



#89 HR Newsletter

Sept 2016: ACAS Code of Practice

ACAS Code of Practice - When it applies and when it does not

2 recent Tribunal cases show that the ACAS code of practice (which needs to be followed for Conduct or Capability dismissals) does not apply to ill-health dismissals or Some Other Substantial Reason (SOSR) dismissals.

#1 EAT upholds ET ruling that ACAS Code does not apply to ill health dismissals

The Claimant, Mr. Holmes (H), was dismissed from his post as security guard on the grounds of ill health. The ET awarded H compensation for unfair dismissal and unlawful discrimination. However, it refused an uplift in compensation for Qinetiq Limited's (Q) failure to comply with the relevant requirements of the ACAS Code of Practice (the Code) on the grounds that it did not apply to ill-health dismissals. H appealed.

The EAT dismissed H's appeal and upheld the ET's finding. The Code applies in cases of alleged actions or omissions involving culpable conduct or performance requiring correction or punishment, such as misconduct or poor performance, which would invoke disciplinary action. Disciplinary action would not be invoked where an employee is absent through illness or ill-health and the Code would not apply. A disciplinary procedure had not been invoked in this case because, apart from his illness, H was able to perform his duties and it was not suggested that his conduct or performance gave rise to a disciplinary situation or involved culpability. Therefore, Q was not required to follow the Code.

However, "[t]he position is different where ill-health leads to a failure to comply with sickness absence procedures or an allegation that the ill-health is not genuine - any disciplinary procedure invoked would be invoked to address the alleged culpable conduct on the employee's part rather than any lack of capability arising from ill health."

#2 EAT: ACAS Code did not apply to dismissal for SOSR

The Claimant, Ms. Stockman (S), was dismissed by her employer Phoenix House Ltd (PH) for some other substantial reason (SOSR). The reason for dismissal was stated to be an irretrievable breakdown in the relationship between S and PH. The ET held that that the dismissal was procedurally and substantively unfair and outside the range of reasonable responses. The ET also held that the Code applied and therefore there was the possibility of an uplift in compensation awarded by a maximum of 25%.

The EAT agreed with the ET's unfair dismissal finding and noted that S had not been given the opportunity to demonstrate that she could return to work without disruption and prove that the relationship had not irretrievably broken down. However, with regard to the

application of the Code in cases of dismissals for SOSR, the EAT disagreed with the ET and Laing J's opinion in *Hussain v Jurys Inn Group Ltd*, that on a purposive construction the Code should apply.

The EAT held that the Code does not apply to dismissals for SOSR. In the EAT's view, it is common sense that a dismissal is unfair where the facts have not been fully "vented" between the decision maker and the employee, and there may be context where the Code would apply where an SOSR dismissal followed on from a disciplinary process (as in *Lund v St Edmund's School Canterbury*). However, to punish an employer for failing to comply with the Code in cases such as this is not what Parliament intended when enacting the Code.