

Employment Newsletter - Autumn 04

Dare to Dismiss!

From 1 October 2004 fundamental new employment laws were introduced covering diverse areas such as disability discrimination, the national minimum wage and the rules regarding the pursuit of claims through the Employment Tribunal. This article, however, concentrates on the new rules introduced to regulate disciplinary and grievance procedures.

Despite what some would have you believe, the new procedures are not that onerous. Most large employers will already have policies in place which comply with the rules. In summary, the employee must be told in writing the reason he is facing a disciplinary hearing and the basis for the charges against him. The employer must invite the employee to a meeting to discuss the matter and that meeting must be held at a reasonable time and in a reasonable location. Finally, if the employee is disciplined or dismissed the employer must offer the right of appeal and hold an appeal hearing.

The real sting in the tail is the consequences that flow if the employer does not comply with the new rules. Any dismissal (assuming the employee has more than a year's continuity of employment) will be automatically unfair. Further any compensation the employee recovers may be uplifted by between 10% and 50%.

By introducing formality into the process practical problems will no doubt arise, for example:-

- (i) There are complicated rules dealing with when the procedures are deemed to be completed. If you misunderstand those rules you may be liable for automatic unfair dismissal and increased compensation.
- (ii) The failure to follow some of the associated steps, such as allowing an employee to bring a companion to the hearing, may result in substantial windfall for the employee.
- (iii) Failure to follow these rules with all types of dismissal, such as redundancy (i.e. offering the right of appeal), might make what was otherwise a fair dismissal automatically unfair.

It is not all one way, and the employees also have obligations. They must take all reasonable steps to attend disciplinary hearings and they must exercise their right of appeal. If they fail to take either of these steps they will normally face a reduction in compensation - again between 10% and 50%. There are also provisions dealing with when ex-employees will be prevented from presenting Tribunal claims without first raising a written grievance to their employer, which are particularly relevant in claims for constructive dismissal, all forms of discrimination and unlawful deduction of salary.

Similar rules now apply to grievance procedures in that once an employer receives notification of a grievance they must hold a meeting and offer the right of appeal against any decision. Employees are required to provide details of the grievance and take all reasonable steps to attend any meeting arranged and exercise any right of appeal. Again, failure to comply with these requirements may result in a 10% to 50% adjustment in any Tribunal award, either up or down depending who is at fault.

The ACAS code of practice on disciplinary and grievance procedures is essential reference material for all employers. The code is relevant in all circumstances involving disciplinary or grievance procedures and although it has been substantially revised, it is re-assuringly familiar to the previous code in many respects. The code suggests that those procedures should be reviewed regularly [shameless plug No.1: If you would like us to review your procedures to ensure they comply with the new Regulations please contact one of the Employment Team], and makes it clear that in certain cases employees will not necessarily have the right to cross examine witnesses. This is contrary to the previous code but is in line with existing case law.

The code also provides useful guidance in dealing with poor performance, setting out the steps which should be taken in relation to capability or performance issues, cross-referring good practice with statutory procedure.

With grievance procedures the code sets out what is reasonable behaviour and should not be too unfamiliar. However previous codes did not contemplate employers having to deal with grievances raised post-termination. The new procedures provide that employees can raise such grievances after leaving their employment. However, the code makes it clear that it is preferable that any grievance should be dealt with before an employee actually leaves. The code emphasises the need for employers to deal with grievances thoroughly, sensitively and confidentially and provides a helpful checklist of the records that should be kept during this process.

As usual, any failure to follow any part of the code does not automatically make an organisation liable to proceedings but Tribunals will take the code into account when considering cases before them.

With revised procedures in place and proper training for those involved in implementing such procedures, the disciplinary process does not need to be a claim waiting to happen!

TALK IS CHEAP

Whilst the changes on 1 October 2004 have provided individual employees with additional rights, early next year important new rules come into effect which may require organisations to establish information and consultation regimes in their workplace, thus providing further collective rights for employees. On 6 April 2005 all employers with at least 150 employees in the UK can be asked to set up Works Councils to comply with the Information and Consultation of Employees Regulations 2004 (the ICE Regulations). Whilst we only currently have draft Regulations, we are told that these are in "final" form.

From 6 April 2005 an employee, or employer, can trigger the procedure which leads to the establishment of the new arrangement, and once this has occurred employers will need to inform and consult with employee representatives over a range of subjects. If agreement cannot be reached then a default mechanism is put in place. Four situations are possible:

1. Pre-Existing Arrangement - which has been approved by the majority of the workforce and not challenged by an employee request.
2. Negotiated Arrangement - following an employee request or a ballot over turning a pre-existing arrangement or negotiations initiated by an employer.
3. Statutory Arrangement - this will occur where the employer fails to respond to an employees request or the parties cannot reach a negotiated agreement within the statutory time frame.
4. No Arrangement - where no employee makes a request and the employer chooses not to

initiate negotiations.

Who does it apply to?

As already stated from 6 April 2005 it will apply to undertakings of 150 or more employees (it will also apply to undertakings with 100 or more employees from 6 April 2007 and 50 or more employees from 6 April 2008).

What is an "undertaking" is clearly important and is defined as "a public or private undertaking carrying out an economic activity, whether or not operating for gain". The DTI draft guidance suggests that this means, in the case of a Company, a separately incorporated legal entity rather than an organisational entity such as an establishment, division or business unit. They will, however, look at each individual limited company. Groups of companies are irrelevant when considering the number of employees.

The number of employees are averaged over the previous 12 month period and only "employees" are counted, which may exclude temporary workers, sub-contractors, etc.

Status of Existing Arrangements

Existing arrangements, such as European Works Councils, Staff Councils or Recognised Union Agreements, can qualify as a pre-existing arrangement. They must be in writing, cover all employees, be approved by those employees and set out the mechanism for the exchange of information and consultation.

If such an agreement exists, there are complex rules on when an employer is not required to negotiate a new agreement following any employee request.

Negotiated Arrangement

An employer can voluntarily open negotiations. Failing this an employer's obligations are triggered when it receives a valid request made by at least 10% of the employees of the undertaking (subject to a minimum of 15 and a maximum of 2,500). The 10% can be part of a series of cumulative requests (although each individual request has shelf life of 6 months). The request must be in writing, dated and sent to either the employer or the Central Arbitration Committee (CAC) which will handle the request if the employees wish to remain anonymous. Once the request has been made the undertaking must, as soon as reasonably practical, but in any event within one month, initiate negotiations for the setting up of an I&C arrangement and in particular the appointment or election of negotiating representatives, notifying the employees who those representatives are and enter into negotiations with those representatives. Negotiations must be completed within 6 months and if such negotiations fail the "default model" will apply.

If an employer believes that the request is invalid it must apply to the CAC for a declaration to that effect within one month of the request being made.

As is the norm when considering collective rights, all employees will be entitled to vote on the appointment of negotiating representatives and there must be at least one representative for each "constituency".

Any negotiated model must set out the circumstances in which an employer must inform or consult the employees, be in writing, dated, cover all employees in the undertaking, be approved by 50% of all employees, be signed by the employer and provide for the appointment or election of

representatives with whom the employer must consult on matters within the scope of the agreement.

Employers and employees are given the freedom to agree on the subject matter, method, frequency and timing of the information and consultation that takes place.

As long as all of the employees in an undertaking are covered by some form of arrangement there is no need for them to be covered by the same one. Rigid arrangements and grade specific ones are permitted.

The Default Model

If an employer fails to initiate negotiations following a request or fails to reach agreement following a request or there is a successful ballot against a pre-existing agreement then the default procedure applies. This is a reasonably prescriptive procedure which is unlikely to be a "good fit" for most organisations.

The employer is required to organise a ballot to elect representatives. There should be one representative for every 50 employees or part thereof (subject to a minimum of 2 representatives and a maximum of 25).

The topics that have to be discussed are not prescribed and again the parties are required to reach agreement. As a minimum, information must be provided on all 3 categories and the consultation must take place in respect of two and three. The 3 categories are:

1. The recent and probable development of the undertakings activities and economic situation;
2. The situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking;
3. Decisions likely to lead to substantial changes in work organisation or contractual relations.

The duty to inform must take place at such time, and in such fashion and with sufficient content as is appropriate to enable the representatives to conduct an adequate study and, where appropriate, prepare for consultation - usually with a view to making counter proposals.

Confidentiality

One of the main concerns of employers in the consultation process on the Regulations was the maintenance of confidentiality. The Regulations provide that an obligation of confidentiality can be placed on the representatives and that any breach will be actionable by the employer. The employer can withhold information when the disclosing of information would seriously harm the functioning of the undertaking or be prejudicial to it. The representatives can challenge any duty of confidentiality before the CAC.

Sanctions

Apart from the individual rights of the representatives, if the employer fails to comply they may be subject to a penalty notice and fined up to £75,000. We still await guidance from the CAC on the procedure for the conduct of complaints under the Regulations. Appeals from the CAC will go to the EAT.

Conclusion

The ICE Regulations are another step along the path towards the provision of more collective rights for employees raised by European legislators. Whilst the emphasis remains on both sides endeavouring to reach agreement, any attempt to introduce an overtly employer-friendly mechanism is likely to backfire. Whilst many workforces will be unaware of their detailed rights they are not stupid (although some would say they do a pretty good impression most of the time). It is a truism that many companies experience the labour relations they deserve!

Whilst employers might not rush to volunteer to put such procedures in place, careful consideration should be given at this stage on the response to any employee request, such as the objectives, duration of the agreement, provisions for variation or termination, provisions for renewal, excluded issues, constituencies, number of delegates, term of office, removal from office, management representatives, frequency of meetings, appointment and powers of the chair, provision of facilities, control of agendas, confidentiality, protection for representatives, costs, dispute resolution etc. [Shameless plug No.2 - If you would like us to review existing arrangements or to consider the introduction of new arrangements please contact a member of the Employment Team].

For many organisations the initial response to the ICE Regulations will be one of horror and bloody minded resistance. However, like a lot of European legislation, matters can easily be taken out of the employers hands. It is unlikely that the statutory default procedure will be a good fit for your organisation and, therefore, no matter what your initial reaction is, you need a pre-emptive plan on what steps your organisation might wish to take in light of any request being received.

This guide is for general information and interest only and should not be relied upon as providing specific legal advice. In relation to any particular matter, readers are advised to seek advice.

Further information:

If you would like more information about any of Goodman Derrick's Employment Law services please telephone and ask to speak to David Bickford, Head of the Employment Team.

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