STATES OF JERSEY

EMPLOYMENT LAW CODES OF PRACTICE: EMPLOYMENT FORUM'S RECOMMENDATION AND MINISTER'S RESPONSE

Presented to the States on 6th August 2013
by the Minister for Social Security

STATES GREFFE

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REPORT

Minister's response to the Employment Forum's Recommendation on the Employment Law Codes of Practice

Earlier this year, I directed the Employment Forum (the 'Forum') to consult upon 3 codes of practice that relate to the Employment (Jersey) Law 2003 (the 'Employment Law'):

Code 1 – Disciplinary and grievance procedures
Code 2 – Uninterrupted rest days
Code 3 – Therapeutic work.

The Forum presented its recommendation to me on 25th July 2013. I am grateful to the members of the Forum and I thank those who responded to the consultation. My response to the 3 recommendations is as follows:

Code 1 – Disciplinary and grievance procedures

The Forum recommended that the code of practice should be revised, and presented a revised draft code of practice for my consideration.

I agree that the revised draft is an improvement and that a simplified, more streamlined procedure should make it easier for employers to understand the steps to a fair disciplinary and grievance procedure. I will consider the revised draft in conjunction with the Jersey Advisory and Conciliation Service (JACS) and I expect to make some minor revisions before circulating a further draft code of practice for consultation later this year. To meet the requirements of the Employment Law, I will publish a notice in the Jersey Gazette advising that the code of practice is available for inspection and encouraging stakeholders to send me their comments.

Code 2 – Uninterrupted rest days

The Forum recommended that, instead of a code of practice, an amendment to the Employment Law should provide a definition of 'uninterrupted' rest days.

I accept the recommendation as I agree that this is a more appropriate approach. I hope that a definition in law, along with new guidance from JACS, will provide clarity for employers in the organisation of atypical working patterns. I will submit the proposed amendment to the Law Draftsman at the next opportunity and I will request that JACS prepares new guidance.

Code 3 – Therapeutic work

The Forum recommended that a new JACS guide should replace the therapeutic work code of practice.

I agree that it is more appropriate to provide equivalent information in guidance rather than in a code of practice. My Department will provide any assistance that JACS requires in the preparation of an appropriate guidance note.

RECOMMENDATION

Codes of Practice

Presented by the Employment Forum on 25 July 2013

CONTENTS

SECTION 1 – BACKGROUND

The Employment (Jersey) Law 2003 (the 'Employment Law') enables the Minister for Social Security (the 'Minister') to approve codes of practice for the purposes of the Employment Law. The Minister directed the Forum to circulate three revised codes of practice for consultation and to make a recommendation to him. The consultation drafts can be found on the website[1].

CODE 1 – Disciplinary and Grievance Practice and Procedures
CODE 2 – Uninterrupted Rest Days
CODE 3 – Therapeutic Work

The Minister may approve codes of practice, subject to certain requirements being met, as set out in Article 2A of the Employment Law:

- The Minister must consult the Jersey Advisory and Conciliation Service (JACS), the Employment Forum (the 'Forum') and other persons, or representatives of such persons that might be affected.

- A notice must be published in the Jersey Gazette advising the public that the code of practice is available for inspection and that representations may be made to the Minister within a 28 day period.

The Minister will consider the Forum's recommendations prior to publishing a notice in the Gazette and approving any revised codes of practice.

[1] www.gov.je/Government/Consultations/Pages/CodesPracticeEmploymentForum.aspx

RECOMMENDATION

Codes of Practice

SECTION 2 – CONSULTATION

Consultation was undertaken during the period 25 February to 1 April 2013. Seven responses were received, some of which were very detailed. Responses were received from the following respondents:

Jersey Chamber of Commerce
CIPD Jersey Group
Law At Work (Channel Islands) Limited
Anonymous employer
Jersey Advisory and Conciliation Service
Paul St. John Turner
Law firm

The comments received in relation to each draft code of practice are summarized below.

1. CODE 1 – Disciplinary and Grievance Practice and Procedures

The purpose of this code of practice was to provide practical guidance on the application of grievance and disciplinary procedures and best practice. The draft code of practice that was circulated for consultation had been revised to reflect two changes that the Forum had recommended to the Minister in March 2012, as well as to update outdated references.

The Forum notes that three of the respondents have challenged the Forum's March 2012 recommendation that the code of practice should be amended in relation to employee representatives in formal disciplinary and grievance hearings. The challenge appears to be made on the basis that the States had decided in 2012 that the Employment Law should not be amended to provide a **statutory** right for employees to be represented in formal disciplinary and grievance hearings by a friend. Comments included the following;

"Firstly, given the background to the proposed changes, namely that a proposition was put forward to the States in 2011 ": DISCIPLINARY AND GRIEVANCE HEARINGS: RIGHT TO A FRIEND" which was later rejected by the States, Chamber is stunned that this code purports to introduce secondary law going beyond principle law, which is not constitutional." (The Jersey Chamber of Commerce)

"First, LAW must take issue with the basis upon which the alleged need to amend this Code was predicated. LAW was in attendance at a meeting of the Counsel of Ministers in July 2011 when Deputy Hill's proposition 'Disciplinary and Grievance Hearings: Right to a friend', (P.112/2011) was extensively discussed (and withdrawn). There was no consensus that "a more acceptable solution than

legislative provision might be to amend the Code". This option was but one of many and was put forward by one person. Moreover, 'amending' a Code and using a Code as a back door way to amend legislation that has, to date, been rejected by the States Chamber is wholly inadvisable for all concerned. (Law At Work (Channel Islands) Limited)

"It is our understanding that this code of practice has been amended to ensure that employees have the right to bring anyone they want to a disciplinary or grievance hearing. We have previously responded to the propositions lodged in 2011 entitled "Disciplinary and Grievance Hearing: Right to a Friend" and the consultation paper entitled "Representation in Disciplinary and Grievance Hearings" and reviewed the Employment Forums response presented to the Social Security Minister on 7 March 2012. Unfortunately it appears that our responses were not listened to. These codes seem to be trying to bring about change of our primary legislation through codes of practice, i.e. codes of practice which go beyond the primary obligation. This offering seems absurd in the circumstances, being that the states only rejected Deputy Hill's proposition in 2011." (CIPD Jersey Group)

The Forum addresses these statements as follows:

1. The States Proposition 'Disciplinary and Grievance Hearings: Right to a friend', (P.112/2011) was not withdrawn; it was deferred to allow time for consultation and was subsequently rejected by the States. It was clear from the States debate that some States Members opposed the Proposition because the Minister for Social Security had already committed to reviewing the provisions of this code of practice via the Forum.

2. The meeting that Law at Work refer to was a meeting with the States Employment Board, the former Minister for Social Security (the 'former Minister'), the former Chief Minister, the former Deputy Hill and a number of other interested parties. Amending the code of practice instead of the Employment Law was not just one of many options proposed by one person. The former Minister reported the outcome of that meeting to the Forum as;

    i. A more acceptable solution than legislative provision might be to amend the code of practice so that it outlines circumstances in which an employer should consider permitting different types of representatives, and
    ii. The Employment Forum should be directed to consult on such an amendment.

3. As a result, the former Minister specifically directed the Forum to consult on whether the code of practice should be amended to describe circumstances in which an employer should consider permitting employees to be represented

by a representative, other than a work colleague or a trade union representative. The Forum presented its recommendation in March 2012 which proposed changes to paragraphs 45 and 50 of this code of practice.

4. The Forum considered all of the responses received during that consultation. The Forum will inevitably make recommendations that are contrary to the opinions of some respondents, particularly where positions are polarised, however that does not mean that the Forum did not consider the views expressed during consultation.

5. It is misleading to assert that a change to primary legislation has been brought about by including a provision in a code of practice.

Paragraph 11(f)

This paragraph specifies that disciplinary procedures should *"Specify those managerial and/or supervisory levels who have authority to take the various forms of disciplinary action, ensuring that immediate superiors do not normally have the power to dismiss without reference to senior managers."* The proposed amendment to this paragraph was to replace one word; *"managerial and/or supervisory levels **that** have authority...". Comments included the following;*

"LAW would counsel the Forum not to admit the changes to clause 11 (f) which purports to limit the right for an employer to dismiss to its officers who have conferred with senior managers. Obviously, such a demand is far too prescriptive a demand of the 'range of reasonable responses' test and, again, does not sit with primary legislation and case law. Moreover, its implementation would create logistical problems for business in that the task of effecting dismissals would, in effect, fall to senior managers alone (there is no point two minds resolving on a cause of action) and in small firms this would leave no independent senior officer to hear any appeal. Indeed, it is already difficult for several of our clients (small businesses) to source original and appellant decision-makers." (Law At Work (Channel Islands) Limited)

"It should be appropriate to just leave this as "specify management and supervisory levels have the authority to take disciplinary action". To require referral to immediate superiors will create specific problems particularly in small businesses. If there is to be an appeal then this would normally go up the line to the senior manager. This senior manager can no longer be used as they are compromised as they have been part of the decision to make the original dismissal. Even in large organisations this can prove problematic. A recent dismissal I have been involved in ended up using 12 individual managers in order to ensure that at each stage of the process managers who had not been involved up to that date were allowed to make decisions. If this is the case for a large organisation how much more difficult would it be for a small organisation, and therefore the Codes of Practice should enable more

senior managers to remain separate to the initial dismissal decision so that they can provide proper routes of appeal." (Anonymous employer)

"Having to specify levels of management authority that can take various forms of disciplinary action is difficult for smaller employers. Ensuring that immediate superiors do not have the power to dismiss without reference to senior managers should not be an essential feature of a procedure, as the decision to dismiss should be made by the person hearing the disciplinary not senior managers who may not be involved." (The Jersey Chamber of Commerce)

Paragraph 45

The code of practice currently does not require an employer to have considered, as part of a fair process, a request for another type of representative beyond employees' statutory and contractual rights. The amendment proposed by the Forum in March 2012 would insert the sentence *"To ensure a fair process, an employer should give consideration to reasonable requests for other types of representatives in circumstances that are appropriate for both parties."*

This would mean that, in determining whether a process has been fair or otherwise, the Employment Tribunal or a court may take into account whether an employer has given consideration to such a request and whether that request was reasonable and appropriate for both parties. The Forum considered that this would encompass a wide range of scenarios and would enable individual circumstances to be considered by both parties, rather than being limited to particular groups of employees or narrow situations, to the exclusion of other appropriate circumstances.

A number of respondents commented on the recommended amendment in this latest consultation, including the following;

"Given the proposed introduction of a new clause 45, which in essence could allow any person to attend disciplinary and grievance hearings, introduces rights which could have a fundamental and detrimental effect on Jersey's businesses. This new clause could be counter-productive and self-defeating as by introducing adversarial lawyers amongst others into fragile internal workplace relations could be disastrous and does not make for good employment relations. As written, it could be viewed by the Employment Tribunal that if an employer had not followed this codes, they would not meet the expectations required for 'fairness and reasonableness'." (The Jersey Chamber of Commerce)

"In relation to point 45 this puts more red-tape for employers in the Island, any party can be heard in the Jersey Employment Tribunal without legal representation, so why try to endorse legal representation in the workplace as well as allowing various parties, who could be emotionally charged (i.e. parent, sibling, partner etc.) and not

have the same obligations as a trade union official or an employee in relation to confidentiality." (CIPD Jersey Group)

"Using the words "to ensure a fair process" has the effect of bringing the facility for some other type of representative to be considered in the same way as Clause 41 where someone may be represented by employees, Trade Union officials etc. The States had specifically rejected this approach and therefore I do not understand why it appears so strongly within the Code of Practice. In essence if an employer refuses a request then the whole process becomes unfair and a claim is likely to be successful. I would suggest that the Employment Forum follows the lead of the States Chamber and removes this facility. As such the Clause should commence at the second sentence "some employees may extend …….". (Anonymous employer)

"LAW would counsel the Forum <u>not</u> to agree to the proposed new wording of clause 45 (namely the entire first sentence) which 'to ensure a fair process' obliges employers to consider reasonable requests for types of representatives not prescribed by statute. Accordingly, any failure to so consider would lead to a negative inference being drawn against the employer which is wholly perverse when the widening of representation has been specifically rejected by the States. LAW would ask the Forum to note that in sharp contrast to us, the ACAS Code actually limits the statutory right to representation (aka the right to be accompanied) by providing guidance on when an employee's request for the same is not reasonable. Possible compromise, therefore, could be to remove the reference 'to ensure a fair process' and amend 'should' to read 'may' and/or to shore up the provisions in clause 44 of the Code to explain to employees what wider types of representation could be considered unreasonable i.e. a representative whose presence would prejudice the hearing etc." (Law At Work (Channel Islands) Limited)

"In regard to amendments to paragraphs 45 and 50 we are in agreement that the Code should encourage employers to consider extending the type of representatives in appropriate circumstances. While paragraph 45 gives examples of who such representatives may be, we believe it would also be useful to give examples of the circumstances when such representatives may be envisaged e.g. in cases involving vulnerable employees, employees who find communicating in English difficult or where the outcome of the disciplinary hearing could effectively end a person's career and a claim for unfair dismissal in the Employment Tribunal would not be an adequate remedy." (Jersey Advisory and Conciliation Service)

The Forum's March 2012 recommendation stated that, *"by listing specific circumstances, it could be inferred that other circumstances do not have to be taken into account."* Examples of who such representatives might be and the scenarios in which they might be envisaged is considered to be more appropriate for inclusion in guidance rather than the code of practice.

RECOMMENDATION

Codes of Practice

Paragraph 50

Paragraph 50 of the code of practice currently states; *"Before the hearing, the employee should inform the employer of the identity of their chosen representative."* The Forum had recommended in March 2012 that the paragraph should be amended to provide that, *"before the hearing, both parties should be informed of the identity and role of each person who will attend the hearing."* The Forum's intention, as with paragraph 45, was to assist in ensuring a fair process and clarity for both parties.

A number of respondents commented on the recommended amendment in this latest consultation, including the following;

"It would appear that this amendment would seem impractical in practice; this is due to the fact that during a hearing either party may want to call witnesses to the hearing to clarify or expand on a point previously made. This provision within the code could prolong a hearing, for adjournments and notifications to be made, making the process more uncomfortable for all concerned." (CIPD Jersey Group)

"The difficulty with this Clause is that should a matter arise which is unexpected, which is not unusual, it may be necessary to pull in another witness, or possibly ask someone who has already provided a witness statement to appear at the hearing in order to provide clarification etc. If this Clause remains the only way to do this would be to adjourn, provide notice of that person and then recommence the hearing at a later date in order to remain within the Code of Practice. This will only delay the process and work against one of the central tenants within a Disciplinary process that the matter should be dealt with within a timely and appropriate manner." (Anonymous employer)

"Disciplinary and/or grievance hearings should necessarily continue to be investigatory in nature if the matters therein are to be properly assessed. On occasion this can mean hearing from witnesses whose evidence is not immediately considered relevant and/or only becomes disputed after invitations to such hearings are sent out. LAW recently had a case where an unexpected witness was required to clarify a particular alleged act during the hearing – this operated to exonerate the employee concerned. Had it not, the proposed new Code would have committed the employer to a breach for failing to give prior notification of this attendee before the hearing. Clearly it is perverse for a party, employee and employer alike, to be penalised for not knowing the future! Any counter-argument of dealing with such unanticipated and unknown developments through adjournments opens up all parties to counter-productive delays, and arguably leaves more scope for disputes turning litigious. This goes against the whole ethos of a disciplinary/grievance in that matters should be dealt with expeditiously and fairly, particularly as these processes are stressful for both parties." (Law At Work (Channel Islands) Limited)

"In relation to clause 50 by changing this so that both parties inform each other who might attend a hearing may not always be practicable. During Disciplinary Hearings witnesses may be called to support previous statements or clarify matters for either party." (The Jersey Chamber of Commerce)

Other comments

A number of other comments were received on the revised code of practice, as selection of which is included below;

"51(c) In relation to respond on the employee's behalf to any view expressed maybe mistaken by both parties in that there is some concern that certain representatives may understand that to mean that they are able to respond to questions on the employees behalf, even though it states it later in the paragraph that they cannot. 51 It states that a representative is not permitted to answer questions on behalf of the employee – however it could be read, only if the employee does not want them to do so." (The Jersey Chamber of Commerce)

"Para 37: Documents to be used in a disciplinary and grievance hearing should also be disclosed a reasonable time (say a minimum of three working days) in advance of the hearing." (Paul St. John Turner)

"*A model grievance procedure: In practice, we would usually expect to see two stages to a grievance procedure; the second stage usually being an appeal. We cannot see that the model grievance procedure includes any appeal. Further, we are unsure as to why three separate stages are required. We are also unsecure why the number of days for responding to the grievance is increased at stages two and three."* (Law firm)

"*The D&G Code summarises certain case law which may well be subject to change over time. Also, we would recommend that the Forum consider including further matters in the D&G Code covering, for example:*
- preparing for a disciplinary or grievance meeting/hearing;
- how the disciplinary or grievance meeting/hearing should be conducted;
- what should be considered before deciding a disciplinary penalty or grievance outcome;
- time limits for warnings." (Law firm)

There was also some agreement that the code should be simplified, and perhaps reviewed completely; the Jersey Advisory and Conciliation Service and the CIPD Jersey Group commented on this.

2. CODE 2 – Uninterrupted Rest Days

The purpose of this code of practice was to provide guidance as to what counts as 'interrupted' rest for the purpose of the statutory rest day entitlement. The intention was to enable employers to make appropriate arrangements that meet the statutory requirement to provide 'uninterrupted' rest days where an employee spends time 'on-call' or 'on standby'. The draft code of practice that was circulated for consultation included only minor amendments, for example, to simplify, the title was changed from 'Entitlement to uninterrupted rest days' to 'Uninterrupted rest days'.

Three comments were received on this code of practice;

"I note the title has removed the word of entitlement. I believe this is an incorrect removal as the rest days' is an entitlement not a provision which an employee has to be provided such as a statutory obligation. We should therefore make it clear right from the beginning this is an entitlement not a statutory obligation." (Anonymous employer)

"*The retention of 'Entitlement' in the title would, however, make for consistency and pre-empt lay readers' confusion that the Code has somehow demoted rest periods from being a statutory entitlement."* (Law At Work (Channel Islands) Limited)

"Whilst codes of practice provide useful guidance for employees and employers in managing the employment relationship, they should not, in our view, seek to supplement the statute and/or seek to resolve some of the matters not dealt with in the statute. We are concerned, in particular, that the Rest Days Code and the Therapeutic Work Code seek to define terms laid out in statute. For example, the Rest Days Code seeks to define 'uninterrupted' ... These are matters of statute which can only be properly decided upon by the appropriate courts and tribunals." (Law firm)

3. CODE 3 – Therapeutic Work

The purpose of this code of practice was to provide guidance to persons undertaking therapeutic work-like activity and to schemes and organisations that provide therapeutic work-like activity to assist them in determining whether the relationship between two parties is that of employee and employer, or client and therapeutic work provider. The draft code of practice that was circulated for consultation had been revised to replace outdated references, as well as to remove paragraphs that were repetitious and unnecessary.

The comments relating to this code of practice included the following;

RECOMMENDATION

Codes of Practice

"Employers are likely to be most concerned that they do not create an employment relationship where they are assisting in providing therapeutic work. We have seen a significant movement in employment attitude towards risk and probably the most obvious example of this is in the movement of temporary staff to agencies, I can therefore see no reason why employers would not take exactly the same view to therapeutic work i.e. employment relationships should be minimised and risk should be minimised. In these circumstances the need for individuals to have therapeutic work, which is a vital element of the support society should be able to provide to those who are our most vulnerable, needs to be protected and therefore the Code of Practice should be supporting and assisting the employer to ensure there is no employment relationship and also the individual requiring therapeutic work by ensuring the Law does not put barriers in the way for those who are in need. Having reviewed the Code of Practice I do not believe it meets these standards. I believe it needs to be far more specific in giving employer's confidence that they can provide therapeutic work opportunities without putting themselves at risk. In today's world if we do not do so employers will walk away as for many of them it is not seen to be worth the risk, therefore leading to a significant loss of opportunity for those most in need. I would therefore urge the Forum to totally review this paper in order to ensure that the guidance is absolutely clear and that there is no prospect of determinations having to be made." (Anonymous employer)

"LAW's average client (over 100 employers in various Jersey industries) will not even entertain such vagaries: they will simply not engage therapeutic and/or potential therapeutic workers thereby depriving both employer and worker alike of this socially important opportunity. This is surely not the Code's desired outcome." (Law At Work (Channel Islands) Limited)

"It is imperative that employers remain pro-active in trying to provide work experience/placements for therapeutic workers. The employment law does not assist this, as therapeutic work schemes are not exempt from the law. The codes than become difficult manage and therefore it is the employment law that needs changing and not the codes." (CIPD Jersey Group)

The Forum has not been directed by the Minister to consider whether to exclude therapeutic work from the Employment Law as part of this consultation. The Forum had recommended to the Minister in May 2009 that it is unlikely to be appropriate to specifically exclude from the protection of the Employment Law those who are being provided with training or assistance in seeking work under a government provided scheme. The Forum anticipated that more detailed principles would be required if such an exemption were to be supported and the specific scenarios in which an exemption would apply would need very careful considered so as not to cause injustice and detriment to those therapeutic workers who are capable of open employment. The stakeholders involved in that consultation did not advocate an exemption from the minimum wage. It was clear to the Forum that an exemption for

all therapeutic workers is not appropriate, as some people, whilst continuing to fall within the remit of schemes such as JET, will be working in open employment, and therefore they should be entitled to the protection of the Employment Law, including the minimum wage.

Comments from respondents relating to the test of employee status were as follows;

"The Code totally ignores two of the fundamental legal tests (of personal service and control) relating to employment status; treats the third test of mutuality as conclusive of an employment relationship (when it is not) and elevates 'payment' from one of many potentially indicative factors (in the third test of control) to a test in its own right. Further, there is no consideration at all given to the interplay with other contractual principles (such as the contracting parties' intentions) which can, in certain circumstances, trump all the foregoing. Accordingly, the Code goes beyond primary legislation (codified and case authorities); is inconsistent with the same; and, if implemented, would put adjudicators in the awkward position of having to dismiss and thereby discredit the Code in favour of correct application of the law and/or possibly lead to bad law and higher frequencies of appeal to the Royal Court. Often employment status is never certain unless or until an enquiring court so pronounces and in such uncertainty." (Law At Work (Channel Islands) Limited)

"Equally important is the unintended repercussion the Code could have on non-therapeutic workers. The definition of 'therapeutic' is too broad and could apply to a whole assortment of non-therapeutic workers including: Project Trident; Advance to Work; Advance to Work Plus; individuals on parole; and a whole host of work experience candidates seeking placements. Similarly, judgment by analogy to the Code could affect the determination of employment status of zero hour and/or agency workers." (Law At Work (Channel Islands) Limited)

"It appears that this code fails to recognise all four tests that the Tribunal should consider when identifying who is or who is not an employee, therefore could this code be counter productive. This may have the adverse effect of what the code is trying to achieve." (CIPD Jersey Group)

"What the Forum has failed to mention is that these new codes also change the well established tests that the Employment Tribunal uses to establish "who is an employee?". These new codes now stipulate quite clearly that the Tribunal will have to rely on just two tests – Mutual Obligation and Payment – to decide if someone is an employee. However it seems that these codes shift the emphasis from mutual obligation to payment as being the main test. The codes should not be directing the Tribunal in this way. Over 40 years of case law in the UK have established legal tests (which our Tribunal do look to for case law) to see who is an employee – Payment however is not one of them! " (The Jersey Chamber of Commerce)

RECOMMENDATION

Codes of Practice

"We are concerned, in particular, that ... the Therapeutic Work Code seeks to define the employee/employer relationship. These are matters of statute which can only be properly decided upon by the appropriate courts and tribunals." (Law firm)

The Forum notes that the code has not redefined the tests that a Tribunal is likely to apply in determining employee status; it states *"When the Tribunal or the courts consider whether a person is an employee for the purpose of the Employment Law, in the absence of further evidence being presented, the following factors, as set out in (a) to (d) are* ***likely to be considered****".*

The code does not stipulate that the Tribunal must only rely on these two tests. The equivalent UK guide also sets out the same advice, however the Forum notes that this guidance perhaps focuses on payment because the UK guide specifically relates to whether therapeutic workers are entitled to receive the minimum wage.

There are no decisions of the Tribunal that directly relate to the issue in question. Respondents refer to "well-established legal principles" relating to the employment status. The Employment Tribunal has made a small number of decisions relating to employee status, however these have related to whether an individual is employed or **self-employed**.

The most recent Tribunal decision relates to an interim hearing in July 2012 in the case of Haggar v Salty Dog Bar and Bistro[2]. The written decision states; "*It is important that the Tribunal does not adopt a checklist approach to the employment relationship by weighing up each of the factors as listed in the first part of this decision as being indicative of employment or not. Instead the Tribunal must, 'consider all aspects of the relationship, no single one in itself being decisive and each of which may vary in weight and direction, and having given such balance to the factors as seems appropriate, to determine whether the person was carrying on business on his own account', per Sir John Donaldson MR in O'Kelly and ors v Trusthouse Forte plc 1983 ICR 728."*

The difficulty with applying existing tests to a client-service provider relationship is that some of these tests may appear to be irrelevant to the relationship in question and others may appear to demonstrate that there is an employee-employer relationship.

Prior to the Employment Law coming into force, it is understood that therapeutic client agreements were intentionally drafted in a similar way to employment contracts and there was a perceived risk that an employment relationship might be created. Having discussed the revised draft code of practice with a representative of the Jersey Employment Trust, the Forum understands that, since the Employment Law

[2] www.jerseylaw.je/Judgments/JET/Documents/Display.aspx?url=2012\2012-07-26-Haggar-38-2012.htm&JudgementNo=38/2012

and this code of practice were introduced in 2005, this practice has ceased and those who provide and arrange therapeutic work are now clear on what is, and is not, employment. Schemes that were previously paying low 'therapeutic' wages (e.g. £3 per hour) are now paying the minimum wage or above where a person is undertaking therapeutic **work**. Where a therapeutic scheme is not providing work, it is made very clear that they are providing voluntary work experience and training to clients, for the client's benefit.

SECTION 3 – RECOMMENDATIONS

The Forum considers that codes of practice are intended to set out the basic requirements of fairness and standards of reasonable behaviour that are applicable in most cases; setting out the principles for handling certain situations. A guide, on the other hand, provides detailed advice that will be helpful in general cases and in individual cases.

The Forum notes that the UK has issued only three codes of practice relating to its employment legislation. In addition to the code of practice setting out 'disciplinary and grievance procedures', the other two codes of practice relate to time off for trade union activities and the disclosure of information to trade unions. Whilst other jurisdictions including the UK, Isle of Man and Guernsey have issued codes of practice relating to disciplinary procedures, the Forum is not aware of any other jurisdictions that have issued codes of practice relating to therapeutic work or rest days.

The Employment Law does not refer to the application or intended subject matter of codes of practice, other than a reference in Article 65 to the codes of practice that have been issued under the Employment Relations Law relating to trade union action. The Employment Law does not require codes of practice to be issued on any matter.

Summary of recommendations

CODE 1 – The Forum recommends that the Minister should approve a new code of practice on disciplinary and grievance procedures, a draft of which is included at the Annexe to this recommendation.

CODE 2 – The Forum recommends that, instead of approving a code of practice, the Minister should request an amendment to the Employment Law that provides a definition of 'uninterrupted' rest days.

CODE 3 – The Forum recommends that the Minister should request that JACS prepares guidance to replace the therapeutic work code of practice.

RECOMMENDATION

Codes of Practice

1. CODE 1 – Disciplinary and Grievance Practice and Procedures

The Forum has concluded that, rather than modifying and revising individual elements of the code of practice, it is likely to be beneficial to provide a simplified procedure, having taken into account the following points:

1. The current code of practice is overly complicated and does not provide a clear, step-by-step procedure for an employer to follow.

2. The latest (2009) ACAS code of practice on disciplinary procedures[3] clearly sets out the required process and uses key points and headings to lead the employer through an appropriate procedure. Jersey's current code of practice was prepared in 2005 and was based very closely on an earlier version of the ACAS disciplinary and grievance code of practice.

3. The consultation responses included some detailed suggestions for improvements to this code of practice. If the code of practice is completely revised, some of these suggestions may become immaterial due to the extent of the re-draft.

4. The Forum had recommended two changes to the code of practice in 2012 (paragraphs 45 and 50). The consultation has revealed that certain employers and employer representatives continue to oppose those recommended changes.

5. Article 2B of the Employment Law provides that if it appears to a court or the Tribunal that any provision of a code is relevant to any question arising in the proceedings, the court or Tribunal **shall (i.e. must)** take that provision into account in determining the question. The Forum agreed that it must carefully consider what particular procedures the code of practice directs the Tribunal to take into account.

6. The Forum is not aware of any Employment Tribunal cases that have relied upon the current code of practice, nor any employers that have relied upon the code of practice in their evidence to the Tribunal. There is little evidence generally that employers and employees are relying on the code of practice to guide their disciplinary procedures.

7. The code of practice should not refer to Tribunal decisions or precedent because this can become out of date quickly and Tribunal decisions might be overturned. The Tribunal should be able to react to changes in best practice and should not be bound by outdated concepts.

[3] www.acas.org.uk/index.aspx?articleid=2174

8. The recent review of the Employment Tribunal's decisions in 2012 identified that some employers are unaware of the requirements of the Employment Law and identified a need to increase employers' awareness of the need to provide fair warning of dismissal or redundancy.

9. The underlying principles are the same for all employers and employees and so the code of practice must be appropriate for all sizes of business.

The Forum recommends that the Minister should approve the revised draft code of practice which is included in the Annexe to this recommendation. The Forum notes that, before approving a code of practice, the Minister is required to place a notice in the Jersey Gazette making the code of practice available for inspection and inviting representations. There will therefore be a further opportunity for interested parties to submit their comments on the revised draft.

The Forum considers that the revised draft code of practice would provide greater clarity and a more straightforward approach that provides sufficient flexibility for any size of business. The revised draft code of practice covers the fundamental principles of a fair process which are set out in a logical order, using clearer language. Some of the more detailed provisions are included in appendices and would not form part of the code of practice itself.

2. CODE 2 – Uninterrupted Rest Days

Article 10 of the Employment Law provides the following entitlement to weekly rest periods;

> *(1) Subject to paragraph (2), an employee shall be entitled to an uninterrupted rest period of not less than 24 hours in each 7-day period during which the employee works for his or her employer.*
>
> *(2) If the employer and the employee so agree in a relevant agreement, an employee shall be entitled to either –*
>
> *(a) 2 uninterrupted rest periods each of not less than 24 hours in each 14-day period during which the employee works for his or her employer; or*
> *(b) one uninterrupted rest period of not less than 48 hours in each such 14-day period,*
>
> *in place of the entitlement provided for in paragraph (1).*[10]

The Employment Law does not define an 'uninterrupted rest period'.

RECOMMENDATION

Codes of Practice

When the Employment Law was being prepared in 2004, concerns were expressed by some employers that the rest day provisions could pose problems for organisations that rely on call-out and standby arrangements because it is not clear whether time spent on-call or on standby can count as uninterrupted rest.

The Forum consulted in 2004 and presented a recommendation to the former Employment and Social Security Committee that;

- "A definition of 'uninterrupted' should be provided and that a rest period should be considered to have been interrupted if, either contractually, or due to business requirements, the employee is **required** by the employer to do one of the following on their rest day;

  - take a work related action, either at home or on the telephone, or
  - attend the workplace, or
  - be at or near the place of work.

- If a rest day is interrupted, compensatory rest must be made available within 14 days of the rest days that were interrupted.

- Subject to appropriate advice, provision should be made in a code of practice rather than legislation, as this is a complex issue that would not easily be incorporated into the Employment Law."

Jersey is not required to implement the European Working Time Directive however it provides some useful guidance. The Directive defines 'working time' as "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice. The Working Time Directive has been clarified and interpreted through a number of rulings in the European Court of Justice. The SIMAP[4] judgment defined all time when the worker was required to be present on site as actual working hours, for the purposes of work and rest calculations. The Jaeger[5] judgment confirmed that this was the case even if workers could sleep when their services were not required**.** The UK Working Time Regulations include the following definition of 'working time' –

(a) any period during which he is working, at his employer's disposal and carrying out his activity or duties,
(b) any period during which he is receiving relevant training, and
(c) any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement;

[4] *Sindicato de Médicos de Asistencia Pública v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, 2000
[5] *Landeshauptstadt Kiel v Jaeger*, 2003

RECOMMENDATION

Codes of Practice

The Forum considers that it is inappropriate for a code of practice to attempt to define a term that is set out in the Employment Law and recommends that the code of practice should be replaced with an amendment to the Employment Law that provides a definition of an 'uninterrupted' rest day.

The Forum is not aware of any Jersey Employment Tribunal case that has relied upon the code of practice or that has related to the application of the code of practice. Nor is the Forum aware of any particular concerns relating to the provisions as set out in the code of practice.

The Forum recommends that the Minister should not approve a revised code of practice under the Employment Law and that the following rules should be presented to the Law Draftsman for the preparation of an amendment to the Employment Law.

*A rest period is uninterrupted as long as the employee is **not required** by the employer to do any of the following on their rest day;*

(a) to be available at the employers' disposal to take a work related action away from the workplace
(b) attend the workplace, or
(c) be at or near the workplace.

A rest day is uninterrupted if an employee does any of (a), (b) or (c) without being required to do so by the employer.

If a rest day is interrupted, compensatory rest must be made available within 14 days of the rest days that were interrupted.

The Forum recommends that, in addition, JACS should be requested to provide guidance about the interruption of rest days in different scenarios including; on-call and standby arrangements, in services where an uninterrupted provision of service is required, in emergency services, where there is a requirement for emergency overtime in crisis situations, and indications of any additional details or arrangements that an employer might wish to set out in written terms of employment or a collective agreement.

RECOMMENDATION

Codes of Practice

3. CODE 3 – Therapeutic Work

Article 1A of the Employment Law defines employer and employee as follows;

"(1) In this Law –

(a) "employer" means a person who employs another person; and
(b) "employee" means a person who is employed by an employer.

(2) For the purposes of paragraph (1), a person is employed by another person if the first person works for the second person under a contract of service or apprenticeship with the second person.

(3) For the purposes of paragraph (1), a person is also employed by another person if the first person enters into any other contract with the second person under which –

(a) the first person undertakes to do, or to perform personally, work or services for the second person; and
(b) the status of the second person is not that of a client or customer of any profession or trade or business undertaking that is carried on by the first person.

(4) It is immaterial whether a contract to which paragraph (2) or paragraph (3) refers is express or implied.

(5) If the contract is express, it is immaterial whether it is oral or in writing."

A person is employed by another person if the first person works for the second person under a contract of service or apprenticeship with the second person. It could perhaps be argued that a person who is being provided with a service as a client of a therapeutic scheme cannot be an employee, even if there is some form of agreement regarding the obligations of the two parties. Whilst a therapeutic arrangement may be set out in an agreement of some sort, it seems unlikely that a genuine therapeutic arrangement would be viewed by a Tribunal as a contract of service or apprenticeship, whether express or implied.

Whilst a therapeutic arrangement will inevitably require the first person to **personally** undertake what is required (e.g. training, work experience), and the arrangement might involve the first person undertaking work-like activity for the second person, ultimately the first person is not undertaking work or a service for the second person. The second person is providing a service to the first person.

RECOMMENDATION

Codes of Practice

The lack of certainty may continue to be a concern for some because relevant departments and agencies need to give clear guidance on what constitutes employee status to ensure they are not adversely affected by confusion about the legal position. However concerns appear to have reduced due to changes in the therapeutic schemes that are being provided, as well as the code of practice.

Jersey's code of practice was closely based on a UK guide that was developed based upon four criteria recommended by the Low Pay Commission (LPC) in 2003. The LPC recommended that, if the four criteria are met, it should be permissible for an individual doing such therapeutic activity to receive some payment without becoming entitled to the minimum wage. The LPC recommended that, if any of the criteria are not met, the activity should be regarded as work and attract the minimum wage.

A representative of the Jersey Employment Trust advised that these four criteria are helpful, even if provided in a guide instead of a code of practice.

If the code of practice is to be replaced with guidance, it is likely to continue to be helpful to set out what factors the Tribunal might consider in order to reduce uncertainty around therapeutic work-like activity, but it will be necessary to review the advice that is given on the factors that the Tribunal might take into account. The focus of the guidance should be shifted away from pay because the guide would relate to employment rights generally, rather than the right to receive the minimum wage (as in the UK).

The basic principle is that an individual is an employee, unless the employer can demonstrate otherwise. The four criteria relate to activity that is purely therapeutic rather than productive so that where any work designated as 'therapeutic' is in fact equivalent to that undertaken in open or supported employment, affected individuals would be entitled to the minimum wage and the other protections offered by the Employment Law.

The difficulty with applying existing tests to a client-service provider relationship is that some of these tests may appear to be irrelevant to the relationship in question and others may appear to demonstrate that there is an employee-employer relationship.

Control – The service provider is likely to have some direct control over what the individual does, e.g. the hours of work-like activity, the method of working. Whilst an independent contractor may retain control over such factors, a client is likely to have to accept the service as it is provided without being able, for example, to dictate the hours in which they are provided with that service.

RECOMMENDATION

Codes of Practice

Mutuality of obligation – The parties are likely to have some sort of obligation to each other. In a contract of service this is usually expressed as being an obligation on the employer to provide work and an obligation on the employee to accept and perform the work offered. A therapeutic arrangement may be set out in an agreement which could give the appearance of an employment contract.

Personal performance – A therapeutic arrangement will inevitably require the first person to personally undertake what is required (e.g. training, work experience), and the arrangement might involve the first person undertaking work-like activity for the second person, but ultimately the first person is not undertaking work or service for the second person. The second person is providing a service to the first person.

Integration test – the extent to which the employee is integrated into the employer's organisation, for example, does the worker enjoy the same benefits of the other employees, is he subject to the employer's disciplinary process.

Economic reality test – is the person independent of the organisation that he is undertaking work-like activity for, e.g. is the person performing services as a person in business on his own account?

Multiple or mixed test – The following 3 questions are asked:

(i) did the worker agree to provide his or her own work and skill in return for remuneration?
(ii) did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?
(iii) were the other provisions of the contract consistent with it being a contract of service?

Since levels of unemployment have increased in Jersey, the use of voluntary work experience and training schemes, for example those provided by the Social Security Department, have also increased whereby a person is undertaking work-like activity as a client of a scheme, rather than as an employee of an employer. If JACS guidance is prepared, it could deal with this matter more widely, rather than being isolated to therapeutic work.

The Forum recommends that, in the preparation of a new guide, legal advice should be taken so that appropriate indications are given on the factors that the Tribunal might take into account in determining whether a person is an employee or a client, whether of a therapeutic work scheme, or any other voluntary work experience or training scheme that provides a service to clients.

RECOMMENDATION

Codes of Practice

ANNEXE – Revised draft Code of Practice

Disciplinary and Grievance Procedures

Introduction

This code of practice has been prepared by the Minister for Social Security (the 'Minister') in order to assist both employers and employees deal with matters related to discipline and grievance in a fair and appropriate way. It recognises that, while employees have a right to be treated reasonably, employers also have a right to manage their businesses and to ensure that employees conduct themselves in a way that contributes to business success.

While larger employers will be likely to have more detailed and extensive procedures, it is important to recognise that the obligation to behave reasonably applies to businesses of all sizes and in all sectors. In deciding cases of unfair dismissal, the Jersey Employment Tribunal (the 'Tribunal') must take into account the employer's size and administrative resources, but this does not mean that small employers are entitled to behave unreasonably. The principles set out in this code of practice are designed to apply to employers with just one or two employees just as much as they apply to larger employers with hundreds of employees.

In preparing this code of practice, the Minister has had careful regard to the need not to burden employers with excessive bureaucracy or red tape. It is hoped that this code of practice can contribute to the success of businesses in Jersey by setting out a clear framework of reasonable and fair treatment. This will help employers deal effectively with issues that arise in the workplace and help employees to raise their concerns in a constructive and proportionate manner.

The principles set out in this code of practice are designed to be as straightforward as possible. Employers who are unsure as to how a particular case should be handled can seek free advice and guidance from the Jersey Advisory and Conciliation Service (JACS).

Status of this code of practice

This code of practice has been approved by the Minister under Article 2A of the Employment (Jersey) Law 2003 (the 'Employment Law'). Breach of the terms of this code of practice does not of itself amount to a breach of the Employment Law, but in cases where it appears to a court or tribunal that any provision of this code of practice is relevant to a question arising in any proceedings, then the court or tribunal must take that provision into account in determining the question (Article 2B of the Employment Law).

RECOMMENDATION

Codes of Practice

Code of Practice on Discipline and Grievance Procedures

When this code of practice applies

1. Part 1 of this code of practice applies in cases where the employee is accused of misconduct by the employer. It is not intended to be followed in cases of business reorganisation, redundancy or poor performance. Nor is it intended to cover dismissals based on the fact that the employee is unable to work because of sickness or injury. It is important to remember however that in all such cases the employer will still be under an obligation to behave reasonably in making a decision to dismiss.

2. Part 2 of the code of practice applies in circumstances in which an employee is aggrieved by the conduct of the employer.

Part 1 – Handling disciplinary issues

Behaving reasonably – fundamental principles

3. The fundamental requirement in dealing with issues of discipline is to behave reasonably. What is reasonable will vary depending on the circumstances of the case and the size of the employer. However all employers should be in a position to observe the basic standards of reasonableness. In practice, this means that:

   - action should not be taken in the heat of the moment, but only after appropriate consideration and reflection

   - before taking action, the employer should carry out an investigation aimed at discovering the facts

   - the employee should always be fully informed of the grounds on which the employer is considering disciplinary action

   - the employee should have a reasonable opportunity to put his or her side of the story

   - any explanation put forward by the employee should be considered by the employer with an open mind

   - any disciplinary penalty should be proportionate to the offence committed and appropriate in the circumstances

4. In all but the most exceptional of cases, a failure to observe any of the above fundamental principles is likely to render any dismissal unfair. The provisions of this code of practice are designed to ensure that these fundamental principles of fairness are followed.

Dealing with matters informally

5. Many low level problems of misconduct can be dealt with informally without the need for a hearing. Often a 'quiet word' with the employee is all that is needed to solve the problem.

6. Dealing with matters informally is a normal part of everyday management and there is no need to follow a particular procedure. However it is a good idea for managers to make a note of when such interventions occurred for future reference.

7. Where the employer believes that disciplinary action such as a written warning or even dismissal is appropriate, then it is important that a formal disciplinary process is followed to ensure that the matter is dealt with fairly.

Taking formal action

8. Where serious misconduct has occurred or where attempts to change behaviour through informal means have failed then it will be appropriate for the employer to take formal disciplinary action. Where there is a written disciplinary procedure (see Appendix 1) then this should be followed. However the following standards should be observed whether there is a written procedure in place or not.

Conducting a fair investigation

9. Formal disciplinary action should not be taken against an employee without a fair investigation first taking place.

10. In a fair investigation the employer will attempt to collect all the relevant information about the alleged misconduct. This may involve gathering appropriate documentation or talking to individuals within the business who are in a position to know what happened.

11. A fair investigation is open-minded. The employer must be looking for evidence which tends to show that the employee is innocent just as much as evidence tending to show that he or she is guilty.

12. While it is not appropriate to apply the standards of a police investigation –a fair investigation is thorough. This is particularly true when key facts are in dispute. A

failure to pursue a plausible line of inquiry or speak to witnesses who are likely to have relevant evidence will often be sufficient to render any subsequent dismissal unfair.

Arranging a disciplinary hearing

13. When the investigation has been completed, the employer needs to decide whether there is sufficient evidence to hold a disciplinary hearing.

14. Where a hearing is to be held, the employee should be given adequate notice to enable him or her to prepare and find a representative. In straightforward cases, notice of one or two days may well be appropriate. However the more complicated the allegations, and the more detailed the evidence, the longer an employee will need to get ready for the hearing.

15. The hearing will usually be held in the employer's offices or some other suitable location. The hearing should be conducted in private, away from other employees if possible.

16. Prior to the hearing, the employee should be given a copy of the results of the investigation and an opportunity to examine the evidence that the employer has gathered.

Conducting a fair hearing

17. A fair hearing is one with no prejudged outcome. Whoever conducts the hearing must do so with an open mind. Wherever possible the hearing should not be conducted by the same person who conducted the investigation. Where the size of the employer means that this is not practicable then the employer needs to be especially careful to maintain an open mind.

18. At the outset of the hearing the employer should explain the purpose of the meeting and the details of the allegation that have been made.

19. The evidence that has been gathered in the investigation should then be examined and the employee invited to comment on any aspect of it.

20. There is no requirement for live witnesses to be brought into the hearing. It is usually sufficient for witness statements to be presented and discussed. However where live witnesses are invited to attend, the employee should be allowed to put questions to them about their evidence.

21. The meeting must be conducted in a way which allows the employee to explain his or her side of the story. While it is appropriate to question the employee,

these questions should genuinely be aimed at discovering the employee's version of events rather than simply catching him or her out.

22. The employee should be given the opportunity to be represented at the hearing by an appropriate representative. There is a law governing this right which is explained in Appendix 2.

Making a decision

23. Once the evidence has been heard, the person conducting the disciplinary hearing should consider what findings to make and what, if any, action to take. This involves reaching a conclusion as to what has happened and the extent to which this constitutes misconduct.

24. Before deciding what action to take, the employer should consider all the surrounding circumstances including whether there are any 'mitigating circumstances'. These are factors which may make the conduct less serious. They may include the personal circumstances of the employee or the way in which the employee has been managed in the past.

25. Although the results of the disciplinary hearing may be explained orally, they should always be followed up in writing.

26. The employer should set out the findings that were made and whether any disciplinary action is to be taken.

27. Disciplinary action will normally take the form of a warning or a decision to dismiss. Employers should be aware that sanctions such as demotion, suspension without pay or a financial penalty will only be appropriate where they are specifically provided for in the contract of employment.

Warnings

28. In most cases where the employer finds that misconduct has occurred, it will be appropriate to issue a written warning.

29. A warning should identify the misconduct that has been found to have taken place and warn that further misconduct on the employee's part will lead to further action.

30. A warning should be time-limited. Typically a written warning will last for either six months or a year.

31. Once that time period has expired then the warning should be disregarded in any future disciplinary proceedings.

32. Where further misconduct is found to have taken place within the period specified in the warning, then it will usually be appropriate to impose a 'final written warning'. A final written warning may also be imposed for a first offence if the conduct is sufficiently serious to warrant it.

33. A final written warning should identify the misconduct and warn that further misconduct will lead to dismissal.

34. A final written warning should also be time limited and should not normally last for longer than 12 months.

35. It will usually be fair to dismiss (with notice) an employee who has an active final written warning in place and who then commits an act of further misconduct even if that misconduct would not justify dismissal on its own.

Gross misconduct

36. Where an employee commits an act of gross misconduct then it will usually be fair to dismiss him or her without notice even if no previous instances of misconduct have occurred.

37. However, even in cases of gross misconduct, the employer should still follow a fair procedure. Indeed, the fact that the employee is accused of gross misconduct makes it even more important that the principles of reasonableness outlined in this code of practice are adhered to.

38. Gross misconduct is an act of misconduct which is so serious that it can be said to fundamentally undermine the trust and confidence that should underpin the employment relationship. Examples are:

    - Theft and dishonesty
    - Violent or threatening behaviour
    - A refusal to obey the employer's reasonable instructions
    - Serious bullying or harassing of colleagues
    - Working while under the influence of drink or drugs
    - Operating a business in competition with the employer

39. This is not an exhaustive list. The employer's disciplinary rules and procedures may set out further examples particular to the business concerned. Ultimately whether conduct amounts to gross misconduct is a matter which depends on a wide range of circumstances and needs to be judged on a case by case basis.

The right to be represented

40. An employee has a right under Part 7A of the Employment Law to be represented at a disciplinary hearing by either a colleague or a trade union official. Full details of the right and how it applies are set out in Appendix 2.

41. From the point of view of reasonableness, the right to be represented is essential in allowing the employee to state his or her case. The representative must be allowed to make representations to the employer and to confer with the employee. On the other hand, the representative should not answer questions put directly to the employee – although he or she may make representations about them.

The right to appeal

42. An employee who has been subject to disciplinary action should be given the right to appeal against the decision.

43. Where the size of the employer permits this, the appeal should be conducted by a more senior level of manager than presided over the disciplinary hearing and who has not previously been involved in the case.

44. In smaller employers this will not be possible, but an appeal should still be offered so that the employer has a chance to reconsider the action that has been taken and listen to any fresh arguments that may be presented.

45. An appeal should essentially abide by the same principles of fairness as a disciplinary hearing – including the right of the employee to be represented. It may amount to a complete rehearing of the case, but it is also acceptable to focus on particular grounds of appeal raised by the employee.

Part 2: Dealing with grievances

Raising a Grievance

46. A grievance is a complaint raised by an employee about the way in which he or she is being treated by the employer. A reasonable employer will seek to deal fairly with grievances raised by an employee.

47. An employee who has a grievance should seek to resolve the matter informally wherever possible by discussing the issue with his or her manager. An employer

should encourage employees who are unhappy to raise this with them at an early stage rather than allow problems to grow and fester.

48. Where the employee believes that an informal resolution is not possible then he or she should put the grievance in writing and give that to the appropriate manager. The grievance should be clearly and concisely stated and should set out what action the employee wants the employer to take in response.

49. On receiving the grievance the employer should organise a meeting with the employee to discuss his or her concerns. This should be arranged as quickly as possible and take place at a reasonable time and place.

50. The employee has the right to be represented in this meeting in the same way and on the same basis as in the case of a disciplinary meeting.

Conducting a grievance hearing

51. At the meeting, the employee should be asked to put forward his or her complaint. This may be done by the representative on the employee's behalf, although the employee should be prepared to answer direct questions from the employer.

52. It may become clear during the meeting that an investigation is needed to discover what has actually happened. In such a case, the meeting should be adjourned and an investigation should then take place.

53. Ideally the investigation will be carried out by a manager who will not be conducting the grievance hearing itself, but this is less important in the case of a grievance hearing than it is in relation to a disciplinary matter. In smaller employers especially, the investigation will often be carried out by the same manager who will eventually conduct the hearing.

54. When the investigation is concluded, the grievance hearing can be reconvened.

55. If the grievance is upheld, the employer will need to decide what action to take. This can be as simple as offering an apology to the employee or it may involve reversing a decision or agreeing to changes in working practices.

56. If the grievance is rejected, this should be clearly explained to the employee along with the basis for the decision. While this may be done orally, it should also be confirmed in writing. The employee should also be informed that he or she has the right to appeal

The right to appeal

57. As with a disciplinary matter, an employee who is not happy with the outcome of a grievance may appeal.

58. At the appeal, the employee should explain why he or she was not happy with the outcome of the original grievance.

59. The manager conducting the appeal should consider carefully the points made by the employee before reaching a decision.

60. When a decision has been reached this should be communicated to the employee and confirmed in writing. The letter to the employee should indicate that the decision is now final.

After the grievance

61. Once a grievance has been concluded, the employer may want to give consideration to what actions are needed to improve relationships in the workplace.

RECOMMENDATION

Codes of Practice

Appendix 1 – Written disciplinary procedures

NB: Appendix 1 does not form part of the code of practice

Why have disciplinary rules and procedures?

1. Whilst employers are not required by statute to have disciplinary rules and procedures it is good employment relations practice so as to promote fairness and order in the treatment of individuals and in the conduct of employment relations. They also assist an organisation to operate effectively. Rules set standards of conduct at work; procedures help to ensure that the standards are adhered to and also provide a fair method of dealing with alleged failures to observe them.

2. It is important that employees know what standards of conduct are expected of them. Further, the Employment Law requires employers to provide written information for their employees in relation to any disciplinary rules and procedures that are relevant[6].

Formulating Policy

3. Employers are responsible for maintaining discipline and for ensuring that there are satisfactory disciplinary rules and procedures. However, if they are to be effective, the rules and procedures need to be accepted as reasonable both by those who are covered by them and by those who operate them. Employers should therefore aim to secure the involvement of employees when formulating new rules and procedures or revising existing rules and procedures. Where a trade union or staff association is recognised, it would often be appropriate for its officials to participate in developing the procedures.

Rules

4. It is unlikely that any set of disciplinary rules can cover all circumstances; moreover the rules will vary according to particular circumstances such as the type of work, working conditions and size of establishment. When drawing-up rules, the aim should be to specify clearly and concisely those necessary for the efficient and safe performance of work and for the maintenance of satisfactory relations within the workforce and between employees and their employer. Rules should not be so general as to be meaningless.

[6] Part 2 of the Employment (Jersey) Law 2003 requires employers to provide employees with a written statement of the main terms and conditions of their employment. Such statements must specify any terms and conditions relating to disciplinary and grievance procedures that are applicable. The employer may satisfy these requirements by referring the employees to a reasonably accessible document, which provides the necessary information.

5. Rules should be readily available and managers should make every effort to ensure that employees know and understand them. This may be best achieved by giving every employee a written copy of the rules[7]. In the case of new employees this should form part of an induction programme. Special allowance should be made for individuals whose first language is not English or who have a disability.

6. Employees should be made aware of the likely consequences of breaking rules. In particular they should be given a clear statement of the type of conduct that may warrant summary dismissal.

Essential features of disciplinary procedures

7. Disciplinary procedures should not be viewed primarily as a means of imposing sanctions. They should be designed to emphasise and encourage improvements in individuals' conduct. In this way, the reasonable and consistent use of disciplinary rules and procedures will benefit employers in promoting good employee relations and in reducing the number of issues that arise for consideration.

8. Disciplinary procedures should:

- Be in writing.
- Specify to whom they apply.
- Not discriminate against any employee because of their sex, race, colour, language, religion, disability, political view or any other status.
- Provide for matters to be dealt with quickly.
- Indicate the disciplinary actions which may be taken and specify the normal duration of warnings.
- Provide for employees to be informed of the complaints against them and, where possible, all relevant evidence before any hearing.
- Provide employees with an opportunity to state their case before a decision is reached.

[7] See footnote 1.

RECOMMENDATION

Codes of Practice

- Clarify whether the statutory right to be represented applies to the hearing, and who may represent the employee (see Appendix 2).
- Ensure that, except for gross misconduct, an employee is not dismissed for a first incident of misconduct.
- Ensure that disciplinary action is not taken until the case has been investigated properly, and in a manner appropriate to the circumstances.
- Provide for a written explanation for any penalty imposed.
- Include a right of appeal and specify the procedure to be followed.

RECOMMENDATION

Codes of Practice

Appendix 2 – The right to be represented

N.B: Appendix 2 does not form part of the code of practice

1. The right to be represented is important to ensure a fair process. Part 7A of the Employment Law gives employees the right to be represented where their employer requires or requests them to attend a disciplinary or grievance hearing and the employee tells the employer that he or she wishes to be represented at the hearing.

2. The right to be represented only applies to disciplinary hearings where the hearing could result in a formal written warning or some other formal disciplinary action being taken against the employee (or the confirmation of one of the above), including appeal hearings. Informal disciplinary hearings, such as meetings to investigate an issue, do not attract the right to be represented. If it becomes clear during the course of such a meeting that disciplinary action is necessary, a formal hearing should be arranged where the employee has the right to be represented.

3. Grievance hearings also attract the right to be represented where an employer deals with an employee's complaint about the performance of a duty (whether statutory or contractual) owed to them by their employer. For example, a grievance about a pay rise is unlikely to fall within the definition, unless the right to a pay rise is specified in the employee's contract.

4. The Employment Law provides that an employee may be represented by one of the following people in formal disciplinary or grievance hearings:

    - A fellow employee who is employed by the same employer;

    - An employed trade union official (who may or may not be an official of a union that is recognised by the employer, but the union must be registered under the Employment Relations (Jersey) Law, 2007); or

    - A trade union official who is not employed by a union, but whom the union has reasonably certified in writing as having experience of, or having received training in, acting as an employee's representative at disciplinary or grievance hearings.

5. An employee may choose an official from any trade union, regardless of whether the union is recognised by the employer. Where a trade union is recognised in a workplace, it is good practice for the employee to ask an official from that union

to represent them. Trade unions should ensure that officials are trained in the role of representing employees.

6. An employee does not have to be a member of a trade union in order to request representation by that union. Fellow employees and union officials are not obliged to accept a request to represent an employee and should not be pressurised to do so.

7. Where there is a dispute about the chosen representative, the Employment Law provides that the Tribunal may consider whether the location of the chosen representative at the time of the request for a hearing makes the choice of that representative unreasonable (e.g. geographically remote).

8. An employer should give consideration to reasonable requests for other types of representatives where this is needed to ensure that the employee has a reasonable opportunity to put his or her side of the story.

9. The Employment Law provides that there should be flexibility in setting the time and date of the hearing, so that hearings are not allowed to drift, but that there is consideration of the reasonableness of employers' actions and employees' requests.

10. If a chosen representative cannot be available at the proposed hearing time, the Employment Law gives employees the right to propose an alternative time, which must be reasonable for both parties and within 5 working days of the date proposed by the employer. In proposing an alternative date, the employee should have regard to the availability of the relevant manager, e.g. it would not normally be reasonable to ask for a new hearing date when it was known that the manager was going to be absent from work on business or on leave, unless it was possible for someone else to act for the manager at the hearing. The location and timing of any alternative hearing should be convenient to both employee and employer.

11. Both the employer and employee should prepare carefully for the hearing. The Employment Law gives representatives the right to a reasonable amount of paid time off during working time to prepare and represent an employee, but only where a fellow employee is being represented (i.e. they both work for the same employer). Where a union official who is not a fellow employee is acting as a representative, time off is a matter for agreement between the union official and his or her own employer.

12. The employer should ensure that, where necessary, arrangements are made to cater for any disability the employee or their representative may have. Where English is not the employee's first language there may also be a need for

translation facilities. The employee should think carefully about what is to be said at the hearing and should discuss with their chosen representative their respective roles at the meeting.

13. Before the hearing, both parties should be informed of the identity and role of each person who will attend the hearing.

14. Representatives have an important role to play; the Employment Law requires the employer to permit the representative to address the hearing in order to:

    - Put the employee's case;
    - Sum up the employee's case;
    - Respond on the employee's behalf to any view expressed at the hearing; and
    - Confer with the employee during the hearing.

15. The representative is not permitted to answer questions on behalf of the employee, address the hearing if the employee indicates that they do not wish them to do so, prevent the employer from explaining his or her case, or prevent any other person at the hearing from making a contribution to it.

16. Employers must be aware that the Employment Law provides that an employee who is dismissed for representing (or proposing to represent) another employee, and an employee who is dismissed for asserting the right to be represented in a disciplinary or grievance hearing, would be automatically protected against unfair dismissal.

17. Where an employer has failed to allow (or threatened not to allow) an employee to be represented, the Tribunal may award up to 4 weeks' pay as compensation and quash any action taken by the employer in respect of the disciplinary or grievance matter (other than dismissal). In an unfair dismissal claim, the Tribunal may take into account an employer's failure to allow the employee to be represented in deciding whether a dismissal was fair or unfair.