

News

Many of you will now be fully aware of the Government's proposals to repeal the current statutory dispute resolution procedures as part of the proposals under the Employment Bill 2008 ("the Bill"). This will mean that when the Bill is passed, there will be no statutory procedures for employers to follow when dealing with employee disciplinarys, dismissals and grievance.

However, that is by no means the end to the dismissal and grievance procedures that we have all come to love and hate! As part of the proposals under the Bill, ACAS launched a public consultation on its revised draft Disciplinary and Grievance Code of Practice (the Code) on 2 May 2008. The consultation period will end on the 25 July 2008.

The intention of the Government is to replace the current statutory regime with a less prescriptive, but concise and principle-based system for dealing with employee disciplinarys, dismissals and grievance. Essentially, the revised Code going forward will mirror the existing statutory regime, but will not be in a statutory form. Additionally, the Code will have the added emphasis of informal resolution and encourages employers to undertake an investigation stage as part of their procedures.

The main principles of the revised Code include:

- dealing with issues promptly and consistently;
- carrying out appropriate investigations;
- using a manager with no previous involvement in the case for grievance or disciplinary hearings;

- allowing the employee to put his/her case forward;
- allowing an employee to be accompanied; and
- providing an employee with a right of appeal.

The key difference between the Code and the existing statutory dispute resolution procedures is that the Code is not legally binding and an employer's failure to follow the Code will not result in a Tribunal finding a dismissal to be automatically unfair. This is great news for employers.

A Tribunal will, however, be able to take the Code into account when considering cases before them. Should a Tribunal consider that there has been an unreasonable failure to comply with any provision of the Code, by either the employer or the employee, it will have the power to adjust any compensation awarded by it up or down (up to a maximum 25%) if it considers it just and equitable to do so in all the circumstances. Therefore, employers will be advised to follow the Code where possible.

Following the end of the consultation period, ACAS anticipates that the revised Code will come into force on the same date that the Government introduces the changes to the statutory dispute resolutions regime under the Employment Bill. This is anticipated for April 2009. At the same time, ACAS also intend to publish a fuller, freestanding, non-statutory guidance document providing supporting information on handling workplace disciplinary and grievance issues. At present, this is in its draft format only.



We will be following the developments of the revised draft code and will provide a full report on the provisions of the Code (and the Employment Bill) once finalised.

In the meantime, should you wish to comment upon the proposed Code before 25 July 2008, please visit the ACAS website at <http://www.acas.org.uk/CHttpHandler.ashx?id=880&p=0>



If your details have changed or if you know anyone who'd like to receive The Works, please contact Paula Bailey Tel: 0116 247 3500 or email paula.bailey@howespercival.com This newsletter is designed to provide a summary of the subject matters covered, it should not be relied upon as comprehensive legal advice.

Key contacts:

howespercival.com

Paula Bailey

No.1 Bede Island Rd
Bede Island Business Park
Leicester LE2 7EA
Tel: 0116 247 3500
Fax: 0116 247 3539
DX: 17013 Leicester 2

Taj Rehal

252 Upper Third St
Grafton Gate East
Central Milton Keynes MK9 1DD
Tel: 01908 672682
Fax: 01908 692447
DX: 84750 Milton Keynes 3

Graham Irons

Oxford House
Cliftonville
Northampton NN1 5PN
Tel: 01604 230400
Fax: 01604 620956
DX: 12413 Northampton

Tom Sharpe

The Guildyard
51 Colegate
Norwich NR3 1DD
Tel: 01603 762103
Fax: 01603 762104
DX: 5280 Norwich

THE WORKS

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NEW DEVELOPMENTS IN EMPLOYMENT LAW

SUMMER 2008

Caught in the act!

At the final interview stage of this year's "The Apprentice", Lee McQueen lied about the length of time that he had spent at University on his CV, claiming that he had spent two full years there, and then continued to lie about this when pressed during interview. When caught in the act he claimed that "it must be four months if you say it is" and when pressed further by Sir Alan Sugar in the final stages, he expressed his regret and qualified his actions as being a form of miscommunication and of embarrassment about his lack of university education. It was later suggested during The Apprentice that in fact many people lie on their CV's. But is this really true? Is lying on CV's a growing problem in a competitive job market?

To ensure that employees who lie on their CV are caught in the act, employers should ensure that all academic qualifications are checked with the relevant awarding educational body and that all referees are contacted to verify the information given by the prospective employee and to confirm the nature and content of the reference that the referee has given, whether based on the employee's previous employment history or otherwise.

In addition to this, all job offers should be made conditional upon receipt of at least one reference by the employer which is, in the employer's option, satisfactory, and on other background checks being completed, such as the employee's right to work in the United Kingdom. Where an offer of employment is not made



conditional upon receipt of satisfactory references and an unsatisfactory reference is received then, if the offer has already been accepted by the employee, the offer cannot be unilaterally withdrawn without resulting in a breach of the employee's contract of employment. In this event, the employer would have to give notice to terminate the contract of employment and would be liable for the payment of notice monies due under the contract. Verifying an employee's qualifications and skills can seem like a lot of additional work, but it is essential to good recruitment practice.

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Story continued inside.

INSIDE

Disability Discrimination

The Statutory Dispute Resolution Procedures

Caught in the act! (continued)

The consequences of getting these initial recruitment processes wrong could turn out to be very expensive, in terms of cost and reputation!

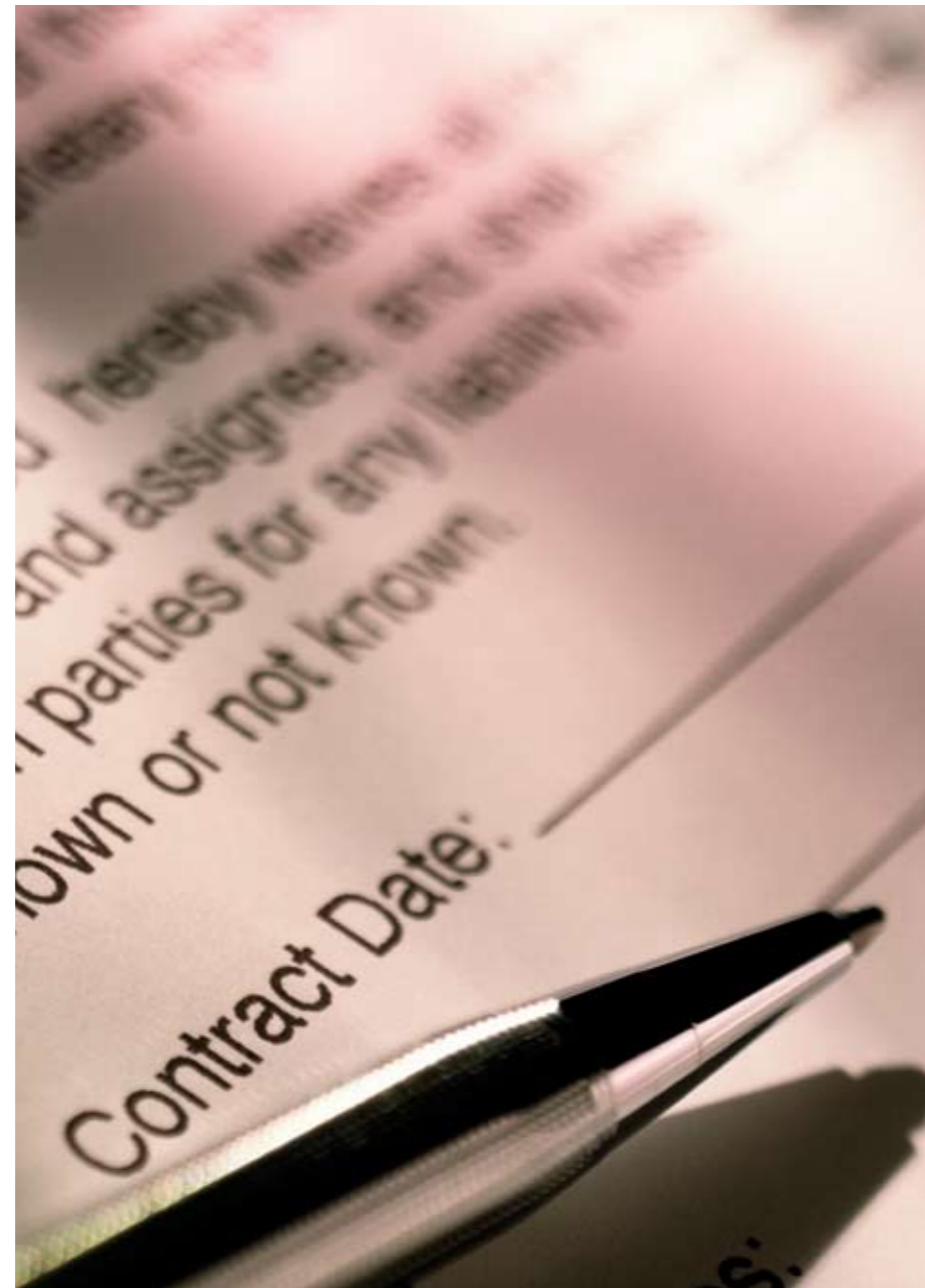
Where an employer discovers that a prospective employee has lied on his CV (or otherwise through the recruitment process) prior to the commencement of the employment relationship and before any offer is made, the employer will have the opportunity to refuse that person's application. This, of course, is subject to the refusal being free from any form of discrimination. In such cases of refusal, the employer must inform that person that they have been unsuccessful in their application and, if possible, the reasons for this.

But what happens if it is not until some later point in the employment relationship that it is discovered that an employee lied during the recruitment process, on his/her CV or otherwise? The answer to this will vary in each particular case. In cases where the individual has worked for the employer for a considerable length of time and has developed a level of trust and confidence with the employer, it may be difficult for the employer to establish that that trust and confidence has been destroyed by virtue of earlier lies on his/her CV (particularly if these have taken place years before). In this case, it may be advisable to speak to the employee concerned to make him/her aware of your concerns, to ask him/her for an explanation and to make him/her aware that honesty and integrity is important to the business and to the employer/employee relationship. In cases where the effect of the lie is such that it may genuinely bring the employer's business into disrepute or undermine the relationship of trust and confidence due to its severity, the employer should consider whether or not disciplinary action (and possibly dismissal) is appropriate and reasonable, and if so, it should ensure that it complies with the current statutory disciplinary/dismissal procedures and an otherwise fair process.

In terms of giving employee references, employers should take care in drafting such references. There is always the

potential for claims of discrimination, defamation, malicious falsehood and negligent misstatement to be made as a result of a reference. In respect of the latter, it must be remembered that when giving a reference the employer owes a duty to take reasonable care in the preparation of the reference. Where a false or misleading reference is made, and that reference induces a third party employer to enter into a contractual relationship with the employee concerned, and that third party employer suffers loss as a result, the employer giving the reference runs the risk of being held liable for that loss.

While there is no general duty on the



majority of employers to provide a reference, if one is given careful consideration should be given to the accuracy and content of all references. The reference given must be fair, accurate and not misleading in its content or overall impression. It is therefore advisable for employers to give factual references only. Employers should also adopt a consistent policy when providing references so as to reduce the risk of discrimination and/or victimization claims arising from employees who are not provided with a reference.

If you would like to discuss any of the above further, please do not hesitate to contact any member of the team.

Case notes Disability Discrimination

The Chief Constable of Lincolnshire v Weaver

The EAT has confirmed that, in deciding whether a proposed adjustment for a disabled employee is reasonable, the tribunal should not only consider factors relating to the individual concerned, but may take account wider implications, such as its effect on the workforce and the future precedent it sets.

Facts: Mr Weaver was a police officer with over 30 years service. In 2002 he developed health problems and was placed on restricted duties. He was later diagnosed as suffering from hereditary motor and sensory neuropathy which affected his mobility.

Given his disability, Mr Weaver accepted a role in the Central Ticket Office to investigate offences relating to road safety speed cameras. He held that post at the time of the Tribunal hearing, and accepted that, although not specifically identified for officers on restricted duties, the post was ideally suited for such officers.

In 2006, Mr Weaver completed thirty years service enabling him to retire on a full pension. Police officers may, however, choose not to retire at this point and remain employed until the force's ordinary retirement age. They would then, however, have to make pension

contributions, and forfeit the full benefit of those contributions by way of additional reckonable years' service. Because of this, most officers, understandably choose to retire upon 30 years service.

As a result, the Home Office introduced the "Thirty + Retention Scheme" in 2002, permitting officers, who can show a business case for doing so, to retire on achieving full pensionable service, take their lump sum pension benefit immediately, and then be re-employed immediately thereafter.

Mr Weaver chose to retire and join the Thirty + Retention Scheme. His business case was, however, rejected because he occupied a post which was appropriate to be undertaken by officers on restricted duties still within their pensionable service. He brought a claim for a failure to make reasonable adjustments.

The Tribunal found that Lincolnshire Police should have allowed Mr Weaver access to the scheme because it could afford to do so and that he had continued in the post in any event. Lincolnshire Police appealed.

The EAT upheld the appeal, finding that the Tribunal had erred in focusing solely on Mr Weaver's position and failing to engage



with the wider objectives of the Lincolnshire Police. The Tribunal was obliged to have regard to all the circumstances, including the benefits to Lincolnshire Police in keeping posts available for officers placed on restricted duties, the precedent the adjustment would set for other cases, and the purpose of the Thirty + Scheme which was to ensure that the Police Force retained the particular skills, experience and knowledge of those retiring officers carrying out full duties.

This is helpful guidance for employers as Tribunals must also consider the implications that reasonable adjustments have on employers as well as the individual concerned.

British Gas Trading Limited v Scott

In this case, an employee who had suffered a dislocation of her left knee-cap on two occasions but had made a complete recovery between the dislocations, was held to be a disabled person within the meaning of the DDA.

Facts: In July 2002, Mrs Scott suffered a dislocation of her left knee. She had made a full recovery by the start of 2003. In July 2005, Mrs Scott again dislocated her left knee and was absent from work until 30 August 2005. On 7 September 2005, she was dismissed, and later brought a claim for disability discrimination.

The Tribunal identified the preliminary issue as being whether the Claimant was, at her date of dismissal, 'disabled'. The DDA states that a person is 'disabled' if she has a physical or mental impairment which has a substantial and long term affect on her ability to carry out normal day-to-day

activities. On the facts, the dislocation of Mrs Smith's left knee was a physical impairment that had a substantial affect on her ability to carry out normal day-to-day activities. Therefore, did the dislocation have a long term affect?

Under the DDA, an impairment is long term if it has lasted or is likely to last 12 months. However, where an impairment ceases to have a substantial adverse effect, it is to be treated as continuing if it is likely to recur. Given that the impairment had no effects between the period of 2003 to July 2005 (as a full recovery had been made) and that it had not lasted for at least 12 months on either occasion, the Tribunal had to decide whether it should be treated as likely to recur.

The Tribunal held that as the dislocation had already recurred, this was powerful evidence that it was likely to recur again.

Accordingly, the Tribunal found that Mrs Smith was disabled. British Gas appealed.

The EAT confirmed that the Tribunal was correct in its decision and was entitled to have regard to all evidence up to the date of the hearing in determining whether a person is disabled. The EAT stated that it was open to the Tribunal to form the opinion that it was more likely than not that Mrs Smith would suffer further dislocations with such adverse affect.

This decision shows the EAT and Tribunal's willingness to expand the scope of the protection of the DDA to employees with recurring injuries. From a practical point of view it highlights the fact that employers need to be made aware and keep records of injuries/illnesses and to have systems in place to spot recurrences so that the risk of an employee being potentially 'disabled' can be identified at an early stage.