There may be trouble ahead. Public policy and the revision of the acas code of practice on discipline[1] 1977-2008[2]

By Anthony Fenley
Centre for Employment Studies Research (CESR)
University of the West of England

Introduction

Students of organisational studies have identified written policy statements as examples of cultural artefacts, which provide an insight into the underlying values and beliefs at work within organisations (Senior and Fleming 2006). This short article examines the mutations of the ACAS Code of Practice on Discipline, since its first inception in 1977 to the current draft Code in 2008. The purpose of this exercise is to identify shifting beliefs held by public policymakers, and the State, about how a key element of the employment relationship should be managed, and how governments seek to shape the power relationship between employer and employee (or worker), and trade unions. Particular attention will be paid to the emphasis on supporting free markets, individualisation of the employment relationship, and increased juridification.

The changing nature of the Codes

The 1977 Code

The 1977 Code corresponds with the Social Contract era of tripartism, and the maturing of the post war consensus. Arguably it represented a conjoining of the tradition of voluntarism (allowing the parties to make their own agreements), and the early beginnings of the process of juridification (legal regulation) of the system of workplace relations.

The Code was five pages long, and consisted of twenty paragraphs. However it enunciated some highly important points. Lay people were made aware that not to comply with the Code was not illegal, but that it could be admitted in evidence, and considered by tribunals when it was relevant. The Code recognised the role of trade unions in disciplinary situations (paragraphs 1 and 5), and the importance of fairness as well as effectiveness in the conduct of industrial relations. It emphasised a corrective approach in the use of procedures (paragraph 9), whilst the specification of eleven key features in this process (paragraph 10) essentially set out the principles of natural justice in the treatment of employees. Other specific advice was provided, and the importance of the catch all 'reasonableness in all the circumstances' noted (paragraph 14).

1 The original Code referred to discipline only, later codes included grievances also. This paper is limited to a consideration of those elements of the Code that relate to discipline, either directly or indirectly.

2 This article was submitted in October 2008

The Code was an example of a strengthened voluntarism that provided a normative framework for parties to pursue best practice, but in addition it furnished a potential underpinning for those employees who were not organised, and for those employers without knowledge of disciplinary policies and processes. The law that under pinned the Code formed the basis for the increased formalisation of workplace procedures in this area (Cully 1999, Lewis and Simpson 1981). However successive Conservative governments felt this was sufficiently interventionist, so that the Code was augmented instead by an ACAS advisory book of 50 pages which was, 'purely advisory and did not have the status of a Code of Practice. (ACAS 187:4)

The 2000 Code

The advent of a New Labour Government led to the first set of substantive changes to the Code in 2000, this also incorporated advice on grievances, but took account of the *individual's* right to be accompanied at both disciplinary and grievance interviews.

The 2000 Code was more extensive than its predecessor, containing an initial thirty-three paragraphs on discipline, and a further sixteen on the right to be accompanied.

The 2000 Code appeared to be a strengthening of the position of employees reflected in the statutory right to be accompanied at disciplinaries and grievances. There is specific reference to the rights of natural justice, and fourteen essential features of the disciplinary procedure identified in support of this approach. However it can be contested that this Code strongly suggested a move towards both the individualisation and juridification of the employment relationship. The introductory paragraph contains no specific reference to trade unions per se (paragraph 1), whilst the right to be accompanied makes clear that is not necessarily via the trade union route (paragraphs 50-66). The terminology encapsulated in the right to be *accompanied*, as opposed to the right to be *represented* is indicative of a potential dilution of a workplace role for unions, seen in the context of detailed prescriptions, enveloped within statute law, on conduct within the meetings (paragraphs 63 and 64). The summarisation of statutory rights in bold throughout the text of the Code provided a further pointer to the shift from strengthened voluntarism towards increased juridification.

The 2004 Code

In 2004 the third embodiment of the Code was made ostensibly to take account of legal responsibilities in accordance with the Statutory Disputes procedures, and a desire to keep the number of employment tribunal cases down.

The 2004 Code consists of 116 paragraphs. It is 42 pages long, including 10 pages of appendices. It represents a significant shift from the 1977 version. Paragraph 6 refers to the statutory minimum Code and continues to emphasise the importance of the catch all 'acting reasonably in all the circumstances'. However paragraphs 26-32 enters into considerable detail about the content of the statutory procedures, detailed advise on exemptions, situations where it relates potential findings of automatically unfair dismissal, and the impact on compensation levels. It goes into detail about circumstances beyond the control of parties, non-attendance by employees, and dealing with grievances raised during disciplinary proceedings. There are twenty paragraphs dealing with the right to accompaniment, including those on grievances, that set out what is and is not contractual, and detail appropriate protocols at the meetings.

At the heart of the 2004 Code, which arguably palls under the weight of legislation, is a paradox that arguably encapsulates the contradictions at the heart of successive New Labour administrations. On the one hand there is increased regulation and the apparent bestowing of rights on employees and workers. On the other hand there is the desire to micro manage the dynamics and mechanics of the disciplinary process through the highly detailed specification of how meetings should be conducted (paragraphs 96-116), and the rapidly increasing juridification, alluded to earlier, that inevitably moves the initiative with these matters away from the workplace and into the purview of the legal profession and the courts.

The 2008 Draft Code

The failure of the Statutory Disputes procedures to reduce the number of tribunal cases, and subsequent criticisms of the prevailing situation in the Gibbons Report (2007), led to a new draft Code been tabled in May 2008, designed to overcome the problems identified by Gibbons. This is expected to become operative in April 2009.

The draft Code was a consequence of recommendations in the Gibbons Report, and the proposed removal of statutory dismissal and discipline procedures (Gibbons 2007, ACAS 2008), the former having called for 'clear, simple, non-prescriptive guidelines' (Gibbons 2007:30). The five pages of the draft Code deal with discipline issues in thirty paragraphs, adopting arguably a highly minimalist approach. In the foreword no reference is made to trade unions, but later paragraphs do acknowledge the trade union role (paragraph 3). The emphasis is on informality and sees recourse to employment tribunals as a last resort. Paragraph six which refers to the formal processes of discipline contains only six sub points, considerably fewer than those in previous Codes.

Amongst the 170 responses to the draft are those from the Law Society (2008) and from Thompsons (2008), the main solicitors for trade unions. Concern is expressed that the Code contains conflicting principles since it will be taken into account to establish liability, but in addition where *either party* has failed to comply with the Codes' provisions, resulting compensation may be adjusted by up to 25 per cent. The Law Society believes the bare essentials approach in the Code is the exact opposite of the prescriptive, guidance-based approach that employers and employees need. They note the failure to emphasise that discipline should be used when other methods have failed and the omission of references to the principles of Natural Justice. Thompsons (2008) also see the draft Code as taking a lowest common denominator approach, and a need for clearer guidance on *how* employers should conduct their procedures, and the need to set standards of fairness.

Thompsons also note the absence of a corrective approach and a dilution of guidance in respect of the formal/informal distinction, clarity and availability of rules and procedures to employees, and the absence of guidance on conducting investigations.

They also express concern with regard to evidence made available to employees and their explicit right to test the evidence, failures over advising about the right to appeals, vagueness over the duration of warnings and the need for greater information in warnings (Thompsons 2008)

The role of the State

Whilst highlighting the potential and actual repression by the State of employees through the prism of historical perspective, Kelly identified the 'contradiction between the logic of accumulation which periodically requires a cut back in workers terms and conditions of employment, and the logic of legitimation, which requires that the victims of capitalist accumulation are protected from its costs if the system is to survive with their support' (Kelly 1998:56). Writing much earlier Barratt Brown referred to not only the *repressive* nature of the State, citing Marx's dictum that, 'the executive of the modern state is but a committee for managing the affairs of the whole bourgeoisie.' (Barratt Brown 1971:186), but also its *ideological* role, referring to Miliband and Poulantzas, in legitimising class interests through State power.

However Barratt Brown went beyond this. He rejected the idea of 'a neutral state subject to pluralist pressures' (*ibid*: 185), arguing instead that the State had, 'a *conformative* role, which contain, incorporate and moderate the conflicts inside capitalist society.' (*ibid*: 186). It was important, therefore to recognise that the State was not a monolith, but a set of institutions designed to incorporate conflict, which was independent from and superior to all social classes rather than been dominated by one.

Interestingly Gibbons indicates this *conformative* role, in referring to the impact of his recommendations, whilst:

> *"…implying a net increase in costs to the State, should include benefits and burden reductions to employers and employees which far outweigh the costs to the State."* (Gibbons Better 2007:7).

In relating this brief discussion of the role of the State to trends in public policy, a valuable link is provided by Davies and Freedland's consideration of the aims of New Labour's employment law initiatives, and the shift away from correcting the 'inequality of bargaining power between management and workers' (*ibid* 2007:8). They note the dual but conflicting goals of promoting first a free market economy underscored by labour flexibility, and secondly providing worker protection and social inclusivity. In describing Blairism as a modified form of neo-liberalism/Thatcherism (*ibid*: 240), they also note that New Labour had a, 'more nuanced vision of the labour market' (*ibid*: 246). They postulate a continuum where if X is highly welfarist promoting worker protection, and Y is strongly neo liberalism, 'the movement from extreme X to extreme Y may turn out to necessitate a higher level of regulation than before.' (*ibid:* 242). Renton (2007) raises the possibility that the complexity and difficulties of the statutory procedures might have been a deliberate State strategy to discourage workers from exercising their rights, and promote a further shift to involving lawyers prematurely and unhappily. But given the consequences of this, and the bemoaning of its impact on business interests, Renton rightly describes this as proving the iron law of unintended consequences.

Conclusions

This paper contends that the ACAS Code can be viewed as a cultural artefact providing insights into the underlying beliefs and values of the State, and especially during the period of the New Labour regimes (1997-2008). The original Code 1977 can be seen as part of a more regulated voluntarism providing a normative framework for the parties, falling within Barratt Brown's definition of a *conformative* role for the State. Whilst this role is not completely eroded in the Codes of 2000 and 2004, and important normative elements are retained we see a shift towards an approach that is over regulatory, designed to support market freedoms, individualisation and juridification. The contradiction at the heart of New Labour in seeking to meet the goal of employee protection whilst sustaining business within a free market economy led inevitably to the worst of two worlds. Gibbons has been critical of its impact not only on employers, but also on employees and trade unions. However the new draft Code in response to Gibbons is excessively minimalist. In seeking a bare bones, non-prescriptive approach, it risks not only diluting employee rights based on justice established by the original Code, but also distorting normative frameworks that serve the parties well in voluntarily resolving workplace disciplinary issues.

The increased statutory importance of the Code with regard to the awarding of compensation, at the same time as the substantive and authoritative guidance of the Code is diluted appears to be highly contradictory or cynical to a fault.

There may be trouble ahead.

References

ACAS (1977) Disciplinary practice and procedures in employment.
ACAS (1987) Discipline at Work. The ACAS advisory handbook.
ACAS (2000) Code of Practice on disciplinary and grievance procedures.
ACAS (2004) Code of Practice on Disciplinary and grievance procedures
ACAS (2004) Discipline and grievances at work handbook
ACAS (2008) Draft Code of Practice on discipline and grievance. Draft for Consultation.
Barratt Brown, M. (1971) 'The Welfare State in Britain' in Socialist Register, 1971.
Dti (2007) Success at Work. Resolving Disputes in the workplace. A consultation. London.
Cully, M., Woodland, S., O'Reilly, A., and Dix, G. (1999), Britain at Work, London, Routledge.
Davies, P and Freedland, M. (2007) Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s, Oxford, Oxford University Press.
Gibbons, M. (2007) Better Dispute Resolution. A review of employment dispute resolution in Great Britain. London, Dti.
Kelly, J. (1998), Rethinking Industrial Relations, London, Routledge.
Lewis, R. and Simpson, B. (1981) Striking a Balance? Employment Law after the 1980 Act, Oxford, Martin Robinson.
Senior, B. and Fleming, J.3rd Edition (2006), Organisational Change, Essex, Pearson Education.
Law Society (2008), Draft ACAS Code of Practice on discipline and grievance. Response to the consultation.
Renton, D. '"Deliver us from Employment Tribunal Hell" Employment Law, Industrial relations and the Employment Bill.' Unpublished paper, University of Hertfordshire, 2007
Thompson Solicitors (2008), Discipline and grievances at work: Draft ACAS guide consultation. Response by Thompsons Solicitors.