

Review

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Issue 20 Summer 2009

New Grievance Procedures

On 6 April 2009 the unpopular three-step statutory disciplinary, dismissal and grievance procedures were repealed by the Employment Act 2008 and replaced by ACAS's Code of Practice. However, the statutory procedures will continue to apply in certain circumstances until 4 July 2009 (or 4 October 2009 if, for example like equal pay claims or claims for a statutory redundancy payment, the claim has a six month time limit) so it is important to understand both procedures.



When does the Code of Practice apply?

The Code of Practice (CoP) applies to all disciplinary matters and grievances which relate to an employee's legal rights. However, the CoP does not apply to:

- Redundancy situations (which are covered by a separate CoP)
- The non-renewal of fixed term contracts
- Grievances raised by a representative of a recognised trade union (or other appropriate workplace representative) on behalf of two or more employees (these should be handled in accordance with the organisation's collective grievance process)

The CoP only applies to grievances/ disciplinary matters raised on or after 6 April 2009. Grievances/ disciplinary matters raised before 6 April will be dealt with by the old statutory procedures. This means that there will be a transition period where the old statutory procedures will continue to apply. For example if an employee raised a grievance about equal pay on 5 April (which is therefore subject to a six month time limit) then she can issue an equal pay claim in an employment tribunal under the old statutory rules until 4 October 2009. After 4 October all claims will be heard under the new CoP regime.

ACAS's Code of Practice

The Code of Practice provides that:

- Rules and procedures should be set down in writing, be specific and clear. Employees and their representatives should be involved in the development of the rules and procedures.
- Employers must act promptly, consistently and carry out investigations – informing the employee of the problem and allow them to put their side across.
- Employees must be informed in writing if there is a case to answer and also advised of their right to be accompanied.



Statutory three step procedures applies:

- If the employer has dismissed, sent an employee a 'step 1' letter or held a meeting informing an employee that it is contemplating taking disciplinary action or dismissal before 6 April 2009
- If an employee complains about a single act (as opposed to a continuing act) which occurred before 6 April or a continuing act which finished before 6 April
- If the employee complains of a continuing act which began before 6 April and has raised a grievance or submitted an ET 1 before 4 October 2009 for redundancy and equal pay claims or before 4 July 2009 for all other claims

The CoP applies where:

- The employer dismisses someone or takes action short of dismissal after 6 April 2009
- The employee raises a grievance about a single act which occurred after 6 April
- The employee raises a grievance about a continuing act which began before 6 April and does not raise a grievance or present an ET1 before 4 October 2009 for a redundancy or equal pay claims or before 4 July 2009 for all other claims

Application of procedure

Automatically applies to all dismissals, disciplinary action and grievances regardless of the size of the employer

Does not apply to employment ending because of redundancy or the non-renewal of a fixed term contract

The procedure

Dismissal: (1) explain in writing basis of their complaint (2) invite employee to a meeting to respond (3) inform employee of decision and right to appeal

Grievances: (1) explain in writing basis of their complaint (2) attend meeting (3) decide on action and allow employee to appeal in writing

Dismissal: Investigate without unreasonable delay; inform employee of problem in writing & notify the employee of meeting; hold meeting; decide on action and allow an appeal

Grievances: Employee to explain in writing basis of their complaint; attend meeting; employer to decide on action and allow employee to appeal in writing

Following the procedure

The employee/employer will be penalised unless they complete the three stage procedure.

The steps taken will depend on the circumstances and the size and resources of the employer

Right to be accompanied

Employee does not have to be informed of right to be accompanied.

Statutory right to be accompanied by fellow employee, trade union official or trade union certified representative at the meeting but not at the investigatory meeting unless agreements permit. Failure to inform of statutory right may result in an uplift.

Penalty for failure to follow

Employer fails to follow: automatic unfair dismissal for employee and between 10 – 50% uplift in award

Employee fails to follow: award can be reduced by between 10 – 50%

Employer unreasonably fails to follow: uplift on award of up to 25% for employee

Employee unreasonably fails to follow: reduction of award by up to 25%

Issuing a claim

Raise a grievance if relevant & wait 28 days before submitting a claim

Time limit can be extended by up to 3 months

Use old ET1

Not mandatory to raise a grievance but possible reduction in award if employee does not do so

No extension of time limit to comply with procedure

Use new ET1

Employment law

the other changes in summary

1 April 2009

- Statutory minimum holiday: increased from 4.8 weeks to 5.6 weeks (24 to 28 days for those working a five day week) inclusive of eight statutory bank holidays. Holiday pay is worked out on a pro-rata basis. Employers will no longer be able to pay workers in lieu of providing the statutory minimum (although they can do this for holiday above the minimum)



5 April 2009

- Statutory maternity, paternity and adoption pay increased to £123.06



6 April 2008

- Conciliation: ACAS has extended its conciliation service. ACAS now offers a Pre-Conciliation service to help resolve workplace disputes (particularly discrimination and unfair dismissal claims in the early stages) before they reach an employment tribunal. The helpline (08457 47 47 47) is open 8am – 8pm Monday to Friday and 9am to 1pm on Saturdays.
- Flexible working: the right to request flexible working has been extended to include employees with children under 17
- National minimum wage: Workers are entitled to claim arrears on wages paid below the national minimum wage from their employer at current rates. HM Customs and Revenue also have powers to fine employers and search and seize property when investigating criminal offences under the National Minimum Wage Act.
- Statutory sick pay: increased to £79.15
- Trade unions: following on from the ECJ's decision in Aslef v UK, TULR(C)A 1992 has been amended to allow trade unions to expel members who belong to a political party if membership of that political party is contrary to the union's rules or objectives. The Aslef case concerned a trade union who wished to expel someone who was a member of the British National Party.



Holiday Pay for Pilots and Cabin Crew

Is the UK Government in breach of its obligations?

In a recent decision, *British Airways v Williams & Others* (2009 EWCL Civ 281), the Court of Appeal has ruled on the meaning of the right of pilots and cabin crew to four weeks "paid annual leave" under the Civil Aviation Working Time Regulations 2004 (The Regulations). In this case pilots were paid only basic pay during their holiday and not their normal pay, which includes allowances and supplements. The Regulations are designed to implement the EU Working Time Directive and the more specific requirements of the Aviation Agreement between the airline industry and the unions in the industry in the EU.



The Court said that there was EU case law that "paid annual leave" in the Working Time Directive did mean "normal" pay or "pay comparable to that which a worker earns while working". However, the Court said that EU Law allowed member states to decide on the precise calculation of what that meant. The Court said that the Regulations, being silent on the calculation of holiday pay, leave it as a matter to be agreed between the employer and employee. The Court accepted that it could be said that the UK's implementation of the Working Time Directive, "left a partial void in what was required of it under Community Law" but said that, if this was the case, the only way a remedy could be achieved was by taking a claim against the member state, the UK Government, (as was done in the case of *Francovich and Bonfazi v Italy* 1991 ECR I-5357) for a breach of its obligation to properly implement the Directive and the Aviation Agreement.

The Court did indicate that the employer was under some obligation to pay holiday pay but suggested that only where the amount that was paid was "only a token or derisory amount" could there be a complaint, or possibly where the amount was so low the employee was discouraged from taking leave. The Court did not even say there was a right to basic pay while on leave.

Some of the airline industry is unionised, but by no means all. The EU lays down employment rights to address the imbalance in bargaining power between employers and employees, especially in non unionised work forces, and to promote health & safety. The Court of Appeal's interpretation of the Regulations undermines this purpose and leaves uncertain exactly what holiday pay pilots and cabin crew are entitled to, which is unsatisfactory for both employers and employees. It also indicates that the UK Government may be in breach of its obligations to properly implement the Working Time Directive and the associated Aviation Agreement.

Employment Department Contacts:

Jacqui Parker

At our Wimbledon office Tel: 0844 858 3800
Email: jacqui.parker@simpsonmillar.co.uk

Joy Drummond

At our London office Tel: 0844 858 3400
Email: joy.drummond@simpsonmillar.co.uk

Rachel Blythe

At our Gateshead office Tel: 0844 858 3000
Email: rachel.blythe@simpsonmillar.co.uk

UK Offices:

21-27 St Pauls Street, **LEEDS**, LS1 2JG
Tel: 0844 858 3200 Fax: 0844 858 3299

Trafford House, Chester Road, Stretford,
MANCHESTER, M23 0RS
Tel: 0844 858 3300 Fax: 0844 858 3399

Floor 2, 33-41 Darlington Street, **LONDON**, EC1V 0BB
Tel: 0844 858 3400 Fax: 0844 858 3499

47 Summer Lane, **BIRMINGHAM**, B19 3TH
Tel: 0844 858 3500 Fax: 0844 858 3599

20 Church Road, Lawrence Hill, **BRISTOL**, BS5 9JA
Tel: 0844 858 3600 Fax: 0844 858 3699

271 Cowbridge Road East, **CARDIFF**, CF5 1JB
Tel: 0844 858 3700 Fax: 0844 858 3799

165 The Broadway, **WIMBLEDON**, London, SW19 1NE
Tel: 0844 858 3800 Fax: 0844 858 3899

15A Walker Terrace, **GATESHEAD**, NE8 1EB
Tel: 0844 858 3000 fax: 0844 858 3015