

REPEAL OF THE STATUTORY DISCIPLINARY AND GRIEVANCE PROCEDURE: ACTION!

We recently wrote about the repeal of the Statutory Disciplinary and Grievance Procedure. The repeal will be effective from 6 April 2009, although the old regime will still apply to ongoing disciplinary and grievance processes. The aim of the repealed regulations was to introduce a one size fits all procedure for dealing with dismissals and grievances. In fact, the result was another layer of legal complexity to trip up employers and employees alike, hence their repeal. The now defunct statutory termination procedure has to a large extent been replaced by the ACAS Code of Practice on Disciplinary and Grievance Procedures (“the Code”) and a non statutory Guide to Discipline and Grievance (“the Guide”). As we will see, the new regime does not necessarily make life any more simple. Following the Code for disciplinary dismissals and grievances will have an impact on the assessment of the fairness of the dismissal and on the calculation of damages. So what are the practical changes and how do they affect you?

When does the Code apply?

Employment tribunals are legally required to take the Code into account when considering relevant cases. The Code applies to all disciplinary or performance issues and to grievances regarding most contractual or statutory rights.

The Code does not apply to redundancy

Unlike the statutory termination procedure, the Code does not apply to redundancy. In practice, an employer will still need to follow a consultation process when making redundancies. However, the process will not end with a formal dismissal hearing and there will not be any right to appeal the redundancy decision. Employees do not have a right to be accompanied to any meeting. The duty to consult with employee representatives on redundancies of more than 20 employees remains.

Nor does it apply to the non-renewal of a fixed term contract, or does it?

The Code specifically excludes its application to the non-renewal of a fixed term contract. But things may not be as simple. According to the Employment Rights Act 1996, the non-renewal of a fixed term contract amounts to dismissal and must be

justified in the same way as the termination of an open ended contract. Whilst the Code excludes the non-renewal of a fixed term contract from its scope, it is likely that the termination procedure will apply if the non-renewal of a fixed term contract is due to underperformance or misconduct when an employee has more than one year's continuous service under one or several fixed term contracts.

The repeal does away with automatically unfair dismissal for procedural reasons

Under the old regime, the failure to follow the statutory termination procedure rendered the dismissal automatically unfair. This has been repealed. However, the repeal is unlikely to put a stop to procedural arguments in front of the employment tribunals.

Ex-employees will attempt to show that the Code was not adhered to support their unfair dismissal claim. Failure to adhere to the Code may result in an increase of up to 25% of the damages, if the failure was unreasonable.

The debate that existed under the old regime as to whether a dismissal was automatically unfair has been replaced with questions of general fairness and assessment of damages. Halving the maximum penalty for failure to adhere to the Code is unlikely to reduce the time taken by employment tribunals in dealing with procedural issues. Unfortunately, cases are likely to take even longer, as there will be two issues: was the Code adhered to and if not, was the failure to adhere to the Code unreasonable.

No need to lodge a grievance to bring a claim

The new regime has done away with one advantage for employers: an employee will no longer be barred from bringing a claim, particularly of constructive dismissal, if he or she has not lodged a grievance first. In our practical experience, the obligation to lodge a grievance prior to lodging an employment tribunal claim was a good thing for employers. Some employees could simply not be bothered to attend a grievance meeting prior to lodging their claim and as a consequence, abandoned their threat of action. The grievance process also enabled employers and employees to come to an agreement before they became entrenched in legal proceedings.

The repeal is not going to simplify matters for two reasons. The first is that the Code does not deal with the application of the grievance procedure to ex-employees. The previous regime had a specific procedure to deal with ex-employees in the form of a modified grievance procedure that enabled the parties to deal with grievances in writing only. This has been repealed.

The Code and the Guide are both silent on the application of the grievance procedure to grievances from ex-employees. It can be argued that the fact that this part of the Code has been repealed means that it is not applicable. Unfortunately, it can also be argued the Code is applicable to ex-employees because the statutory definition of “employee” includes an ex-employee. We will have to wait and see how the employment tribunals deal with this issue.

The other reason why there will still be discussions as to whether a grievance was necessary is that the employment tribunals will be able to censure the party responsible for the failure to adhere to the Code by an adjustment of up to 25% to the damages.

Content of the Code

As explained above, employment tribunals are legally required to take the Code into account when considering relevant cases. A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings. However, employment tribunals will take the Code into account when considering relevant cases.

Employment tribunals are not required to have regard to the Guide. However they may do so when assessing the fairness or unfairness of a dismissal.

Having dealt with when it does and doesn't apply, what is new about the Code? Most of the content of the Code reflects the case law as it has been developed since the 1970's. However, there are some new concepts: the duty to consult on disciplinary rules and the right to call witnesses are the two new issues keeping employment lawyers awake at night.

Duty to consult on the disciplinary rules

The Code states: “Employees and, where appropriate, their representatives should be involved in the development of rules and procedures.” The Guide simply explains: “It is good practice to develop rules in consultation with employees (and their representatives where appropriate) and those who will have responsibility for applying them.”

There are no practical tips as to how to comply with the duty to consult. Does the duty to consult apply to both the rules (what constitutes misconduct) and the procedures (should there be two or three warnings before dismissal). Will you have to consult on both existing and new rules and procedure? Do you have to ask each new recruit whether he or she likes the rules and procedures?

Whilst consultation is a nice concept, the duty to consult seems to be only relevant in practice to employers who are used to consulting with unions or employees representatives. The duty to consult appears to be nonsensical for small employers. But will the employment tribunals share our views?

Right to call witnesses

It has long been established that as part of the investigation an employee must be presented with sufficient details of the allegations to enable him or her to present their case. Many employers prefer not to turn a disciplinary hearing into a quasi courtroom and will not bring witnesses to the disciplinary hearing and will not allow an employee to do the same. Courts have confirmed that there is no duty to allow employees to cross-examine witnesses at a hearing, provided that they are given an opportunity to challenge witnesses’ statements and that their objections to witness statements are investigated.

The Code appears to go a step further. It states: “The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.”

It does not seem to oblige the employer to produce anything other than witness statements. However, the employee can call witnesses if he or she wants to. The Code and the Guide are silent on whether an employee can call one of the employer's witnesses to challenge his or her statement, and on how to deal with a witness who has been called.

What to do next

Your contracts of employment or staff handbook containing your disciplinary rules and procedure are likely to reflect the old regime and will need to be reviewed. We are offering to adapt your current disciplinary and grievance procedures for £100 plus VAT.

For more specific information or to discuss your requirements please call either Amanda Galashan or Julie Calleux at EmployEase on 0845 123 3741, or email us at info@employease.co.uk.

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