NEWSLETTER 104 MAY 2014

NEW PAY RATES IN FORCE 5 MAY 2014

New pay rates came into force on 5 May – contact us immediately if you need more information.

THE IMPORTANCE OF A WELL-CONDUCTED DISCIPLINARY INVESTIGATION

A recent case serves as a reminder to employers of the importance of ensuring that they do not prejudge disciplinary proceedings and that disciplinary procedure is correctly followed and are fair and balanced, regardless of the allegation made.

Carrying out disciplinary investigations

In order to conduct disciplinary proceedings fairly, employers need to carry out a disciplinary investigations to establish the facts. In carrying out a disciplinary investigation, employers should seek to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (the ACAS Code). Whilst non-compliance with the Code is not in itself necessarily grounds for proceedings, employment tribunals will take the ACAS Code into account when deciding whether an employer has acted reasonably or not in dismissing an employee or taking the disciplinary action that it has.

The purpose of a disciplinary investigation is to seek to ascertain the facts and enquire into the circumstances surrounding the alleged misconduct, to enable the investigator to take a balanced view of the information that emerges.

A thorough, well-conducted investigation may prevent cases of unfair dismissal and reduce the potential for criticism of the organisation's employment practices. Further, a recent case highlights that, in certain circumstances, there is potential for a poorly conducted disciplinary investigation to lead to a claim for discrimination.

Austin v West Sussex County Council

In this recent case, reported in the Equal Opportunities Review, an Employment Tribunal (ET) found that the employer had discriminated against an employee on the grounds of his sex, as a result of the way it conducted the disciplinary process following an allegation made against the employee.

Mr Austin (A) was employed by West Sussex County Council (the Council) and was line managing another employee, who brought a claim of harassment against A. A was suspended and sent home and, in breach of the Council's disciplinary policy, A was informed of his suspension over the telephone and the suspension was never reviewed.

A was told that there had been allegations of sexual harassment made against him (despite there being no evidence of sexual misconduct) but was given no further details about the nature of the complaint (again in breach of the Council's policy), or the name of the employee that had brought the complaint (which the ET could see no reason for). An investigation was carried out and it was proposed to go ahead with a disciplinary hearing which had been scheduled despite the fact that A was unfit to attend. A resigned and brought a claim

for constructive unfair dismissal and sex discrimination.

The ET found that, based on the evidence of the Council's witnesses, there was nothing which pointed to A's conduct being of a sexual nature and the Council had wrongly applied this label. The ET found that, had the complaint been made against a female employee, "the conduct complained of would not have been labelled sexual harassment and the procedural irregularities…would not have flowed". The Council's conduct therefore amounted to sex discrimination. The employee's complaint of constructive unfair dismissal was also successful (i.e. he established that the Council's conduct amounted to a repudiatory breach of contract such that he was entitled to resign and bring a claim for unfair dismissal). The ET found that there had been numerous procedural failings, some of which are outlined above, including failures to follow its own policy as well as the ACAS Code. These failings, and the Council's prejudging of the disciplinary proceedings, amounted to a breach of the implied term of trust and confidence that existing between A and the Council and A had therefore been unfairly constructively dismissed.

What does this mean for employers?

This decision highlights the importance of a thorough, well-conducted disciplinary investigation whereby the fact-finding process is balanced and fair to both employees, regardless of the nature of the allegation made. The case shows that failures in this respect could not only lead to claims for unfair dismissal but could, in certain circumstances, also amount to discrimination.

This can have serious (and expensive) consequences for employers. In this case, not only did the ET make an award to compensate A, it also made what is known as a "wider recommendation". The ET recommended that the Council, within certain time limits, review its procedures and policies, to ensure compliance with the

ACAS Code, and train its HR staff and managers (and employees involved in investigations) in respect of the revised policies. This would be a very time-consuming and potentially expensive process.

Tribunals' powers to make wider recommendations in successful discrimination cases are due to be removed (date currently unknown). However, even without this power, the ET has powers to make significant awards in successful unfair dismissal claims (with the maximum compensatory award being the lower of one year's gross salary or £72,400) and even more significant awards in discrimination claims (where there is no compensatory award cap). In this case, the employee was awarded £168,957! And regardless of whether such a claim is successful, it would still be costly for an employer to defend. The benefits of a well-conducted and fair disciplinary investigation are therefore evident, and employers should seek to comply with the ACAS Code when carrying out disciplinary investigations, as well as complying with their own policies.

ACAS EARLY CONCILIATION – IN FORCE 6 APRIL 2014

The Scheme

A statutory framework has been published introducing mandatory ACAS early conciliation in tribunal claims. The scheme places a mandatory obligation (with limited exceptions) on claimant employees to notify ACAS of their intention to bring a tribunal claim before their claim is lodged.

Transitional provisions cover the period between 6 April and 5 May 2014 during which the new scheme will be available to prospective claimants. It will then be mandatory for claims presented on or after 6 May 2014. However, ACAS anticipates that it will be well used from 6 April, as a note will feature on the employment tribunal website encouraging use even before it becomes mandatory.

The process involves employees submitting a short compulsory form, which can be done online, which is then submitted to ACAS. When this is received by ACAS a process called "Stop the Clock" takes effect which is a period of up to one month during which the employee's time limit to bring their claim is 'paused' to allow ACAS and the parties to explore whether the matter can be resolved through early conciliation. This can be extended by two weeks where parties are in active talks. An employer can also make a request for early conciliation but in these circumstances the "Stop the Clock" process does not apply.

An Early Conciliation Support Officer (ECSO) will contact the claimant employee (or their legal representative if they have one) to obtain further details of the matter (the aim is for this to happen by close of play on the working day on which ACAS receive the complaint). The ECSO will then explore the possibilities of resolution with both parties.

It is notable that the employee is required to provide ACAS with only very brief details about the nature of their claim. Employers will have to take care that they know what potential claims are being discussed, and potentially settled.

If agreement is reached

If both sides agree to conciliate and an agreement is reached, the ECSO will assist in recording this on a COT3. Care will have to be taken to ensure all claims are properly settled, as the detail provided by the employee will be brief, and it may be that an "all claims" settlement is appropriate. ACAS will be willing to apply these terms in Early Conciliation cases (when in standard cases, they will only conciliate on the claims actually lodged at tribunal).

If agreement is not reached/conciliation is not undertaken

Whilst it is mandatory for claimant employees to notify ACAS of their intention to bring a tribunal claim, it is not mandatory for either party to actually engage in conciliation. If parties decline to engage in conciliation or the conciliation is unsuccessful, the ECSO will issue a certificate to all parties confirming that the claimant employee has notified ACAS as required. Without this certificate, the employee cannot bring a claim.

Under the 'Stop the Clock' process the claimant employee will have a minimum of one month following the end of early conciliation to submit a claim to the ET, meaning that the time limit for presenting claims could be extended by some two months.

Employers should also bear in mind that even if an employee does proceed to make a claim, ACAS will still offer their conciliation services at that stage.

What does this mean for employers?
The aim, of course, is to get workplace disputes resolved as early as possible and, ideally, without the need to go to tribunal, which would of course save time, cost and disruption to the business. Our view is that this increased focus on early conciliation, combined with the new tribunal fees regime which is now in force, will lead to an increase in the use of mediation to resolve disputes, which is something that employers and HR in particular, should be alive to.

BRITISH COATINGS FEDERATION STATEMENT ON MIT (methylisothiazolinone)

Consumer safety is of utmost importance to all British Coatings Federation members. The use of preservatives and other biocides, such as MIT (methylisothiazolinone), is strictly controlled by the EU. MIT is a preservative used in paints as well as many other consumer goods such as household cleaning products, cosmetics and personal care products.

MIT is used in paints to prevent water-borne products from spoiling due to bacterial contamination. It gives the shelf-life necessary for paint to be transported and stored for sale, and therefore is an essential ingredient in water-borne products.

The industry accepts that MIT in paint can cause an allergic reaction to the very small percentage of the population already sensitised to MIT. The industry is investigating alternatives to MIT with preservative manufacturers; however, current alternatives are extremely limited and may not provide a safer solution.

The industry has already started a programme to label products containing more than 100 parts per million of MIT, which will allow consumers allergic to MIT to be aware of its presence in paint.

The BCF and its members are open to a dialogue with dermatologists to understand the issue from their perspective. If as part of this dialogue it is found that there is a possibility of an allergic reaction below 100 parts per million, the industry is open to considering voluntary labelling on all paint products containing MIT - a commitment above and beyond the legal requirements.

The BCF remains confident that our members' products are safe to use for the vast majority of the population, if used in accordance with manufacturers' instructions. Anyone developing symptoms of an allergic reaction should seek the advice of a medical expert.

Facts on legal labelling requirements of paints containing MIT

Today, EU legislation requires manufacturers to indicate the presence of MIT if levels are above 0.1% (or 1,000 parts per million), and all paint manufacturers who are members of the BCF in the UK comply with the regulations and correctly label products (in most cases paints in the UK have a percentage of MIT below this level).

From June 2015, there is a new legal requirement for MIT to be declared by manufacturers when it is present at a lower threshold of 0.01% and above (100 parts per million) as part of the EU Classification, Labelling and Packaging Regulation.

Monthly Bulletin of Indices

YEAR	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEPT	OCT	NOV	DEC
2003	631	632	632	635	635	632	664	667	667	667	667	667
2004	667	667	666	666	667	667	709	709	710	710	711	712
2005	711	713	713	713	713	714	769	769	769	768	769	770
2006	769	770	770	769	769	769	793	794	793	793	793	793
2007	793	795	795	795	795	795	824	825	825	825	826	826
2008	826	827	827	831	831	832	874	874	874	873	873	874
2009	874	875	874	874	875	875	875	875	875	876	876	876
2010	876	878	878	878	879	879	879	879	879	879	880	880
2011	880	885	885	885	888	889	898	898	909	908	908	911
2012	910	911	913	912	910	912	912	914	915	915	924	924
2013	939	940	943	942	941	938	937	937	938	937	937	937
2014	941	941*	942*	941*								

***Provisional**