

THE NEW WORKPLACE CULTURE OF CONFLICT

By RUTH MCGUIRE, BSC

New legislation intended to reduce the number of disputes reaching employment tribunals was enacted last month. This article suggests how problems between employers and employees should now be resolved at an earlier stage

It is hoped that fewer cases will now be fought out at employment tribunals

The compensation culture is here to stay. Whether we like it or not, we live in a country where litigation is slowly becoming a first rather than a last resort for conflict resolution. For employers, it is a particularly worrying situation. According to a common mantra in the US, "every business is only one law suit away from bankruptcy". In the UK, the mantra could be that "every organisation or company is only ever one employee away from a tribunal".

According to John Cridland, deputy director-general of the Confederation of British Industry: "The have-a-go mentality is fuelling a surge in dubious employment tribunal cases that is both costly and time-consuming." Figures from the Employment Tribunals Service confirm that the number of employment claims being submitted is increasing. This is clearly a reflection of the way employees feel about their employers. It is this culture that the Government wants to change. It wants both employers and employees to see employment tribunals as a last resort, a mechanism that is only used when other options have failed.

The issue of unnecessary suspensions from work following patient safety incidents has already been highlighted in this journal (*Hospital Pharmacist* 2004;11:222). Taken one step further, suspensions can turn into dismissals and if employers have not followed correct statutory procedures, they could end up with an adverse judgement from an employment tribunal. Around 40 per cent of

applications to tribunals are for claims of unfair dismissals.

Conflict at work is costly in terms of lost productivity, low morale and, if problems remain unresolved and result in a tribunal, legal costs. Apart from the inevitable emotional costs of bringing legal action, many employees have to suffer the financial burden of funding legal action from their own pockets. Likewise, in order to defend a claim brought by an aggrieved employee, employers also have to pay for legal costs. When the cost of lost productivity is added to the legal costs of defending legal action which may last many months and the potential costs of damaged reputation, it is easy to see why some employers choose to settle a case before a tribunal hearing where they risk losing a case and being faced with even greater costs.

Since 1 October 2004, both employers and employees have been required by law to comply with minimum statutory procedures in relation to disciplinary and grievance matters. The new procedures are governed by the Employment Act 2002 (Dispute Resolution) Regulations 2004. Employers need to comply with procedures because non-compliance could be costly. Employees also need to comply with procedures otherwise they could find they have no grounds for taking legal action against an employer. A new employment tribunal form will ask both parties whether they have used statutory procedures. The intention here is to encourage both sides in a dispute to sort out problems before resorting to legal action.

For their own protection it is vital for both employers and employees to be aware of their rights and responsibilities under new legislation.

THE NEW REQUIREMENTS

The 2002 Act covers workplace disputes in relation to:

- Mandatory dismissal and grievance procedures
- Mandatory grievance procedures
- Sanctions for the increase and reduction of tribunal awards for non-compliance with the procedures

EMPLOYEE COMMUNICATIONS

Most good employers will already have a staff handbook which outlines disciplinary and grievance procedures. The new legislation is not intended to replace existing procedures if they are comprehensive and sound. However, employers and managers do need to review existing procedures in the light of the legislation. In addition if they have not already done so, all employers are required to issue a written document that outlines their disciplinary and grievance procedures and any changes that have been made in response to the new legislation.

The new legislation can be communicated to employees through the job contract, the particulars of employment, the "offer letter" sent out to prospective employees after a successful interview or a "statement of change" document that highlights the new statutory procedures. If employees have not been made aware of their rights by an employer, an employment tribunal could find against the employer and fine them for non-compliance with legislation.

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INFORMAL WARNING

The word discipline has its roots in the word disciple and implies teaching or training. In other words, discipline even when talked about in the context of child rearing really means to train or teach. Disciplinary procedures should therefore be viewed by managers and employees as a mechanism for solving serious behaviour problems rather than as some sort of stick with which managers can beat or punish their employees.

The new legislation assumes that employers will always try to deal with any disciplinary or performance issues at an informal level before proceeding to formal procedures. This is, of course, unless an employee has been involved in gross misconduct or a serious matter. Many workplace problems can be dealt with at an informal level by competent managers. But that is often part of the problem — incompetent managers who do not know how to manage staff or how to deal with conflict. Competent managers, however, will have good working relationships with their staff and will have earned their trust and respect. In these circumstances, an informal warning to address a problem can usually resolve a conflict.

If an informal warning is issued, it should be used as an opportunity to help an employee recognise that there is a problem. It is far better for an employee to be able to arrive at that conclusion themselves than for them to be told. In other words during an informal warning meeting, the aim should be to lead the employee down a path so that they can identify the problem for themselves and work with a manager to find a solution. This method of conflict resolution enables the employee to take ownership and responsibility for the problem rather than seeing it as a manager's problem or as something that is being done to them by management.

FORMAL WARNING

For serious matters, or if after an informal warning and after a reasonable amount of time has elapsed there has been no improvement in an employee's conduct or performance, the next stage is the formal warning.

The purpose and aim of a formal warning should be resolution. Managers need to bear this in mind. They need to be committed to this aim and committed to giving an employee the opportunity to explain themselves. Employees are entitled to be accompanied at a hearing. If a manager is not satisfied with an employee's explanation, they should write to the employee and outline the problem, state what they expect the employee to do about it, set a timescale for the employee to improve and outline what will happen if there is no improvement.

If after the deadline for improvement has been reached, there is still no improvement, then a final written warning which outlines details of and the grounds for a complaint should be given. The final written warning should inform the employee that a failure to improve could lead to dismissal and should also mention an employee's right of appeal. Except in cases of gross misconduct, employment tribunals are unlikely to find that an employee was fairly dismissed if they did not receive a final written warning.

Because the legislation is new and yet to be tested, some solicitors are unsure as to how the sequence of warnings are to be interpreted in law. However, the received understanding seems to be that if, after informal and formal warnings, a problem with an employee still exists or if a problem involves a serious matter, then the standard statutory disciplinary and dismissal procedures apply. The three step standard statutory procedure for disciplining employees is as follows:

- The written statement
- The hearing
- The appeal meeting

WRITTEN STATEMENT

This statement should outline the allegation or complaint against the employee which may lead to disciplinary sanctions or dismissal. Managers should ensure they have carried out a full and thorough investigation before making their allegations. It is important for an employee to be given sufficient information before a formal hearing so that they can make a considered response to allegations. Attempts to take shortcuts by landing an employee with sudden allegations during a hearing rather than before a hearing, will probably result in an adverse judgement against an employer at the tribunal stage. Managers should also remind employees that they have the right to be accompanied during a hearing.

THE HEARING

The date of the hearing should allow an employee sufficient time for preparation but should not be unnecessarily delayed. The location of the hearing should be convenient for the employee and reasonable provisions should be made for a disabled employee or for a disabled representative who may be accompanying the employee to the hearing.

The hearing should be conducted in an appropriate and courteous manner and it should be obvious to all present that the purpose and aim of the meeting is resolution. A manager other than the one who is conducting the hearing should also be present at the hearing to take notes and to share in the decision making after the meeting. The hearing should conclude with a summary

and also a deadline for a decision being communicated to the employee. It is important that decisions are not made during the hearing. This is one area where employers may trip up. However, if the hearing is genuinely impartial and if the focus is really on resolution rather than punishment, then any decisions can only be made after the hearing.

After considering all the facts, the employee's explanation and any extenuating circumstances, a decision can be made about what, if any, sanctions to impose. The employee should be given the opportunity to appeal against a disciplinary decision. If an appeal hearing is held, it should be chaired by a manager other than the one who dealt with the original disciplinary hearing. Following the appeal meeting, employees should be informed of the decision and it should be made clear to them that the decision is final.

Of course any procedure is only as good as the manager who implements them and the new legislation does not address the problem of the incompetent or insensitive manager. Employment tribunals still expect employers to act reasonably and can still find against them if they have followed the statutory procedures to the letter but have not acted reasonably towards an employee (see Panel 1 on principles of reasonable behaviour).

ADVICE FOR EMPLOYEES

You are an employee with a grievance. What exactly does that mean? Is a grievance just a moan about management or can you, as an employee, bring a grievance if you have had a major fall out with a colleague? There is now a statutory definition of a grievance which is "some action that the employer or a colleague has taken or proposes to take which affects him or her, and which the employee considers has taken for some reason that is not

Panel 1: Principles of reasonable behaviour by an employer

- Improve rather than punish
- Inform and allow opportunity to state case
- Allow employees to be accompanied
- Establish facts and ensure action is reasonable
- Never dismiss for first offence unless gross misconduct
- Written explanation
- Right of appeal
- Be thorough, prompt and consistent

Courtesy of the Advisory, Conciliation and Arbitration Service

connected with the way he or she is doing the job”.

So, if you are going to raise a grievance, think carefully about the nature of your complaint. Is it related to the way you are doing your job or is about something totally unrelated. For example, are you being bullied or harassed by a manager or colleague? Have you been treated unfairly in some other way? Are you being verbally abused? Do remember that your employer has the right to expect you to reach a certain level of performance in your job and to take steps to encourage you to reach acceptable levels of performance.

Even if you decide that you have sufficient grounds for lodging a formal grievance try, if possible, to resolve problems informally. Good grievance and disciplinary procedures will always encourage employees to try the informal approach first before launching into formal proceedings. However, if an informal approach is not appropriate for some reason or does not resolve a problem, you cannot bring a case to an employment tribunal unless you have exhausted your organisation's formal grievance procedure.

Before embarking on grievance proceedings, think carefully about the implications and weigh up whether you are prepared for the emotional cost. For example, a grievance may involve a colleague or manager with

whom you are bound to have daily contact. Think about how working relationships will be affected if you bring a grievance and whether you are prepared for isolation or even hostility from colleagues. You also need to think about whether you have the stamina to see a grievance through to the end. This is because if you start a grievance procedure but fail to complete it and still have a problem which you decide to take to a tribunal, even if your case is proven, your compensation or award could be reduced by anything between 10 per cent and 50 per cent which would then only compound your feelings of being treated unfairly. Starting out a grievance process against a colleague or manager is not for the faint hearted. It is stressful and emotionally taxing.

The standard statutory procedure for grievances is more or less the same as the procedures for an employer who decides to discipline an employee. So the same three step procedure applies as mentioned on the previous page.

Under new legislation you are required to put your grievance in writing. The written statement should set out your grievance in detail. Legislation requires that you allow your employer up to 28 days to make a response. Premature claims to a tribunal will be automatically rejected. At the hearing meeting you

have the right to be accompanied by a colleague or employee representative.

CONCLUSION

The impact of the new legislation remains to be seen. However, it will be measurable. If the number of applications to employment tribunals decreases in significant numbers, it will be indicative of more internal resolutions of problems in the workplace. If not, the Government will have to think again.

DISCLAIMER Please note that this article addresses the new legislation only in general terms and does not constitute legal advice. Please consult a solicitor or the Advisory, Conciliation and Arbitration Service (ACAS) (see Panel 2) for detailed advice and guidance.

Panel 2: Contact details for further information and advice

- www.dti.gov.uk
- www.acas.org.uk
- ACAS helpline 08457 47 47 47