

EMPLOYMENT LAW CHANGES

DISCIPLINARY AND GRIEVANCE PROCEDURES

On 6 April 2009 the current legal requirement for employers to follow specified procedures in relation to disciplinary matters and grievances raised by employees will be abolished. The current procedures will be replaced by a new ACAS Code of Practice on Disciplinary and Grievance Procedures (the **Code**) which will be (heavily) supplemented by detailed Guidance Notes produced by ACAS.

Employers who are compliant with the existing requirements on procedures to be followed when handling disciplinary matters or grievances should already have written disciplinary and grievance policies in place which largely comply with the Code. As a general principal, it is important for employers to act consistently, promptly and to carry out the necessary investigations.

The overriding message from the Code is that both employers and employees must act in a way which is fair and reasonable in all the circumstances when dealing with disciplinary or grievance matters.

Key aspects of the new code relating to disciplinary handling

In brief, for disciplinary matters the Code requires employers to:

- inform the employee in writing if any action is to be taken;
- investigate the matter without unreasonable delay and establish the facts;
- keep any suspension during an investigation as short as possible and review such suspension (in particular, whether it is still necessary) on a regular basis;
- hold a meeting without unreasonable delay (but ensuring that the Employee is allowed sufficient time to prepare). Both the Employee and a representative of the Employer should attend such meeting and give advance notice of any witnesses to be called. If the Employee persistently misses the meeting, without good reason, then a decision can be made in their absence;
- allow the Employee to be accompanied at the meeting;
- after the meeting, decide on the appropriate action and inform the Employee in writing;
- if a warning is given, advise the Employee of the nature of the misconduct, the time scale to improve, the consequences of failing to improve and how long the warning will remain on record;
- if a decision is taken to dismiss the Employee, ensure that this decision is taken by a manager with the authority to dismiss and subsequently confirmed to the Employee without

delay;

- allow the Employee the opportunity to appeal any decision.

Key aspects to handling grievances

In respect of grievances:

- Employees are encouraged to try and resolve the matter informally with their line manager;
- the Employee must set out the grievance in writing, including the nature of the grievance;
- a meeting should be held, without unreasonable delay, to discuss the grievance;
- both parties should attend the meeting and it should be adjourned if there is a need to conduct an investigation;
- the Employee should be allowed to be accompanied at the meeting;
- after the meeting, the Employer should decide on the appropriate action and inform the Employee in writing of the decision and of the right to appeal;
- if the Employee wishes to appeal they must set out the grounds for appeal in writing without unreasonable delay.

Transitional Provisions

Inevitably, there will be disciplinary matters and grievances which straddle the 5 April 2009 date and there are specific provisions dealing with the transition from the current procedures to the Code. Whether or not current procedures apply or the new Code should be followed will depend on what action has been taken in respect of the disciplinary matter or the grievance on or before 5 April 2009.

Given the technicality of the transitional procedures (far too technical in our view) we would strongly encourage you to seek advice as to which procedure should be followed.

What action do I need to take now?

1. The current procedures should be followed strictly until 6 April. After 6 April consideration will need to be given as to whether or not the transitional provisions apply if disciplinary action has commenced (even just the issuing of an invitation to the disciplinary meeting) or a grievance has been raised before 6 April.
2. Check that your Existing Written Disciplinary & Grievance Procedures are compliant with the Code.

NB. If your existing disciplinary and grievance procedures comply with the current procedures, they are likely to comply with the new Code (especially if they were prepared by this firm) and so no action will need to be taken. If you do not have any written disciplinary/grievance procedures or they have not been updated by us since October 2004, they are unlikely to be compliant with the Code.

Are these changes good news for employers?

Yes – they remove the *automatic* unfair dismissal rule for failure to follow the current statutory procedures and you are not *automatically* liable if you fail to follow the Code.

It is reasonable to assume, however, that a dismissal carried out in breach of the Code will, in most cases, lead to a finding of unfair dismissal (or at least unwelcome uncertainty over the parties' legal position). The Employment Tribunal also has power to increase or decrease awards by up to 25% for unreasonable failure to follow the Code.

FLEXIBLE WORKING

From 6 April 2009 the right to request flexible working arrangements will be extended to carers of children aged 16 or under (currently such right was restricted to carers of children under 6 or disabled children under 18). Other than this eligibility change, the rules related to flexible working remain the same – in brief:

- the employee requesting flexible working must have worked for the employer for a continuous period of 26 weeks before making the application;
 - it is only a right to request flexible working and not to receive it;
 - the employer must seriously consider the request from the employee for flexible working;
 - reasons for refusing a request for flexible working must strictly comply with the existing provisions; and
 - both employer and employee must comply with the existing procedures.
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STATUS OF AGENCY WORKERS

The use of agency workers has increased considerably in recent years and is only likely to increase further given the current uncertain economic times.

Past

For some time, the position regarding agency workers seemed fairly straight forward (they were either employed by the agency or not considered to be employees at all). All of this changed in 2004 with a Court of Appeal decision which suggested that, where there is no express contract between the agency worker and the end-user, an implied contract could exist making the end-user liable for certain employment rights in respect of the agency worker, such as unfair dismissal and redundancy payments (*Dacas v Brook Street Bureau (UK) Ltd*). There then followed a number of judgments both in the Employment Tribunal, the Employment Appeal Tribunal and the Court of Appeal which further “muddied the waters” on this issue.

Present

Thankfully, employers have now been given respite in this matter (although for how long remains to be seen) with a recent Court of Appeal decision (*James v Greenwich Council*) which has declared that a contract of employment can only be implied to a relationship if it is a necessity to make the arrangement work.

Questions have often arisen in cases where an agency worker has been dismissed as to whether the worker was an employee of the agency, an employee of the end user or just self-employed. The basic legal question is simply whether the worker was employed by the end user under a contract of employment and this must be decided in accordance with common law principles of implied contract.

Contrary to previous decisions in similar cases, in *James*, the Employment Appeal Tribunal said that, in the absence of contradictory evidence, the passage of time does not by itself establish a mutual undertaking of legal obligations between a worker and an end-user sufficient to mean that a contract of employment can or should be implied. In addition, it does not by itself generate a legal obligation on an end-user to provide work or on the worker to do work.

Therefore, even though a worker may have been engaged (via an agency) by one entity for a number of years, this does not automatically render such person an employee.

This case reinforces the argument of those using agency workers that they, the end user, should not be considered the employer.

Future

Both the Employment Appeal Tribunal and the Court of Appeal have noted in a number of judgments that, given the huge numbers of agency workers in the UK (approximately 1.3 million) the position of agency workers is a matter for reform by the government. Unfortunately, any hope for legislation on this matter is likely to be delayed due to ongoing discussion on key provisions...but watch this space for future developments.

On a practical note...

For now, when engaging agency workers, ensure that your company has a clear contract with the agency setting out the terms upon which you are engaging them and any individual whom they send to you to carry out work. Having a clear and unambiguous contract will help to avoid discrepancies which could lead to an Employment Tribunal implying additional terms. Ensure that relevant provisions are incorporated to compensate the company for any losses that may be incurred by agency workers trying to claim that they are, in fact, employees and ensure that the agency also has a contract with the worker and ask for sight of the terms of this contract.

If possible, allow the option for the worker to delegate performance of his or her duties so that there is no requirement for personal service (this is likely to be easier for workers in more junior positions than those in senior positions) and reduce the day to day control that you have of the agency worker by, for example, requesting that the agency providing the worker deals with matters such as sickness and other absence and disciplinary matters.

INCREASE IN STATUTORY MINIMUMS

Minimum Statutory Holiday Entitlement

From 1 April 2009 full time employees' annual statutory paid holiday entitlement will increase from 24 days to a minimum of 28 days. Public holidays may be included within the entitlement to 28 days. Employers who currently offer fewer than 28 days holiday per year, including public holidays, will need to increase holiday entitlement. Part time employees will also be entitled to receive additional holiday - their holiday entitlement

should be calculated pro-rata to their hours worked.

Statutory Maternity, Paternity and Adoption Pay & Statutory Sick Pay

From 5 April 2009 the standard rate of statutory maternity, paternity and adoption pay that employees are entitled to receive will increase from £117.18 per week to £126.06 per week. From 6 April 2009 employees will be entitled to statutory sick pay at a rate of £79.15 per week (increasing from £75.40 per week).

Employers who currently operate non-contractual schemes in relation to maternity/paternity/adoption leave and/or sick pay will need to amend their records accordingly and any commercial payroll software will need to be updated to reflect the changes. In addition, all employment related documentation such as employee handbooks containing information relating to these matters will need to be reviewed and updated accordingly.

For advice on the new Code, on tackling disciplinary and grievance procedures generally, on any of the other matters raised in this Newsletter or employment related queries generally, please contact one of our employment team:

David Fenton; Kelly Whitfield; or Emma King.

This article should not be relied upon as a substitute for legal advice as to any particular matter.

If you would like specific advice please contact the persons stated above.

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