Hammonds

Insight

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Human Capital (Employment)

Statutory Dispute Resolution Procedures: RIP

The statutory Dispute Resolution Procedures are on their last legs. Earlier this month the Employment Act 2008 received Royal Assent, which means that from 6 April 2009 the parties will no longer have to tie themselves in knots over the mandatory three step disciplinary and grievance procedures.

The statutory procedures are to be replaced by a "lighter touch" regime based around a new, much shorter, Acas Code of Practice. The final version of the Code was approved earlier this month and will also come into force on 6 April. The Code itself is very short (it only runs to ten pages) and does not contain anything controversial. A failure to follow the Code will not by itself make employers liable to proceedings. Tribunals will however have the power to adjust awards upwards by up to 25% if employers have acted unreasonably in not following the principles set out in it, and downwards by the same amount if the failure was that of the employee. The current minimum 10% adjustment will be abolished.

Acas has also issued some 70 pages of non-statutory guidance (currently in draft form), which contains more comprehensive advice for employers dealing with disciplinary and grievance situations. Tribunals will not be required to have regard to the guidance when considering complaints, but some have expressed concern that this could happen nonetheless, especially bearing in mind the lack of detail in the new Code.

In theory the repeal of the statutory procedures should not have significant implications for employers in terms of how they handle disciplinary and grievance issues on a daily basis. In the case of misconduct, for example, they will still be expected to write to the employee setting out the allegations against him, to invite him to attend a disciplinary hearing and to offer him the right of appeal. The good news is that the failure to comply with one of these procedural steps will no longer render a dismissal **automatically** unfair – although it could of course still have implications for the fairness of the dismissal and for the level of any compensation awarded.

Employers may wish to familiarise themselves with the new Acas Code and the non-statutory guidance – we understand that the final version of the guidance should be available in early December. They should also review their disciplinary and grievance procedures to ensure that they are consistent with the principles set out in the Code. To the extent that employers replaced their own procedures with the statutory procedures, these should be amended in advance of April.

Managers conducting disciplinary and grievance matters should be made aware of the new legal position. It would make sense for them to read the new Acas Code and the accompanying guidance to ensure they act in accordance with the principles laid down.

It would be nice to think that the repeal of the statutory procedures will achieve its aim of less litigation – it is however inevitable that there will be case law over the new provisions. Hopefully, however, it will be on nothing like the scale we have seen with the statutory procedures.

We set out below an "At a glance" table summarising the changes.

Current provisions	New provisions
Disciplinary action: Employers must follow the relevant statutory disciplinary procedure (SDP) prior to dismissing an employee or taking "relevant disciplinary action". The SDPs apply to almost all dismissals, including redundancies and the non-renewal of a fixed-term contract.	The standard 3-step procedure and the modified 2-step procedure will no longer apply. Employers should comply with the principles contained in the new Code governing disciplinary action (and with their own disciplinary procedure). The new Acas Code will **not** apply to dismissals due to redundancy or the non-renewal of a fixed-term contract. Employers should therefore simply comply with their own policies and procedures governing such dismissals, which is likely to entail broadly the same steps anyway.
Unfair dismissal: An employer's failure to comply with the relevant SDP renders a dismissal automatically unfair. Furthermore, a Tribunal may disregard any failure by the employer to comply with other (e.g. workplace-based) procedures in respect of the dismissal, if following such procedures would have had no effect on the decision to dismiss.	Dismissals will not be automatically unfair for a failure to comply with the new Code. The unfair dismissal test will revert to the position pre-2004. This means that a dismissal could be procedurally unfair, but the Tribunal should then reduce any award of compensation to reflect the likelihood that the dismissal would have gone ahead anyway if the correct procedures had been followed.

Grievances: Employers must follow the relevant statutory grievance procedure (SGP) when handling grievances raised by employees.	The standard 3-step procedure and the modified 2-step procedure will no longer apply. Employers should comply with the principles contained in the new Code governing grievances (and their own grievance procedure). Under the new provisions this should mean that employers will no longer be forced to invite employees to a formal meeting in response to even the most minor of issues. This was one of the key failings under the statutory procedures – that it unnecessarily formalised everything. The wide definition of "grievance" meant that employers invoked the formal procedure in response to all expressions of discontent because they did not want to run the risk of being in breach of the SGP.
Employers must handle any grievances raised by ex-employees in accordance with the relevant SGP.	Employers will no longer be forced to go through a formal grievance procedure in response to grievances raised by ex-employees. In practice however it may still be sensible to investigate an ex-employee's concerns – especially as he may still bring proceedings.
Employees must raise a grievance and wait 28 days before lodging an Employment Tribunal claim.	Employees will no longer have to pursue an internal grievance before presenting a claim to an Employment Tribunal. Having said that, if they fail to do so they may still be penalised when it comes to the Tribunal hearing - he may see his compensation reduced by up to 25% if he is successful. If he is unsuccessful there will be no mechanism for punishing him for not trying to resolve his grievance in the workplace.
Compensation: A Tribunal must increase any award where an employer fails to follow the relevant statutory procedure by 10% and may, if it considers it just and equitable, increase it by up to 50%. A Tribunal must reduce any award where an employee fails to follow the relevant statutory procedure by 10% and may, if it considers it just and equitable, reduce it by up to 50%.	There will be an alternative mechanism to "encourage compliance" with the new Code. A Tribunal may, if it considers it just and equitable, increase any award to an employee by up to 25% if it believes that the employer has unreasonably failed to comply with the Code. Similarly, a Tribunal may also reduce any award by up to 25% if it appears to it that the employee has unreasonably failed to comply with the Code.
Time limits: The time limits for presenting complaints to an Employment Tribunal can be extended in certain circumstances where a statutory disciplinary or grievance procedure is being followed, for example if an employee is still pursuing an internal disciplinary procedure.	As the statutory procedures will be repealed there will no longer be scope for Tribunals to extend time limits on this basis. This should at least make things more certain for employers.
Role of Acas: Acas has a duty to conciliate for a fixed period except in certain types of cases such as discrimination where it has an ongoing duty to conciliate.	The fixed conciliation periods will be scrapped. Acas will once again be able to conciliate in Employment Tribunal proceedings at any stage of the proceedings. In practice this is what is happening now, as it was acknowledged last year that the fixed conciliation periods were not working and Acas amended its approach accordingly.

We will of course keep you updated on the changes but in the meantime if you have any queries, please contact one of the following or your normal contact in the team.

For more information please contact:
CHIEF OPERATING OFFICER AND INTERNATIONAL HEAD OF HUMAN CAPITAL: Sue Nickson, Email: sue.nickson@hammonds.com

LEEDS
Mark Shrives-Wright
Partner & Head of Leeds Human Capital
Email: mark.shrives-wright@hammonds.com

LONDON
David Whincup
Partner & Head of London Human Capital
Email: david.whincup@hammonds.com

MANCHESTER
Nick Jones
Partner & Head of Manchester Human Capital
Email: nick.jones@hammonds.com

BIRMINGHAM
David Beswick
Partner & Head of Birmingham Human Capital
Email: david.beswick@hammonds.com

Tel: +44 (0)870 839 0000

WWW.HAMMONDS.COM

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Richard Green at Hammonds LLP, Freepost, 2 Park Lane, Leeds, LS3 2YY or email richard.green@hammonds.com

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