

April 2009

Introduction

Welcome to the April 2009 edition of the Grundberg Mocatta Rakison LLP employment newsletter. We hope that you find this newsletter to be a useful updating resource for the various legislative changes which take effect in April 2009. The changes to the employee dispute resolution procedures are the most significant.

Employee Dispute Resolution – the rules change again!

The Employment Act 2008 (the “2008 Act”), which comes into effect on 6 April 2009, will significantly change the law concerning employee dispute resolution.

The Act will repeal the Employment Act 2002 (the “2002 Act”) which, together with the Employment Act 2002 (Dispute Resolution) Regulations 2004, provide for minimum statutory disciplinary and grievance procedures. Under the 2002 Act, an employer faces a finding of automatic unfair dismissal and also an uplift in compensation of between 10% and 50% if the minimum statutory dismissal and disciplinary procedures (“SDDP”) are not complied with to the letter.

Further, under the 2002 Act an employee is unable to bring a claim in an Employment Tribunal (“ET”) unless he has first submitted a grievance to his employer.

The SDDP were criticised for causing an increase in the number of cases being referred to the ET and their abject failure to resolve internal disputes. As a result, their repeal is much welcomed.

In practice, the 2008 Act will not require drastic changes in the way which disciplinary and grievance procedures should be handled. However, it is intended that the 2008 Act will allow parties more flexibility to carry out the procedures in a way that is reasonable in the circumstances and in accordance with the size and the resources of the employer. It is also hoped that it will reduce the number of formal grievances which employers have to deal with each year.

The main changes resulting from the 2008 Act are as follows:

The New Procedures

The SDDP will be replaced by a Code of Conduct (the “Code”) prepared by the Advisory, Consultation and Arbitration Service (“ACAS”). The Code is intended as a “best practice” code for employers and employees and failure to comply with the Code shall be taken into account by the ET when deciding whether a fair procedure has been followed and a dismissal is unfair. However, such failures will not automatically result in findings of unfair dismissal. Instead, the ET will be required to decide whether non-compliance with the Code is reasonable in the circumstances. ACAS have also prepared a Guide which is intended to assist the interpretation of the Code.

Time Limits

Currently, if a grievance is ongoing when the usual 3 month time limit to bring a claim in an ET is due to expire, the time limit will automatically be extended by a further 3 months.

This extension will be removed by the 2008 Act with effect from 6 April 2009 and the standard 3 month time limit to bring a claim shall apply (subject to other time limits that may apply to particular cases, for example, in redundancy or equal pay cases).

Award Adjustment

As stated above, if an employer fails to comply with the SDDP, the ET is currently obliged to increase the compensation awarded to an employee by between 10% and 50%.

Under the 2008 Act, if either party is found to have failed unreasonably to follow the Code, the ET will instead have discretion to increase or reduce the compensation awarded by up to 25%. The ET’s decision will be influenced by various factors, for example, the size of the employer’s business and the nature of the failure.

Fairness: Application of *Polkey v AE Dayton Services Ltd (1987) 3 WLP 1153* (“Polkey”)

Currently, if an employer complies with the SDDP but does not carry out a generally fair procedure, the dismissal may still be fair if a fair procedure would not have made a difference to whether or not the employee was dismissed.

However, on the repeal of the 2002 Act, Polkey will once again apply and the dismissal may be found to be unfair even if a fair procedure would not have affected the decision to dismiss, although a reduction to compensation awarded is also possible (see below).

Compensation

Following repeal of the 2002 Act, the rules relating to compensation set out in Polkey shall once again apply. These state that a compensatory award will be reduced if it is found that an employee would have been dismissed even if the correct procedures had been followed. The degree of reduction will depend on the likelihood of the employee's dismissal had the appropriate procedures been carried out.

Grievance Procedure

Another significant change under the 2008 Act is that there will no longer be a requirement to raise a formal grievance in order to bring a claim in the ET. This is likely to have the following consequences:

- Employers will have more flexibility to try to resolve grievances informally.
- Employers will not have to treat each written complaint as a formal grievance, leading to a reduction in management time spent on such matters.
- It will no longer be necessary to analyse all written documentation in every case in order to ascertain whether or not a complaint amounts to a grievance.
- Employers will no longer be under an obligation to hear grievances from ex-employees.

Redundancy and expiry of fixed term contracts

Following the implementation of the 2008 Act, the Code will not apply to and will not have to be followed in redundancy situations and when fixed term contracts expire. In a redundancy situation, provided that the required consultation procedure and a generally fair procedure are followed, dismissals are likely to be fair. Consequently, dismissals are likely to be confirmed at an earlier stage and with less formality.

Overlap between Grievance and Disciplinary Procedures

Under the 2002 Act, complex provisions apply in situations where grievances are submitted whilst a disciplinary procedure is being conducted. The 2008 Act will remove this confusion by removing the need to submit formal grievances to enable an employee to bring a claim.

Transitional Provisions

Although the 2008 Act comes into force on 6 April 2009, there are complex provisions governing which rules are to apply in circumstances where dismissal proceedings and grievances are commenced before that date. As a general rule, the following will apply (this is a summary only as these transition provisions are complex and we advise that specific advice is sought regarding their application in a particular case):

Dismissals

If a step 1 letter (written invitation to a disciplinary/dismissal meeting) has been sent or step 2 meeting (the disciplinary/dismissal meeting) has taken place before 6 April 2009, the SDDP will apply.

Grievances

The 2008 Act will apply in circumstances where the action complained about takes place on or after 6 April 2009.

However, if the act complained of commenced before 6 April 2009 but continues beyond that date, the SDDP will continue to apply to all grievances except those relating to equal pay, redundancy pay and some industrial action claims where a step 1 letter or ET claim form is presented to an ET before 4 July 2009.

In equal pay, redundancy pay and some industrial action claims, the relevant date for application of the new regime is 1 October 2009.

Conclusion

The Code sets out guidelines to which Employers should adhere when taking formal action against an Employee and is likely to become the most important document for employers to consider when dealing with disciplinary and grievance matters after 6 April 2009.

Employment Newsletter

www.gmrlaw.com

A copy of the Code can be found at <http://www.acas.org.uk/CHttpHandler.ashx?id=1041>

A copy of the Guide can be found at <http://www.acas.org.uk/CHttpHandler.ashx?id=1043>

Further statutory employment law changes in April 2009

The following employment related changes will come into force in April 2009.

The minimum statutory holiday entitlement increases to 28 days

From 1 April 2009, workers' annual statutory holiday entitlement will increase from 4.8 weeks to 5.6 weeks per year (i.e. 28 days for someone working five or more days a week). Any days off for public or bank holidays can be counted towards a worker's statutory holiday entitlement as long as it is paid leave. As the increase in holiday is a beneficial change to terms and conditions of

employment/engagement, there is no need for employers to reissue contracts. However, employers should inform staff of the increased entitlement in writing.

Statutory maternity, paternity and adoption pay increases

From 5 April 2009, the standard rate of statutory maternity pay, statutory paternity pay and statutory adoption pay will increase from £117.18 to £123.06 per week.

Statutory sick pay increases

From 6 April 2009, statutory sick pay will increase from £75.40 to £79.15 per week.

Right to request flexible working is extended

From 6 April 2009, the right to request flexible working will be extended to parents of children aged 16 and under. Currently the right is restricted to parents of children under the age of 6 or disabled children under the age of 18 or carers of adult dependants.

This paper is only intended to be a brief overview of legislative changes coming into force in April 2009. If you believe that the legislative changes highlighted in this newsletter will significantly affect you or you require further advice on their application, please contact either Dan Peyton or Lucy Harrington of our Employment team on 0207 632 1600.

On 1 May 2009, Grundberg Mocatta Rakison LLP will merge with US law firm McGuire Woods LLP. The London practice will operate under the name McGuire Woods London LLP.

Disclaimer: Please note that the information given in this paper is intended to be an update and does not constitute legal advice. Should you have any specific queries please contact a member of the employment team.

Copyright © Grundberg Mocatta Rakison LLP