New Acas guidance on holding disciplinary and grievance meetings without meetings (UK)

Friday, May 8, 2020

Neatly timed to coincide with the beginning of the end of lockdown, ACAS has this week has issued some new thoughts on the conduct of disciplinary and grievance proceedings during the pandemic. Can or should you really run these things without the physical meetings referred to in generations of prior ACAS guidance?

In these respects, this new advice unfortunately asks many more questions than it answers. “The employer needs to decide...“, it says repeatedly, or “The employer must consider...“. I am not sure either that much is really added to the sum of human wisdom by the cautionary note that “In cases that might result in dismissal, the employer must always act fairly to avoid unfair dismissal”.

The new ACAS advice makes it clear that the existing law remains unchanged, as does its own formal Code of Practice, but remember that that Code is just a gloss upon The Law. All that says is that the employer should have a lawful reason for the dismissal and (Section 98(4) ERA 1996) that fairness will depend on “whether in the circumstances...the employer acted reasonably...in treating [that reason] as a sufficient reason for dismissing the employee“. That question is in turn to be decided “in accordance with equity and the substantial merits of the case“. Clearly no requirement for particular processes or a physical meeting there. The reference to
“circumstances” must include constraints imposed on the process by the lockdown. Therefore the question for the employer is how far the absence of a physical meeting means that its decision would no longer be in accordance with equity or the substantial merits of the case.

In reality, the key function of a physical disciplinary or grievance meeting is merely to satisfy the natural justice requirement that the employee be heard before any final decision is made. So we are really considering only those circumstances where doing a meeting by phone or video link would prevent that. As a matter of law the issue is neutral and for the ET to decide, but in practice, it will be for the employee to show how he has been prejudiced by the convening of a disciplinary or grievance meeting when the parties cannot sit together. Possible considerations include:

- Ensuring that the employee knows how to use any video equipment and has no disability which might make that more difficult for him than would be the case at a physical meeting.
- Whether there are documents considered which might be hard to see or describe remotely. In that case the employer should send the employee in advance hard copies of the relevant paperwork, paginated for ease of reference. For a bundle of any size, this is far better than relying on an emailed file which may put too much strain upon a domestic printer, if the employee has one at all.
- Is this a case where the facts are materially disputed? The greater the degree of controversy, the more appropriate it may be to aim for a physical meeting.
- Is there any particular urgency to the situation? That might be through circumstances relating to the employee (e.g. suspected gross misconduct) or to the employer (e.g. a requirement to get someone off expensive paid suspension as soon as possible). That is not to say that urgency is a pre-condition of going ahead remotely, but it would certainly be relevant at the margin.
- Does the proposed technology allow the employer to have a note taker and the employer to have his companion in on the call? It may be that the hearing would need to be through a series of calls to allow the questioning of witnesses and to allow the companion and the employee in question to confer confidentially if that is what they want.
- On the document point again, does the employer have access to all the relevant papers, or are they in the office out of reach? You should not take action against an employee on the basis of any document he has not seen, and similarly you shouldn’t disregard any document which the employee reasonably says you ought to look at, merely because you can’t get access to it at the vital moment.
- The guidance makes it clear that an employee acting as companion in a disciplinary or grievance meeting is fulfilling a statutory function and so will not be “working” for furlough support purposes. The same is true of witnesses and oddly also of those chairing grievance or disciplinary meetings even though that might be part of their normal job were they not on furlough.
- How far is your view of the evidence going to be affected by the employee’s physical demeanour in the meeting? Although it is all a bit amateur psychologist, you will be less able to see psychological signs of truth or misrepresentation at a meeting held remotely, i.e. the sweating, flushing, dropped eye contact and other tics which might have tipped you one way or the
other credibility terms in a finally-balanced case.

- You can record a call on phone or video if you wish, but you should make it clear at the outset that that is what you are doing and must then be prepared to provide the employee with a copy, however badly the “meeting” went. Remember that the employee may be doing the same without your knowledge, so don’t let the fact that you are doing the meeting from home lead you to relax. On video, make sure you have something suitable in the background. Instagrammable or Homes & Gardens not required, but you will look much less professional if it becomes clear that you are sitting in judgement on someone’s career while in your bed, the bath, a park or an inappropriate t-shirt or if you have children/dogs/someone doing lunch trotting around behind you.

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