

Client Alert

Latham & Watkins
Tax Department

UK Workplace Dispute Resolution: Key Changes from 6 April 2009

Since 1st October 2004, all those involved in workplace disputes have had to grapple with the statutory dispute resolution procedures (SDRPs) when disciplining or dismissing employees, or dealing with employee grievances. Rather than encouraging early resolution of workplace disputes, which had been the intention, the overly prescriptive and technical nature of the SDRPs actually increased the number of employment tribunal claims in this area.

Following consultation, the SDRPs will be repealed with effect from 6 April 2009 when the operative provisions of the Employment Act 2008 come into force. In their place, employers should follow a new ACAS Code and Guide in relation to discipline and grievances at work. These are not legally binding but the Code will be admissible in evidence and will be taken into account by the tribunal in determining the fairness of the dismissal.

Practical Differences Between the Old and New Regimes

The SDRPs provided for a three-step procedure (which could be modified in certain situations such as where the employee had already left employment) involving a letter setting out the issue, a meeting to discuss it, confirmation of the decision made

by the employer and offering the employee the right of appeal.

The Code instead focuses on general principles, which include the following:

- employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions;
- employers and employees should act consistently;
- employers should carry out any necessary investigations to establish the facts of the case;
- employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made;
- employers should allow employees to be accompanied at any formal disciplinary or grievance meeting, and to call witnesses; and
- employers should allow an employee to appeal against any formal decision being made.

It's apparent that the three-step procedure would still fall squarely within these guidelines. Whether replacing the set requirements in the SDRPs with a more principles-based approach will actually reduce the case law in this area and lead to more effective resolution of disputes remains to be seen.

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The Code also states that staff should be “involved in the development of” the procedures as far as possible. Where no changes are required to existing policies to bring them into line with the Code, it would probably be a step too far to read this as requiring the employer to *e.g.* consult with the employees about its existing policies. However, if changes are required, it would be sensible to notify the employees of those changes, and possibly offer them the opportunity to comment on them. In addition, if changes are required to procedures that are in fact contractual (as opposed to just being in workplace policies), employee consent will be required to any changes.

Other important points to note from the Code and Guide are:

- the Code places significant emphasis on attempting to resolve disputes early through third-party mediation, which was not a feature of the SDRPs themselves;
- the statutory dismissal procedure generally applied in all dismissal situations. However, the Code does not apply to redundancy dismissals or dismissals due to the expiry of a fixed-term contract;
- the Code expressly states that it is not intended to apply to collective grievances, *i.e.* grievances raised by two or more employees at the same time. Employers may therefore wish to consider whether they put in place their own separate collective grievance procedure;
- there is more emphasis on employees themselves behaving reasonably throughout the course of the procedures; and
- the Code states that where a grievance is raised in relation to a disciplinary action or investigation, while it might be appropriate to suspend the disciplinary process while the grievance is investigated, if they relate to similar subject matter it could be sensible to run both procedures concurrently.

Other Legal Implications of the Changes

The repeal will also remove other statutory requirements introduced to work alongside the SDRPs. Key effects of the repeal will be:

- an employee who has not submitted a grievance is no longer barred from bringing an employment tribunal claim;
- submitting a grievance used to trigger a three month extension of the three month time limit for bring a claim after termination of employment. This will no longer apply;
- unfair dismissal compensation in relation to claims where there was a failure to follow the SDRPs by either party could be adjusted by 10-50 percent in the wronged party's favour. Under the new regime, there will be an adjustment of 0-25 percent for an unreasonable failure to follow the ACAS Code (there will be no adjustment for a failure to follow the Guide); and
- failure to follow the statutory dismissal procedure meant a dismissal was automatically unfair. This concept will not apply in the new regime although the tribunal will obviously look at whether the ACAS Code was complied with in determining the procedural fairness of the dismissal.

What You Need to Do Now

All employers of UK employees should review the policies they have in place to cover disciplinary action, dismissals and grievances, and check that they comply with the new Code and Guide. An employer is of course perfectly entitled to have a bespoke procedure in place but it is important to make sure that such a procedure does not contradict the Code. Obviously any procedures that expressly refer to the SDRPs will also need to be amended.

Any disciplinary or grievances procedures that begin before 6 April 2009 will still be subject to the SDRPs.

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