A matter of principle

From April 6 2009, the new ACAS Code of Practice on Disciplinary and Grievance Procedures was introduced. But what does this mean for employers in dental practices with limited legal expertise or time for discipline and grievance? Sunil Abeyewickreme explains

Under the statutory regulations that came into force on October 1 2004, all employers were required to follow three steps in dealing with dismissal, disciplinary action and grievances in the workplace. In the case of unfair dismissal, if an employer had not followed these steps, an Employment Tribunal would make an automatic finding of unfair dismissal. If for example an employer did not inform the employee of their right to appeal, this could have resulted in a Tribunal making a finding of automatically unfair dismissal even if it can be proven that the employee had committed an act of gross misconduct eg fraud or theft.

Similarly if an employee had not set out a grievance in writing and waited a specified time before commencing a claim in the Employment Tribunal, the claim would not be accepted. If either employer or employee did not comply with these procedures any award could be increased or decreased between 10 per cent and 50 per cent depending on which party was at fault.

Based on principles

One of the most important effects of this change in the law in April is that an employer's failure to follow the code will not result in a finding of automatic unfair dismissal. The change in law resulted from the fact that the legislation that had only been introduced in 2004 and which was supposed to promote settlement of disputes and a reduction in Tribunal claims, set procedural requirements that were too rigid. This led to an actual increase in claims being brought in the Employment Tribunal. The new ACAS Code is regarded as being more principles-based which allows employers greater flexibility.

In effect, the three-step statutory procedures have been replaced by a 45-point ACAS Code of Practice, which may not require employers to deal with discipline and grievance issues in a fixed way, however, it is the case that if a Tribunal decides that the ACAS code of practice has not been reasonably followed, they can increase (if the employer failed to follow the code) or decrease (if the employee failed to follow the code) any award by up to 25 per cent.

The new ACAS Code states that when employers are dealing with cases of misconduct, differ-

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most people should conduct the investigation and disciplinary hearing if reasonably practicable. It is unlikely that smaller employers would be penalised if the same person conducted both but employers should try to comply with this provision.

Employment contracts
It is still a legal requirement that employment contracts must specify any disciplinary rules or refer to documents setting out disciplinary or grievance procedures if not specified within the contract. Should these procedures not be followed, this may lead to a claim of breach of contract. It is therefore still a requirement (as it was under the old regime) to have written disciplinary and grievance procedures. Given the changes in law, employers may take this opportunity to review their policies and procedures, but in real terms the introduction of the new ACAS Code will not require any changes to be made if they complied with the previous statutory procedures. The new ACAS Code recommends all the requirements of the statutory procedures to be followed, except in cases of dismissals for redundancy and non-renewal of fixed-term contracts on their expiry. Where it is expressly stated that the new ACAS Code does not apply, it could be difficult for an employer to change their disciplinary and grievance procedures without the consent of their employees.

Improvements with the new ACAS Code
In terms of the way employers and employees handle disputes in the workplace, the new ACAS Code may appear to make no difference. However, the difference will become apparent if a dispute escalates to a claim that is brought in an Employment Tribunal as there will be no automatic decisions on the basis that a procedure has not been followed. Instead Tribunals will be considering cases of unfair dismissal will have to consider whether the failure to follow the ACAS Code was unreasonable. The Tribunal has much more discretion available to them in such cases, compared to that available under the old statutory procedures.

An employee who will not need to raise a grievance before submitting a claim to an Employ-

ment Tribunal, however failure to do so could result in any award being decreased by 25 per cent. Under the statutory procedures, by raising a grievance the time limits for filing a claim would have been extended, as of April 6 2009 this is no longer the case. If an employer had more than one claim, for example, unfair dismissal and a claim of disability discrimination, there could have been two different deadlines for filing claims at the Employment Tribunal. So an employer may have dealt with one claim to later realise that they had to deal with another.

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Transitional provisions
Unfortunately, as is usual for major changes in employment law, there will be a period where transitional provisions apply.

If an employer has disciplined or dismissed an employee, sent an employee a document setting out the claim, an alleged conduct which lead the employer to con-

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template dismissing or taking disciplinary action, or held a disciplinary meeting on or before April 5 2009 the three-step statutory procedure will continue to apply after the April 6 2009.

It is understandable that the compulsory statutory grievance procedure would apply if an employee had raised a grievance in writing to the employer about a complaint that took place in its entirety before April 6 2009.

If an employee complains about an action, which began on or before April 5 2009, it is the case that the compulsory statutory grievance procedure applies. In these circumstances, the written grievance must be submitted to the employer by no later than October 4 2009 if it relates to a claim for equal pay or statutory redundancy pay or certain dismissals in connection with industrial action, or by no later than July 4 2009 if it relates to anything else but breach of contract cases. For breach of contract cases the compulsory statutory procedures apply if the action the employee complains about took place in its entirety before April 6 2009. If however a breach of contract begins on or before April 5 2009 and continues beyond that date it is not clear which regime will apply as the transitional provisions do not refer to such cases.

It will not be unusual to see claims being brought under the compulsory statutory procedures well into 2010. The transitional period will be testing for dental practices that are caught up in disciplinary and grievance issues.

Conclusion

The introduction of the new ACAS Code seems to have simplified the law to some extent by removing the rigid procedures, which could not be easily followed in complex disputes and could result in unjust decisions. Nevertheless, it is not clear how the Tribunal will deal with the new code when hearing employment claims, as the lack of specific detail and scope for interpretation of what is unreasonable by the Tribunal may lead to employers being found in breach. The repeal of the statutory procedures has left a void, which will only be clarified over the next few years by developing case law.

Employers should take legal advice at an early stage when considering how to deal with a dispute in the workplace.

About the author

Sunil Abeyewickreme qualified as a barrister and heads the Employment Law Department at the leading dental law firm, Cohen Cramer. Prior to joining the firm in October 2008 he had been a legal adviser to the BDA for four years. He has considerable experience in the field of employment law and has given a number of presentations across the country on various legal subjects relevant to dentistry.