



Institute of Directors

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**THE RT HON KEMI BADENOCH MP**

Secretary of State for Business and Trade

Department for Business and Trade

Old Admiralty Building

Admiralty Place

London

SW1A 2DY

Dear Secretary of State,

**IoD response to the consultation on the Code of Practice on Dismissal and Re-engagement**

**About the IoD**

*The IoD is an independent, non-party political organisation representing approximately 20,000 company directors, senior business leaders, and entrepreneurs. It is the UK's longest-running organisation for professional leaders, having been founded in 1903 and incorporated by Royal Charter in 1906. Its aim is to promote good governance and ensure high levels of skills and integrity among directors of organisations. It campaigns on issues of importance to its members and to the wider business community with the aim of fostering a climate favourable to entrepreneurial activity in the UK.*

The IoD welcomes the opportunity to respond to this consultation on the Draft Code of Practice on Dismissal and Re-engagement. Striking an appropriate balance between worker protections and labour market flexibility is of considerable interest to the IoD and its membership, and we are therefore pleased to present our views.

In the first section, we provide a summary of our key perspectives on the proposed Code. We then offer more detailed views in respect of the specific questions posed in the consultation.

**Summary of the IoD view**

The development of a Code is welcome in providing employers with clarity regarding their responsibilities when considering changes to terms and conditions where there is the prospect of dismissal and re-engagement.

Qualitative survey feedback from IoD members was clear that threats of dismissal and re-engagement should not be used as a negotiation tactic, and that dismissal and re-engagement should only be considered as an absolute last resort due to risks that such an approach presents in terms of industrial relations and organisational reputation.

The draft Code constitutes a useful and reasonable means of balancing worker protections and labour market flexibility. There are aspects of the Code, however, which would benefit from additional clarity.

### Specific questions

**1. Paragraphs 6-10 of the Code set out the situations in which it will apply. Do you think these are the right circumstances?**

Yes. Any expansion of the circumstances in which the Code would apply would risk interfering with areas of employment law where there already exist well-developed and entrenched legal principles, such as redundancy.

While it makes sense for the Code to apply regardless of the number of employees affected, or potentially affected, by the proposed changes, this constitutes a particularly marked change for SMEs, given that employers' existing legal obligations in respect of collective consultation under the Trade Union & Labour Relations (Consolidation) Act 1992 only apply where an employer is proposing to dismiss and re-engage 20 or more employees. The Code therefore risks creating a confusing environment for SMEs trying to understand their obligations, given that aspects of it do not align with existing legislation.

Government should therefore ensure that the available information and guidance on dismissal and re-engagement specifically caters to the needs of SMEs, which are more likely to struggle with the costs of compliance:

*"The current balance between employer flexibility and employment rights is perversely skewed toward the interests of very large companies that can absorb compliance overheads that will put smaller firms out of business. This should be the focus of policy improvements."* – IoD member

Further clarity on the point at which the Code comes into effect would also be helpful. The Code refers to it coming into force when employers consider making changes to employment contracts which, if not accepted by employees, may lead to dismissal and re-engagement, but more precise guidance or examples of when that is envisaged to apply would reduce ambiguity for employers.

**2. If employees make clear they are not prepared to accept contractual changes, the Code requires the employer to re-examine its business strategy and plans taking account of feedback received and suggested factors. (Steps 3 – 4 in table A and paragraphs 20 – 23 of the Code). Do you agree this is a necessary step?**

Yes. In February 2023, we polled 859 business leaders on aspects of the draft Code (see Appendix). When asked whether they agreed that, if staff are not prepared to accept contractual changes employers should have to re-examine their business strategy and plans, taking account of feedback received, 57% agreed and 28% disagreed.

**3. Do you have any comments on the list of factors which an employer should consider, depending on the circumstances, in paragraph 22 in the Code?**

The factors presented in paragraph 22 — including the objectives the employer is seeking to achieve, the negative consequences of acting unilaterally, and whether plans carry any risk of discriminatory impacts — are balanced and echo the qualitative feedback we received from business leaders in our research on their views on good dismissal and re-engagement practice.

**4. The Code requires employers to share as much information as possible with employees, suggests appropriate information to consider, and requires employers to answer any questions or explain the reasons for not doing so. (Steps 5 and 6 in table A and paragraphs 24 – 42 of the Code). Do you agree this is a necessary step?**

Yes. Our research (see Appendix) found that 94% of business leaders agree that employers should share as much information as possible on the nature of contractual changes with staff and answer any questions or explain the reasons for not doing so.

*“There are times in business that contractual arrangements need to be addressed or changed. This should not be ‘one sided’ as this would not be fair and balanced to all stakeholders. If the change is to support the sustainability of the business than all parties need to understand the reasons why this change need to take place.” – IoD member*

*“Transparency between employer and employee is critical to success.” – IoD member*

**5. Is the information suggested for employers to share with employees at paragraphs 25 and 33 of the Code the right material which is likely to be appropriate in most circumstances?**

Yes. The information suggested — including the nature of the proposals; who will be affected by the proposals; why there is a need for the proposed changes; the timeframe for the proposed changes; and any other options that have been considered — covers the key information needed for constructive dialogue between employees and employers.

**6. Before making a decision to dismiss staff, the Code requires the employer to reassess its analysis and carefully consider suggested factors. (Step 13 in table D and paragraphs 57 – 59 of the Code). Do you agree with the list of factors employers should take into consideration before making a decision to dismiss?**

Yes. Our research found that business leaders consider dismissal and re-engagement a method of last resort when business objective can be achieved in no other way; as such, the Code’s suggestion that employers assess whether their aims could be achieved through other means is reasonable.

However, some employers may seek additional clarity as to the steps they would need to take to evidence that the factors described have been taken into consideration. For example, phrases such as, “the employer should take some time to reassess its analysis...” and the following bullet points are

ambiguous and may be interpreted differently by employers and employees. Clarity on timescales is particularly important given the time-sensitive nature of many of the situations likely to lead employers to use dismissal and re-engagement as a last resort:

*“In reality businesses are reacting to real time threats to their existence. You have very little time in challenging circumstances... [The best approach is to] inform people why changes need to be made, get their views on possible alternatives, make a final decision and act quickly.” – IoD member*

*“A lot depends on the scale and nature of the organisation, and the pace of change within the sector. The need for employee security needs to be considered in the light of the need for fleetness of foot in some industries.” – IoD member*

**7. The Code requires employers to consider phasing in changes, and consider providing practical support to employees. (Step 15 in table D and paragraphs 61 - 63 of the Code). Do you agree?**

Yes. Our research (see Appendix) found that a majority of business leaders agree that employers should share as much information as possible on the nature of contractual changes with staff and answer any questions or explain the reasons for not doing so. In our survey, 77% of 859 business leaders agreed with the statement to some extent, while only 10% disagreed.

## General questions

**8. Do you think the Code will promote improvements in industrial relations when managing conflict and resolving disputes over changing contractual terms?**

On the whole, the Code is likely to improve industrial relations in situations where dismissal and re-engagement is used by an employer as a last resort. However, the ambiguity present throughout the Code does pose potential risks for industrial relations. While the Code benefits from not being excessively prescriptive, ambiguity risks the Code being interpreted differently by employers and employees.

Furthermore, while the Code refers to the potential for tribunals to ‘decrease any award by up to 25%, where it is the employee who has unreasonably failed to comply’, the Code itself makes very limited references to the behaviours with which employees will be expected to comply. For the Code to engender improvements in industrial relations, it would benefit from being more explicit about the ways in which employees can contribute to a meaningful conversation.

**9. Does the Code strike an appropriate balance between protecting employees who are subject to dismissal and re-engagement practices, whilst retaining business flexibility to change terms and conditions when this is a necessary last resort?**

Yes. The Code’s provisions will incentivise employers to implement a high standard of information sharing and to review plans based on employee feedback, while retaining employers’ ability to use dismissal and re-engagement when required as a last resort.

**10. Do you have any other comments about the Code?**

Section 11 states that collective agreements are considered, for the purposes of the Code, as encompassed in the terms ‘employment contract’ or ‘terms and conditions’. When coupled with Section 1’s statement that employment contracts – thus including collective agreements, which are not

currently legally enforceable – ‘are legally binding agreements’, the Code risks creating ambiguity as an employer could breach the Code but not the law. This risk would be mitigated by removing the reference to collective agreements in Section 11.

I hope you have found our comments helpful. If you require further information about our views, please do not hesitate to contact us.

With kind regards,

A handwritten signature in black ink that reads "A. Hall-Chen". The signature is written in a cursive, slightly slanted style.

Alex Hall-Chen

Principal Policy Advisor for Employment

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## Appendix

### IOD MEMBER SURVEY RESULTS: FEBRUARY 2023

This question is about the practice of 'Fire and Rehire', whereby an employer dismisses a worker and rehires them on new, less-favourable terms. The government is seeking views on how employers should behave in future when seeking to change staff terms and conditions. To what extent do you agree or disagree with the following suggestions?

| Count of Attribute         | Column Labels  |   |  |
|----------------------------|--|---|--|
|                            | Employers should be required to consider phasing in changes and consider providing practical support to staff. | Employers should share as much information as possible on the nature of contractual changes with staff, and answer any questions or explain the reasons for not doing so. | If staff are not prepared to accept contractual changes, employers should have to re-examine their business strategy and plans, taking account of feedback received. |
| Row Labels                 |  |   |  |
| Strongly agree             | 30.0%  | 58.6%   | 15.9%  |
| Agree                      | 46.9%  | 35.7%   | 40.9%  |
| Neither agree nor disagree | 12.1%  | 3.0%  | 13.9%  |
| Disagree                   | 7.8%   | 1.6%  | 19.9%  |
| Strongly disagree          | 2.3%   | 0.6%  | 8.1%   |
| Don't know                 | 0.8%   | 0.5%  | 1.3%   |