practicable to take all of the steps set out in this Code. The size and resources of the employer should always be taken into account*."

4.3 At various points in the Code reference is made to "good practice" (e.g. paragraphs 4, 7, 9 and 43). What is this intending to convey? The concept is confusing because it suggests other parts of the Code are not "good practice" - surely not - or it is not mandatory to comply with "good practice" (i.e. failure to follow will not result in the penalty of a 25% award adjustment). The Code should change the expression, or make clear what is intended (including consequences of non-compliance). Alternatively, "good practice" should only feature in the guidance.

5 Employers and employees should do all that they can to resolve disciplinary and grievance issues in the workplace. Recourse to an employment tribunal should only be a last resort.

5.1 The parties are required to do "all that they can" to resolve disciplinary and grievance issues. This goes beyond a "reasonable endeavours" requirement and requires a high standard that is unrealistic.

5.2 While we appreciate the foreword is not part of the Code, the similarity between the third paragraph of the foreword and this paragraph 5 is striking. Thus, paragraph 5 will be interpreted as mandating third party resolution (e.g. mediation). While we would agree that alternative dispute resolution is to be very much encouraged, we do not think paragraph 5 is the correct way to do this. The result will be that Employment Tribunals will be asked to rule on whether, for example, failure to mediate was non-compliance with the Code. This is an issue as much for employers as employees. It will spawn the satellite litigation that the Code was presumably designed to avoid.

5.3 Paragraph 5 should be transferred to non-statutory guidance.

6 Whenever a formal process is being followed it is important to deal with issues fairly. There are a number of elements to this.

o Issues should be dealt with <u>promptly</u>. Meetings and decisions should not be unduly delayed.

- ***Employers should act <u>consistently</u> and ensure that like cases are treated alike.***
- ***Appropriate <u>investigations</u> should be made, to establish the facts of the case.***
- ***Any grievance or disciplinary meeting should, so far as possible, be conducted by a manager who was <u>not involved</u> in the matter giving rise to the dispute.***
- ***Where the employer is raising a <u>performance</u> problem the immediate manager would be involved.***
- ***An employee should be <u>informed</u> of the basis of the problem and have an opportunity to <u>put their case</u> in response before any decisions are made.***
- ***An employee has the right to be <u>accompanied</u> at any disciplinary or grievance meeting.***
- ***An employee should be allowed to <u>appeal</u> against any formal decision made.***

6.1 Very few people would disagree with the eight elements set out. However, the paragraph contains no recognition of flexibility. For example, while it is right that, as a general matter, issues should be dealt with "promptly", there may be very good reasons for delay (whether on the part of the employer or the employee). The Code should recognise that it is "undue delay" that is unreasonable. Not all delay is unreasonable. "Undue delay" should replace "promptly" throughout the Code ("promptly" is used in paragraphs 8, 13, 25, 33 and 40 of the draft Code).

6.2 Further, no hierarchy is set for these elements (which is an issue if there is no flexibility) but yet if they are treated equally there is potential for conflict. For example, issues are to be dealt with "promptly" but investigations are to be "appropriate". But a thorough investigation might require delaying a hearing.

6.3 Also, the unqualified nature of the statements creates conflict with subsequent text. For example, an employee is stated to have "the right" to be accompanied. Is this intended to mean "right" in the sense of as prescribed by law - in which event this is covered elsewhere. Or, as is likely to be the more natural interpretation adopted by lay readers, the Code is creating a "right" (i.e. 25% adjustment to Tribunal awards) - which we consider it should not be doing - otherwise ACAS is, in effect, legislating beyond Parliament.

6.4 With regard to the second element, speaking of employers being "consistent" and treating "like cases … alike" is an over-simplification. There are very few disciplinary cases that are alike. Even in a case where a number of disciplinary hearings arise out of the same set of facts, the circumstances of each employee is likely to be materially different. For example, the Code might say: "*Employers should act consistently in approach by taking into account how similar issues have been treated*".

6.5 Regarding the fourth bullet, what does "involvement" mean? This needs clarification.

6.6 There is a specific problem with the sixth element. If suspension with pay in order to conduct an investigation is within the Code (and there is nothing to say it is not) then this suggests an employee must have an opportunity "to put their case" before being suspended. But this is back to front, since the investigation has to be conducted in order to determine whether there is a case for the employee to answer.

7 It is good practice to keep written records during disciplinary and grievance cases. A written record should be kept of the outcome.

7.1 It is very unclear what "to keep written records" means in the first sentence. Is this requiring "keeping" what has been produced or suggesting written records should be produced such as a transcript of the hearing - which would seem an unnecessary burden? Does it only refer to the "written records" produced for a hearing? Does it apply to investigations? There may be many reasons for not generating/keeping "written records", such as compliance with laws such as data protection. The rules of the Data Protection Act should be mentioned in the text.

7.2 The text also begs the question of what "keep" means - who keeps, where do they keep, for how long do they keep?

7.3 The overarching concern we have with this paragraph is that it creates a new burden for employers because we doubt employers currently convert to written form all information produced, nor do they keep everything that is generated.

DISCIPLINE

Keys to handling disciplinary problems in the workplace

Establish the facts of each case

8 It is important to investigate potential disciplinary matters promptly to establish the facts of the case before memories of events fade.

8.1 The use of "investigate" might suggest an investigation is required for every hearing. This is not necessarily so. In some cases an employer may need to do no more than collect the relevant evidence.

9 If there is a purely investigatory meeting this will not by itself result in any disciplinary action. However, it should be made clear to the employee that the investigation may lead to disciplinary charges being raised. The statutory right of accompaniment will not apply, but it is good practice to allow the employee to be accompanied.

9.1 We think it not appropriate in all cases to say that an investigation "may" lead to disciplinary charges. After all, on some occasions the investigation may be carried out in order to "clear" an individual who has been accused by another employee or a third party. It would appear to place such an individual under unnecessary stress to suggest there may be disciplinary charges.

9.2 For similar reasons we consider that being "accompanied" is not always good practice. Furthermore, as also previously noted, ACAS by this statement is legislating beyond Parliament. Parliament has deliberately not extended the right to be accompanied (Section 10 Employment Relations Act 1999) into investigations yet an employer who does not comply with the Code by not permitting the employee to be accompanied risks a 25% adjustment to any award albeit he did not infringe Section 10.

10 In those cases where a period of suspension with pay is considered necessary, this period should be kept as brief as possible.

10.1 On some occasions the party may agree a "long" period of suspension. The text should recognise this is acceptable.

12 This notification should contain sufficient information to let the employee know what the alleged problem is and its possible consequences.

12.1 The final part of the sentence suggests that the employer must detail all possible consequences. This would seem to be over-prescriptive. A reference to outlining the "principal" consequences would seem more appropriate. For example the Code might say: "*let the employee know what the alleged problem is and the possible range of disciplinary action that may be taken*".

12.2 Further, one assumes this is intended to mean "disciplinary" consequences and not anything else.

Hold a meeting with the employee to discuss the problem

13 Before holding a disciplinary meeting ensure that the employee has been notified of the nature of the problem and the basis of the allegations against them. The meeting should then be held promptly whilst allowing the employee reasonable time to prepare their case.

13.1 As was recognised by the Statutory Procedures, there may be occasions where the employer is not obliged to hold a meeting (e.g. violence by the employee). This should be recognised in the draft Code.

13.2 Does a notification for the purposes of paragraph 12 satisfy the notification required by paragraph 13? Perhaps the two paragraphs should be combined.

14 At the meeting allow the employee to set out their case and answer any allegations that have been made.

14.1 Here and elsewhere it is striking that the Code places no obligations upon the employee, such as to attend and behave reasonably (compare the Statutory Procedures). There is a lack of even-handedness.

Decide on appropriate action

18 Following the meeting decide whether or not disciplinary or any other action is justified and inform the employee accordingly.

18.1 While in many cases an employer will adjourn a hearing before making a decision, this is not always so. A decision might be rendered at the hearing. It would be perverse for an employer to face a 25% adjustment award because of this. The Code should recognise that decisions are sometimes made at the disciplinary hearing.

18.2 It would be helpful to state that the employee should be informed in writing. As writing is specified elsewhere (e.g. paragraph 19) if this is not stated then the reader would be entitled to assume writing is not required. Also, compare this with paragraph 28, which does specify "in writing".

19 Where the employee is found guilty of misconduct or to be performing poorly they should be given a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.

19.1 See the comment at paragraph 22 regarding exceptions to the second sentence.

20 If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. In small organisations this might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.

20.1 What is the definition of "small"? See 4.1 above.

20.2 It is not obvious why in some cases “large” organisations should not issue a final written warning where there is serious harm to the organisation.

21 A first or final written warning should set out the nature of the misconduct or poor performance, the change in behaviour or improvement in performance required (with timescale). The employee should be told of a specified period after which the warning will be disregarded.

21.1 With regard to the final sentence, it should be recognised that there are occasions where a warning may last for an indeterminate period.

21.2 Also, warnings may be relevant in other contexts (such as redundancy selection) and therefore not “disregarded”.

22 The employee should be informed that a further act of misconduct, or failure to improve performance, within the set period following a final warning, may result in dismissal or some other penalty such as demotion or loss of seniority.

22.1 The text should reflect that some acts of misconduct need not be time limited (see paragraph 95 of the draft guidance).

23 Some acts, termed gross misconduct, are so serious that they may call for summary dismissal for a first offence. But a fair disciplinary process, including a right of appeal, should always be followed, before deciding whether gross misconduct has occurred.

23.1 The second sentence contrasts with the modified procedure under the Statutory Procedures. There, Parliament recognised that a first meeting was not always necessary. This should be reflected in the draft Code.

23.2 Regarding the second sentence, how can there be an appeal “before deciding whether gross misconduct has occurred”? There has to be an appeal from a decision!

24 Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but might include things such as theft or fraud, physical violence or serious insubordination.

24.1 Other examples would be helpful. They could be taken from the non-statutory guidance or paragraph 24 transferred to the guidance.

24.2 See also 3.1 above regarding disciplinary rules being mandatory - which this paragraph suggests is the case.

Provide employees with an opportunity to appeal

25 Appeals should be heard promptly and ideally at an agreed time and place.

25.1 An onus should be placed on employees to set out their grounds of appeal in writing. This reflects the good practice of the Statutory Procedures.

25.2 While we agree appeals should be heard “promptly” (expressed as “without undue delay” - see 6.1 above), there are numerous reasons why an appeal might be deferred. For example, if the employee has triggered a grievance procedure. Should an employer ignore, in effect, the grievance procedure by carrying on with the appeal, or should the grievance procedure and appeal be run in parallel, or should the appeal be adjourned until the grievance procedure has been followed through? Any of these three options might be appropriate in the circumstances. Thus, it would not seem right to dictate one approach. Again, the draft Code should demonstrate more flexibility.

25.3 The Code should recognise that an appeal may be a review or a re-hearing.

26 Wherever possible the appeal should be dealt with by a manager who is more senior than the manager who conducted the first hearing.

26.1 See the comment in paragraph 41.1 below.

28 Employees should be informed in writing of the results of the appeal hearing as soon as possible.

28.1 This is an example of the Code using the expression "as soon as possible" whereas elsewhere it says "promptly". Is there a difference? What is the difference? Why not say "without undue delay" here and throughout? See also 38.1 below.

30 If an employee is charged with, or convicted of a criminal offence this is not in itself reason for disciplinary action. Consideration needs to be given to the effect of the charge or conviction on the employee's ability to do their job.

30.1 The first reference is obscure. While one might say a five-year prison term does not "in itself" call for disciplinary action, no employer could be expected to ignore the imprisonment. The sentence should recognise that there are circumstances where the nature of a charge or conviction inevitably calls for disciplinary action

30.2 With regard to the second sentence, we do not think that "ability to do their job" is the sole factor that determines whether disciplinary action should be taken. For example, there are situations where the reputation of the employer could be adversely affected by not disciplining.

30.3 Further, employees might be concerned that the second sentence suggests that any custodial sentence would justify disciplinary action. We do not think this is necessarily the case.

GRIEVANCE

Keys to handling grievances in the workplace

Let the employer know the nature of the grievance

31 This is best done in writing and to the employee's line manager.

31.1 Is it right that all grievances should be subject to a formal procedure? Compare the Statutory Procedures where only certain "formal" grievances are subject to that procedure. An employee may want to initially discuss an issue informally, and this should be recognised in the Code.

Hold a meeting with the employee to discuss the grievance

33 Arrange for a formal meeting to be held promptly after a grievance is received.

33.1 It is not obvious that all grievances require a "formal" meeting.

33.2 Why is there no obligation upon an employee to raise a grievance "promptly" (or "without undue delay")?

34 Allow the employee to explain their grievance and how they think it should be resolved.

34.1 See the comment at 14.1 above.

Decide on appropriate action

38 Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee without undue delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance.

38.1 What is the difference between "promptly" and "undue delay" here? There should be consistency in the text. See 6.1 above.

Allow the employee to take the grievance further if not resolved

39 If an employee feels that their grievance has not been satisfactorily dealt with they should be allowed to take the matter further on appeal.

39.1 How is the employee to appeal? Should it be inviting? What time period should apply?

40 Appeals should be heard promptly and at an agreed time and place which should be notified to the employee.

40.1 See the comment at 38.1 above.

41 Where possible the appeal should be dealt with by a manager who is more senior than the manager who dealt with the first hearing.

41.1 The text should explicitly recognise that - "not possible" - are cases where the employer has few managers.

Special cases

43. It is good practice to consider dealing separately with issues involving bullying, harassment or whistleblowing.

43.1 We were unclear initially as to what "*dealing separately*" meant. The Guidance clarifies this and states that employers may want to have separate procedures. This should be made clear in the drafting of the Code.

43.2 There are other "special cases" that the Code should address:

- the relationship between an employer's procedure (possibly in a collective agreement) and the Code's procedure;
- collective grievances;
- aggregating a series of grievances;
- post termination of employment grievances - compare the Statutory Procedures which address this; and
- interaction between grievance and disciplinary procedures.