CHILTERN HR

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NEWSLETTER

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1. Revised ACAS Code of Practice on Disciplinary and Grievance Procedures

Parliament has approved an ACAS revised Code of Practice on Disciplinary and Grievance Procedures http://www.ACAS.org.uk/media/pdf/f/m/ACAS-Code-of-Practice-1-on-disciplinary-and-grievance-procedures.pdf. The revised Code took effect from 11 March.

New paragraphs 14 to 16 and 36 to 38 have been inserted and confirm that:

- employers must agree to a worker's request to be accompanied by any chosen companion who is a fellow worker, trade union representative or official;
- workers can change their mind on their choice of companion;
- employers should be given enough time to make any necessary arrangements to enable the chosen companion to attend the meeting, although a request to be accompanied does not have to be in writing or within a particular time frame;
- workers should, where possible, provide their employer with the name of the companion and specify whether it is a fellow worker, trade union representative or official;
- if a companion is not available the time proposed for a hearing, an alternative time must be arranged by the employer that is reasonable and within five days of the original date.

ACAS has updated its accompanying non-statutory guidance, 'Discipline and grievances at work: the ACAS guide' http://www.ACAS.org.uk/media/pdf/e/m/Discipline-and-grievances-ACAS-guide3.pdf.

2. Investigation into fraudulent mileage claimed was reasonable

The Court of Appeal has held that an employer's investigation relating to mileage expenses claimed was reasonable.

An audit of the employee's mileage claims, which compared the mileage claimed against the distances for the journeys calculated by the AA route-finder, showed that the mileage claimed was nearly twice as far as it should have been.

Disciplinary proceedings were commenced and as part of the investigation the mileage claimed was checked against the same journeys made by the employee in the previous year. The distances had increased significantly. The distances were also checked using the RAC website which gave similar distances to the AA.

The employee said that the discrepancies were explained by difficulty in parking, one-way roads and road works causing closures or diversions. The employer did not consider it necessary to go through each and every journey with the employee because every journey was above the mileage suggested by both the AA and the RAC. At the disciplinary hearing it, therefore, limited its questioning of the employee to two of the journeys in question.

The employer concluded that since the employee made the same journeys several times he should have known the best places to park, the fact that there were one-way systems was not a reasonable explanation as the AA route-finder takes these into account, and whilst road closures and diversions would account for some increased mileage, they could not explain why the mileage on every journey was increased.

What does this mean?

The Court of Appeal said that it was not necessary for the employer to extensively investigate each line of defence advanced by the employee. What was important was the reasonableness of the investigation as a whole. It was not necessary in the circumstances for the employer to have checked with the local authority, as part of the investigation, whether new residents' parking bays had been installed, which would have made parking difficult and it was not necessary for the employer to have checked whether there had been road works or to have recreated the journeys travelled.

What should employers do?

The reasonableness of an investigation will depend on the facts of a particular case. In this case the mileage claimed over a lengthy period of time was considerably higher than it should have been. Had the difference not been as high or had the mileage claimed related to far fewer journeys then the employer may have been expected to investigate in more detail.

3. Calculating the National Minimum Wage

The Department for Business, Innovation and Skills (BIS) has published updated guidance on calculating the national minimum wage (NMW) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/409995/bis-15-169-calculating-the-minimum-wage.pdf. The guidance provides practical advice and examples to explain what counts and does not count as pay and working hours for minimum wage purposes, eligibility for the minimum wage, how to calculate the minimum wage and how the minimum wage is enforced.

4. Pay cut was lawful

The Employment Appeal Tribunal has dismissed an appeal against the rejection of a claim of unlawful deductions from wages after a 5% pay cut was imposed on a workforce without their express consent when their employer ran into financial difficulties.

In this case there had been no formal objection by the union to the change in the pay rate, which took effect from 30 April and first appeared in pay statements on 10 May; no grievance was raised and no individual objections were raised by employees. The first indication of objection came with the union's solicitors' letter, dated 23 October.

What does this mean?

On the facts of this case the employees had accepted the variation by their conduct. In continuing to work without protest until 23 October, they had, taking account of all the circumstances, accepted the change in their terms and conditions as to pay.

What should employers do?

Employers seeking to impose pay cuts should always take legal advice before doing so.

5. Employer did not have knowledge of disability

The Employment Appeal Tribunal has held that an employer did not have constructive knowledge of an employee's disability as it had made reasonable, albeit not perfect, efforts to ascertain whether the employee was disabled.

The employee had persistent short-term absences and gave various reasons for her absences including hypertension, stress and anxiety, possible viral infections, dizziness, difficulty breathing, reaction to medication, head colds, wrist pain and stomach upsets. On one occasion she provided no explanation for her absence. She also failed to comply with her employer's absence notification procedure.

An occupational health report concluded that she was not disabled. However, it failed to answer the questions the employer had asked. The employer followed it up and a more detailed report was prepared. The more detailed report also failed to deal sufficiently with the questions posed. The employer did not follow this up further but did make other efforts to investigate whether the employee was disabled. This included holding back to work interviews and considering correspondence from the employee's GP.

What does this mean?

The employer did not have actual or constructive knowledge of the employee's disability. It was reasonable for the employer to conclude that she was not disabled because the advice from the occupational health advisor was consistent with what the employer knew at the time. There was no reason for the employer to believe that her medical problems would extend for a period sufficient to bring her within the definition of disability and many of her absences were not due to impairments giving rise to a disability. Furthermore, the employer had, by referring the employee to the occupational health advisor, holding back to work interviews and considering correspondence from her GP, done all it could reasonably be expected to do to discover any disability.

What should employers do?

Employers should make up their own mind as to whether a person is disabled and not simply defer the decision to an occupational health advisor. Other steps should be taken such as those taken in this case to establish whether an employee is disabled.

6. Controlled diabetes was not a disability

The Employment Appeal Tribunal has held that diet-controlled type 2 diabetes was not was disability for the purposes of disability discrimination law.

What does this mean?

Type 2 diabetes, in itself, does not amount to a disability under the Equality Act 2010.

What should employers do?

Employers should be careful not to generalise the effects of conditions that can be managed by diet. They should instead consider whether an employee is disabled in the normal way.

7. Helping older workers stay in employment

The Government has published a report, 'A New Vision for Older Workers: Retain, Retrain, Recruit' as part of an initiative to tackle discrimination against the over 50s in employment. The report https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411420/a-new-vision-for-older-workers.pdf sets out ways to help older workers stay in or return to employment including apprenticeships for those over 50, flexible working and better training for line managers. It recommends that employers carry out an age and skills audit (including monitoring and guarding against age bias in recruitment practices) to enable employers to manage knowledge and experience in their business. It also recommends that employers provide training to effectively manage older workers, promoting options such as flexible working, family crisis leave and menopause awareness.

The Department for Work & Pensions has also produced a toolkit https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411125/older-workers-employer-toolkit.pdf which encourages managers to take steps to retain, retrain and recruit older workers and highlights the benefits of employing older workers.

8. Whistleblowing guidance

BIS has published guidance for employers on whistleblowing as well as a Code of Practice.

The guidance 'Whistleblowing: Guidance for Employers and Code of Practice" https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415175/bis-15-200-whistleblowing-guidance-for-employers-and-code-of-practice.pdf explains the law on whistleblowing, how employers can put whistleblowing policies in place and bring them to the attention of staff. The Code of Practice sets out good practice examples of how whistleblowing should be managed.

9. Disclosures were not made in good faith

The Employment Appeal Tribunal has dismissed an appeal following a finding by a tribunal that an alleged protected disclosure had not been made in good faith.

The employee, in this case, had raised safety concerns and accused management of concealing those safety issues. After carrying out an investigation those concerns were not upheld and the employee was told that if he wished to pursue his allegations he would need to produce further evidence. He continued to maintain that there was an attempt to conceal unsatisfactory work and lodged a grievance complaining that he had suffered a number of detriments as a result of raising his concerns. At an appeal meeting relating to the grievance, however, he admitted that there was no question of any safety implications arising.

What does this mean?

As the employee had made serious allegations not caring whether or not they were actually true which could have damaged his employer's reputation the alleged protected disclosure had not been made in good faith and, therefore, he was not protected by the whistleblowing legislation.

What should employers do?

Employers should ensure that they have a whistleblowing policy in place and that this is communicated to all staff.

10. Enforced subject access has become unlawful

From 10 March it will be a criminal offence for employers to require job applicants or existing employees to obtain a copy of their criminal records by means of a subject access request, and supply it to the employer in connection with their recruitment or continued employment. Instead employers should use the criminal records disclosure regime operated by the Disclosure and Barring Service. The new criminal offence carries an unlimited fine in England and Wales.

Reference: The Data Protection Act 1998 (Commencement No. 4) Order 2015