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# Employment Write News

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01/02/03/04 Employment Law Update – New ACAS Code of Practice



# Employment Law Update

At last, we appear to have a change in employment law that should make life easier, rather than more complex, for employers. In this edition of Employment Write, we are focusing on the major changes to the way in which employers and employees will need to deal with each other from April 2009 onwards.

On 6 April 2009 the new Employment Act 2008 comes into force. The Act follows the Government's wholesale review of the law on dispute resolution within the employment field (the so-called Gibbons' Review). This review was commissioned in the face of mass criticism of the complexity of employment law issues, particularly those created by the introduction of the statutory disciplinary and grievance procedures in 2004.

These procedures were introduced with the intention of encouraging the resolution of employment disputes in the workplace and minimising employees having to resort to employment tribunal claims. However, it is widely agreed that they achieved completely the opposite result.

## The Current Statutory Procedures

The controversial statutory disciplinary and grievance procedures which currently apply are to be repealed as part of the incoming Employment Act. As a reminder, the main features of these procedures are:

### Statutory Disciplinary and Dismissal Procedure (SDDP)

The SDDPs provide a minimum three step procedure which must be used in the vast majority of cases when an employer is seeking to dismiss an employee.

In short, an employee has to be invited to a meeting in a letter which outlines the conduct or circumstances which led the employer to propose dismissing them. They then have a right to attend a meeting at which the allegations are discussed. Thirdly, following a decision being reached, they are entitled to have the decision reviewed by way of appeal.

The consequence of a failure to comply with the SDDP (however minor that failure), is that the dismissal is automatically unfair. This leaves an employer with an undefendable claim and an obligation to pay financial compensation together with an uplift in compensation of up to 50%.

### Statutory Grievance Procedure (SGP)

The SGPs provide a similar three step process. An employee must outline their grievance in writing and then be invited to a meeting by their employer to discuss that grievance. Again, the employee has the right of appeal. There is also a mechanism whereby former employees who have grievances can agree to have them dealt with in writing (without the need for a meeting) as long as both parties agree to this course of action.

There are extremely complicated rules regarding admissibility of claims and time limits for bringing claims governed by the SGPs. Most deadlines can be extended from three to six months. These rules were intended to prevent employees from bringing tribunal claims before they had first raised the issues under their employer's grievance procedure.

Although the SGPs' intentions were laudable in theory, they have resulted in an enormous amount of employment tribunal litigation regarding the interpretation of these rules and have left both employers and employees confused as to how to resolve work place issues. Whilst the aim was to resolve complaints before they got too confrontational, in reality, the rules simply resulted in confusion regarding what amounted to a grievance, employers being forced to treat all complaints submitted in writing as a grievance and parties becoming polarised in their views at a very early stage.

### **Uplift in Compensation**

Breaches of the SDDPs and SGPs are punished with a potential uplift or reduction in compensation of between 10% and 50% depending on which party has been at fault and depending upon the severity of any breach.

Although adjustments in compensation were intended to apply equally to all parties, recent statistics show that, in 2007, one third of tribunal cases resulted in an uplift (and in half of those cases, the uplift was 40% or more). Conversely, claimants' compensation was reduced for a failure to comply with a relevant procedure in only six cases.

### **How the Employment Act changes the law on dispute resolution**

The Act's express intention is to make it simpler to resolve workplace disputes and is the Government's second attempt, after the perceived failure of the statutory procedures. The Act abolishes the statutory procedures entirely and replaces them with a new ACAS Code of Practice.

We go on to consider the terms of the Code below but, in short, the Act changes the law of dispute resolution in the following key ways:

- A failure to follow the Code relating to a disciplinary matter will not result in a claim for unfair dismissal being deemed to be automatically unfair. This means that a tribunal will not be required to find that a dismissal is automatically unfair just because

there has been a procedural error in the process that has been followed.

- The possible adjustment to compensation of up to 50% for a failure to comply with a SDDP or a SGP has been replaced with an adjustment of up to 25% in compensation for "an unreasonable failure to comply with the Code." The Act provides that where a tribunal believes it is 'just and equitable', it can make such an adjustment to any compensation awarded. However, the adjustment of compensation is no longer obligatory.
- The Act sees a return to the position before the SDDPs where a procedural failure can result in a dismissal being found to be unfair, but if an employer can show that following a fair procedure would have still resulted in the same outcome, the claimant's compensation will be reduced accordingly (a so called Polkey reduction). For example, if an employer dismisses an employee for stealing but does not deal correctly with a procedural aspect of that dismissal, then the dismissal may be found to be unfair. However, if the employer can show that by following that procedural step they could have legitimately dismissed the claimant, any compensation awarded can be reduced by up to 100% to reflect that.
- In relation to grievances, the rules requiring an employee to bring a grievance and wait for 28 days before submitting their claim have been removed. Therefore, an employee who believes that they have been the victim of discrimination, for example, can submit a claim to the employment tribunal without having first sent a written complaint to their employer. On first sight, this may mean that it is easier for employees to bring claims and may encourage further claims. However, tribunals will have regard to whether the claimant has acted 'reasonably' within the terms of the Code and may reduce any compensation accordingly.
- The often complicated rules regarding extension of time for bringing claims in cases involving grievances have also been abolished. Therefore, the three month time

limit for submitting the majority of claims to an employment tribunal will be reinstated.

## So, what does the Code say?

The new ACAS Code of Practice is a 10 page document which is an attempt to distil the principles of natural justice relevant to dispute resolution into an easily understandable and workable form.

The Code sets out a number of the principles deemed necessary to ensure that any disciplinary or grievance process is fair. A failure to comply with the Code does not render a process automatically unfair unless the failure can be justified. However, employment tribunals have a duty to consider the terms of the Code. Therefore, a failure to comply is likely, in most circumstances, to leave a party open to criticism.

The Code spells out guidance that differs in a number of respects from the current law:

- In misconduct cases, different people should carry out the investigation and the disciplinary hearing.
- When the employee is informed of the allegations against them, they should also be provided with copies of written evidence such as witness statements.
- The procedure for holding a meeting with an employee is more detailed. For example, there should be an opportunity for witnesses to be called.
- There is guidance on what a “reasonable request” to be accompanied means and on what a companion may (and may not) do during the hearing.
- The decision to dismiss can only be taken by a manager who has authority to do so.
- Employers are encouraged to keep written records at every stage of any process.
- Employers should make a decision on the evidence available where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause.
- The previous obligation to postpone meetings at least twice for unforeseen circumstances no longer applies.



It is obviously crucial for employers to be familiar with the terms of the Code before dealing with any disciplinary or grievance issue.

As well as the Code, ACAS have also published a larger guidance document which provides more detailed guidance on dispute resolution issues, together with how employers and employees should handle issues in practice. Although the Code will be considered by tribunals, the Guide will not and will therefore not influence a tribunal's decision on the fairness of a decision, nor on the level of compensation that is awarded. However, it is a useful document and also contains draft policies and procedures.

### When the Code applies

The current SDDP applies to the vast majority of dismissal cases, including those which are not on the face of it compatible with the statutory rules. The Code expressly states that it does not apply to redundancy dismissals or the expiry of fixed term contracts, which means that, in those circumstances, a fair procedure still needs to be followed but the terms of the Code do not need to be taken into account.

However, the Code must be considered when terminating employment for conduct or due to a reason relating to the employee's ability to do their job.

### A new requirement to consult with employees

The Code states that employees and, if appropriate, their representatives should be involved in the development of disciplinary and grievance procedures. There is little guidance on what type of involvement is required and only time will tell if employers will actually be criticised

by tribunals for not involving employees in the process.

One way that employers could demonstrate involvement is by informing employees at the time when they are looking to introduce any revised policies and inviting any comments from their workforce on a draft set of policies prior to the introduction of the final version.

## Transitional Provisions

The Code comes into force on 6 April 2009. However, there are transitional provisions outlining which rules will be applicable to cases that overlap the introduction date.

**Disciplinary** – The current SDDP will continue to apply where an employer has either sent a step 1 letter to the employee (inviting them to a disciplinary meeting), held a step 2 meeting or taken disciplinary action or dismissal before 6 April 2009. Otherwise, the new regime under the Code will apply.

**Grievance** – The SGP will continue to apply where:

- The event that is the subject of the grievance took place before 6 April 2009 (where the employee is complaining about one specific incident).
- The conduct complained about begins before 6 April 2009 and continues beyond that date and the employee presents a complaint to an employment tribunal or submits a valid grievance:
  - on or before 4 October 2009 for claims with a six-month time limit (equal pay and redundancy claims).
  - on or before 4 July 2009 for claims with a three-month time limit.

## Steps for Employers – Be Prepared

All employers should be aware of the upcoming changes and ensure that their disciplinary and grievance policies and procedures reflect the provisions of the Code. Employers dealing with disciplinary and grievance issues should also have a copy of the Code to hand to guide them through the process as well as referring to the Guide when further information is required.

Employers who are proposing amendments to their disciplinary and grievance procedures should consider consulting with employees or their representatives, as discussed above.

If employers intend to depart from the terms of the Code, they should consider their reasons for doing so as it may be possible to justify an alternative process in certain circumstances.

## Other Changes under The Act

The Act also introduces a number of other changes which are worth mentioning in brief:

- It introduces a change to the way in which arrears of wages are calculated when employers have failed to pay the minimum wage and strengthens the sanctions that can be taken to ensure enforcement;
- It abolishes the fixed ACAS conciliation periods for conciliating on employment tribunal claims (although ACAS have been ignoring the fixed conciliation period for a number of months);
- It introduces additional regulation relating to employment agencies; and
- It allows trade unions to expel members who are or were members of political parties which are inconsistent with the views of the union (subject to following a required procedure).

## The Employment Department - Key Contacts

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Charlotte trained with Neil Myerson Solicitors, having studied law previously at Durham University. We are delighted that she has joined our busy employment department following her qualification as a solicitor in September 2008.

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