Make Work Pay: Consultation on the revised Code of Practice on Access and Unfair Practices

Submission to the Department for Business and Trade

Chartered Institute of Personnel and Development (CIPD)
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About the CIPD

The CIPD is the professional body for HR and people development. Our organisation champions better work and working lives and has been setting the benchmark for excellence in people and organisation development for more than 100 years.

It has 160,000 members across all sectors and sizes of organisation and provides thought leadership through independent research on the world of work, and offers professional training and accreditation for those working in HR and learning and development.

Public policy at the CIPD draws on our extensive research and thought leadership, practical advice and guidance, along with the experience and expertise of our diverse membership, to inform and shape debate, government policy and legislation for the benefit of employees and employers. It also seeks to promote and improve best practice in people management and development and to represent the interests of our members.

Response

Question 1: Do you have any comments about the changes to the Code to reflect the updated legal framework?

The revised Code of Practice reads well and clearly explains the updated legal framework within the relevant sections throughout the Code. The Code is measured and is balanced in how to consider the needs and circumstances of all main parties in the employment relationship, ie employers, unions and workers. In this sense it reflects the principle-led approach set out in the Government's vision for creating a modern industrial relations framework, ie '*proportionality*' and '*balancing the interests of workers, employers and the public*'.

However, it could be helpful to have a summary and/or list of the key legislative changes being made to the recognition and derecognition process under the ERA 2025 upfront, in Section A 'Introduction' for example. This could be a similar list to that which is provided on page 13 of the consultation document and would enable employers, managers, HR professionals, trade unions and others to understand the significant changes at a glance. This would make the Code more accessible and support its application at a workplace level.

To further improve accessibility and understanding/implementation of the Code it could also be helpful to have a glossary upfront to explain key terms such as:

- 'access' (this term is explained in the Code but it could be a bit lost and not necessarily easy to find considering the length of the Code which runs to 40 pages); also, there could be confusion with the more general, new 'access' right that will also be introduced through the ERA
- 'Access Agreement' and its legal status (explained on page 26)
- 'Relevant application' (this term is explained, but would still be helpful to have it included upfront as part of a glossary or 'definitions' section
- 'Negotiation period'
- 'Suitable Independent Person'/'Qualified Independent Person' (ditto)
- 'Unfair Practice' – again, this is explained later in the Code (page 29) but would be helpful to have upfront

- ‘union’, ‘workplace’, ‘working day’ – explained in the Preamble but difficult to find easily
- ‘Central Arbitration Committee’ and ‘Acas’.

Other issues

SMEs: Para 45 is helpful in terms of highlighting the particular constraints that SMEs, particularly small employers, could have in relation to access agreements and privacy of meetings, eg the potential to hold digital meetings as an alternative – but there is some repetition between para 45 and 52, and the latter could provide some further practical detail of what flexibility would mean in an access agreement in terms of accommodating the ‘particular needs of the employer’ – eg what is reasonable in certain circumstances? Perhaps setting out examples would be helpful here.

Behaving responsibly: We welcome the attention drawn to the importance of behaving responsibly under Section E, ‘Other access issues’ (para 60, page 26). This is fundamental to the building of productive working relationships between a union and employer. If both parties behave professionally and responsibly during the recognition process when the union has access, this will lay the groundwork to develop a partnership approach to collective third party representation going forward as well as a wider harmonious employment relations climate. The Code provides helpful practical examples of what the law means here, ie the employer should not offer inducements to workers to not attend access meetings – but it could be helpful to provide some additional guidance on the standards of behaviour that would support responsible behaviour, similar to those which are expected more broadly in an organisation as part of building a culture of dignity and respect. These expected standards of behaviour could be referenced in an access agreement.

Question 2: How well do the structural changes to the Code reflect the changes being made by the Employment Rights Act?

The consultation document states that the structure of the Code has been revised to reflect the legislative changes made by the ERA, **including to make the revised Code of Practice applicable to the full recognition and derecognition process and not just the ballot stage.** This key point could be made clearer at the beginning of the Code as it is a substantive legislative change that everyone needs to be aware of at the outset – and yet the ‘Preamble’ does not make this clear.

Question 3: Do you agree that the suggested minimum frequency of meetings during the access period should be once every 5 working days?

We feel that the frequency of meetings will depend on each situation and vary according to the organisation’s workforce, the union’s arrangements and other factors such as needs of the business. Therefore, it’s difficult to be prescriptive and ideally there should be some flexibility. However, we recognise the need for a baseline to be set out in guidance but are of the view that providing a broader timescale, for example a suggested minimum frequency of between five and ten working days, would provide more flexibility to suit the particular case.

Question 4: Do you agree that the suggested minimum duration of meetings be increased from 30 minutes to 45 minutes?

Yes. We welcome the guidance on setting out the duration of meetings in an access agreement so that all parties are clear on the agreed limits of the union's activities during the access period, and agree that 45 minutes is reasonable for a larger scale meeting in most circumstances.

Question 5: Do you think the updates to the Code appropriately reflect the increased use of digital communication in workplaces?

Broadly, yes, and it is good to see the Code updated to reflect the tremendous changes in workplace digital communications since the Code was last published.

Paragraph 37 does highlight the general risks that digital technology can create for privacy and cyber security. However, under the section '**Written communication under the access agreement'** (page 23) it could be helpful to have more explanation/assurance of compliance with data protection requirements in relation to the expectation that an employer 'should allow the nominated employee or HR official to use the employer's systems to disseminate [this] information by email. Para 51 also advises that a nominated union representative employed by the employer may also want to make use of internal electronic communication such as email for campaigning purposes. As data protection law is understandably an area where employers and HR professionals are very cautious about, it would be helpful to highlight the relevance of data protection law in terms of sharing data such as email addresses (whether personal or corporate data etc), and how the law applies in relation to written communication during the recognition/derecognition process – eg there needs to be a lawful basis etc.

Question 6: Do you think the role of the CAC in resolving disputes is adequately explained in the Code?

Section G relating to Intervention by the CAC in resolving disputes could be expanded on to give more practical information on what a dispute on access could mean in practice as it is quite technical. Eg – how would the CAC become involved and what would be the process for resolving a dispute between the parties?

One area where disputes around access arrangements could occur is in relation to 'privacy of meetings' and whether or not managers and supervisors can attend an access agreement (page 21). The Code provides helpful additional information in terms of the factors to take into account but there is a risk that some unions could want to impose a blanket ban on the attendance of any supervisors or managers. This is a difficult area to set out prescriptive advice, but some consideration of management level could also be part of the decision process as 'management' covers a very wide spectrum of seniority levels in many organisations, ranging from a relatively junior employee, with responsibility for one or two employees, to a senior director with significant managerial responsibility.

Question 7: Do you think that the Code includes sufficient information in relation to Section D of the Code which covers the elements in an access agreement?

Broadly, yes, the Code contains helpful and practical guidance on the elements that should be included in an access agreement, including the important principle that access agreements should reflect local circumstances.

Question 8: Do you think the Code provides sufficient guidance on how unfair practices might be used to influence the outcome of an application?

Broadly, yes, there is clear guidance in the Code on what constitutes unfair practices and the examples are helpful. It would be helpful under **Section F Responsible campaigning and unfair practices** to include reference at the beginning of this section on the major legislative changes on unfair practices introduced through the ERA 2025 – ie

- that the point at which the prohibition on unfair practices applies is brought forward to when the CAC notifies the parties that it has accepted a 'relevant application'
- the time during which an unfair practice allegation can be made after the close of a recognition or derecognition ballot is extended from 1 working day to 5 working days after the close of the recognition ballot
- when the CAC makes determinations on whether an unfair practice has occurred, it will only have to consider whether an unfair practice has occurred and will no longer have to consider the effect it may have had on the ballot outcome.

Question 9: -Are there any areas or topics of the Code of Practice which relate to access that you think would benefit from further guidance?

See comments above.

Question 10: - Are there any areas or topics of the Code of Practice which relate to unfair practices that you think would benefit from further guidance?

Broadly, no – but see response above under Q8.