

## Disciplinary Procedures – All change!

In October 2004 the Government introduced a standard disciplinary and dismissal procedure. If an employer failed to follow the procedure the dismissal was automatically unfair and any compensatory award could be increased by up to 50%.

In theory this was intended to improve employment relations and reduce the number of disputes ending up in the Employment Tribunal. The idea was to promote fairness and help resolve disputes without the need for litigation by having a set procedure for disciplinary hearings or where an employer was contemplating dismissal.

In practice the procedure has had the opposite effect. Many employers are now terrified of not following the set procedure and instead of having an informal discussion to suggest areas for improvement, they will embark upon the full rigmarole of a formal hearing which can be stressful for all concerned and can lead to parties becoming entrenched in their positions.

Furthermore, the Employment Tribunals have become swamped with so called “satellite litigation”. In other words the tribunals’ time was being taken up with arguments about whether the standard procedures applied in any given case and whether they had been followed or not rather than getting to the heart of the dispute itself. This might be good news for the lawyers, but less welcome for employers and employees who found their legal bills rising as a result.

Following an extensive consultation exercise the government have decided to revoke the statutory procedures for dismissals that take place after 6 April 2009. However, employers would be mistaken in thinking that this will give them *carte blanche* when dealing with employees.

First of all, if a dismissal has not taken place by 6 April but the employer has held a disciplinary or dismissal meeting or has invited the employee to such a meeting before this date then the procedures will still apply.

The statutory grievance procedures will continue to apply to grievances where the date of the action about which the employee complains took place before 6 April 2009 or started before 5 April 2009, and continues after that date and the employee presents a complaint to an employment tribunal or submits a valid grievance either before 6 July 2009 or 6 October 2009, depending on the nature of the claim.

Secondly, the new regime which will replace the current system still requires employers to follow a fair and reasonable procedure when dismissing or disciplining employees. In considering this question the Employment Tribunal will expect the employer to have followed the new ACAS Code of Conduct.

This Code of Conduct is arguably more flexible than the old statutory procedure but to a large extent sets out the same fundamental requirements of a fair procedure.

These are that:-

- Employers and employees should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers and employees should act **consistently**.
- Employers should carry out any necessary **investigations**, to establish the facts of the case.
- Employers should **inform** employees of the basis of the problem and give them an opportunity to **put their case** in response before any decisions are made.
- Employers should allow employees to be **accompanied** at any formal disciplinary or grievance meeting.
- Employers should allow an employee to **appeal** against any formal decision made.

A failure to follow these steps is still likely to result in an unfair dismissal, even if the underlying reason for the dismissal is a potentially fair one, such as misconduct, capability or redundancy. Indeed Tribunals will have the power to increase compensatory awards by up to 25% if an employer has unreasonably failed to follow the Code of Conduct.

## Conclusion

Even though the procedural requirements may have been loosened a little employers must still be aware of the requirements of a fair procedure. No one wants to end up in an Employment Tribunal and investing in professional advice as soon as the possibility of disciplinary action or dismissal arises can save time, money and heartache in the long run.

It will be many months before cases decided under the new regime start to be reported and employers should err on the side of caution for the time being.

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