

The LA employment alert!

MARCH 2009

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LEM011/09/LA/LLP

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 LesterAldridge LLP

Changing terms & conditions

These are difficult times. What if you need to save money, but you don't want to lose people? Can you ask staff to reduce their working hours?



“You can change working hours – or other terms and conditions – if there is a good business reason for doing so”



Yes. This might affect one person or a group of people – or everyone.

You can change working hours – or other terms and conditions – if there is a good business reason for doing so.

So how do we go about it?
Check the Contract.

What does the contract say?
If there is a clause in the contract they tend to fall into two categories.

Wide clauses
These say that the employer can make any change they want to the contract.

Employers read this as: I can do anything I want.

Tribunals read this as: you can do very little – because the wording is not specific enough.

This type of wide clause will only allow you to make minor changes - e.g. change healthcare provider provided there is no diminution in benefits – without the specific

approval of employees.

Specific clauses
These clauses, where the wording is very specific and relates to the contemplated change, allow the employer to make that change.

But - even if the wording in the contract is very clear, you still need to follow a proper process before you impose the change.

Why?
Implied term of mutual trust and confidence. Implied into every contract of employment - that the parties will not act in such a way as to destroy the relationship of trust and confidence.

So, if you just impose the change, and try to rely on the clear wording, without consultation and without trying to reach agreement, employees can resign and claim constructive unfair dismissal because you have breached that implied term.

The net effect, therefore, is that employers should always follow a proper process and try to reach

agreement with the affected employees, whether or not the contract of employment caters for the specific change.

What is the process?
Start off by speaking to employees and explain the proposed changes and the rationale for them.

If the changes will affect a group, it may be worthwhile suggesting that they discuss the proposals between themselves and that they try to come up with a plan for their group – that suits them and also achieves your objectives.

Whether the changes affect a group or an individual, if agreement can be reached at this early stage, you simply need to write to the employee(s) confirming the new arrangements and asking them to sign and return a copy of the letter.

It might be necessary for the letter to be signed as a deed – to avoid any arguments about lack of consideration.

What if they don't agree?

You will need to move on to a more formal stage.

In essence this will involve writing to the employees, explaining the proposed changes and the rationale for them,

explaining the likely impact on the individual recipient, and asking for an indication (perhaps by a tick box on a separate sheet)

as to whether they are willing to agree to the proposed change or if they want an initial meeting to discuss it in more detail and raise any concerns.

Some or all employees may agree.

If some do not agree you will need to meet with them to discuss their concerns.

What if they have good reasons for not agreeing?

It may be that if you want to reduce hours some employees cannot afford financially to agree to that.

If you want to increase hours it may be that some cannot agree

because they look after young children, elderly parents etc.

It is important that you explore with them their reasons for not being able or willing to agree – and try to accommodate their concerns as best you can without prejudicing what you are trying to achieve by making the changes.

What if they still won't or can't agree?

If some employees still won't agree, these are your options:

- Let it drop for those who will not agree; or
- Force the issue and dismiss and offer to re-engage;
- Impose the change

Let it drop?

This is seldom a realistic option if you need to make the change and the majority of employees have already agreed to the change.

Dismiss and offer to re-engage?

This is dramatic but can sometimes be necessary.

It can result in unfair dismissal claims even if the employee accepts re-engagement.

However, any dismissals should be fair provided there is a good business reason for making the change, you have followed a decent procedure and considered issues raised by employees and tried to

accommodate individual needs.

Even if an employee succeeds in a claim, will there be any loss?

If they have accepted re-engagement there might be some limited loss if you have reduced their hours but there won't be any loss if you have increased hours or made some other change which does not reduce their pay.

If they have not accepted re-engagement there will be an argument about whether they have failed to mitigate their loss by refusing your offer.

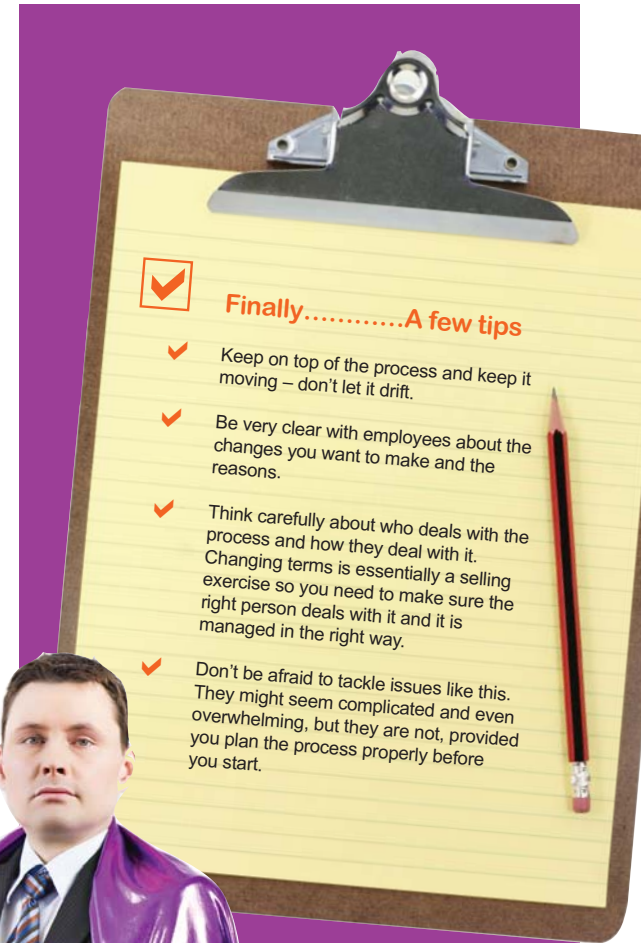
Impose the change?

You would only impose the change at this point if you have very clear wording in the contract allowing you to make the

particular change, you have a good business reason for needing to make the change and you have consulted.

If you impose the change in the absence of clear wording in the contract – even if you have followed a proper procedure – employees can:

- work under protest and claim for deductions from wages (if their earnings reduce); or
- resign and claim constructive unfair dismissal; or
- refuse to work under the new terms.



Finally.....A few tips



Keep on top of the process and keep it moving – don't let it drift.



Be very clear with employees about the changes you want to make and the reasons.



Think carefully about who deals with the process and how they deal with it. Changing terms is essentially a selling exercise so you need to make sure the right person deals with it and it is managed in the right way.



Don't be afraid to tackle issues like this. They might seem complicated and even overwhelming, but they are not, provided you plan the process properly before you start.

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Bye-bye statutory dismissal procedures!

Just as we have all finally got our heads around the statutory dispute resolution procedures – they are being binned.

The statutory procedures were brought in to help employers and employees resolve disputes. However, with this aim in mind - they have been an unmitigated disaster!

From 6 April the rules are going to change. Rather than having a prescriptive set of procedures that must be followed, a Code of Practice has been devised for employers and employees to follow. This “ACAS Code of Practice” will not be legally binding, but it will be taken into account by Tribunals in determining claims. It is intended to be “the standard of reasonable behaviour” in most cases.

What will this change mean?

Employers will need to follow the ACAS Code in respect of most

dismissals (there are some exceptions) and grievances. However the ACAS Code (which can be found on the ACAS website) is not that much different from the procedures that employers have been following – it is just a bit clearer as to what is required.

If there is an unreasonable failure to follow the procedure in the ACAS Code the Tribunal can adjust any awards to employees by 25% - up 25% for an employer's unreasonable failure to follow the Code and down 25% for an employee's unreasonable failure to follow the Code.

Employers will also have additional guidance in the form of an ACAS Guide to disciplinaries, dismissals and grievances. This



“It is worthwhile looking at your procedures and updating them as necessary”

disciplinary and grievance matters know about the Code and Guide (and, if appropriate, your updated policy) and can put this into practice.

The Transition Phase

Unfortunately on 6 April 2009 it will be premature to pop open the champagne to celebrate the demise of the statutory dismissal procedures.

Many employers are still going to be embroiled in the statutory procedures long after 6 April due to the ‘transitional provisions’.

The Government have had to phase out the old rules to introduce the new. Sadly for employers this transition is likely to catch out the unwary!

will provide more comprehensive advice and guidance on conducting disciplinary matters. This document is just to aid employers and will not be taken into account by the Tribunal.

So what are the best bits?

- No more automatically unfair dismissals!
- No more “spot the grievance”. Every employer's favourite

game of avoiding a potential uplift in compensation and missing the opportunity to resolve a dispute internally by recognising what constitutes a grievance (pretty much anything in writing!) will be gone.

- Time limits - no more automatic 3 month extension.

What do you need to do now?

Firstly, continue using the

existing rules for the moment. The new law will not come into place until 6 April.

You need to also beware of the transition phase (see below).

Read the ACAS Code and the ACAS Guide.

Check your procedures and update them as necessary. Then make sure that your staff who will be involved in

In the most basic terms (the actual rules are quite complex), the transition arrangements are:	
For dismissals - - if before 6 April you have:	For grievances – - if:
(a) sent a letter inviting an employee to a disciplinary hearing (step 1 letter); or	(a) the matter complained about in the grievance happened entirely before 6 April; or
(b) held a disciplinary hearing (step 2 meeting); or	(b) the matter complained about started before and is on-going at 6 April and the employee starts either the grievance procedure or tribunal proceedings before 5 July 2009 (where the time limit for bringing that claim is 3 months, i.e. most claims) or before 5 October 2009 (where the time limit for bringing a claim is 6 months, i.e. equal pay, redundancy payments and some industrial action claims)
(c) dismissed an employee	-
then the old rules apply (i.e. you have to get the statutory procedure right to avoid automatically unfair findings.	then the old rules apply (i.e. the employee must raise a grievance and wait 28 days before being able to submit a Tribunal claim).

What does this mean?

As you can see the transitional arrangements in relation to dismissals are, thankfully, much clearer than for grievances!

If you are contemplating dismissals – make sure that you do not invite an employee to a disciplinary hearing before 6 April unless you want to contend with

the old rules.

For grievances?

Well, the position (as you can see above) is not that straightforward. If in doubt about whether the circumstances relating to the grievance started before or are ongoing at 6 April 2009 – seek legal advice about which rules apply or at least be aware that the

old rules could apply.

Role up ACAS!

The Government have put their hands in their pockets to beef up ACAS' services.

More money is being put into ACAS to fund their telephone helpline, conciliation service and a new mediation scheme.

“ACAS have already piloted this scheme with great success”



The ACAS helpline will be extending their opening hours (we have been informed by our local ACAS officer) from 8am to 8pm Monday to Friday and 9am to 1pm on Saturdays.

It is also hoped (by us and employers!) that the improved helpline will be able to provide more assistance to employers (previously the service and advice has been noticeably weighted towards employees).

The helpline will also be trying to help prevent disputes from going to the Tribunal. When an employer or employee contacts the ACAS helpline the advisers will be considering whether the parties would benefit from free mediation.

If the parties have tried to resolve the matter internally and this has failed (meaning that the employee is likely to bring a claim) and there is still time before the claim has to be issued – then ACAS could offer a free mediation service.

Either the ACAS helpline can spot the appropriate circumstances to offer this service or the employee or employer or legal representative can request to be considered for this service.

ACAS have already piloted this scheme with great success and it is hoped that this new service (when rolled out nationally) will be helpful to all parties in resolving disputes.

The cost of failing to pay

Alongside the repeal of the statutory procedures the Government have added in an additional penalty that employers need to be aware of.

If an employer is found to have made unauthorised deductions from wages or delayed in paying a statutory redundancy payment, the Employment Tribunal can now award the employee with compensation for any resulting financial loss.

What does this mean?

It means that if you fail to pay (or correctly pay) your employee their wages and they suffer bank charges or interest a Tribunal can make an award for you to pay these sums.

Potentially employees may be able to recover other resulting losses (i.e. lost holiday deposits) – but we will have to wait and see how liberal the Tribunal will be with this new law.

The Tribunals can enforce this right in relation to any proceedings commenced after 5 April 2009.

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Your Questions answered by our team of experts



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Question

One of our employees was dismissed a week or two ago and they have now appealed to me in writing. I am the Managing Director.

Can I just reply in writing or do I have to hold a meeting? I would prefer not to hold a meeting if I can avoid it.

Answer

I am afraid you have to hold a meeting. You would only deal with it in writing if the employee specifically requested that.

Appeals can be an opportunity for employers and not just a hoop jumping exercise. See it as an opportunity.

In the appeal, you can put right any mistakes that were made in the original dismissal process – e.g. failing to interview all relevant witnesses or consider all relevant evidence.

But – you cannot cure any flaws in the statutory dismissal procedures.

So, review the paperwork from the dismissal and, if you have any concerns at all about the steps taken, you may be able to address those failings at the appeal stage.

What about new evidence?

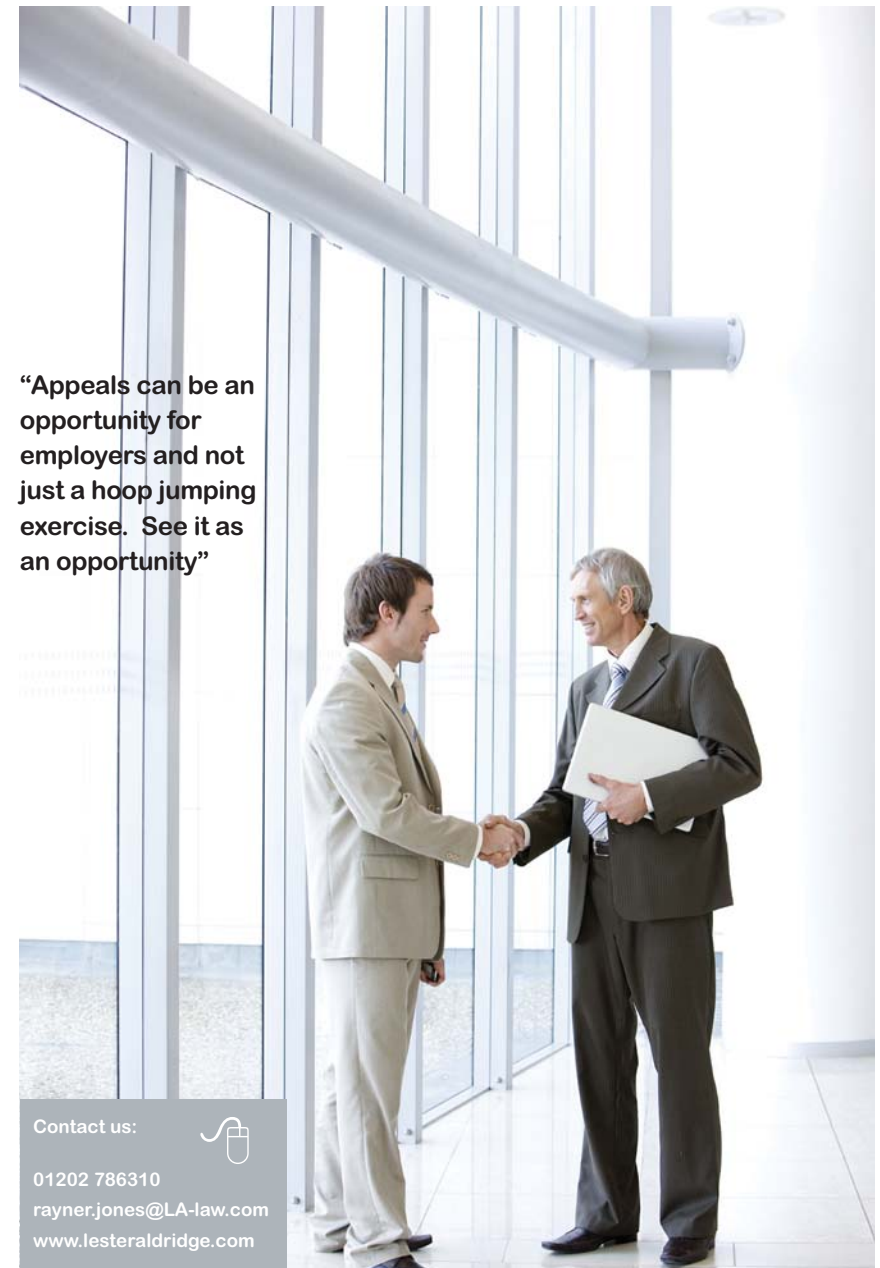
Can you consider new evidence raised at the appeal stage?
Yes.

Of course, you would take it into account if it assists the employee.

You can also take new evidence into account if it supports the original decision to dismiss.

In fact, you can uphold the decision to dismiss on the basis of new evidence even if the evidence available at the disciplinary hearing did not justify dismissal!

So – dealing with appeals can be time consuming, but very often it is worthwhile spending that time if it might mean avoiding a claim or defeating that claim if it is brought.



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