CONSULTATION	CONSULTATION ON REVISED ACAS CODE OF PRACTICE ON DISCIPLINE AND GRIEVANCE
Response to consultation	**Roger Kline (rkline@ucu.org.uk)** **National Head of Equality and Employment Rights** **University and College Union** **27 Britannia Street** **London WC1X 9JP**

Response by the University and College Union – July 2008

Summary

- UCU supports the TUC evidence provided in response to the consultation
- We have a number of concerns about the content of the Code which in part arise from the attempt to produce a much shorter Code that the current one. We are aware of no evidence that a shorter Code will improve industrial relations, or that the length of the current Code presents problems.
- In particular we are concerned that, whilst the overwhelming majority of our members work for employers with more detailed procedures which generally set higher standards, current developments in further, higher, adult and prisons education mean that any weakening of the Code is likely to be used by private contractors, for example, to revise their own procedures.
- We are concerned that much of the material which it is proposed be found in separate guidance materials ought to be in the Code itself. This is a particular problem given that tribunals will only take the Code, not the accompany guidance into account when adjusting awards for in taking account of any failure to follow the Code
- We identify a number of issues such as bullying, performance and sickness which are inadequately addressed in the new Code

ACAS Draft Code of Practice on discipline and grievance

UCU response

Introduction

The University and College Union (UCU) represents 117,000 lecturers, researchers and academic related staff in further, higher, adult and prison education. We are affiliated to the TUC and we endorse all the main points made by the TUC in its own response to this consultation.

In almost all of the organisations employing UCU members we are a recognised trade union and they have agreements or procedures are in place which set standards which are at least as high as those of the current ACAS Code of Practice and in many cases set much higher standards. In old universities, for example, additional protection is given to our members through University statutes.

General concerns

Nevertheless we wish to raise a number of concerns about the likely impact of the revised Code on our members in those workplaces where such standards are not met, as well as in the growing number of private contractors seeking work in all the sectors where our members work.

In some areas such as prison education and language schools private contractors play a substantial role and their employment practices often fall far short of those agreed with the rest of the sector. We also wish to raise concerns about the impact of the revised Code on those workplaces where higher standards are set but not always followed and the risk that the proposed truncated Code will set a "lower bar" which may lead to a gradual deterioration in the effectiveness of procedures which currently are more comprehensive that the current Code.

This is of particular concern since when employment tribunals take the Code into account when adjusting awards for failure to comply with provisions of the Code, they will not take the accompanying guidance into account.

No evidence that a shorter Code is needed

We believe it is a real weakness that the revised Code fails to include much of the detailed good practice guidance contained in the current Code setting out how employers should proceed in disciplinary cases and grievances. The lack of such detail is likely to make it more difficult, not easier, to resolve workplace disputes.

Moreover the Code does not clearly set out the principles of natural justice in the way the previous Code did and it is unwise to assume that all employers understand such principles, let alone seek to abide by them. Nor do not believe it is sufficient to assume employers will read the accompany guide whose status may be unclear to them.

Whereas the current Code makes clear that employment tribunals can increase compensation awards where the employers or employees fail to comply with the provisions of the Code, the revised Code does not. We believe this caution should be specifically drawn to the attention of employers as it may serve to concentrate their minds.

In workplaces where relatively good procedures currently exist there is a risk that over time existing employers or new entrants into the sectors our members work in – notably as private contractors – will rely on the new Code and ignore the guidance – and introduce weaker procedures.

The central thrust of the revised Code is that it is to be both much shorter and less prescriptive. Yet no evidence has been provided to demonstrate that a much shorter Code, with crucial advice and principles relegated to accompanying guidance, will be an improvement. We believe the most significant problem with the existing Code was not its length but the impact of the 2004 Dispute Resolution Regulations.

We believe that ACAS should return to its role of setting standards that all employers should follow. The Government appears to believe that a comprehensive statutory Code would not meet the needs of smaller employers. UCU believes that the best way to deal with this problem is for it to be clear to all employers that the existing ACAS Code sets the standard of fairness expected and that employers who do not observe them will run an increased risk from findings of unfair dismissal.

The revised Code as it now stands is so basic that there will be a real risk that there will pressure to shorten and effectively water down on the procedures which are currently the norm in further and higher education. It is certainly the case that the likely adoption of even more basic procedures by private contractors seeking to enter the sectors will be encouraged by this approach with no apparent benefits to either staff or good industrial relations.

Along with many others, UCU's submission to the Gibbons Review argued that the statutory procedures had caused the premature formalisation of disputes. It will be a real

pity of the replacement of those procedures doesn't strongly encourage an informal approach where this is possible in the way that the 2000 Code did.

Specific concerns

The revised Code as currently drafted has several general shortcomings:

- The Code does not make it clear that disciplinary action should be to improve performance rather than simply to punish staff. The failure to do so is one of a number of omissions that will not encourage the informal resolution of concerns, or setting of appropriate decisions, that good industrial relations require.
- It fails to give clear guidance as to the nature or purpose of the investigations an employer must undertake, in particular that the more serious the allegations, the more thorough the investigation should be, and the more careful written records should be.
- A number of statements in the Code are so vague as to be meaningless. For example, in Para 4. it suggests that "where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case" without giving any examples or more detailed advice. Yet it does not, for example, set out the importance of employers considering mitigating or extenuating circumstances
- Despite the truncated nature of the Code it states (Para 4 again that in small organisations it may sometimes not be practicable to take all the steps set out in this Code" without any indication of which steps this might refer to
- It fails to make sufficiently clear the need for employers to provide employees with full written details of any allegations against prior to the hearing including evidence gathered by the employer and to have an opportunity to prepare and put their case in response to before any decisions are made. To do that effectively we believe it is essential that in disciplinary proceedings employees are provided with the employer's case and evidence prior to providing any written response or bundle themselves. To do otherwise, places the employee as a very considerable disadvantage and means that, contrary to natural justice, employees may not be able to adequately respond to the employer's case
- It provides no advice on which factors employers should take into account prior to a decision as to whether any disciplinary or other action is justified.
- It gives no guidance as to how long it might be reasonable for warnings to remain "live", yet it states that "if someone if found guilty (sic) of misconduct or performing poorly they should be given a written warning (and) a further act of misconduct or failure to improve performance within a set period would normally result in a final warning"
- It does not make clear that an employee has a *right* to appeal, as recognised in case law.
- The Code refers (Para 30) to a possible link between criminal offences and disciplinary action in a way that will alarm without providing any clarity at all

- Whilst an employee is to be obliged to put a grievance in writing the employer is only required to record the outcome of the grievance with no explicit requirement to set out the outcome to the employee in writing.
- The revised Code should provide more detailed guidance on how to handle issues informally since that is often the best place to resolve disputes
- The Code makes no reference to equality reps, environmental reps, or union learning reps all of whom play a growing role in industrial relations
- The Code itself has important gaps, notably in failing to set out of clear principles of natural justice in respect, for example, of what might be considered reasonable behaviour by employers.
- We are surprised that the revised Code does not make clear that employers should keep written records during grievance and disciplinary procedures. It seems to us that it is clearly in everyone's interest – not least the employers as well as the employee's - that good records are kept, including records of meetings (which should be shared with employees)
- There is unfortunately no advice in the revised Code, unlike the helpful advice in the current Code, on when or how it is appropriate to suspend an employee on full pay during an investigation.
- There is no reference in the Code to the desirability of managers having appropriate training in both the Code and guidance
- The revised Code does not make clear that following an informal or formal process an employer can decide that no action is necessary.

The current Code summarises the basic tenets of natural justice and what tribunals have considered as reasonable behaviour by employers as follows:

> 'At the meeting, the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be allowed to ask questions, present evidence, call witnesses and be given opportunity to raise points about any information provided by witnesses.' (Paragraph 15)

It is unfortunate that a similar summary is not contained in the revised Code.

Key issues not tackled

One major concern for UCU is the absence from the revised Code of any reference to key issues that our members face and for which the revised Code provide little or no assistance:

- A recent survey of UCU members identified bullying and harassment as their single most important concern yet the Code give no assistance in setting out principles which might apply to grievance or disciplinary cases on these matters. Para 43, for example,

suggests to employers that they have separate procedures for handling harassment and bullying cases. That is fine but it gives no further guidance on an issue of major importance.

- The revised Code, unlike its predecessor, does not provide useful advice or set out principles on how to handle cases involving long term absence and the possible disability discrimination implications of employer's actions.
- It sets out no principles by which disputes around appraisal, performance or capability should be handled and the relationship between the handling of these issues and possible disciplinary action. By conflating performance and misconduct (Para 20) the Code raises a major problem since it is widely regarded in the sectors our members work in, to have separate procedures for capability and performance.

Unlike the current Code, the revised draft will lead to employers being required to take out individual grievance procedures for all employees involved in a collective grievance in a workplace whilst union members could also see their compensation in any subsequent litigation cut should they fail to raise an individual grievance with their employer even if their union had previously attempted to address the issue collectively. It is hard to see how such provisions are in anyone's interest.

The revised Code of Practice should make clear that an employee does not need to raise an individual grievance where a recognised independent trade union is trying to resolve their grievance collectively.

UCU agrees believes with the sentiment that 'recourse to an employment tribunal should only be a last resort' but does not accept that this Code will strengthen informal and workplace resolution of disputes and there is a risk that this may deter some employees from pursuing justified Tribunal claims.

Similarly the suggestion that 'the size and resources of the employer should always be taken into account' is not correct when victimisation or discrimination has occurred since in those cases cost will not be considered as justification for inappropriate action.

Conclusion

Staff in adult, further higher and prisons education generally have more detailed procedures that those set out in the revised Code – indeed that are set out in the current Code. The impact of the revised code will nevertheless impact on industrial relations and the resolution of disputes in those sectors.

In an increasingly competitive environment there will be a temptation for private contractors to seek to cut short term costs by adopting the approach of the revised Code rather than the more sophisticated procedures which are currently the norm across the sectors UCU members work in.

We are concerned both at the serious gaps in the Code itself and at the relegation of important principles and detail to the guidelines and the absence of any evidence that the shortening of the code will improve industrial relations. We have identified a number of the more important gaps which are likely over time to affect some of our members and ask that, in accordance with our response, and the more detailed response by the TUC, the revised Code itself be substantially revised to at least restore the key elements removed from the existing Code.