COOLEHADDOCK
+employment law bulletin

HOW WILL THESE NEW RULES AFFECT THE WORKPLACE?

1. From 1st October 2004, new rules come into force with an important impact upon employees, managers and HR professionals.

In summary:

- unless an employer follows a minimum dismissal and disciplinary procedure, any dismissal will be automatically unfair. In addition, employees will receive increased levels of compensation if they bring a tribunal claim.
- BUT employees will not normally be allowed to bring tribunal claims unless they have lodged a formal internal grievance and given their employer at least 28 days to try to resolve matters.

DISMISSAL

What do employers need to do?

2. There are minimum procedures employers need to go through when dismissing an employee.
3. These apply whatever the reason for dismissal, subject to a few exceptions. So they must be followed when dismissing employees for redundancy and absence from work, as well as misconduct dismissals.
4. The procedures do not apply to verbal or written warnings (although the employee still has the right to be accompanied by a workplace colleague or union representative). Nor do they apply if there is a collectively negotiated industry procedure for disciplinary action or dismissals (an agreement between one company and a union is not enough).
5. There are two types of procedure, known as the 'standard' and the 'modified' procedure. The standard procedure will be used in the overwhelming majority of cases, and the modified procedure (which is a shorter-form procedure) can be used only in very serious cases of gross misconduct, where the employee had to be dismissed as soon as the misconduct was discovered.
6. Employers must go through the following three steps. It is important to ensure each part of each step is complied with, or any dismissal will be automatically unfair.

STANDARD PROCEDURE

Step 1: statement of grounds for action and invitation to meeting

1. (1) The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.

1. (2) The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2: meeting

2. (1) The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.

2. (2) The meeting must not take place unless-

(a) the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and

(b) the employee has had a reasonable opportunity consider his response to that information.

2. (3) The employee must take all reasonable steps to attend the meeting.

2 (4) After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.

august 2004

employment law

contents

page 1
HOW WILL THESE RULES AFFECT THE WORKPLACE?
What do employers need to do?
DISMISSAL
STANDARD PROCEDURE
Step 1: statement of grounds of action and invitation to meeting
Step 2: meeting

page 2
Step 3: appeal
MODIFIED PROCEDURE
Step 1: statement of grounds for action
Step 2: appeal
EMPLOYMENT ACT 2002
Schedule 2, Part III - General Requirements
Introductory
Timetable
Meetings
Problem Areas with the 'Meeting' provisions

page 3
THE STATUTORY GRIEVANCE PROCEDURE
Following the Procedures
Employment Act 2002
Schedule 2, Part II - Grievance Procedures
Chapter 1 - Standard Procedure
Step 1: Statement of Grievance
Step 2: meeting

page 4
Step 3: appeal
Employment Act 2002
Schedule 2, Part II - Grievance Procedures
Chapter 2 - Modified Procedure
Step 1: statement of grievance
Step 2: response
Failure to start the grievance procedure
NEW RULES ABOUT WRITTEN CONTRACTS
The Existing Law
The New Law

Step 3: appeal

3 (1) If the employee does wish to appeal, he must inform the employer.

3 (2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.

3 (3) The employee must take all reasonable steps to attend the meeting.

3 (4) The appeal meeting need not take place before the dismissal or disciplinary action takes effect.

3 (5) After the appeal meeting, the employer must inform the employee of his final decision.

(source: Employment Act 2002, schedule 2)

7. This is not a difficult procedure to follow. Most proper disciplinary policies will already be largely compliant. The significance is the consequence for getting any aspect wrong: both an automatic finding of unfair dismissal, and an increase in compensation payable to the employee.

Q. So can I just forget about my old practice of interviewing witnesses and providing copies of their statements in advance, or of drawing up redundancy matrices before selecting individuals for redundancy?

8. No. The new statutory disciplinary procedure is in addition, not alternative, to existing unfair dismissal law.

9. So in misconduct cases, you will still have to show a tribunal that you had an honest belief in the employee's guilt, based on reasonable grounds after reasonable investigation. The tribunal also needs to be satisfied that the decision to dismiss falls within the range of reasonable responses of an employer (i.e. after formal warnings have first been given, unless the offence is one of gross misconduct).

10. Overall, these procedures will probably add to the burden for employers rather than reduce it.

Q. Do I need to go through the standard procedure in cases of really serious misconduct?

11. No - although we recommend that the standard procedure be followed wherever possible. The new laws do allow, in very limited circumstances, for the employer to dismiss first and ask questions later, without dismissal being automatically unfair. This does not mean the dismissal is automatically fair; the employer will still need to show he had good reason to act as he did.

12. The 'modified' procedure, as it is known, requires the employer to set out the reasons for the decision to dismiss after the dismissal has occurred, and then offer a right of appeal (with an appeal meeting if the employee chooses to appeal). There is no requirement for any investigation or meeting before the dismissal.

MODIFIED PROCEDURE

Step 1: statement of grounds for action

4. The employer must-

(a) set out in writing-

(i) the employee's alleged misconduct which has led to the dismissal,

(ii) what the basis was for thinking at the time of the dismissal that the employee was guilty of the alleged misconduct, and

(iii) the employee's right to appeal against dismissal, and
(b) send the statement or a copy of it to the employee.

Step 2: appeal

5 (1) If the employee does wish to appeal, he must inform the employer.

5 (2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a meeting.

5 (3) The employee must take all reasonable steps to attend the meeting.

5 (4) After the appeal meeting, the employer must inform the employee of his final decision.

(source: Employment Act 2002, schedule 2)

13. The modified procedure applies when:

(1) the employer dismissed the employee without notice because of his conduct;

(2) the dismissal occurred at the time the employer became aware of the conduct or "immediately thereafter";

(3) the employer was entitled to dismiss the employee by reason of his conduct without notice or pay in lieu of notice, and

(4) it was reasonable to dismiss the employee before enquiring into the circumstances in which the conduct took place.

We have a number of concerns about how this will work in practice.

14. We advise employers not to attempt to use the modified procedure unless the employee has been dismissed - presumably in the heat of the moment - and the employer has no choice but to try to argue the modified procedure applies.

Q. What should happen at the meetings?

15. This is loosely covered in the Act, as set out below. It echoes existing good practice for disciplinary meetings.

EMPLOYMENT ACT 2002

Schedule 2, Part III - General Requirements

Introductory

11. The following requirements apply to each of the procedures set out above (so far as applicable).

Timetable

12. Each step and action under the procedure must be taken without unreasonable delay.

Meetings

13 (1) Timing and location of meetings must be reasonable.

13 (2) Meetings must be conducted in a manner that enables both employer and employee to explain their cases.

13 (3) In the case of appeal meetings which are not the first meeting, the employer should, as far as is reasonably practicable, be represented by a more senior manager than attended the first meeting (unless the most senior manager attended that meeting).

16. Note that meetings and written communications can deal with more than one issue at the same time. This avoids the need for separate meetings (or letters) when there are a number of overlapping disciplinary and grievance procedures ongoing.

Problem Areas with the 'Meeting' provisions

17. Because of the crucial importance of complying with these provisions (as the dismissal will be automatically unfair if not complied with), we are concerned there will be dispute over the following points:

(1) 'each step … must be taken without unreasonable delay' - we do not yet know whether tribunals will consider it legitimate, for example, to wait two weeks until a witness returns from holiday.

(2) 'timing … of meetings must be reasonable' - reasonable for whom? What if the employee is a night-shift worker, but the HR professional taking the disciplinary decision works during the day?

(3) 'location of meetings must be reasonable' - what if the employee is temporarily posted overseas? Does 'reasonable location' impose a burden on the employer to hold meetings away from the workplace in sensitive cases? or at the employee's home in sickness absence cases?

(4) 'meetings must be conducted in a manner that enables the employee to explain [his] case' - does this mean the employee is entitled to legal representation in complex cases, or where he does not speak fluent English? Does it give the employee a right to cross-examine witnesses against him?

18. There are real risks of even local tribunals giving inconsistent decisions, which will cause substantial practical difficulties for employers when deciding how to manage disciplinary proceedings.

Q. What happens if I do not follow the statutory disciplinary procedures?

19. There are two consequences:

20. First, any dismissal is automatically unfair. No question of reasonableness will arise the dismissal is deemed to be unfair if "the procedure has not been completed, and the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements."

21. The converse does not hold true: just because the employer has complied with the statutory procedure, it does not make the dismissal automatically fair. The statutory disciplinary procedure is an additional hurdle to overcome. The employer will still need to show, as under the old law (for example):

(a) for conduct dismissals, that dismissal was within the range of reasonable responses, and that he had an honest and reasonable belief in the employee's guilt after a reasonable investigation;

(b) for absence dismissals, that he has investigated the employee's medical condition and there is no reasonable prospect of an imminent return to work;

(c) for redundancy cases, that he has selected the employee fairly and considered alternative employment.

22. However, as set out above, the law has changed (in the employer's favour) to the extent that most breaches of written procedure will no longer make a dismissal unfair - provided the minimum statutory procedure has been followed. A tribunal will ask whether following the fuller procedure would have made a difference to the end decision to dismiss and, if the employer would still have dismissed, then a dismissal will not be unfair just because the employer did not follow all its procedures.

23. Note the employee still normally needs to have accrued one year's continuity of employment to claim unfair dismissal: this is not an exception to the one-year qualifying period. However, if the employee is bringing a claim that does not require one year's continuity of employment (e.g. a whistleblowing-related dismissal, which is automatically unfair irrespective of the length of employment and the procedures followed), then the employer still risks an increase in compensation because of the failure to follow the minimum procedures.

24. Second, compensation is increased. The tribunal must increase any award by 10%, and has a discretion to award up to 50%. In unfair dismissal cases, this is still subject to the normal £55,000 limit on awards, and in exceptional circumstances (which is not defined) the tribunal can refuse to make any increase. There will normally be a minimum aware of four weeks' pay.

25. This compensation increase does not just occur in unfair dismissal cases. So if a dismissed employee with less than one year's employment establishes that the dismissal was on grounds of her gender, there will also be an uplift to the compensation for sex discrimination if the statutory dismissal procedures were not followed.

Q. What happens if the employee does not comply with the statutory disciplinary procedures?

26. If the employee fails to comply with the procedure - for example, by not taking reasonable steps to attend the disciplinary meeting - then his/her compensation is reduced. Again, this is normally by 10% but a tribunal has power to reduce it by up to 50% (or, in exceptional circumstances, make no reduction).

27. Interestingly, because of the way in which the new legislation is framed, it seems that a failure by an employee to appeal a dismissal decision will result in the reduction to his award. This replaces the old (but usually overlooked) law that a failure to appeal would reduce employee's unfair dismissal award by no more than two weeks' pay.

THE STATUTORY GRIEVANCE PROCEDURE

28. The statutory grievance procedure is intended to reduce the number of tribunal claims by encouraging employees to use an employer's internal grievance procedures. It does this by a fairly draconian method: banning employees from bringing most types of tribunal claims unless they have lodged a formal grievance with their employer (or ex-employer) and then waited 28 days. As with the statutory dismissal and disciplinary procedure, there are linked provisions increasing or decreasing awards depending on whether there has been partial or full adherence to the statutory procedures.

29. The procedure operates whenever the employee has a 'grievance', defined as "a complaint by an employee about action that his employer has taken or is contemplating taking in relation to him." It is very likely that this will cover the acts of fellow employees, although we can expect employees (who have not complied with the procedure and therefore cannot bring a tribunal claim) to argue that the definition only covers acts of the senior management.

30. Again, there are two types of procedure, known as the 'standard' and 'modified' procedure. The standard procedure will be used in the vast majority of cases.

Following the Procedures

31. The standard procedure is as follows:

Employment Act 2002

Schedule 2, Part II - Grievance Procedures

Chapter 1 - Standard Procedure

Step 1: Statement of Grievance

6 The employee must set out the grievance in writing and send the statement or a copy of it to the employer.

Step 2: meeting

7 (1) The employer must invite the employee to attend a meeting to discuss the grievance.

7 (2) The meeting must not take place unless-

(a) the employee has informed the employer what the basis for the grievance was when he made the statement under paragraph 6, and

(b) the employer has had a reasonable opportunity to consider his response to that information.

7 (3) The employee must take all reasonable steps to attend the meeting.

7 (4) After the meeting, the employer must inform the employee of his decision as to his response to the grievance and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3: appeal

8 (1) If the employee does wish to appeal, he must inform the employer.

8 (2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.

8 (3) The employee must take all reasonable steps to attend the meeting.

8 (4) After the appeal meeting, the employer must inform the employee of his final decision.

32. The modified procedure, which can only be used when employment has ended and both sides agree in writing to use it, is as follows:

Employment Act 2002

Schedule 2, Part II - Grievance Procedures

Chapter 2 - Modified Procedure

Step 1: statement of grievance

9. The employee must-

(a) set out in writing-

(i) the grievance, and

(ii) the basis for it, and

(b) send the statement or a copy of it to the employer.

Step 2: response

10. The employer must set out his response in writing and send the statement or a copy of it to the employee.

33. The provisions about what should happen at meetings are the same as for the statutory dismissal and disciplinary procedure - see paragraphs 15 to 18 above.

Q. What happens if I do not follow the statutory grievance procedure?

34. If the employer fails to follow the statutory grievance procedure, any compensation arising from a free standing tribunal claim will be increased by 10% (subject to the wider discretion to increase it from between 0% and 50%). However, the tribunal needs to have another claim to trigger a right to compensation at all - an employee cannot simply sue on the basis the employer has failed to follow the statutory grievance procedure unless there is an underlying (and successful) claim of, for example, race discrimination or unpaid wages. It is the compensation from those claims that will be increased by 10%.

35. In certain circumstances, a failure to deal with a grievance (e.g. not dealing with it at all, or taking an unreasonably long time to deal with it) will allow the employee to resign and claim constructive dismissal. This is merely existing law, rather than a change brought in by the new legislation.

Q. What happens if the employee does not follow the statutory grievance procedure?

Failure to start the grievance procedure

36. If an employee fails to lodge a grievance, he is prevented from bringing a claim arising out of those issues in an employment tribunal. This ban applies to almost all claims (including constructive dismissal, most types of discrimination, underpayment of wages, holiday pay, redundancy payments and minimum wage claims) but, curiously, not breach of contract, or discrimination on grounds of part-time work or fixed-term work.

37. To be allowed to present the tribunal claim, the employee must do two things:

38. First, he must start off the statutory grievance procedure by "set[ting] out the grievance in writing and send[ing it] to the employer". If the modified procedure applies, the employee must also set out the "basis" for the grievance, i.e. give some level of detail.

39. Second, the employee must wait 28 days before presenting his claim to the tribunal. The purpose of this 28-day window is to give employers an opportunity to resolve the grievance using the internal grievance procedure before litigation commences.

NEW RULES ABOUT WRITTEN CONTRACTS

The Existing Law

40. Sections 1-3 of the Employment Rights Act 1996 require employers to provide a written statement of terms and conditions of employment within two months of commencing employment. This must include a note specifying any applicable disciplinary rules if the employer has over twenty employees.

41. There is currently no financial penalty if the employer fails to comply; however, an employee can apply to an employment tribunal for a declaration as to his terms and conditions.

The New Law

42. There are three main changes to the rules relating to the written statement of terms and conditions of employment. These come into effect, like the disciplinary and grievance procedures, on 1st October 2004.

43. First, all statements of terms and conditions of employment (which includes contracts) will need to include written details of disciplinary procedures as well as disciplinary rules.

44. Second, the requirement to provide written details of disciplinary rules and procedures will apply to all employers, not just those with more than twenty employees.

45. Third, a financial penalty is introduced for non-compliance with the obligation to provide written particulars of employment. The penalty is either two or four weeks' pay (capped at the normal maximum, currently £270 per week), unless "there are exceptional circumstances which would make an award or increase … unjust or inequitable".

46. However, it is not a free-standing right to compensation. It is an increase in compensation if, and only if, a tribunal finds in favour of the employee under another type of claim (such as unfair dismissal, or underpayment of wages).

For further information please contact:

Stephen Loosemore or Malcolm Fitzgerald at
5 The Steyne, Worthing, West Sussex BN11 3DT
tel: 01903 213511 fax: 01903 237053

Nigel Desoutter at
14 Carfax, Horsham, West Sussex RH12 1DZ
tel: 01403 210200 fax: 01403 241275

This newsletter is a guideline only to recent changes in employment law. You are advised to seek Legal Advice from our Employment Group on any specific queries you may have.