

### **ACAS PUBLISHES REVISED STATUTORY GUIDANCE ON ACCOMPANIMENT AT DISCIPLINARY AND GRIEVANCE MEETINGS**

ACAS has published a draft revised Code of Practice ("the Code") on Disciplinary and Grievance Procedures providing new guidance in respect of a worker's right to be accompanied. The Code confirms that workers can choose who they like to accompany them to a grievance or disciplinary hearing, as long as they fall within the defined category of companions, following the EAT's ruling in *Toal v GB Oils*.

In relation to accompaniment at disciplinary meetings, ACAS has amended its guidance by inserting new paragraphs 14 to 16 into the Code, and identical paragraphs 36 to 38 relating to grievance meetings. Changes in the revised Code confirm that:

- workers have a right to choose who should accompany them to a grievance or disciplinary hearing, as long as they fall within the defined category of companions;
- workers can change their mind on their choice of companion;
- it is only a matter of 'good practice' (rather than a legal requirement) for workers to take practicalities into account in choosing a companion;
- an employer should be given enough time to make any necessary arrangements to allow the chosen companion to attend the meeting, whilst also making it clear that a request to be accompanied does not have to be in writing or within a prescribed time frame;

- workers should also consider how they make their request so that it is clearly understood, for instance by letting the employer know in advance the name of the companion where possible and whether they are a fellow worker or trade union official or representative; and
- if a chosen companion is not available, an alternative time must be arranged by an employer that is reasonable and within five days of the original date, as provided for in the statute.

The revised draft Code is now subject to Parliamentary approval.

### **PARENTAL LEAVE CHANGE: FROM 5 APRIL 2015 EXTENDED TO PARENTS OF CHILDREN UNDER 18**

Parental leave has been available to parents of children under 5 years of age for some time. The same rules allow adoptive parents to take leave for up to 5 years after the child is placed with them and parents of disabled children can take the leave up to the child's 18th birthday.

From 5 April the current age limit will be removed and all parents of children under 18 will be entitled to request parental leave. The total amount of parental leave that can be taken per child was increased from 13 weeks to 18 weeks in March 2013.

There are no other changes being made to the parental leave scheme. Employees will still:

- have to have a year's service to apply;

- have, or expect to have, responsibility for a child;
- take leave in blocks of one week and no more than 4 weeks per year;
- have to take unpaid leave; and
- normally be required to give 21 days' notice of a request to take leave.

Employers must permit leave to be taken immediately following the birth or adoption of a child and in other cases need to follow the requirements of the Maternity and Parental Leave etc Regulations 1999 to postpone parental leave requests generally.

This leave should not be confused with the new shared parental leave that comes into force in respect of babies due or children placed for adoption on or after 5 April 2015.

## **CHALLENGING FINAL CERTIFICATES UNDER JCT**

JCT contracts include a “conclusive evidence” clause which provides that the Final Certificate constitutes conclusive evidence that all sums due to the Contractor have been accounted for unless proceedings challenging the content of the Final Certificate are commenced within 28 days.

In the recent case of *The Trustees of the Marc Gilbard 2009 Settlement Trust (the “Trust”) v OD Developments and Projects Limited* (“ODDP”), the court considered whether the conclusive evidence clause allows the Contractor to commence one type of proceedings within 28 days and then commence a different type of proceedings much later.

### **Background**

The Trust had employed ODDP under a JCT Standard Building Contract Without Quantities Revision 2 2009.

Clause 1.9.3 of the Contract states:

*“If any adjudication, arbitration or other proceedings are commenced by either Party within 28 days after the Final Certificate has been issued, the Final Certificate shall have effect as conclusive evidence as provided in clause 1.9.1 save only in respect of the matters to which those proceedings relate.”*

On 3 December 2013, the Contract Administrator issued his Final Certificate showing a sum of more than £230,000 owing to the Trust by ODDP.

On 20 December 2013, well within the 28 day time limit imposed by clause 1.9.3,

ODDP commenced legal proceedings in the Technology & Construction Court challenging the Final Certificate. However, the legal proceedings progressed very slowly. In January 2015, ODDP changed its mind about the litigation and decided that it wanted to challenge the Final Certificate in adjudication instead.

ODDP argued that this course of action was permitted by clause 1.9.3 because once any type of proceedings had been issued, the Final Certificate became inconclusive in relation to the subject matter of those proceedings. Any other type of proceedings permitted under the contract could then be issued at any time thereafter in relation to the same subject matter as the original proceedings. ODDP pointed out that there was nothing in the wording of clause 1.9.3 that prevented a switch from one type of proceedings to another. It also argued that clause 1.9.3 had to be interpreted in this way in order to allow it to exercise its legal right to adjudicate “at any time”. The Trust argued that the correct and most sensible interpretation of clause 1.9.3 was that ODDP could only pursue the proceedings

that had been commenced within the 28 day period i.e. the litigation, but not the adjudication. The Trust applied to court for a declaration to this effect.

### **What is the literal meaning of clause 1.9.3?**

The court preferred the Trust's interpretation of clause 1.9.3, stating that it was "*wholly contrary to the conclusivity provisions in the contract*" to interpret clause 1.9.3 as meaning that any sort of proceedings commenced within 28 days would render the Final Certificate inconclusive in any other proceedings commenced months, or even years, later regarding the same dispute. The court could not find anything in the wording of clause 1.9.3 which permitted the commencement of a series of subsequent proceedings both prior to and after the expiry of the 28 day time limit. It was clear from the clause wording that any and all proceedings which ODDP wished to commence (which might have included both starting an adjudication and issuing legal proceedings in order to protect its position if the adjudication went wrong) had to be commenced within the 28 day time limit in order to avoid the Final Certificate becoming conclusive.

### **What is the common sense meaning of clause 1.9.3?**

It is established law that where a clause has more than one possible meaning, the court is entitled to choose the meaning which is more consistent with business common sense.

The court noted that the purpose of clause 1.9.3 is to provide clarity and certainty to the parties. This was best achieved if clause 1.9.3 only permitted the parties to commence proceedings within the 28 day period. It simply did not make business common sense to allow for more than one

set of proceedings to be commenced within an unknown timeframe.

### **Was ODDP's right to adjudicate "at any time" affected?**

The court rejected ODDP's argument that clause 1.9.3 would prohibit it from referring a dispute to adjudication "at any time" if the adjudication had to be commenced within the 28 day time limit.

First of all, even though the Final Certificate had become conclusive, there was nothing to prevent ODDP from commencing an adjudication challenging it outside the 28 day period. It was just rather fruitless to do so, given that the terms of the contract made the Final Certificate conclusive and unchallengeable.

In addition, the fact that it was now rather pointless to commence an adjudication was purely due to ODDP's own actions, as ODDP had chosen to litigate rather than adjudicate within the 28 day time limit. It would have been open to ODDP to start both an adjudication and legal proceedings within the 28 days if they had wished to keep their options open.

Finally, the Construction Act does not provide an unfettered right to adjudicate which exists independently of other contractual terms. The terms of the contract imposed a clear constraint on the ability to adjudicate.

### **Analysis**

The 28 day period following the issue of the Final Certificate is a critical one for the Contractor, who has to decide very quickly whether the Final Certificate should be challenged, and if so, what type of proceedings should be commenced for that purpose.

This case confirms that the time limit imposed by the JCT conclusivity provisions is set in stone. The Contractor cannot start one type of proceedings and then later change to another, even if the subject matter of the proceedings remains the same. This case therefore emphasises to Contractors that their actions and decisions in the period following issue of the Final Certificate are critical. All options and strategies should be considered before it is too late.

## TENDER PRICES FORECAST TO 4TH QUARTER 2019

With domestic consumer prices and general inflation very low, and the Eurozone looking at possible deflation, little upward pressure on materials prices is expected over the first year of the forecast period, with a rise of 0.8%. Over the following years, with both the construction and whole economy strengthening, it is anticipated that materials prices as a whole will rise from 2.6% over the year to 4th quarter 2016, to 4.1% in the year to 4th quarter 2019.

Most wage awards for 2015 have already been agreed and are between 2% and 3%, with the average of wage awards being 2.8% over the first year of the forecast period. Thereafter, the average of wage awards is expected to rise at an increasing rate on the back of stronger construction demand, in turn giving strength to wage bargaining bodies. It is anticipated that total new work output will grow strongly in 2015 and 2016. Growth is then expected to slow in 2017, prior to growth increasing in 2018 and 2019. The recovery in the construction market started primarily in London, but is now beginning to spread to some of the major regional centres. It is anticipated that some capacity constraints will put upward pressure on tender prices

through to the end of 2014 as contractors struggle to cope with the increase in workload, leading to higher annual price rises over the next quarter or so. It is anticipated that annual price increases will be around the 7% - 8% mark in the final quarter of 2014. As contractors begin to cope with the increasing workload in 2015, annual increases are expected to start to slow down, with an increase of 4.3% in the year to 4th quarter 2015. With above trend growth in demand over the remainder of the forecast period, and with upward pressure from input costs, tender prices are forecast to rise between 4.0% - 5.5% per annum. Tender prices are forecast to rise by around 30% over the next five years.

### Summary of Forecasts

	4Q2012	4Q2013	4Q2014	4Q2015	4Q2016	4Q2017	4Q2018
Annual % Change	to 4Q2013	to 4Q2014	to 4Q2015	to 4Q2016	to 4Q2017	to 4Q2018	to 4Q2019
Tender Prices	+5.8%	+7.6%	+4.3%	+4.5%	+5.4%	+5.5%	+4.9%
Building Costs	+1.3%	+1.6%	+1.9%	+3.1%	+3.6%	+3.7%	+4.2%
Nationally Agreed Wage Awards	+1.1%	+2.3%	+2.8%	+3.3%	+3.9%	+3.9%	+3.9%
Material Prices	+0.4%	+1.1%	+0.8%	+2.6%	+3.3%	+3.5%	+4.1%
Retail Prices	+2.7%	+1.9%	+2.2%	+2.9%	+3.5%	+3.7%	+3.6%
Construction New Work Output*	+0.7%	+6.1%	+6.1%	+4.6%	+2.8%	+3.7%	+4.4%

\* Year on Year (4Q2012 to 4Q2013 = 2012 to 2013)

## Monthly Bulletin of Indices

YEAR	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEPT	OCT	NOV	DEC
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	941	941	961	961	961	960	960*	962*
2015	961*											

\*Provisional