

**BRISTOL CITY COUNCIL
HUMAN RESOURCES COMMITTEE
FOR INFORMATION – 2 April 2009**

Title: Changes in employment law

Ward: City Wide

Report of: Director of Central Support Services

Officer presenting report: Rachel Yablsey, Employee Relations
Manager
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Recommendation

This report is submitted to this committee for its information regarding the changes in employment law, and amendments to Council HR policies, with effect from 6th April 2009.

Please note that this report is being dispatched prior to the conclusion of consultation with the Trade Unions and if there are any further subsequent changes, we will submit an additional briefing sheet prior to committee.

In the event that there are any issues of disagreement, this will no longer be an information item and the Committee will need to approve the proposed changes.

Summary

The current statutory dismissal, disciplinary and grievance procedures are being repealed with effect from 6 April 2009. In its place will be a new ACAS Code of Practice on discipline and grievances. This necessitates some minor changes to BCC policies, and the trade unions have been consulted on these.

Please note that the revised Code will not apply to dismissals due to redundancy or the non-renewal of fixed term contracts upon their

expiry.

The significant issues in the report are:

As above.

1. Policy

Several council policies will need minor revisions in order to comply with the new code. The changes for each of the affected policies are laid out in the attached Appendix B.

2. Consultation

2.1 Internal

The Trade Unions were sent information regarding the proposed changes on 3rd March 2009 and consultation meetings have been held on Friday 13th March and Friday 20th March 2009.

2.2 External

N/a

3. Background and Assessment

3.1 The attached briefing note (Appendix A) sets out the changes of the new Code including what employment tribunals may take into account, timescales, the maintenance of a list of recognised (suitably qualified and trained) TU representatives, employee rights and good practice.

3.2 The briefing note also gives an outline of transitional arrangements where disciplinary and grievance cases are underway on 6 April 2009. HR will need to ensure that Service Managers, employees and the Trade Unions are advised as to which procedure applies during the transitional period.

3.3 For Members' information, Appendix B also highlights how these changes impact upon existing policies and procedures.

4. Other Options Considered

4.1 The policy changes are required because BCC policies must

comply with legislation. However, due consideration has been given to two areas where we believe our policy differ:

- a) the Code states that there is no right for an employee to be accompanied by a trade union representative during the investigatory stage. We agree that this right should be afforded wherever possible as the support of a Trade Union representative is often valuable. However, given that the Code places a responsibility on both the employer and employee to progress issues without unreasonable delay we will provide the normal five days working notice of a meeting and if the employee requests a reorganisation of this meeting we will try to agree a date no later than five working days following the original date, otherwise the meeting will need to proceed without representation.
- b) the Code does not provide any timescales within which investigations should be completed and places an emphasis on 'without unreasonable delay'. We have agreed with the Trade Union Side that whilst we will not place timescales upon the process, the chronology will continue to apply and the Commissioning Manager should ensure that the alleged perpetrator (and the complainant/witnesses) are updated a minimum update period of 28 working days from the date that it is acknowledged there is an incident to be investigated.

5. Risk Assessment

- 5.1 Not to amend procedures and policies would mean BCC policies would not comply with legislation and would be at risk of costly litigation.
- 5.2 In relation to the recommendation that we afford the right of representation to employees during an investigatory stage, this approach does mean that there may be up to a ten working day delay to investigation meetings being held, however, we feel that this is in the best interests of the council and the employee.

6. Equalities Impact Assessment

- 6.1 The existing impact assessments have been reviewed and it is not envisaged that the minor changes will have impact adversely on any equalities groups.

7. Legal and Resource Implications

Legal:

This Report highlights the repeal of the statutory dispute resolution procedures. The ACAS Code of Practice will apply as of 6th April 2009 and act as the primary source of guidance for Tribunals in determining the fairness of any dismissal or grievance procedure.

(Advice provided by Husinara Islam for Head of Legal Services)

Financial:

(a) Revenue

Employment Tribunal awards against an employer may increase by 25% under the new Code of Practice (see 'General Principles of Fairness'). They may also be reduced under the "Polkey" principle (see Appendix A).

(b) Capital N/A

There are no financial implications arising from this report, the purpose of which is to update an existing policy to conform with new legislation.

(Advice from Stephen Skinner, Head of Finance, CSS and Chief Executive Depts)"

Land: N/A

Personnel: As set out in Appendix A

Appendices:

- A Briefing note on revised ACAS Code of practice and our policy and practice
- B Changes to BCC Policies after 6th April 2009

LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985

Background Papers: None

APPENDIX A

ACAS Code of Practice

Changes to Discipline and Grievance Procedures Briefing note

As you are aware, the current statutory dismissal, disciplinary and grievance procedures are being repealed with effect from 6 April 2009. In its place will be a new **ACAS Code of Practice** on discipline and grievances. **Please note** that the revised Code will not apply to dismissals due to redundancy or the non-renewal of fixed term contracts upon their expiry.

3 Step Procedure

The main change to the new Code is the removal of the stringent requirement to follow the 3 step procedure, which has resulted in adverse judgments for the most minor infringements.

With effect from 6th April 2009, a failure to follow the Code will not, in itself, make a person or organisation liable to proceedings. However, employment tribunals will take the Code into account when considering relevant cases. If they consider that an organisation has unreasonably failed to follow the code, they will be able to adjust awards against them by up to 25%. Similarly, if an employee has unreasonably failed to follow the code, any award can be reduced by up to 25%.

ACAS have produced a guide to handling disciplinary and grievance matters, and although ETs will not be able to adjust awards on account of failure to follow the guidance, they may use it to determine if we have complied with the general principle of fairness.

Employers must follow a fair dismissal procedure. The principle established under "Polkey" is reinstated, in that awards can be reduced to reflect the likelihood that dismissal would still have resulted if a fair procedure had been followed.

Timescales

Currently we provide a 28 day timescale within which to complete investigations (this is in line with the period within which the

employer has to try to resolve the issues before it can be considered by an ET). The new code does not stipulate a time period and an employee will be able to lodge an ET complaint immediately. The new code puts an **emphasis upon employers and employees raising and dealing with issues promptly and without unreasonable delay**. It is therefore important that we continue to produce a 'time line/chronology' of actions taken and why delays have been encountered'.

Following consultation with the Trade Unions we have, however, agreed to honour the previous recommendation by the Human Resources Committee that the responsible manager (or Commissioning Manager) should ensure that the complainant/ alleged perpetrator and if appropriate the witnesses are provided with an update of progress within 28 days of the date of notification that there is an issue to be investigated.

Trade Unions

The code makes reference to 'competent' Trade Union representatives accompanying employees. Employee Relations will continue to maintain a list of recognised TU representatives and will assume that Trade Unions provide suitably qualified and trained representatives.

It should be noted that whilst there is no statutory right for employees to be accompanied by a companion or a Trade Union Representative during the investigation stage. We have agreed that we should continue to afford the employee five working days notice of a meeting and allow the right to representation. If the meeting needs to be rescheduled due to availability it should be rescheduled within a further five working day period. If the employee is unable to arrange appropriate representation, given that there is a responsibility for both the employer and the employee to progress issues without unreasonable delay, the employee will need to attend the meeting unrepresented.

Right of Appeal

The Code continues to provide the 'right to appeal' against a disciplinary sanction and/or the outcome of a grievance. Our procedures have always requested a certain level of detail, however, in practice this has been lacking. This aspect will therefore need to be enforced for an appeal to proceed.

Transitional arrangements

There will be a period following the introduction of the new code on 6 April 2009 where the organisation will still be dealing with disciplinary and grievance cases that arose before this date or an issue is under consideration. The following is to assist in ascertaining whether the correct procedure is the one that applied up to 5 April or the new one with effect from 6 April 2009.

Disciplinary issues

The "trigger event" will be the letter informing the employee that the employer is considering taking disciplinary action.

The "old" procedure will apply where:

- An investigation has been concluded and it is considered that there is a case to answer, and a letter dated 5 April 2009 or earlier has been sent to the employee informing them that a disciplinary hearing is to be convened.
- A disciplinary warning has been given (or the employee has been dismissed) and an appeal is outstanding.

The "new" procedure will apply with effect from 6th April 2009 where:

- Allegations are being investigated under the code of practice on the conduct of investigations/management investigation but there is as yet no conclusion as to whether there is a case to answer.
- A manager is collating evidence but has not yet concluded that there is a case to answer.

Grievance

The deciding event will be the action about which the employee complains.

The "old" procedure will apply where:

- The employee has raised a grievance before 6 April 2009.

- The action complained of occurs wholly before 6 April 2009.
- For almost all types of grievance (but see below), the action complained of began before 6 April but continues after that date and the employee submits a grievance or presents a claim to the employment tribunal before 4 July 2009.
- For equal pay, redundancy payments and some industrial action claims, the employee submits a grievance or presents a claim to the employment tribunal before 4 October 2009.

The "new" procedure will apply where:

- The employee has raised a grievance dated 6 April 2009 or later about actions which happened on or after that date.

If an employee submits a letter dated 6 April 2009 or later raising a grievance, the receiving manager should ask them to complete a grievance form if they wish to progress the matter.

Impact on our Policies/Procedures

Chris Haines from ACAS has provided some clarity of the new code to assist us in determining the implications for our policies. The changes for each of the affected policies will be laid out, and if you would like to discuss these please contact us. If you feel it would be helpful to discuss the issues as a team, again please let us know.

Further Information

Please contact the Strategic HR: Corporate Employee Relations Team

Date: April 2009

Changes to Policies after 6 April 09

Disciplinary procedure

2.1 Amended

An employee who is subject to this procedure has the right to be represented or accompanied by a trade union representative or work colleague at any disciplinary / appeal hearings. The employee is responsible for arranging to be represented or accompanied.

If an employee requests that the meeting be postponed because they are unable to get a trade union representative of their choice or work colleague to accompany them on the proposed day, a new date should be arranged which is mutually acceptable to all involved, provided the new date falls within five working days of the original date.

At disciplinary or appeal hearings employees may call witnesses. They should advise the manager of the names of their witnesses so that appropriate time off for them can be arranged.

2.4 Addition (*in italics*):

"If the employee concerned is a trade union representative or officer, the manager should tell the full-time trade union officer prior to commencement of this procedure *after obtaining the employee's agreement.*" This is in line with the ACAS code.

3.8 Amended:

"If an employee is on probation the manager should inform them of the decision and offer the right of appeal."

4.1 Amended:

For misconduct cases different officers should carry out the investigation and the disciplinary hearing. However, in some cases it may be a straightforward matter of the employee's manager collating the evidence and moving to a disciplinary hearing. For example, the facts may be undisputed, or if there has been falsification of timesheets, the documentary evidence will be clear and not require an investigation.

4.4 Amended:

Investigations should be dealt with promptly. It is the responsibility of the commissioning manager to ensure relevant parties are informed of progress within 28 days of the complaints/incident being acknowledged as requiring further action.

Complicated investigations may take some time, but investigating officers should update the commissioning manager at reasonable intervals. It is the responsibility of the commissioning manager to ensure relevant parties are informed of progress at reasonable intervals, although they may ask the investigating officers to do this.

If the facts gathered by the manager or an investigation concludes that there is a case to answer, disciplinary hearings should be held without undue delay in order to conclude the matter for all, especially if the employee has been suspended.

A chronology should be kept so that it can be demonstrated that efforts have been made to progress the issue without undue delay. A chronology should form part of the Council's submission, if the case is subject to an appeal.

6.7 New:

"Notes should be made of the hearing. These are not agreed notes and any differences of opinion can be noted. It may be helpful to share them following the hearing and deal with any issues arising. The notes will be made available at any subsequent appeal hearing. However, in certain circumstances some information may be withheld, for example to protect a witness."

6.8 New:

"If an employee is unwilling to attend the meeting, or unable despite being offered an alternative date, the employee may be represented at the meeting by a Trade Union Representative/Colleague and/or may make written submissions to the meeting. The manager will take a decision on the evidence available."

7.8 Amended and addition:

(This clarifies the procedure following dismissal and re-engagement.)

Remains the same down to "A final written warning will form part of such a disciplinary decision." Delete last sentence, add:

"Employees will have the right to appeal against the dismissal. If they are offered re-engagement into an alternative post, they will be expected to move into the post even if they are appealing against their dismissal. If the appeal is upheld, they will return to their substantive job.

If they don't take the alternative post it will not be held open for them. In these cases, if their appeal is upheld they will return to their substantive job. If the appeal is rejected the dismissal stands."

9.6: Deleted:

"A higher level of warning can be imposed upon appeal."

Grievance

Section 1 Addition:

"Please note that grievances can't be investigated if they are already being considered as part of an existing process."

Section 3. Stage 1: Addition *in italics*

"If you are unable to resolve your grievance informally, there are three stages to the formal procedure. You have the right to be accompanied by your trade union at all stages and you are encouraged to take advice before submitting your grievance. *With effect from 6 April 2009 a grievance will only be considered if it is submitted on an employee grievance form.*"

Stage 2 paragraph on timescales deleted. Now reads:

Investigations should be dealt with promptly. It is the responsibility of the commissioning manager to ensure relevant parties are informed of progress within 28 days of the complaints/incident being acknowledged as requiring further action.

Complicated investigations may take some time, but investigating officers should update the commissioning manager at reasonable intervals. It is the responsibility of the commissioning manager to ensure relevant parties are informed of progress at reasonable intervals, although they may ask the investigating officers to do this.

A chronology should be kept so that it can be demonstrated that efforts have been made to progress the issue without undue delay. A chronology should form part of the Council's submission, if the case is subject to an appeal.

Managing change

Section 5.5 amended (*amendment in italics*):

"Some changes do not carry an entitlement to redundancy/redeployment (see "Scope 2" above). The employees concerned may be dismissed on the grounds of "some other substantial reason" (SOSR) and managers must ensure that they follow *a fair procedure for dismissal ie informing the employee of the intended dismissal, inviting them for a meeting, giving them a right of appeal.*"

Code of practice on the conduct of investigations

3.4 This clarifies the situations where a manager may or may not both investigate an issue and conduct a disciplinary hearing if necessary

Amended:

For misconduct cases different officers should carry out the investigation and the disciplinary hearing. However, in some cases it may be a straightforward matter of the employee's manager collating the evidence and moving to a disciplinary hearing. For example, the facts may be undisputed, or if there has been falsification of timesheets, the documentary evidence will be clear and not require an investigation.

6.1 amended:

An employee may be accompanied by a trade union representative or a work colleague, and it is their responsibility to arrange this.

If an employee requests that the meeting be postponed because they are unable to get a trade union representative of their choice or work colleague to accompany them on the proposed day, a new date should be arranged which is mutually acceptable to all involved, provided the new date falls within five working days of the original date.

7.1 deleted.

7.2 amended: (28 day period)

Investigations should be dealt with promptly. It is the responsibility of the commissioning manager to ensure relevant parties are informed of progress within 28 days of the complaints/incident being acknowledged as requiring further action.

Complicated investigations may take some time, but investigating officers

should update the commissioning manager at reasonable intervals. It is the responsibility of the commissioning manager to ensure relevant parties are informed of progress at reasonable intervals, although they may ask the investigating officers to do this.

A chronology should be kept so that it can be demonstrated that efforts have been made to progress the issue without undue delay. A chronology should form part of the Council's submission, if the case is subject to an appeal.

10.2 amended (was 10.3):

"Occasionally there may be a request that an investigation be taped. It is not the council's practice to allow this. The investigation is about ascertaining facts, not emulating a court of law, and it is not desirable to create an intimidating environment."

Please note that the previous 10.2 has been deleted (investigating officers must not get into an argument with the individual or their representative).

12. Addition:

"Members of the public may also be asked to sign a confidentiality agreement." (note: This is in addition to the requirement for ex-employees to sign a confidentiality agreement.)

14.1 amended:

This paragraph has been removed as it duplicated the disclosure table. It now reads:

"Please refer to the disclosure table at appendix A."

Fixed term contracts

Please note that termination of fixed term contracts has now been amended. The procedure in the new version is that the manager writes to the employee advising them that their contract will not be renewed.