



Shelley Torey
Department for Business, Innovation and Skills (BIS)
Labour Market
1 Victoria Street
LONDON
SW1H 0ET

7 June 2012

Dear Madam

BVCA response to BIS call for evidence “Dealing with dismissal and “compensated no-fault dismissal” for micro businesses”

This response is submitted on behalf of the Legal and Technical Committee of the British Private Equity and Venture Capital Association ("BVCA").

The BVCA is the industry body and public body advocate for the private equity and venture capital industry in the UK. More than 520 firms make up the BVCA membership, including more than 250 private equity, mid market and venture capital firms, together with 250 professional advisory firms.

In 2010, the ongoing number of people employed by UK private-equity backed businesses was 810,000 on a full-time equivalent basis (FTEs).

The BVCA Legal and Technical Committee includes amongst its objectives the shaping of policy and the implementation of policy to ensure that it accommodates the needs of the British venture capital and private equity community.

This response sets out, on behalf of the BVCA, the answers to those questions which are considered to be most pertinent to BVCA members.

Question 1: Before this call for evidence were you aware of the ACAS Code?

The BVCA considers that, on the whole, its members will have been aware of the ACAS Code prior to this call for evidence.

Question 2: Before this call for evidence were you aware that the statutory dismissal procedures were abolished in April 2009?

The BVCA considers that, prior to this call for evidence, its members will, on the whole, have been aware that the statutory dismissal procedures were abolished in April 2009.

Question 4: Has the new Code prompted you to review your organisational discipline and grievance policies and procedures?

The BVCA considers that, on the whole, its members will have updated their disciplinary and grievance procedures in the light of the current version of the ACAS Code.

Question 6: Do you find the language of the Code easy to understand?

The BVCA considers that the language of the Code is very easy to understand.

Question 7: Do you find the language of the Code appropriate for dealing with performance issues ?



The BVCA does not consider that the language of the Code is suitable for dealing with performance cases. This is because:-

- There are negative connotations to the reference to 'disciplinary' matters when dealing with performance cases.
- The Code suggests that there should be an investigation before meeting with the employee, but this is rarely necessary in performance cases.
- It is rarely appropriate to move through the various stages of warning in a performance case; again, the "warning" language has negative connotations.
- It is the experience of BVCA members that employees may improve their performance during the monitoring period only to let it slide once a warning has lapsed.
- In some cases it may be desirable to move to dismissal much quicker and the Code should permit this where there is the potential for business interests to be damaged.

Question 8: Have you used the Code when carrying out a disciplinary procedure?

The BVCA considers that, on the whole, its members will refer to their internal disciplinary procedure and will not generally make explicit reference to the Code.

Question 10: Do you consider the disciplinary steps set out in the Code to be burdensome?

The BVCA does not consider that the disciplinary steps set out in the Code are, in themselves, burdensome (subject to our response to question 22 below). However, in certain circumstances of serious misconduct where there is a genuine concern about the physical safety of employees or damage to property, the BVCA considers that the Code should expressly provide for a truncated dismissal procedure to be followed.

Question 14: Should the requirements of the Code be different for micro and/or small businesses?

The BVCA welcomes the proposals in relation to micro businesses. However, on behalf of its members, the BVCA queries why these proposals are being limited to micro businesses? If simplifying dismissal procedures is considered to be good for business, then it is the BVCA's view that the procedures could arguably be simplified for all businesses, regardless of their size, to help maintain their competitiveness in an increasingly global market place.

Question 16: Does the Australian Small Business Fair Dismissal Code provide a useful model for the UK?

The BVCA considers that the Australian Small Business Fair Dismissal Code provides a useful model for the UK. However, the BVCA considers that the principles in that Code could be applied more widely to all UK businesses, regardless of their size.

Question 17: Please provide any further comments on the Australian Small Business Fair Dismissal Code.

The BVCA particularly welcomes the provision in the Australian Code that redundancy (provided it is genuine) is always a fair reason for dismissal.



Additionally, the BVCA welcomes the provision in the Australian Code that, if the Code is followed, the dismissal should be deemed to be fair (which is essentially a reversal of the current burden of proof in unfair dismissal cases).

Question 18: Do the requirements of your internal disciplinary processes differ from the requirements of the Code?

The BVCA considers that its members' internal disciplinary processes are unlikely to differ in any significant way from the requirements of the Code.

Question 22: Any other general comments on the Code.

The BVCA would welcome clarity regarding what amounts to a grievance in the context of the previous case law under the statutory procedures. The Code suggests that a grievance must be raised by an "employee", whereas previous case law suggests that a grievance can be lodged by a third party as agent for the employee (for example, in a solicitor's letter before action). It is the BVCA's view that the interpretation in the Code is to be preferred and that, where an employer is unclear whether a grievance has been lodged, their obligation should simply be to ask the employee whether they wish to raise a grievance.

There is a lack of consistency in some of the drafting in the Code. For example, when arranging an appeal hearing, the disciplinary section of the Code requires the date to be *agreed*, whereas the grievance section does not. The BVCA considers that, if the Code is to be revised, all such inconsistencies should be ironed out at the same time.

The BVCA would welcome clarity on the issue of dealing with grievances from former employees. It is the BVCA's view that the Code should not apply in these circumstances.

The BVCA would welcome further clarity in the Code regarding progressing a disciplinary or grievance case in an employee's absence. It is the BVCA's view that the employer should be encouraged to progress the case, allowing the employee to send an 'advocate' on their behalf or to make written representations. Furthermore, in cases where the employer believes that the employee is deliberately interfering with the progression of a case, the Code should make it clear that the employer may treat this as a disciplinary offence.

The BVCA is concerned that paragraph 12 of the Code, which gives employees the right to call relevant witnesses at a disciplinary hearing, can be open to abuse. The BVCA is concerned that employees may use this provision to demand to call witnesses whom they wish to cross-examine, rather than witnesses who will support their case. In any event, as the burden is on the employer to carry out a fair investigation, it should be the employer's prerogative to decide which, if any, witnesses are relevant. Accordingly, the BVCA considers that this provision should be removed from the Code.

Paragraph 32 of the Code suggests that, when a grievance is raised, the employer's first action should be to meet with the employee to discuss the grievance. However, it is the BVCA's experience that, where the grievance has been articulated clearly in writing, many employers undertake an investigation first, thereby obviating the need for two meetings with the employee. Accordingly, the BVCA considers that the Code should recommend an initial meeting with the employee only where the grounds of the grievance are unclear.

The Code states that employees and their representatives should be involved in the development of rules and procedures. This is not always practical or appropriate and should not, therefore, be a Code requirement.

The Code also states that the right of appeal should be given for all types of disciplinary actions, which includes warnings. This is unnecessarily burdensome for many employers and should be limited to a right of appeal against decisions to dismiss and grievance decisions only.



If you would like to discuss any of the points raised in this response please contact myself or Simon Horner (shorner@bvca.co.uk).

Yours faithfully

A handwritten signature in black ink, appearing to read 'S. Witney'.

Simon Witney
for and on behalf of
BVCA Legal & Technical Committee
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