

EMPLOYMENT NEWSLETTER



Welcome to the October edition of our employment law newsletter.

With autumn upon us and Halloween drawing near, this employment law newsletter focuses on some key topics helping you avoid workplace disputes that could return to haunt you months later!

Continuing with our running theme of disciplinary proceedings we explore how to ensure disciplinary meetings don't become a horror story.

We also study the recent tribunal decision of Caroline v ICTS (UK) Ltd, and the dangers of being so distracted by policy, you fail to see the dangers lurking in plain sight.

We consider the increased use of Data Subject Access Requests, and how those throwaway comments about a colleague, could refuse to stay buried.

Finally, to give you further chills at the end of this newsletter there is a quick recap of those provisions of the Employment Rights Act 2025 coming into effect this month.

Whilst ghouls may not exist, costly employment claims certainly do!

WHAT LURKS BENEATH: HIDDEN RISKS IN DISCIPLINARY PROCEEDINGS

With significant changes to unfair dismissal laws expected to take effect on 1 January 2027, ensuring you know how to conduct a fair disciplinary process from beginning to end is vital.

Having already considered what should be included in your disciplinary procedure and the importance of carrying out a fair investigation, we now focus on the disciplinary hearing itself. Many findings of unfair dismissal arise here, making it essential to get it right.

Step 1: Choose your disciplining manager wisely

Where possible this should be someone different to the investigating manager (see our July 2026 newsletter), whilst keeping an appropriate manager aside to handle any appeal.

This should also be someone who has authority to decide the outcome and take ownership of any disciplinary decisions made. If a tribunal claim follows, they may be required to attend any final hearing and explain why they reached the decision they did. It will be important they can do so.



Step 2: Get the invitation right

Employees should receive a written invitation to the meeting setting out:

- In clear terms, the misconduct or performance concerns to be discussed at the disciplinary meeting.
- The possible consequences, including whether dismissal is being contemplated.
- The date, time and location of the hearing.
- The right to be accompanied by a trade union representative or workplace colleague.

You should also enclose the evidence you intend to rely upon, such as the investigation report, witness statements and any relevant documents.

Whilst not a current legal requirement, if revisions to the ACAS Code of Practice currently under consultation are confirmed you will also need to set out in the invitation what steps you have already taken to resolve your concerns informally. If none have been taken you will need to explain why.

A common mistake is to send a brief invitation stating only that concerns have arisen and that a meeting has been arranged. It needs to be clear to the employee what exactly the concern(s) to be discussed are, and what the potential outcome may be.

Step 3: Allow time to prepare

Providing evidence is of little value if it is handed to the employee immediately before the hearing. Employees should be given reasonable notice and opportunity to review the concerns, consider the evidence and arrange representation if they wish to be accompanied.

What is reasonable will depend on the circumstances, but very short notice is unlikely to be viewed favourably by a tribunal. Rushing the process rarely achieves anything other than increasing legal risk.



Step 4: Respect the right to be accompanied

The statutory right to be accompanied is frequently overlooked.

Where the right applies, employees may be accompanied by a trade union representative, a certified trade union official or a fellow worker. Refusing a reasonable request may give rise to a separate tribunal claim and can also contribute to a finding that the overall process was unfair.

A companion can often assist in ensuring the hearing is conducted fairly and that the employee is able to present their case effectively.

If the employee attends the scheduled meeting unaccompanied you should, at the start of the meeting, remind them of this right.

Step 5: Conduct a genuine hearing

One of the biggest risks is approaching the hearing with a decision already made. A disciplinary hearing should be a genuine opportunity to understand the full picture, not simply a rubber-stamping exercise.

The purpose of the hearing is to test the evidence, hear the employee's explanation and determine whether the concerns are substantiated. Decision-makers should therefore:

- Explain the concerns, ensuring the employee understands.
- Review the evidence objectively.
- Ask open questions and listen carefully to the employee's response.
- Allow the employee to set out their account of the situation, ask their own questions and present evidence.
- Consider any mitigation raised.

If there are any flaws in the investigation process picked up, such as a witness not spoken to, key questions not asked or documents obtained, this is also the prime opportunity to correct matters. Do not be afraid, if needed, to adjourn the meeting to make follow up enquiries. Just make sure to reconvene the meeting and give the employee the opportunity to comment on any new information gathered before making a final decision.

Do not forget to fully document the matters discussed at this meeting!

Time should then be taken after the meeting to reflect on matters discussed before deciding the outcome.



Step 6: Reach a fair and balanced decision

Even if concerns are upheld, dismissal is not automatically the appropriate sanction.

Absent serious misconduct or serious negligence, it would be unreasonable to jump straight to dismissal. A first or final written warning may be more appropriate. In some circumstances other steps may also be sensible, in place of or alongside a warning, such as the implementation of training or workplace mediation.

Employers should consider all relevant circumstances, including:

- The seriousness of the concerns.
- Any live disciplinary warnings.
- Length of service.
- Previous disciplinary record.
- Mitigating circumstances.
- Consistency with outcomes in similar cases.

Two employees may commit the same misconduct but receive different sanctions. An employee with a final written warning and a history of similar conduct may be treated differently from an employee with twenty years' service and an otherwise unblemished record.

Tribunals recognise that disciplinary decisions involve an element of judgment. The question is usually whether the decision fell within the range of reasonable responses open to a reasonable employer in those circumstances.

When communicating your decision ensure the outcome and reasons for it are clearly set out.

Also do not overlook the employee's right to appeal. This should be explained. Appeals will be covered in more detail in our next newsletter.

If you get it wrong, is all lost?

Not necessarily, especially where the failings are procedural only.

Where a tribunal concludes that dismissal would have occurred even if a fair procedure had been followed, compensation may sometimes be reduced. This principle stems from the well-known case of *Polkey v AE Dayton Services Ltd*.

However, that is rarely a position employers should rely upon. A procedural flaw can still result in a finding of unfair dismissal; a decision that will be made publicly available online.

In short, whilst arguments about remedy may be available after the event, most employers would much prefer to avoid being in that position at all. Taking the time to get the process correct at the outset is almost always less costly and time consuming than having to explain yourself before an employment tribunal after the event. Our team is on hand to help you get it right.





A FAIR PROCESS REQUIRES FAIR THINKING: THE TRIBUNAL'S MESSAGE TO EMPLOYERS LOOKING TO DISMISS FOR REPEATED SHORT-TERM ABSENCE

Employers are often advised to follow their policies and procedures consistently. That is undoubtedly good practice. However, it is also important to remember that some policies are introduced with the aim to help support fair decision-making, not become a substitute for it.

In Caroline v ICTS (UK) Ltd, the employment tribunal found that an airport security supervisor had been unfairly dismissed under an attendance management procedure, awarding compensation of almost £38,000. The judgment provides a stark warning to employers about the dangers of treating policies as a tick-box exercise rather than exercising genuine managerial judgment.

The facts

The claimant, Susan Caroline, had been employed for approximately seven years as a Security Supervisor at Aberdeen Airport. Over a period of around 21 months, she accumulated a number of sickness absences, including time off following shoulder surgery, Covid-19 infections, an eye injury and other genuine illnesses. The tribunal accepted that all the absences were genuine.

The employer operated an attendance management policy based on trigger points. Following a series of absence review meetings, the claimant progressed through the relevant stages of the procedure and was ultimately invited to a contractual review meeting where dismissal was considered.

At that meeting, the claimant raised concerns regarding anxiety, mental health issues and the possibility that she was suffering from reactive arthritis, which she believed could explain some of her symptoms and absences. Despite those representations, the employer proceeded to dismiss her.

The dismissal was upheld on appeal, with the tribunal critical of the way the appeal process was conducted.

Where did the employer go wrong?

The tribunal's criticism was not that the employer had failed to follow its attendance management procedure. The problem was that decision-makers appeared to have become fixated on that process.

Perhaps the most striking passage in the judgment was the tribunal's finding that the dismissing manager believed the policy effectively left him with no choice. The tribunal concluded:

"He was following a policy for the sake of the policy, rather than trying to achieve any of the actual objectives of the policy. It was a classic case of a dismissing manager adopting 'tunnel vision'."



The Tribunal identified a number of failings:

Failure to investigate relevant medical issues

The claimant raised the possibility of an underlying medical condition during the review process. The tribunal found that the employer took no meaningful steps to investigate this further, despite having obvious options available, including obtaining additional occupational health advice or medical evidence from the claimant's GP.

The tribunal also found that the dismissing manager misunderstood the existing occupational health report available. The report had not stated that there was no underlying health condition; rather, it had suggested that the claimant was unlikely to meet the legal definition of disability under the Equality Act 2010. Those are fundamentally different issues.

Failure to consider alternatives to dismissal

A recurring theme throughout the judgment was the absence of genuine consideration of alternatives to dismissal.

The tribunal found that the manager had not meaningfully considered whether there were any alternative measures available. Instead, he looked at the policy, noted that it did not expressly identify an alternative outcome at that stage, and moved to dismissal.

That approach is particularly risky in capability and absence-management cases, where tribunals expect employers to consider whether support, adjustments, monitoring periods or other interventions may be appropriate before ending employment.

Failure to assess business impact

Employers are entitled to act where sickness absence is having a detrimental effect on the business. However, the tribunal found little evidence that the employer actually examined the practical impact of the claimant's absences.

When questioned, the manager referred to general operational pressures and KPI concerns but was unable to identify any specific business disruption that had genuinely informed the dismissal decision. The tribunal concluded that the issue had not been properly considered at all.

A flawed appeal process

The appeal process also attracted criticism. In fact, it was described by the tribunal as “shambolic”. The tribunal found that the appeal manager failed to properly investigate and address key points raised by the claimant, including concerns about the existence of an underlying medical condition and whether alternatives to dismissal had been explored. The appeal outcome letter did not adequately address several of the claimant's grounds of appeal, suggesting no careful thought had been given to them.

The judgment also noted that the claimant was incorrectly informed that her appeal rights had been exhausted, despite the employer's own policy unusually providing for a further appeal stage.



Lessons for employers

The case highlights an important distinction between procedural compliance and procedural fairness.

An employer may faithfully follow the steps set out in a policy and still arrive at an unfair dismissal if decision-makers fail to engage with the substance of the issues before them.

You should therefore ensure that your managers:

- Treat policies as guidance rather than automatic decision-making mechanisms.
- Exercise independent judgment at every stage.
- Properly investigate potential underlying medical conditions.
- Understand the difference between disability assessments and broader health considerations.
- Consider alternatives to dismissal and document that consideration.
- Assess the actual operational impact of absences rather than relying on assumptions.
- Use the appeal process as a genuine opportunity to review and, where appropriate, correct earlier decisions.

Conclusion

This decision is a timely reminder that tribunals will look beyond whether a procedure was followed and examine whether meaningful thought and judgment were exercised throughout the process.

Employers frequently invest significant time and resources in developing policies designed to ensure consistency and reduce risk. However, consistency should never become rigidity. When managers treat procedures as a route map that must inevitably lead to a predetermined outcome, they risk falling into the same "tunnel vision" identified by the tribunal.

The safest approach is to remember that policies are there to support fair decisions, not to make those decisions for you. In employment law, process matters, but thoughtful decision-making matters even more.





NO TRICKS, JUST TRANSPARENCY: WRITE EVERY MESSAGE AS THOUGH YOUR EMPLOYEE MIGHT ONE DAY READ IT!

This last article serves as a reminder to be careful about internal communications within your business.

We are seeing a sharp increase in the number of Subject Access Requests submitted by current and former employees. This is perhaps linked to the increasing use of AI to assist employees when facing issues in the workplace.

If an employee has an issue with a colleague, or is facing disciplinary or capability proceedings, AI platforms will not only highlight a Subject Access Request as an available option – they will often actively encourage employees to submit this and even offer to prepare a “ready-to-send SAR” to the employer. Weaponised Subject Access Requests where employees are fishing for information are going to become more common.

For those unfamiliar with Subject Access Requests, in an employment context it is a formal request from a current or former employee for certain personal information an employer holds about them. It can include copies of their personnel file and other documentation regarding performance improvement plans, appraisals, grievances and disciplinary proceedings. Crucially, it can also extend to any other communications where the employee’s name is mentioned – for example, in private email chains or Teams / Slack messages between management or colleagues.

Seemingly private messages between management of “Jack is becoming an issue, we need to get rid of him” or “Sophie is taking a lot of time off sick, I think we should replace her with someone who’s going to do the job” would be disclosable to the individual if they submitted a Subject Access Request, which only adds fuel to the fire for any existing complaints. As a rule, if you wouldn’t make the comments to the employee in person then don’t put it in writing to a colleague. Keep these communications offline.

Employers must comply with a Subject Access Request. Non-compliance or withholding information can constitute a breach of GDPR legislation and lead to intervention from the Information Commissioner’s Office, who have enforcement powers and can issue fines to the employer.

In the case of RDF Media Group plc and RDF Media Limited v Clements [2007] board members at the employer sent internal email communications which referred to their employee, Mr Clements, as “a bit dim” and “a little weasel”, in addition to other personal comments which came out in Employment Tribunal proceedings. Far from ideal when the employer was trying to convince the Tribunal that Mr Clements’ claim for breach of trust and confidence was nonsense!

Even if a Subject Access Request is not made if a tribunal claim is received, such communications could still be disclosable if relevant to the proceedings, even if they are harmful to your legal position, as is transparent from RDF Media above.

The exception to the rule is legal professional privilege. Communications with us for the purposes of giving and receiving legal advice, as your solicitors, are exempt from any Subject Access Requests. Employees are not entitled to see them.

Our recommendation

It’s important to ensure you and your team are mindful about the communications taking place within your business. If you would feel uncomfortable having to share the communication further down the line, don’t say it, or at least not in writing! In the unfortunate event that you receive a Subject Access Request or tribunal claim from an employee then please get in touch so our team can guide you through the process.



THE EMPLOYMENT RIGHTS ACT 2025 - WHAT'S COMING INTO FORCE THIS OCTOBER AND WHAT IS NOT!

Finally, we would remind employers that the following comes into effect this month. If you need any further guidance on how this impacts you and the steps you should be taking, please get in touch.

- With effect from 30 October 2026, employers will become liable for third party harassment of their staff, not just sexual harassment. We can guide on internal changes to mitigate risk.
- The duty to take reasonable steps to prevent sexual harassment in the workplace by colleagues is increasing further. From 30 October 2026 employers now need to take "all reasonable steps". We can provide staff training, policies, template risk assessments to mitigate risk.
- The time limit to bring tribunal proceedings has doubled with effect from 1 October 2026 to six months less one day. It will be even more important for employers to keep records for longer if they are to have any chance of defending proceedings. Contact us if you need us to carry out an audit of your current retention policies.
- For all bar small employers (under 21 employees) trade unions will have the right to request workplace access from 30 October 2026. It will be important to have a plan of action in place as strict time limits to respond to access requests will apply.

The following, originally intended to come into effect on 30 October 2026 has now been pushed back to 1 January 2027:

- All employees must be notified of their right to join a trade union, with the Government to issue prescribed wording to be used. Let us know if you wish to be added to our list for legal alerts and we will update you once the prescribed wording and associated regulations are published.



HOW CAN WE HELP?

Between our HR Support Service and Employment Team we can help with a variety of employment concerns, including any issues or needs relating to the content of this newsletter.

Our HR and employment teams have a proven track record when it comes to helping employers:

- Ensure contracts and policies are legally compliant.
- Successfully navigate employee grievances, disciplinary and capability proceedings. Be it manager training or more bespoke guidance we can help.
- Get the duty to make reasonable adjustments right, avoiding claims.
- Robustly defend tribunal proceedings.

Our HR Support Service clients also benefit from preferential hourly rates and access to employment disputes insurance cover.

You should seek legal advice before relying on the content of this newsletter as every situation is different and the law in employment is ever changing.



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