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EMPLOYEE DISPUTES AND DISMISSALS: THE NEW REGIME

By Bernadette Daley and Laura Pharez

The statutory dispute resolution procedures, which have been heavily criticised, change on 6 April 2009. The pre-6 April 2009 regime, which consisted of a mandatory "three step" process for disciplinary and grievance procedures, will be repealed and a new framework will be put in its place.

The revised Acas Code of Practice sets out the principles that apply after 6 April. This Code is supported by a revised Acas guide which provides more information on handling disciplinary and grievance issues in the workplace. Elements of the Code are mandatory. Best practice recommendations are contained in the foreword to the Code. These are not mandatory although employers should still have regard to these recommendations.

Key changes

The new regime is intended to provide basic practical guidance for employers, employees and their representatives. The main changes are as follows:

- The Code has removed the concept of "automatic unfair dismissal" for a failure to follow the statutory procedures. This is a welcome development for employers. However, there remain increased penalties for an unreasonable failure to follow the mandatory provisions of the Code. Employment tribunals will be able to adjust any awards of compensation (up or down) by up to 25%, so the new regime still has some teeth, even if they are not as sharp as its predecessor's.
- Significantly, the Code says employees should be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses to a disciplinary meeting. This is one of the more contentious aspects of the Code. Employers are understandably reluctant to allow employees to dictate who should give evidence or to allow them to cross examine those witnesses. An employer can argue that a witness is not "relevant" and therefore exclude them from the proceedings. They can also still seek to protect the anonymity of witnesses where appropriate. That said, this is clearly an important development and one that employers will need to consider carefully.
- For disciplinary matters, the Code advocates that the investigatory officer should be someone different to the decision maker where appropriate. Smaller employers may be able to justify having the same person but most will be expected to separate out the 'judge and jury'.
- The Code provides that employees should be involved in the development of rules and procedures. Acas is encouraging a level of involvement which reflects the

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size and resources of the employer but it will be left to the tribunals to spell out what this means in practice. This could be read to mean that employees should be involved in drafting policies. This may not be news for those companies which already have active staff forums or unions but, for those who do not, this represents a shift in workplace culture. The foreword to the Code also suggests dealing with issues involving bullying, harassment or whistleblowing under separate policies.

- The Code emphasises the importance of training, stating that it is important to help employees and managers understand what the rules and procedures are, where they can be found and when they are to be used. It remains to be seen how many employers really will initiate training for employees on the new procedures.
- The foreword to the Code encourages employers and employees to seek to resolve disciplinary and grievance issues in the workplace. Readers may recall that the statutory procedures were intended to do this but had the opposite effect in practice. However, the Code states that, if this is not possible, companies should consider using an independent third party mediator. This could be an internal mediator, or if appropriate, an external mediator. The Government has for some time tried to encourage greater use of mediation in the workplace so this is not a new development. Historically, mediation has been less common and generally only used once a claim has been issued. Whilst a 'sea change' is unlikely, mediation could be a good option for more complex disputes.
- As far as timing is concerned, the Code and the guidance contain different concepts in different situations, including the requirement to act "promptly", "without unreasonable delay", "speedily" together with some specific timeframes e.g. holding a grievance meeting 5 working days from when it is lodged. There will be some confusion here until we have clearer guidance from the tribunals. In the meantime, the general principle should be that an employer should always act as quickly as it can in the circumstances.
- The Code provides clearer guidance on an employee's right to be accompanied. It states that it would not normally be reasonable for them to insist on being accompanied by someone whose presence would prejudice the hearing or someone from a remote geographical location.
- Under the Code, employees have the right to appeal all disciplinary decisions. No stage of the disciplinary procedure prior to dismissal is excluded. This is an extension of the previous regime.
- The Code does not release a party from continuing to follow the Code where the other party has breached it. Employers therefore need to continue with the process as best they can, even if they believe the employee is not complying with their obligations under the Code.
- Employers may be pleased to note that the Code does not apply to redundancy dismissals or the non-renewal of fixed term contracts at the end of the fixed term. As employees may still be able to claim unfair dismissal, employers do still need to follow a fair process so, in practice, this is not as significant a point as it may seem.
- Employers often struggled with the concept of overlapping grievance and disciplinary issues under the statutory procedures. The Code seeks to simplify this. If an employee raises a grievance during a disciplinary process, that process may be temporarily suspended in order to deal with the grievance. If the two are related, and employer can deal with both issues at the same time.
- Employees are no longer required to raise a grievance before lodging a claim in the employment tribunals. As an employee's conduct in failing to raise a grievance

(thereby limiting the employer's ability to resolve it) could impact the tribunal's decision and the compensation that the employee receives, employees may continue to lodge grievances. If not, employers will have less advance notice of claims and less ability to resolve them prior to tribunal. Employers are no longer obliged to hear grievances from ex-employees.

- The Code does not apply to "collective grievances", i.e. grievances raised on behalf of two or more employees. The Code recommends that these be handled in accordance with an organisation's collective grievance process. Employers are therefore advised to ensure that they have such a policy in their handbook.

Transitional provisions

As we are currently in a cross-over period, there are transitional provisions which deal with matters that started before 6 April and continue beyond that date. These whether the old statutory procedures or the new regime applies. They are fairly complex but, in essence:

If, on 6 April, an employer has started a disciplinary or dismissal action (for example by sending a step 1 letter to the employee, or by holding a step 2 meeting with the employee), the employer should continue to follow the statutory procedures throughout the disciplinary or dismissal process. The new regime applies to disciplinary or dismissal action which commences on or after 6 April.

For grievance procedures, if the action which the employee is complaining about takes place on or before 5 April and continues beyond that date, the employer should follow the statutory grievance procedure. However, this is subject to some cut off provisions. For the statutory procedures to apply, the employee must submit a written grievance or employment tribunal claim on or before 4 July 2009 (or 4 October for equal pay and statutory redundancy pay claims). For action occurring on or after 6 April, the new regime will apply.

Advice to employers

- Employers should review their disciplinary and grievance procedures to ensure they comply with the new regime. They should also identify where a more relaxed and informal approach to dealing with problems at work may be appropriate.
- Employers have to give employees a reasonable opportunity to call witnesses. Many employers may be reluctant to point this out to employees. At present we recommend including this in the staff handbook or other policy document but employers should be careful how they draft this, and how much freedom they give employees here.
- Employers should consider whether to include a mediation stage in their internal processes and whether it would be appropriate to draft a clause in employees' contracts requiring employees to participate in mediation (where the employer considers mediation is appropriate).
- It is also important to train managers in how to deal with problems at an early stage and on the new regime. Employers may want to open this out to employees generally or involve pre-existing staff forums or representative bodies in that process.
- The new Code does not apply to redundancies but employers should exercise caution here as employees could still claim unfair dismissal. In practice this will probably mean that employers will still follow a similar procedure.