

CHANGES FROM 6TH APRIL 2009

THE EMPLOYMENT ACT 2008

GRIEVANCE AND DISCIPLINARY PROCEDURES

From 6th April 2009, the existing statutory grievance and disciplinary procedures no longer apply to new grievances and disciplinary matters. They have been replaced by a revised Code of Practice on discipline and grievances at work, known as the Acas Code.

Which Provisions Apply?

The old statutory grievance and disciplinary procedures continue to apply if, on or before 5th April 2009, an employer has either:

- Dismissed an employee;
- Taken relevant disciplinary action against the employee; or
- Sent a letter to an employee setting out grounds for disciplinary action or dismissal.

For grievances, the old procedures continue to apply if:

- The basis of the grievance occurred wholly before 6th April 2009; or
- The basis of the grievance occurred before 6th April 2009 and continues, and a complaint is made to a tribunal about that grievance by 4th July 2009, or for equal pay, redundancy and industrial action dismissal claims, by 4th October 2009.

Otherwise, the revised Acas Code applies.

What Difference will the New Provisions Make?

The same principles apply to both the old and new provisions. Where an employer had contractual disciplinary and grievance procedures which followed the requirements of the old code, they are likely to comply with the new code.

The Old Grievance and Disciplinary Procedures

Prior to 6th April 2009, under the disciplinary procedures there were three steps that the employer had to take when contemplating disciplinary action or dismissal. First, the employer was required to set out in writing the grounds which led him to contemplate disciplinary action or dismissal and send this to the employee. Second, the employer had to arrange a meeting with the employee to discuss the matter, after which the employee would be informed of the decision and the right of appeal. The third stage was an appeal meeting if requested by the employee.

Prior to 6th April 2009, the statutory grievance procedures prescribed three steps to be taken in the event of an employee having a grievance. The first step was that the employee had to set out the grievance in writing and send a copy to the employer. The second was that the employer had to invite the employee to a meeting to discuss the grievance, inform the employee of its response and notify the employee of the right to appeal. The third stage was an appeal meeting if requested by the employee.

Penalties

If an employer failed to follow the grievance and disciplinary procedures, any dismissal would be automatically unfair. Also the tribunal might increase the compensation due to the employee by up to 50%.

If an employee failed to follow the grievance and disciplinary procedures, any compensation could be reduced by up to 50%. A failure by an employee to raise a grievance with the employer before presenting a complaint to the tribunal may have prevented him from presenting that complaint.

The Revised Acas Code

The new Acas Code states that it '*provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace.*' The Code can be taken into consideration by tribunals in relation to disciplinary matters (including misconduct and poor performance) and grievances between employers and employees. The Code defines grievances as '*concerns, problems or complaints that employees raise with their employers.*' However the Code does not apply to redundancy dismissals or the non-renewal of fixed-term contracts, nor does it relate to collective grievances – those raised on behalf of two or more employees by a trade union representative or other appropriate workplace representative.

Failure to follow the Code is relevant for establishing liability in an unfair dismissal case. It cannot be used to establish liability in other complaints to the tribunal, for example sex discrimination, although a breach of the Code may affect compensation.

Penalties

Unlike the previous statutory procedures, the Acas Code is not legally binding and any failure to follow its provisions will not automatically result in any penalty. Having said this, a tribunal will take into account as evidence a failure of either party to follow the code in situations to which it applies. Compensation may be increased by 25% if the tribunal finds that the employer failed unreasonably to follow the Code, or decreased by up to 25% if the employee has failed unreasonably to follow it.

There is also guidance and a foreword which accompany the revised Code, which tribunals are not required to take into account, nor will a failure to follow the guidance or the foreword result in any compensation increase or decrease. However, whilst tribunals are not required to, it is expected that they will be considered.

The Main Provisions of the Code

- Employers should have **clear and specific rules and procedures** set out in writing for handling disciplinary and grievance situations.

Employees, and where appropriate, their representatives should be involved in their development. Employees and managers should be helped to understand where they can be found and how they are to be used. Disciplinary rules should give examples of acts that the employer regards as gross misconduct.

- Whether any formal action taken is **reasonable or justified** will depend on all the **circumstances of the particular case**, taking into consideration the **size and resources** of an employer.
- Employers and employees should raise and deal with issues **promptly**.
- Employers and employees should act **consistently**.

- Employers should carry out necessary **investigations** to establish the facts of the case.

This may involve an investigatory meeting. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing. If a period of suspension with pay is necessary, the period should be as brief as possible, kept under review and made clear that the suspension is not considered a disciplinary action.

- In disciplinary matters, employers should **inform** employees of the **basis of the problem** and give them an opportunity to **put their case** at a meeting before any decisions are made.

If it is decided that there is a disciplinary case to answer, the employee should be made aware of this in writing, containing sufficient information about the allegation and the possible consequences to allow the employee to prepare his case in advance. This would normally involve providing copies of any written evidence.

The employee should be told the time and venue of the meeting and of their right to be accompanied. Employers and employees and those accompanying them should make every effort to attend the meeting. The employer should explain the complaint at the meeting and go through the evidence. In the case of a grievance, the employee should explain the grievance and be given the opportunity to suggest how they think it should be resolved. Where an employee persistently fails to attend a disciplinary meeting without good cause, the employer should make a decision on the basis of the evidence available.

If the employee or their representative is unable to attend the meeting arranged by the employer, the employee is entitled to an adjournment of the meeting to an alternative date within five working days of the original meeting date.

The employee should be given a reasonable opportunity to ask questions, present evidence, raise questions about information provided by witnesses and call their own relevant witnesses. If either the employer or the employee intends to call witnesses, they should give the other party advance notice of this.

- Employees should let the employer know the **nature of any grievance**.

Ideally, grievances should be resolved informally, but if this is not possible, the employee should raise the matter in writing formally, without unreasonable delay with a manager who is not the subject of the grievance.

- Employers should allow employees to be **accompanied** at any formal disciplinary or grievance meeting.

If a worker makes a reasonable request, he has a statutory right to accompanied where a disciplinary meeting could result in a formal warning being issued, some other disciplinary action taking place, or the confirmation of a warning or other disciplinary action, following an appeal. What is a reasonable request will depend on the circumstances of the case.

In the case of a meeting about a grievance, if a worker makes a request, he has a statutory right to be accompanied where the complaint is about a duty that an employer has to the employee, such as breach of contract.

In either situation, the worker can choose a companion who may be a fellow worker, a trade union representative (certified by their union as being competent to accompany a worker), or an official employed by a trade union.

With the worker's consent, the companion can address the hearing, confer with the worker and respond on his behalf to any views expressed at the meeting. However the companion

cannot answer questions on the workers behalf, or prevent the employer from explaining their case.

- Employers should **decide upon appropriate action** and **inform the employee** in writing.

In the case of a grievance, an employer should write to the employee to state what action the employer intends to take to resolve the grievance.

In the case of a disciplinary matter, a finding of misconduct or unsatisfactory performance usually results in a written warning. A further act of misconduct or lack of improvement in performance in a set period usually results in a final written warning. However if the initial misconduct or unsatisfactory performance is sufficiently serious, a final written warning may be appropriate.

A written warning should set out the nature of the misconduct or poor performance, and the change in behaviour or performance required in set period of time. The employee should be told how long the warning will remain current and the consequences of further misconduct or failure to improve performance.

There may be some instances in which the behaviour of an employee is so serious that it constitutes gross misconduct and calls for dismissal without a written warning. However, employers must still ensure that a fair disciplinary process is followed.

A decision to dismiss the employee can only be taken by a manager with sufficient authority. The employee should be informed as soon as possible of the reasons for dismissal, the date when the employment contract will terminate, the notice period and their right of appeal.

- Employers should allow an employee to **appeal** against any formal decision made.

Appeals relating to grievances or disciplinary matters should be held without unreasonable delay and ideally at an agreed time and place. The employee should provide the employer with the grounds for their appeal in writing. The appeal should be dealt with impartially, and where possible, by a manager who has not previously been involved in the matter. Employees have the right to be accompanied and should be informed in writing of the result of the appeal as soon as possible.

Special cases

Where an employee **raises a grievance during a disciplinary process**, the disciplinary process may be suspended to deal with the grievance, although it may be appropriate to deal with both concurrently if the matters overlap.

Where disciplinary action is contemplated against an employee who is a **trade union representative**, the normal disciplinary procedure should be followed but it would be good practice, with the consent of the employee, to discuss the matter with a union official.

The fact that an employee is charged with or convicted of a **criminal offence** should not usually in itself be grounds for disciplinary action. The employer needs to consider what effect the charge or conviction has on the employee's suitability to do the job and their relationship with the employer, colleagues and customers.

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