Bulletin

Essential Employment Law News

Employers beware! Whether you employ just one or hundreds of employees, ignorance will be no excuse if you fall foul of three important areas of new employment legislation. They take effect in October 2004 and relate to Dispute Resolution, Disability Discrimination and the National Minimum Wage.

Dispute Resolution

Did you know?

- Currently 64% of applications to employment tribunals come from employees who have not held a meeting to resolve the problem with their employer before an application was made.
- Half the employers facing a tribunal claim did not have a procedure to deal with the problem.
- Only 60% of small businesses (those with under 100 employees) have written grievance or disciplinary procedures.
- There were almost 100,000 tribunal cases last year which dealt with close to 150,000 individual claims.
- Tribunals currently cost industry more than £220m a year. These costs include financial penalties, employee turnover, absence due to stress and related illness, recruitment costs, legal expenses and management time.

In light of these statistics the government has recognised the need to improve the resolution of workplace disputes actually in the workplace itself. The intention is to reduce the number of claims resulting in a tribunal.

From October 2004 employers must have a disciplinary procedure in place which satisfies the requirements of the Employment Act 2002 (more specifically, the Dispute Resolution Regulations 2004 stemming from this). Therefore, the following standard statutory disciplinary procedures must be followed by employers before they dismiss or impose a significant sanction on an employee such as demotion, loss of seniority or loss of pay:

1. employers must set out in writing the reasons why dismissal or disciplinary actions against the employee are being considered. A copy of this must be sent to the employee who must be invited to attend a meeting to discuss the matter
2. a meeting must take place
3. an appeal procedure must be established.

The legislation also includes a standard statutory grievance procedure which applies when any employee has a concern, problem or complaint that cannot be dealt with informally. The steps involved are:

1. employees must set out their grievance in writing and send this to their employer
2. the employer must invite the employee to a meeting to discuss the grievance
3. an appeal procedure must be established.

The legislation does allow for modified procedures, although these can only be used in very limited circumstances.

What if you don't follow the statutory procedures?

The government pulled back from insisting that these procedures should form part of an employee's contract of employment. However, failure to follow the new procedures could result in any compensation award made by an employment tribunal being increased or reduced, depending on which party is at fault.

This could be anything from a 15% to 50% increase or reduction in the award. This could make a significant difference bearing in mind that the maximum compensatory award for unfair dismissal is £55,000.

The new legislation has been incorporated into the Advisory, Conciliation and Arbitration Service (Acas) Code of Practice on disciplinary and grievance procedures. This is currently in draft form, in advance of the new legislation coming into effect in October. The Code provides practical guidance not only on statutory requirements but also on:

- what constitutes reasonable behaviour when dealing with disciplinary and grievance procedures
- drawing up and using disciplinary and grievance procedures.

It is worth noting that whilst failure to follow any part of the Code does not, in itself, make a person or organisation liable to proceedings, employment tribunals will take the Code into account when considering relevant cases.

It therefore makes sense for employers to follow the Code when dealing with grievance and disciplinary procedures.

Code of Practice on disciplinary and grievance procedures

Other key changes to the Code include the provision of core principles of reasonable behaviour when dealing with disciplinary situations as well as guidance on developing disciplinary procedures. Other amendments include:

- guidance distinguishing between informal and formal action. In terms of formal action the Code recommends that an employee is given at least one opportunity (first written warning) to improve before they are issued with a final written warning
- a distinction has been drawn between action for unsatisfactory performance and misconduct. A first formal warning is normally appropriate in both cases, however in the case of the former, there is more emphasis on the improvement in performance required, timescales, review dates and support
- clarification has been provided around the circumstances in which employers may move directly to a final written warning, for example where the misconduct or unsatisfactory performance is sufficiently serious because it is having a harmful effect on the organisation, even taking into account general past record and length of service.

What action do you need to take?

If you already have disciplinary and grievance procedures in line with the existing Acas Code of Practice you are unlikely to fall foul of the statutory requirements. If you would like to find out more about the amendments to the existing Code visit www.acas.org.uk.

However, if you currently have no disciplinary and grievance procedures in place then urgent action is required in order for you to meet your statutory responsibilities in this area. Please contact us if you require further guidance.

Dispute Resolution FAQs

Q. When must statutory disciplinary procedures be used?

- In situations short of dismissal based on either conduct or capability. For example when an employee is to be demoted, suspended without pay or transferred to another business area. They do not however apply in situations where an individual is given an oral or written warning or is suspended on full pay.
- In all dismissals (except constructive dismissals). This includes the obvious reasons for dismissal ie based on conduct, capability or redundancy. However this also includes the not so obvious reasons such as retirement, expiry of a fixed term contract or unsatisfactory probationary period.

Q. Are there occasions where the statutory disciplinary procedures do not apply at all?

- In situations where it is not practicable to carry out or complete the procedure. For example if the business suddenly and unexpectedly ceases to function or an employee cannot continue without contravening a statutory requirement (eg a salesman loses his driving licence).
- In redundancy situations when collective consultation has already taken place.
- In circumstances where all employees of the same description or category are dismissed and offered re-engagement either before or upon termination of their contract.

Q. What happens if an employee raises a grievance during the course of the disciplinary procedure?

Here an employer should consider suspending the disciplinary procedure for a short period while the grievance is dealt with. Depending on the nature of the grievance, for example where it is against the manager undertaking the disciplinary procedure, it may be appropriate to bring in another manager to deal with the disciplinary process. This however may not always be practicable in a small organisation and so the same person should deal with it as impartially as possible.

Q. If an employee is unhappy about a disciplinary sanction (other than paid suspension or a warning) or dismissal, should he/she raise a grievance?

No. In such circumstances the statutory grievance procedure would not apply, as the statutory disciplinary appeal procedure is the appropriate route. However, the employee can raise a grievance if they believe the sanction or dismissal:

- amounts to unlawful discrimination, for example where two employees, from different ethnic backgrounds may receive different sanctions for the same misconduct
- the true reason for the action is not the reason given by the employer, for example an employee may be demoted on the basis of capability when the real reason is to create a role for another employee.

In these circumstances, an employee must raise a grievance before they consider making a claim to an employment tribunal.

National Minimum Wage

October 2004 also sees the annual increase in the national minimum wage (NMW). This year's increase, as shown below, is almost 8%.

	10/04	10/03
Adults	**£4.85**	**£4.50**
18 – 21	**£4.10**	**£3.80**
16 - 17	**£3.00**	**(New)**

A new hourly rate has been introduced for 16 and 17 year olds, although apprentices under the age of 18 are exempted from this new young workers rate.

In addition, from October 2004 employers will have to pay their output workers the minimum wage for every hour they work based on an hourly output rate derived from the time it takes a worker working at average speed to produce the work in question. For example, if average output is 10 items per hour, the fair piece rate for that item will be 48.5 pence. Here someone producing fewer than 10 items will receive less than the minimum wage. From April 2005 this fair piece rate will go up to 120% of the average speed, 58.2 pence in this example. This will mean that most output workers will then earn the minimum wage.

It is important that employers take the NMW requirements seriously. If the matter were to end up in the Courts the onus would be firmly on the employer to prove that they complied with their obligations to pay the minimum wage!

If you need any assistance in reviewing your current terms and conditions please contact us.

Disability Discrimination

The government is continuing its fight against disability discrimination. This is despite the Disability Discrimination Act which made the unjustified less favourable treatment of a disabled person unlawful almost ten years ago.

Did you know?

- 16.1% of disabled people are unemployed compared to the national average of 7.4%.
- Disabled people still earn 20% less than non-disabled people.
- 70% of the 1.5 million active disabled people became disabled whilst at work.

October 2004 will see new regulations that give disabled people new rights, particularly in the area of employment. These remove the exemption in applying the provisions of the Disability Discrimination Act previously granted to small businesses (15 employees or fewer) and will now apply to all employers irrespective of size.

- Any treatment amounting to 'direct discrimination' will be deemed automatically unfair and will be extended to cover those suffering from HIV, MS or cancer.
- The burden of proof will shift clearly to the employer so that a tribunal will automatically find in favour of the employee unless the employer can prove that his or her conduct was not unlawful.
- Employers must always consider reasonable adjustments to accommodate disabled employees. For example by varying a rule under which all employees have to work from 9am to 5pm in order to allow a disabled employee to work flexible hours and providing additional breaks to overcome fatigue arising from the disability.
- A disabled person suffering any form of bullying or harassment will be expressly protected by the legislation.

Remember there is no limit on the level of compensation that can be awarded in discrimination cases.

It is concerning that over 50% of employers questioned in a recent survey were unaware of their obligations in respect of reasonable adjustments needed to accommodate disabled employees. You may need to consider professional advice to review your recruitment and selection procedures, your equal opportunities and harassment policies or your access and working arrangements.