# ACAS

## Consultation on the draft code of practice on handling requests for a predictable working pattern

**Consultation response from Lewis Silkin LLP**

Lewis Silkin is a leading specialist employment law practice. We have around 160 specialist employment and immigration lawyers, including 33 partners, based in London, Oxford, Manchester, Leeds, Cardiff, Dublin, Belfast and Hong Kong. We are ranked in the top tier of employment practices by the independent legal directories and many of our lawyers are recognised as leading practitioners in employment law.

This response is submitted on behalf of Lewis Silkin, rather than our clients, and is based on our experience in practice of advising predominantly medium to large-sized employers across a variety of sectors.

We are happy for you to publish our response.

**Question 1**

**Should the Code be split into 2 sections: one dedicated to requests to employers, and another to requests to agencies or hirers?**

We would propose that rather than being split into 2 sections, the Code is split into 3 sections. Although the Act divides these arrangements between chapters 2 and 3, there are in fact three distinct scenarios under which a request for a more predictable working pattern might be made:

(1) an employee to their employer (s.80IA(1));

(2) an agency worker to the temporary work agency ("Agency") with which they have a contract to perform work/services (s. 80IF(1)); and

(3) an agency worker to the hirer under whose supervision and direction they are working ("the Hirer") (s. 80IF(2)).

Our concern is that the amalgamation of (2) and (3) could make the Code more difficult to use.

Although the Agency and the Hirer's duties in responding to an application under the legislation are the same, there are key differences in how the legislation applies to these two different arrangements which would make separate sections in the Code beneficial. The fact these are combined in the current draft leads to unnecessary complication. Taking the qualifying conditions for the request as an example, in the current wording paragraphs 45 to 50 of the Code are potentially confusing, with some paragraphs applying only to one of these two arrangements and others to both. Similarly, the wording in paragraphs 78 and 79 becomes complex when both scenarios are covered within the same sentence. A Code with 3 sections would avoid these complications.

There are also key differences in the potential request and outcomes of an application to either an Agency or Hirer for which a 3-part Code would better cater. For example, a request made to a Hirer can be for a contract of employment or a worker's contract with the Hirer. This does not apply to an application made to an Agency (as a request in this scenario can only be for a change in the terms and conditions). This means that paragraphs 51 to 54 of Section B of the Code only apply to Hirers.

Although it would result in a longer Code, we think it would be beneficial for an Agency or a Hirer to be able to simply turn to the section of the Code relevant to them and be confident that all paragraphs in that section are applicable. This ease of reference would also assist Tribunals in looking to apply the Statutory Code of Practice to a specific set of facts.

In summary, we think that as a practical aid to supporting both those making requests under this legislation and responding to them, it would be clearer if a specific section of the Code were to apply to each of these three scenarios.

**Question 2**

**Is the term 'worker(s)' and its associated meaning under the 2 separate sections of the Code sufficiently easy to understand?**

No, we do not think that the term 'worker' is always easy to understand in this context. In the Code it essentially means an individual making a request under this legislation. However, the overlap with the technical employment law understanding of the term is potentially confusing.

For example:

- In paragraph 3, Employer is defined as "A person or organisation who employs an individual to work for them, as defined in the Employment Rights Act 1996". The fact that this does not also refer to engaging an individual means that paragraph 6 is inconsistent with this definition.
- Paragraph 7 of the Code states that "A worker has a statutory right to make a request to their employer for a more predictable working pattern if their working pattern lacks predictability". This conflicts with the definition of Employer as "A person or organisation who employs an individual to work for them, as defined in the Employment Rights Act 1996".
- In paragraph 51 of the Code, the drafting becomes circular when it is suggesting that the 'worker' is applying to become 'a worker'. A longer formulation, while more cumbersome, would be clearer.

**If you answered 'no', what is your opinion on how the Code should differentiate between (a) employees and workers who are not agency workers and (b) agency workers?**

**Please explain the reasoning for your answer, and, where appropriate, please include any suitable alternative terminology that you would like to see.**

We think that it would be easier to understand if the Code used the terms 'Workers' (to describe employees and workers who are not agency workers), and 'Agency Workers' and that these should be separate definitions that more closely reflect s. 230(3) ERA 1996.

**Question 3**

**Please set out any specific areas of the Code that you feel would benefit from further clarification.**

**Please include your reasoning and suggestions for improvement.**

We think that there are a number of areas which would benefit from further clarification:

- **Scope of the legislation:** The concept likely to prove most challenging for employers, Hirers and Agencies to understand is what exactly is meant by predictability and what the intended scope of the legislation is. While we appreciate that the Code cannot overreach itself by adding to the substance of the legislation, it will be difficult for employers to put the new regime into practice without effective guidance on the scope of the law. We have suggested in question 4 below how more detail could be added on this point.

- **Positioning with flexible working requests:** Paragraph 15 of the Code provides that if an employee makes a statutory request for flexible working and the purpose of that request is to have a more predictable working pattern, it will count as both one of the employee's two statutory requests for flexible working and one of their two statutory requests for a predictable working pattern. We think that two points requiring clarification arise from this.

  First, we think further guidance is needed to help employers understand whether the flexible working request they are dealing with would be considered to have this specific purpose. As s. 80IA(4)(a) requires a statutory request for a predictable working pattern to label itself as such, the employer will

need to feel confident in making an assessment that a flexible working request without this 'label' in fact counts as a request under both regimes. Given the concept of predictability is not something employers have been required to assess before, this could be challenging and lead to inconsistent treatment between decision makers. It may be beneficial for Acas to include examples in its non-statutory guidance to illustrate this.

The second, and connected point is that we propose that the Code introduces a statutory duty on employers to confirm in their decision that the request is being treated as a request for flexible working **and** a request for a predictable working pattern. The clarity would be beneficial to all parties.

- **Qualifying period:** We think that paragraph 8 is unclear and difficult to understand. For example, is it sufficient for the individual to have only worked for one day in the 26 weeks period? Does the worker need to have worked in the 26 weeks leading up to the request? Or only in the month prior (e.g. 26-30 weeks before the request? Similarly, paragraph 46 is also unclear. Can the 12 continuous weeks be at any point during the 26 week period?

- **Working patterns agreed at a workforce level:** Handling a request "reasonably" means taking into account both the reasons for the individual's request and the needs of the organisation. Our view is that paragraphs 17 and 18 of the Code should provide more detailed guidance as to how an employer should consider a request for a predictable working pattern in the context of its wider operations.

  For example, in many large organisations, working patterns have been negotiated and agreed at a workforce level (for example because the business would not be financially viable without a degree of flexible resourcing), but the Code does not address how this sits with the individual predictable working pattern request process. In this situation, we would assume that ensuring working patterns are consistent with what has been previously discussed and agreed would be a legitimate consideration for an employer; it will often be the case that many of the business reasons listed in paragraph 18 will underpin those wider discussions and agreements. However, further guidance from Acas as to how employers should deal with this situation would be beneficial. (We have addressed this point again in question 12 below.)

- **Consideration of alternatives:** Although not a point that needs clarifying, we believe that paragraph 19 could add a significant additional burden to employers in what is quite a tight decision-making timetable (we discuss this further below). The need to "consider alternative working patterns" is potentially quite an onerous and open-ended obligation. Although this approach would of course be more constructive than simply rejecting a request, we believe the wording around this could be softened and left more to the discretion of the employer in the specific circumstances. This would be particularly relevant if this is not the first request that the employer has made, potentially for the same working pattern.

- **Requests to Agencies**: A challenge that Agencies may face in responding to a request under this legislation is whether, in a triangular relationship like this, the request is within their power to accept. The Agency may, for example, feel unable to commit to a particular working pattern if they lack a sufficient understanding of a relevant Hirer's situation; they may be unable to make a decision without relying on business reasons provided by the Hirer. We expect that requests under Chapter 3 of the Act may well require co-operation between the parties in this kind of working arrangement. This would also be needed if two requests (one to the Hirer and one to the Agency) are 'live' at the same time. This is not addressed in the Act itself, but if making reasonable attempts to get information from another party (i.e. from the Hirer when a request is made to an Agency) is to be considered part of "dealing with [an] application in a reasonable manner" it would be helpful for additional detail on what this would entail to be provided in the non-statutory guidance.

- **Involvement of umbrella companies**: Further complicating this kind of chain scenario would be the involvement of an umbrella company, which is technically the employer. Although a request under this legislation could be made to the umbrella company, it would have no control over guaranteeing hours and therefore a particular working pattern. Again, we would suggest that this scenario is addressed in the non-statutory guidance.

- **Timetable for dealing with a request**: As stated in paragraph 35, all requests – including any appeal – must be communicated within one month of the date of the request. This is a short timeframe in practice and we think that further guidance on a suggested workflow and timescale would be helpful to support employees in avoiding breaching this requirement.

**Question 4**

**Does the Foreword to the Code set the right tone in encouraging the responsible and fair use of flexible contracts, while summarising the key principles of good practice included in the Code?**

Yes, we do think that the Foreword sets the right tone. However, we think that this could say more about the intended scope of the legislation. This would help employers, who importantly have not previously been legally required to consider and make a determination on the question of "predictability". This could be achieved by:

- addressing the policy background to the legislation (i.e. that this was intended to address one sided flexibility and provide greater financial certainty for a vulnerable category of workers); and
- explaining more about what predictability means in terms of the type of changes that might be requested or made to someone's working pattern as a result of a request under this legislation.

**Question 5**

**Should the Code include a section on protections from detriment and dismissal?**

**If you answered 'yes', should the example of ceasing or reducing hours, as a direct response to making a request for a predictable working pattern, be included in the Code? Or should this be included in the non-statutory guidance instead?**

**Please set out any other examples of detriment you would like to see included in either the Code or non-statutory guidance.**

Yes, we think that protection from dismissal and detriment should be covered in the Code. Examples are useful to both applicants and the organisations dealing with the requests. However, our view is that examples should be included in the non-statutory guidance.

**Question 6**

**What are the advantages and disadvantages of the Code recommending that workers should be allowed to be accompanied at meetings to discuss a request for a predictable working pattern?**

A key consideration in relation to the process that should be followed to deal with a request for a predictable working pattern is that the procedure is consistent with the flexible working regime. Recommending that workers are allowed to bring a companion would achieve this aim.

This is, however, potentially complicated in the agency scenario – please see below.

**Question 7**

**What is your opinion on the Code recommending the same categories of companion as those that are allowed in discipline and grievance meetings?**

In our view this approach is sensible. These categories are familiar to employers and would ensure consistency between different internal procedures. However, please see above the potential complications in the agency scenario.

**Question 8**

**For agency workers, what are the practical considerations around the Code recommending that a companion may be a fellow worker from the agency, hirer or both?**

The current wording could result in the companion being external to the Hirer or the Agency, which could be problematic as business sensitive and confidential information may need to be discussed in the meeting. This could be explicitly addressed in the Code as being relevant to the question of whether the request to be accompanied is reasonable in the circumstances. Going further, it could be specified in the Code that if an agency worker has made a request for a predictable working pattern to the Hirer and they wish to be accompanied, any fellow worker requested as a companion should ideally be someone who also works for the Hirer.

**Question 9**

**Should the Code recommend that employers, agencies and hirers provide any additional information which is reasonable to help explain why a request has been rejected?**

No. Although transparent and well explained decisions are beneficial to both the applicant and organisation considering the request, it is our view that reference to providing 'any additional information which is reasonable to help explain the decision' is an onerous obligation and goes further than the Code needs to.

The formulation of this obligation around the concept of "additional information" could be interpreted as requiring an employer to include a substantial amount of supporting evidence. For example, statistics supporting the decision or the disclosure of other working patterns which were taken into consideration. Given the tight one-month decision-making timetable, this is undesirable. It would also be a significant additional burden on business which have a high number of agency workers eligible to make requests under the legislation. We suggest that it would be enough to state in the Code that the decision should set out the business reason why a request has been rejected and explain in clear terms why that decision has been reached. This approach would also be more aligned with the flexible working regime.

**Question 10**

**What are the advantages and disadvantages of the Code stipulating that, wherever possible, an appeal should be handled by a manager not previously involved with a request?**

This is consistent with good practice in relation to handling appeals in an employment context. Given this is already qualified by stating this applies 'where possible', we do not think that there are disadvantages to this.

**Question 11**

**Should the Code include a section about the right to request flexible working?**

**If you answered 'yes', do you believe that paragraphs 14 to 16 in the draft Code provide sufficiently clear guidance on the interaction between the 2 rights?**

Yes, it is important that the Code directly addressed the interaction between these two regimes. However, please refer to our answer to question 3 above in which we identified how this part of the Code could be clearer.

**Question 12**

**Please set out any other areas that you feel should be included in the Code or non-statutory guidance.**

As noted in relation to question 3 above, the Code does not make explicit reference to the extent to which an employer can rely on the fact working patterns have already been negotiated and agreed at a workforce level

when considering a request for a predictable working pattern. It's possible that the working arrangement requested by the worker has already been considered as part of workforce-wide negotiations and the organisation considering the request would want to ensure that its conclusion on the individual request is consistent with this. This important practical point should be addressed in the Code.

Also, on the question of wider context, the organisation considering the request will want to balance considering the request on an individual basis against setting a precedent that it is not practicable to replicate. For example, although it may be possible to agree one request, the entity responding to the request may be concerned that this would then make it difficult to turn down other requests that are substantially the same. But operationally it may not be feasible for all employees to work "predictably".

If the intention is that employers should in fact consider requests on a "first come, first served" basis, it would be helpful if the (non-statutory) guidance makes it clear that agreeing a single request cannot set a precedent for any future request. Also, if it is permissible to consider the impact on the wider business of having multiple requests, it would be helpful if the (non-statutory) guidance makes that clear with examples for illustration.