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'D(&G) DAY' on 6 APRIL 2009!

Be ready for the new Disciplinary & Grievance procedures

Change in law

The current law relating to disciplinary and grievance matters is changing on 6 April 2009. On 'D(&G) Day' the Employment Act 2008 will repeal the Statutory Dispute Resolution Procedures and introduce a new regime.

Disciplinary and grievance procedures commenced before 6 April 2009 will continue to be governed by the 'old' law. Disciplinary and grievance procedures commenced on or after 6 April 2009 will be governed by the new regime.

New regime

The new regime applies to all cases of misconduct and poor performance, but expressly excludes dismissals on the grounds of redundancy or the non-renewal of a fixed-term contract. However, until the new law settles down all employers would be well advised to follow the new regime in all cases.

From 6 April 2009 all employers and employees will be required to follow a new Code of Practice on Disciplinary & Grievance Procedures. The Code of Practice is supplemented by a guide entitled Discipline & Grievances at Work: The ACAS Guide. The Code of Practice and the Guide were drafted by ACAS, and copies of them can be downloaded from www.acas.org.uk. All employers and employees should read and familiarise themselves with these documents in good time before 6 April 2009.

Penalty for non-compliance

Employers must follow a fair procedure when dealing with cases of misconduct and poor performance. A failure to do so can result in an unfair dismissal. The Code of Practice sets out what in most cases should amount to a fair procedure. A tribunal will be required to consider whether an employer has followed the Code of Practice when it comes to decide whether an employer has followed a fair procedure. Note that a failure to follow the Code of Practice does not result in an automatic unfair dismissal (as was the case under the 'old' law when there was a failure to follow the Statutory Dismissal Procedure).

Tribunals will have discretion to increase or reduce awards by up to 25% where an employer or an employee has unreasonably failed to follow the Code of Practice. If the employer unreasonably fails to follow it, the tribunal may increase the employee's compensation by up to 25%. If the employee unreasonably fails to follow it, the tribunal may reduce the employee's compensation by up to 25%. The amount of any increase or reduction will be what is just and equitable in the circumstances. Note that under the 'old' law compensation could be increased or reduced by between 10% and 50% when there was a failure to follow the Statutory Dispute Resolution Procedures.

Code of Practice

To a large extent the Code of Practice reflects natural justice. The Code of Practice should be applied in each case of misconduct or poor performance. The principle points of the Code of Practice are set out below...

- The employer should carry out a reasonable investigation into the facts and issues in question. This is likely to involve the collation of evidence, the taking of statements, and the holding of investigatory meetings.
- The employee should only be suspended if necessary, and then only for so long as is necessary. Any suspension should be kept under review.
- The employee must be given a written notice of the alleged misconduct or poor performance, and the possible outcomes if the allegations are proven eg dismissal, final warning or warning. The notice should provide enough detail to enable the employee to answer the allegations at a disciplinary meeting.
- The employee should be given copies of any witness statements and other documentary evidence being relied upon.
- The written notice should convene a disciplinary meeting. The meeting should take place without delay, but providing the employee with a reasonable period to properly prepare (typically 5 working days).
- The written notice must inform the employee of his or her legal right to be accompanied at the meeting by a fellow worker or a trade union representative.
- The employer and the employee should give each other advance notice of any witnesses they intend to call.
- A disciplinary meeting must be held. If the employee unreasonably fails to attend, the employer may make a decision on the evidence available at the time.
- At the meeting the employer should explain the allegations and go through the evidence that has been gathered. Note that these are specific requirements under the new regime which did not feature under the 'old' law. The new regime does not go further and specifically provide for the employer to call witnesses, but as much would be inferred in the interests of natural justice. The employee should be given a reasonable opportunity to ask questions,

present evidence and call relevant witnesses. In any event, if the evidence of a witness is challenged in his or her absence, consideration should be given to adjourning the meeting to enable the witness to attend and be cross-examined.

- After the meeting the employer should inform the employee of its decision in writing without delay. A written warning should set out the misconduct or poor performance in question, the improvement required, the timescale for improvement, how long it will remain current, and the consequences of further misconduct or poor performance. Dismissal is usually only appropriate for gross misconduct or if there has been a written warning and a final written warning.
- The employee must be given a right of appeal. Note that the new regime specifically provides for a right of appeal against warnings as well as dismissals, unlike the 'old' law which only provided for a right of appeal against dismissals (although a right of appeal against warnings was invariably given as a matter of good practice).
- The employer must inform the employee of his or her legal right to be accompanied at any appeal meeting by a fellow worker or a trade union representative.
- Any appeal should be heard without delay, and should be handled by a fresh manager who is more senior than the previous manager with no prior involvement in the case.

At all times employers should manage conduct and poor performance cases proactively, and nothing precludes cases being dealt with informally if that is appropriate.

Written records of all communications and minutes of all meetings should always be kept.

Disciplinary rules and procedures

The new regime requires employers to involve employees (or their duly elected representatives) in the development of disciplinary rules and procedures, and to help employees and managers understand and use those rules and procedures.

No time extensions

The new regime does not provide for any extensions of time in which an employee must present a claim out of a tribunal, even where the procedure may be ongoing. Note that under the 'old' law there was an automatic 3 month extension of time in certain circumstances. This means that time limits have become tighter under the new regime.

IF YOU REQUIRE ANY ADVICE OR ASSISTANCE in connection with the introduction of the new regime on 6 April 2009, or have any questions about 'D(&G) Day' generally, then please contact **ALAN MASSENHOVE**, a solicitor in our

Corporate/Commercial Department and the head of our Employment Unit, on **020 7398 4700** or by email at alan.massenhove@sykesanderson.com.

Please note that this is a new area of law and you should not take or refrain from taking any step without legal advice on the particular circumstances. The content of this Article is of a general nature only, and no liability is accepted in connection with it or if any reliance is placed on it.

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