

Insight

on Employment & Benefits

Employment law update

Step back in time - the new ACAS Code of Practice on Disciplinary and Grievance Procedures

From 6 April 2009, the statutory dispute resolution procedures, introduced in October 2004, will be abolished. In their place will be a non-mandatory framework contained in the ACAS Code of Practice on Disciplinary and Grievance Procedures ("ACAS Code"). Effectively the new ACAS Code is a step back to the position prior to the introduction of the statutory dispute resolution procedures. Employers will need to be aware of, and should follow, the ACAS Code where it applies in grievance and in disciplinary situations. However, a failure to follow the ACAS Code will not of itself lead to a finding by the employment tribunal that a dismissal was automatically unfair. Nevertheless it may lead to an uplift in any award of compensation by up to 25%.

What went wrong with the statutory dispute resolution procedures?

Criticism of the statutory dispute resolution procedures, of which there were many, included that they carried a very heavy administrative burden and led to an increase in the number of disputes rather than a reduction, by leading to the escalation of employer/employee disputes at an earlier stage. The fact that failure to follow the statutory dispute resolution procedures of itself gave rise to an automatic unfair dismissal meant that process more than substance was at risk of becoming the main issue for employers and employees alike in dispute situations.

Within two years of their introduction, it became clear that the statutory dispute resolution procedures were not achieving their aims and, on 12 December 2006, the Secretary of State directed the Department of Trade and Industry (as it then was) to review the options for simplifying and improving employment dispute resolution.



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Step back in time - the new ACAS Code of Practice on Disciplinary and Grievance Procedures

The Flexible Working Request: now available for parents of older children.

Hot topics - in Brief

The headline recommendation of the review was the complete repeal of the statutory dispute resolution procedures.

The new ACAS Code

From 6 April, the statutory dispute resolution procedures (and associated provisions within the Employment Rights Act 1996) will be repealed. The new ACAS Code applies in its place to disciplinary matters, including misconduct and poor performance, and to employee grievances.

Key aspects from the ACAS Code to note are:

- The ACAS Code expressly states that it does not apply to redundancies (unlike its predecessor), termination of fixed term contracts or grievances raised on behalf of two or more employees by a trade union or workplace representative (i.e. collective grievances).
- Where there is a disciplinary situation, employers should inform employees of the basis of the problem, the possible range of disciplinary consequences and give them an opportunity to put their case in response before any decisions are made. This means writing to an employee in advance of any meeting, providing them with sufficient details and adequate time to prepare.
- Issues should be raised and dealt with "promptly" and meetings, decisions or confirmation of decision should not be "unreasonably" delayed. Although further guidance is not given as to what will be considered prompt or an unreasonable delay, it will depend on the facts on each case. In reality employers will need to balance this requirement against the need to properly investigate matters and to consider the issues properly before any decision is made.

- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting by either a fellow worker or a trade union representative (note this is also a statutory right where a formal warning is being issued or some other disciplinary action is being taken).
- Employers should allow an employee to appeal against any formal decision. Where possible, the appeal should be conducted by a person who has not been previously involved.

The consequences for failing to follow the ACAS Code differ to those under the previous regime:

- The submission of a grievance under the previous regime gave rise to an automatic 3 month extension of time for the employee to bring an employment tribunal claim. There is no automatic extension of time under the new regime.
- An employee under the new regime who has not submitted a grievance is not barred from bringing a claim.
- Compensation under the old regime could be adjusted by 10-50% (although less than 10% was permissible in exceptional circumstances) where the grievance procedure was not complied with. The adjustment under the new regime is 0-25% upwards or downwards and can be applied where there was an "unreasonable failure" to follow the procedure set out in the ACAS Code.

Practical issues

Employers should be reviewing their disciplinary and grievance procedures in light of the repeal of the statutory dispute resolution procedures and the introduction of the new ACAS Code.

ACAS has produced a general guidance booklet on disciplinary and grievance situations. The booklet contains sample disciplinary and grievance procedures.

These may be a useful starting point for employers to review their current procedures or to introduce a new procedure.

In relation to grievances, the ACAS Code states that an employer should have a written grievance procedure that is specific and clear. The ACAS Code also states that employees (and where appropriate, their "representatives," – i.e. union representatives) should be involved in the development of the grievance rules and procedures.

Where changes are made to procedures, employees and managers should be made aware of the changes. It is important both in relation to any changes and generally that managers and supervisors are trained on how to handle disciplinary matters and employee grievances including when to commence a formal procedure.

The Flexible Working Request: now available for parents of older children

From 6 April 2009 the right to make a flexible working request will be extended to employees who are parents of children aged 16 years and under. This will mean that a larger proportion of the UK workforce will be able to ask their employer to accommodate a flexible work pattern.

It is unclear what effect this change, combined with current market conditions, will have on the volume of flexible working requests and whether employers will be more or less able to accommodate such requests. Employers, as always, need to ensure they are handling requests in accordance with the statutory process and giving proper consideration to any application made.

Improper refusal may give rise not only to a failure to comply with the statutory process for considering any request but also give rise to a risk of an employee arguing they have been constructively dismissed or, where they argue that they have been treated less favourably because of their flexible working request, a discrimination claim.

The right to request flexible working consists of:

- a right for eligible employees to request to work flexibly;
- a statutory request procedure for assessing the request;
- an obligation on the employer to properly consider the request; and
- a list of prescribed grounds on which the employer may refuse.

Flexible working is a wide concept and includes various ways to make time worked flexible (eg part-time work, staggered hours, flexi-time, sabbaticals, job share etc) and/or make the location flexible (eg working from home). It does not always mean a reduction in hours worked.

An employee who has worked for their employer for 26 weeks continuously has the statutory right to make a flexible working request where they have:

1. a child under 16 (as of 6 April 2009); or
2. a disabled child under 18 who receives Disability Living Allowance, provided they are responsible for the child and are applying to care for the child.

Process

The flexible working request process can be summarised as follows:

- an employee must make a written application to the employer, setting out:

- why they are eligible to make a flexible working request;
- how they want their work pattern changed; and
- what they believe the effect will be on the employer's business;
- within 28 days of receiving the request, the employer must arrange to meet with the employee in order to discuss the application;
- within 14 days after the date of the meeting, an employer must write to the employee to either:
 - agree to the request (setting out on what date the change will take effect); or
 - reject the application, providing an explanation as to why (note there are specific statutory grounds) and noting the process for appeal; and
- the employee has 14 days to appeal the decision.

Grounds for rejecting an application

A flexible working request can be refused on the basis of one or more of the prescribed reasons:

- the burden of additional costs;
- detrimental effect on ability to meet customer demand;
- inability to re-organise work among existing staff;
- inability to recruit additional staff;
- detrimental impact on quality;
- detrimental impact on performance;
- insufficiency of work during the periods the employee proposes to work; and
- planned structural changes.

An employer is also required to provide a "sufficient explanation" as to why the chosen ground or grounds apply.

Penalties

Where an employee makes a claim to the employment tribunal and it is found that the employer failed to comply with the legislative procedure, the tribunal may order the employer to reconsider the employee's application in accordance with the procedure and/or to pay the employee a compensatory award. The maximum level of compensation is 8 weeks' pay subject to the statutory cap on a week's pay (currently £350). Where the employee was also prevented from being accompanied to meetings, the employer may be liable for an additional award of 2 weeks' pay (again, capped).

Where the employer has failed to consider the employee's request properly or has treated the employee less favourably on a discriminatory ground (i.e their sex), the employee may also have grounds for arguing they have been constructively dismissed or discriminated against. An award of compensation for discrimination is not subject to the statutory cap.

Things for an employer to remember

Note:

- where an application is incomplete the employer can request further information and where the employee unreasonably refuses to provide the information needed, the employer can treat the application as withdrawn;
- the employee is entitled to be accompanied by a worker, employed by the same employer, at the meeting;
- the employer can propose alternative arrangements to the employee; and
- an employee can make only one application every 12 months in accordance with the statutory process.

Hot topics - in brief

1. Employment Act 2008

The Employment Act 2008 was introduced to Parliament on 6 December 2007 and received Royal Assent on 13 November 2008 but did not specify commencement dates for all of its provisions.

The Department for Business, Enterprise and Regulatory Reform has issued an Order that will bring the following provisions of the Employment Act into force on 6 April 2009:

- changes to enforcement of national minimum wage in relation to a new penalty on employers for underpaying workers and information sharing between enforcement officers; and
- changes to allow a union to expel or exclude an individual from trade union membership on the grounds of political party membership.

2. New rates and limits

The new limits and rates in relation to tribunal awards, statutory redundancy payments and recoverable employee entitlements on employer insolvency came into effect on 1 February 2009. Notably, the new limit on a week's pay (gross) for certain purposes was revised up from £330 to £350 and the maximum for an unfair dismissal compensatory award is now £66,200 (where the cap applies).

Normal weekly earnings in relation to statutory maternity pay, statutory paternity pay and statutory sickness pay will also be increased on 6 April 2009 from £117.18 a week (or 90% of normal weekly earnings if lower) to £123.06 a week (or 90% of normal weekly earnings if lower).

3. Working Time (Amendment) Regulations 2007

The second phase to the increase in the minimum statutory holiday entitlement, introduced in the *Working Time (Amendment) Regulations 2007*, comes into effect on 1 April 2009.

From this date the minimum annual entitlement for full time employees will be increased from 4 weeks to 5.6 week (i.e 28 days where the employee works a 5 day week). Note this minimum is inclusive of bank holidays.

4. ECJ ruling on accrual of annual leave while sick

The European Court of Justice ruling in the case of *Stringer and other v Her Majesty's Revenue and Customs C52-/06* indicates that a worker will continue to accrue annual leave while absent from work on sick leave and must be allowed to take that leave at a later date or compensated for the untaken annual leave accrued while absent sick on cessation of employment.

Given this judgement, the House of Lords will now need to consider the position under the *Working Time Regulations 1998*, in particular whether an employee can request to take annual paid leave during a sick absence or whether they could be required to take annual leave by an employer during this time (so as to prevent it from accruing). The House of Lords will also need to consider whether the *Working Time Regulations 1998* need to be amended in light of the European Court of Justice ruling to allow unused annual leave to be carried over into another leave year.

5. Immigration

The points-based system introduced in November 2008 by the Home Office in relation to work permits for types of skilled labour (Tier 1 (Highly Skilled - General) and Tier 2 (Skilled)) is being further reviewed and tightened.

From 1 April 2009 the rules in relation to Tier 1 Highly Skilled - General permits will be amended so that applicants will be required to hold a master's degree (previously only a bachelors degree was required) and to have earned at least £20,000 over a 12 month period (previously the requirement was to have earned £16,000 over a 12 month period).

In relation to Tier 2, on 1 April 2009 employers must advertise any vacancy at Jobcentre plus to satisfy the resident labour market test. In addition the Migrant Advisory Committee will greater scrutinise shortage occupations, considering how these shortages might be addressed in future by up-skilling resident workers to make United Kingdom less dependent on migration for the future.

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