Employment Pensions & Benefits Communiqué

October 2004

Dispute resolution - the new rules

Communication during workplace disputes determines whether we reach an amicable solution or the doors of the employment tribunal. New rules to be introduced from 1 October, 2004 are aimed at reducing instances of the latter.

Failing to follow the new **Disciplinary and Dismissal Procedure** (DDP) and the new **Grievance Procedure** (GP) could have potentially serious consequences for both employers and employees In particular, where an employer has failed to go through certain steps and meet certain requirements before dismissing an employee, the dismissal will be deemed automatically unfair. On the flip side, an employee who has not first tried to resolve the dispute directly with his or her employer by raising a grievance will not be entitled to lodge an employment tribunal claim.

There are also financial implications, with a tribunal having the discretion to either increase or decrease the employee's compensation depending on who failed to follow the relevant procedure. The amount of any adjustment could be anything from 10 to 50%, so certainly not insignificant.

In addition, in certain circumstances the normal time limit for bringing a tribunal claim will be extended by 3 months. Again, this is designed to maximise the possibility of resolving disputes without the need for tribunal proceedings.

The following key points should help organisations cope with the operation of the new rules:

1. In general terms, the 3-step standard form of DDP and GP is as follows: the issues of concern should be set out in writing, a meeting should be held to discuss the issue, and the employee should be given an opportunity to appeal any decision taken. However, **do not** be lulled into a false sense of security by thinking that the new rules are just plain common sense which reflect your current practices. There are pitfalls to trap the unwary and it is important to review your procedures to ensure they comply. If a trade union is recognised in the workplace, it may be helpful to consult with the union. Training is also recommended so that managers and other relevant members of staff have a good understanding of the new procedures and their implications.

2. The new rules state that if you intend to dismiss an employee or take action short of dismissal (for example, demotion), you need to use the 3-step procedure, but if you intend to issue a warning, you do not. This is dangerous because it introduces an element of pre-judgment which should not be present in a disciplinary process! Best practice would be to use the 3-step procedure whenever you contemplate taking any form of disciplinary action.

   There is also a "modified" DDP which applies where the employee is dismissed for misconduct without notice and without any investigation having taken place. The modified DDP essentially consists of setting out the reasons why the employee was dismissed and then allowing the employee the opportunity to appeal against the dismissal. However, this procedure should not be used unless absolutely necessary, i.e. where you really have no option but to dismiss on the spot and any investigation would have been futile. It will only be in exceptional circumstances that employers will be entitled to apply the modified procedure and it is always advisable to take time to investigate an incident, perhaps using a short suspension on full pay in order to do so.

3. The DDP applies where an employer is contemplating dismissal and this will include not only dismissal on grounds of capability and conduct, but also on other grounds including redundancy, non-renewal of a fixed term contract and, in certain circumstances, retirement. Employers will have to adapt to this new way of dealing with such dismissals.

4. The procedures state that both sides must be allowed to "explain their cases" and this might lead to employees requesting to be accompanied in circumstances where they have no such statutory right, but where it may be considered reasonable to allow it e.g. at a meeting to discuss redundancy. Decisions should be taken as to whether to introduce a policy dealing with this, or to deal with it on a case-by-case basis (although the risk of establishing a custom and practice should also be borne in mind).

5. Employers will need to ensure they are on the ball as all action under the new procedures must be "taken without unreasonable delay". This requirement applies to employees as well.

6. It will be useful to revisit rules on who has the authority to issue written reasons for the commencement of the procedure and who has the authority to dismiss.

7. Employers should also clarify rules on reporting alleged wrongdoing through a whistle blowing procedure and how this will interact with their grievance procedure – this is because if an employee wishes to blow the whistle, the statutory GP will generally not apply.

8. Because employees will generally not be entitled to lodge a tribunal complaint unless they have first lodged a grievance, employers should be prepared for an increase in the number of grievances they have to deal with. Training for line managers and HR staff will be essential. A rather alien concept will also be introduced in that employees will be able to lodge a grievance after they have left employment in the form of a "modified" GP. Employers will be faced with the problem of how to resolve a grievance by such an individual who may only be going through the motions to allow them to lodge a tribunal claim. They may well be motivated by financial compensation from an employment tribunal rather than any apology they might receive by going through a grievance procedure. Meanwhile, employers will need to comply with their part of the statutory grievance process, otherwise any compensation which is awarded to the employee will most likely be increased. Bearing this is in mind, employers will have to make decisions as to whether financial resources and management time should be spent in resolving the dispute at an early opportunity – perhaps through negotiation of a compromise agreement - or by defending any subsequent tribunal proceedings.

9. Currently, certain details regarding disciplinary rules do not need to be given to employees as part of the written particulars of employment if the employer has fewer than 20 employees. However, from October **all employers** will be required to provide the relevant details.

10. Finally, employers must remember that any dismissal process must be underpinned by reasonableness. Even if the statutory dismissal and disciplinary procedures are followed to the letter, the dismissal will **not** automatically be fair. An employer should not dismiss an employee without good reason and should always act reasonably.

Should you require further advice on this area, please contact:

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