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Discipline & Grievance A Practical Guide

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Introduction to the New Procedures

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Where Are We Now?

- Employment Act 2002 & Employment Act 2002 (Dispute Resolution) Regulations 2004
- Employment Act 2008
- New ACAS code of Practice



Old Rules - Statutory DDP

- Standard Procedure
- (investigation first)
- Step 1 – invitation to meeting (letter)
- Step 2 – meeting
- Step 3 – appeal



New Rules & ACAS Code

- Establish the facts
- Inform the employee of the problem
- Hold a meeting with the employee to discuss the problem



New Rules & ACAS Code

- Allow employee to be accompanied
- Decide on appropriate action
- Opportunity to appeal



Statutory GP

- 3 steps as per DDP
- Employee sets out complaint in writing
- Employer invites employee to a meeting
- Employer reaches a decision and offers an appeal



New Rules & ACAS Code

- Let the employer know the nature of the grievance (in writing)
- Hold a meeting to discuss the grievance with the employee
- Decide on appropriate action
- Appeal



Failure to follow DDP & GP

DDP

- Automatically unfair dismissal
- Uplift of 10-50% compensation plus 4 weeks minimum basic award



Failure to follow DDP & GP

GP

- Claim presented to Tribunal (after 28 days)
- Deduction of 10-50% compensation



New Rules & ACAS Code

- Employee can issue ET claim without waiting 28 days after presenting grievance
- No more automatically unfair dismissal (4 week basic award)



New Rules & ACAS Code

- Uplifts of up to 25% where employer fails to follow Code of Practice
- Deductions of up to 25% where employee fails to follow Code of Practice



Adjustment of time limits

- Claims must usually be pursued within 3 months of date of termination
- The old rules allow for extension of time limits if a grievance or appeal ongoing
- New rules – no extension of time



Timescale – transitional arrangements

- Dismissal
 - Old rules apply if dismissal, step 1 letter or step 2 meeting before 6th April
 - If no action taken until after 6th April then new rules apply



Timescale

- Grievance
 - New rules - if action complained of occurred on or after 6th April
 - Old rules - if action “wholly” before 6th April



Timescale

- Where action complained of starts before 6th April and continues after 6th April:-
 - old rules if the employee sends a step 1 grievance letter, or presents an ET1, by 4th July 2009.
 - If that date passes without a step 1 letter or ET1 being sent, then the new rules apply.



Timescale

- For equal pay, redundancy payments and some industrial action claims, the same applies *except* the changeover date is 4th October rather than 4th July.



What else is new?

- Code of Practice must be followed where formal warning issued
- Doesn't apply where dismissal relates to redundancy or expiry of fixed term



Basic Approach to Discipline & Grievance

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Unfair Dismissal - principles

- Onus on the employer to show reason for dismissal is potentially fair
- Section 98 Employment Rights Act 1996:
 - Capability or qualification
 - Conduct
 - Redundancy
 - Duty/restriction imposed by enactment
 - Some other substantial reason



Unfair Dismissal

- If Employer successful in identifying a potentially fair reason for dismissal, must then consider whether the employer acted reasonably in dismissing
- Must be within the band of reasonable responses



Unfair Dismissal

- In dismissal for suspected misconduct, necessary for the employer to show
 - That he had a genuine belief,
 - Based upon reasonable grounds,
 - After a reasonable investigation,
 - Of the guilt of the employee



Gross Misconduct

- Conduct so serious as to justify dismissal without notice
- Examples
 - Unprovoked physical violence
 - Theft
 - Improper personal behaviour
 - Gross insubordination



Investigation

- There must be a full investigation of the conduct
 - Interview witnesses
 - Gather evidence (documents)
 - Review evidence & re-visit parts of investigation where necessary



Standard of Proof

- Standard of proof required during the investigation
 - The balance of probabilities
 - Note – not beyond reasonable doubt – more likely than not



Invitation to Disciplinary Meeting

- Set out allegations
- Right to be accompanied
- Contemplating dismissal



Invitation Letters

- Zimmer v Brezan 2008
 - A step 1 dismissal letter must state that the employer is contemplating dismissal.
 - Although not expressly stated in the statute it must be construed that way



Meeting

- Convene meeting
- Reaffirm right to be accompanied
- Take notes
- Discuss allegations
- Ask relevant questions
- After meeting - consider evidence and reach decision



Appeal Process

- Employee confirms wish to appeal
- Employer invites to an appeal meeting (right to be accompanied)
- Convene meeting
- Write to employee confirming outcome



Appeals

- Internal procedure required the employee set out grounds of appeal in writing
- Employee failed to do so & employer refused to deal with appeal
- Statutory procedure only requires employee to inform the employer of wish to appeal



Appeals

- Breach of statutory procedure - dismissal automatically unfair
- Same could apply to time limits – reasonable time is all that is required



Grievances

- Strong direction provided on approach to grievances
- Long letter of resignation
- No request for it to be treated as a grievance



Grievances

- EAT said:-
 - Provided the employee sets out complaint in writing - no formality required for a step 1 letter.
 - The requirements are minimal
 - The statutory procedures should rarely result in the Claimant being barred or indeed the employer being liable for an automatic unfair dismissal



What is a grievance?

- The fact that the grievance is contained in a letter of resignation makes no difference at all.
- An employee does not have to make it clear that a grievance is being raised
- There is no requirement for an employee to comply with any company or contractual procedure



What is a grievance?

- Employer merely has to be able to understand the general nature of the complaint – full detail not required
- Employer does not have to be given the chance to respond to the grievance. The procedure only require the employee to set out grievance in writing

- Shergold v Fieldway Medical Centre (2005)



What is a Grievance?

- A letter before action from a solicitor can amount to a statutory grievance letter
- It does not matter if headed “without Prejudice”
 - Arnold Clark Automobiles v Stewart (2006)
- Can be much wider



What is a Grievance?

- Chard v Telewest Communications PLC
- A letter written by the employee’s chiropractor was sufficient based upon the contents



Help for Employers

- Canary Wharf Management v Edebi (2006)
- On a fair reading of the statement the employer can be expected to appreciate that the relevant complaint is being raised



Help for Employers

- If the statement cannot be read in a non technical/unsophisticated way as raising the grievance which is the subject matter of a tribunal complaint, then the tribunal cannot hear the complaint



Role Play

Amy – Aggrieved employee

Peter – Supervisor

Charlotte – Witness

Ruth – Employer

Joanne – Appeal officer



Points to Note

- Take notes of meetings/informal discussions
- Keep copies of letters sent/received
- Allow employee to be accompanied at grievance/disciplinary
- Independence/objectivity
- Gather evidence



What can Forbes do for you?

- Provide advice
- Draft letters/documents
- Provide Independent Appeal Officer
- Bespoke Training
- Representation at Employment Tribunal



Questions?



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