



The New ACAS Code of Practice - the implications

As of 6 April 2009 the statutory dismissal, disciplinary and grievance procedures were abolished and instead in its place the Government has introduced the ACAS Code of Practice.

Sejal Raja answers a number of key questions relating to the new ACAS Code of Practice ("the Code").

The statutory procedures, referred to in this article as the "Old Regime" came into force in October 2004 and introduced a mandatory "three step process" to be followed in the work place to handle disciplinary and dismissal matters raised by an employer, and grievances raised by an employee.

The Old Regime required written notification that will be issued to the other side, a meeting between the two sides, and (if appropriate) an appeal. Additionally, where the employer or the employee respectively failed to use the three-step procedures, the legislation required an employment tribunal to increase or decrease any award by between 10-50%. Furthermore, if the Employer failed to follow the Old Regime this could give rise to a claim for automatic unfair dismissal.

The introductions to the new ACAS Code of Practice sets out some guidelines for employers dealing with discipline and grievance, such as the need to deal with issues promptly and consistently.

It gives definitions of disciplinary situations (which include misconduct and/or poor performance) and grievances (concerns, problems or complaints that employees raise with their employers). It also states that more comprehensive advice and guidance on dealing with disciplinary and grievance situations will be contained in the ACAS booklet, which will contain sample disciplinary and grievance procedures.

Is the Code legally binding?

Whilst the Code will not be legally binding, employment tribunals are required to take into account the provisions of the Code when considering whether employers and employees have acted reasonably. If the employment tribunal finds that the employer or employee has failed to comply with the Code the employment tribunal will have the power to adjust any compensation by up to 25% either upwards or downwards depending on which party is at fault. This is a reduction from the 50% which was the maximum under the Old Regime. In addition failing to follow the Old Regime could make the dismissal automatically unfair whereas failing to follow any aspect of the Code is likely to make the dismissal unfair but the employment tribunal will be able to consider whether a fair procedure had been followed would it have made any difference to the decision, if the answer to that is no, then it is likely that the employee will not recover any compensation.

Continued...

Does the Code apply to all dismissals?

Unlike the Old Regime the Code will not apply to redundancy dismissals and non-renewal of fixed term contracts. In those circumstances, we recommend that you continue to follow the Old Regime.

What are the key points that I need to be aware about in relation to the new Code?

The key points set out in the Code are as follows

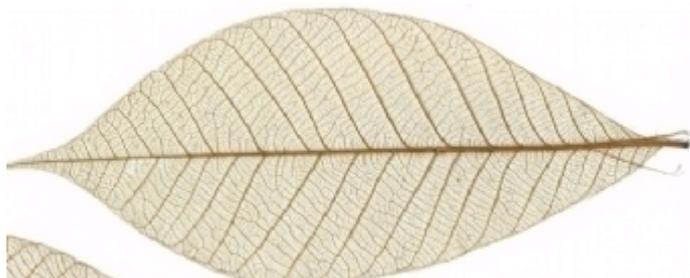
- Employees and employers should raise and deal with issues promptly and without unreasonable delay
- Employers should carry out all necessary investigations to establish the facts of each case
- Employers and employees should act consistently
- Employers should inform employees of the basis of any problem and allow them an opportunity to put their case before a decision is made
- Employees should be allowed to be accompanied to any formal disciplinary or grievance meeting. It is now a requirement that the invitation is clearly set out in the letter inviting the employee to a disciplinary and/or grievance meeting, which was not a requirement under the Old Regime
- Employees should be allowed to appeal against any formal decision
- The extension to submit employment tribunal claims is no longer applicable under the new Code.

Do I have to raise a grievance before submitting a claim in the employment tribunal?

No. Under the new Code an employee does not have to raise a grievance before submitting a claim in the employment tribunal.

What happens if the employee raises a grievance during the course of disciplinary proceedings?

The Code suggests that the disciplinary process be suspended temporarily whilst the grievance is dealt with. However where the grievance and disciplinary issues are related it may be appropriate to deal with both concurrently.



Will I need to amend the current disciplinary and grievance procedure?

No; if your current procedures comply with the Old Regime you will not need to amend your current procedures. However, you should be aware that the Code states

“That fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations. These should be set down in writing, be specific and clear. Employees and, where appropriate their representatives should be involved in the development of rules and procedures. It is also important to help employees and managers understand what the rules and procedures are, where they can be found and how they are to be used”.

This will probably be subject to some litigation as it is unclear how this is going to be interpreted by the employment tribunals. Will an employment tribunal find an employer to have acted unreasonably if it has followed a fair process but that process did not have the involvement of employees and/or trade unions in its development.

Can I proceed with the disciplinary hearing if the employee does not attend?

The Code states that *“where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause, the employer should make a decision on the evidence available”.*

The first part of the statement suggests that an employer can proceed with the disciplinary hearing where an employee is “persistently unable” to attend a hearing. This will probably cover a situation where the employee is unable to attend because of ill health. But how long should an employer wait before proceeding? The definition of “persistently” is likely to be litigated before the employment tribunal.

Continued...

What happens after 6 April 2009? Do I automatically use the new Code?

The Old Regime will continue to apply after 6 April 2009 in certain circumstances.

In the case of disciplinary and dismissal cases the Old Regime will apply if, on or before 5 April 2009, the employer has either

- dismissed the employee
- taken relevant disciplinary action against the employee or
- complied with step 1 or step 2 of the standard procedure or step 1 of the modified procedure

This means that where the employer refrains from taking any steps until after 6 April, the Old Regime will not apply.

In grievance cases the Old Regime will continue to apply where

- the action about which the employee complains occurred before 6 April 2009 or
- where the action forming the basis of the grievance begins on or before 5 April 2009 and continues beyond that date; the Old Regime will only apply if the employee either sends a grievance letter or presents a complaint to a Tribunal based on the grievance on or before 4 July 2009. For equal pay claims or statutory redundancy payment claims and certain industrial action dismissal claims the cut off date is 4 October 2009.

All in all this is good news for employers. The draconian penalties imposed by the Old Regime are no longer applicable and it will be a question of acting reasonably. There will obviously be some litigation to clarify certain aspects of the Code, however this is unlikely to be as complicated as the Old Regime.

Sejal Raja is a member of the firm's Employment group. She has considerable experience in both contentious and non-contentious employment matters, including drafting and negotiating employment contracts, advising on disciplinary procedures and dismissals. sejal.raja@rlb-law.com

Disclaimer

This briefing is for guidance purposes only. RadcliffesLeBrasseur accepts no responsibility or liability whatsoever for any action taken in relation to this note and recommend that appropriate legal advice be taken.

LONDON: 5 Great College Street, Westminster, London, SW1P 3SJ, Tel +44 (0)20 7222 7040, Fax +44 (0)20 7222 6208

LEEDS: 6-7 Park Place, Leeds, LS1 2RU, Tel +44 (0)113 234 1220, Fax +44 (0)113 234 1573

CARDIFF: 25 Park Place, Cardiff, CF10 3BA, Tel +44 (0)29 2034 3035, Fax +44 (0)29 2034 3045

