



GRIEVANCES

From 6 April 2009 the law governing grievance and disciplinary procedures changed. Many employers have out of date grievance and disciplinary procedures as a result.

It used to be the case that an employee was unable to bring an employment tribunal case for discrimination or other in-work matters if he or she had not brought a statutory grievance first. A grievance letter had to be submitted to the employer and 28 days must have passed before a claim could be made.

From 6 April 2009 the law concerning grievance and disciplinary procedures dramatically changed. The statutory grievance and disciplinary regime was abolished.

Both before and after the legislative change which became effective in April 2009, the ACAS Code of Practice on Disciplinary and Grievance Procedures set out basic principles of fair practice and natural justice which should form part of an employer's procedures. It has been modified to reflect changes in the law. While the ACAS Code is not legally binding it does set out a general standard that an employment tribunal must take into account in deciding any unfair dismissal case. In practice, it is seen as the touchstone of principled personnel practice by the employment tribunals.

ACAS CODE OF GUIDANCE ON DISCIPLINARY AND GRIEVANCE PROCEDURES (THE 'CODE')

The new Code became effective on 6 April 2009. It does not apply to redundancy dismissals or to non-renewal of fixed term contracts. An employment tribunal now has discretion to increase or reduce an employee's compensation by up to 25% in any successful case for unfair dismissal, discrimination or other specified cases, for either party's unreasonable failure to follow the Code.

The new ACAS Code is less than 10 pages long. More detail is in a 70 page guide called 'Discipline and Grievances at Work: the ACAS Guide' (the 'Guide'). As tribunals do not have to follow the Guide it is unclear how this may influence cases, but it sets a standard and acts as a best practice framework. ACAS is influential as an organisation and the good standards that it promotes are certainly persuasive if not binding. Both the Guide and the Code can be downloaded for free from the ACAS website.

Key recommendations in the Code for disciplinary hearings include:

1. Where possible, different people should carry out the investigation and disciplinary hearing;
2. The employee should be given sufficient information about the alleged misconduct or poor performance to prepare to answer the case;
3. Employers and employees should act consistently;
4. Employees should be given the right to appeal against any formal decision made;
5. Notification of a disciplinary hearing should advise the employee of his or her right to be accompanied by a work colleague or trade union representative;
6. Investigations of potential disciplinary matters should be carried out without unreasonable delay



Most employers will have their own disciplinary rules in the staff handbook. These may be followed provided that they comply with the general standards of fairness set by the Code and, where they continue to apply, the statutory minimum dispute resolution procedures. Many staff handbooks now require revision.

Current good practice requires the disciplinary process to be handled without undue delay and with the maintenance of confidentiality. In accordance with the ACAS Code a disciplinary process will include the following stages: -

- > **Investigation**
The Code says it is important to carry out investigations of potential disciplinary matters without unreasonable delay. Where possible, different people should carry out the investigation and the disciplinary hearing in misconduct cases. This is designed to ensure greater objectivity by the employer in its investigation. The investigation does not have to be carried out in a specific way so that it could, for example, include holding a preliminary meeting with the employee or perhaps just be a simple gathering of evidence.
- > **Minor Issues**
Poor performance and minor misconduct should be dealt with informally by advice or counselling with the emphasis on encouraging the employee to improve. The employee must understand what is to be done to improve and how such improvement will be assessed over time.
- > **Formal Disciplinary Action**
where the matter is not minor, a disciplinary hearing enabling the employee to answer allegations should be held. The Code says that written notice must be given to the employee including notification that he or she may be accompanied. To enable the employee to prepare adequately the notification must give sufficient information about the alleged misconduct or poor performance and possible consequences including copies of any written evidence such as witness statements.
- > **Disciplinary Hearing**
the Code requires the avoidance of unreasonable delay while allowing the employee reasonable time to prepare her case. The employer must explain the complaint at the meeting and present the evidence while allowing the employee reasonable opportunity to answer questions and present his or her own case.
- > **Suspension**
This must be on full pay unless the employment contract says otherwise. If the misconduct is serious it may be fair to suspend but this should be for as short a period as possible and must be kept under review. What tribunals deem to be unnecessary or 'knee jerk' suspensions can result in employers being liable for constructive dismissal.
- > **Usual Disciplinary Stages**
No employee is generally dismissed for a first offence unless it amounts to gross misconduct. (Gross misconduct is not always what an employer says it is!)
- > **Informal Action**
Typically used for cases of minor misconduct or unsatisfactory performance where an informal word is used to deal with the difficulty.



- > **First Formal Action**
The disciplinary procedure starts at this stage for more serious problems and will normally take the form of the first written warning. ACAS say that the warning should set out the details of the complaint, the required improvement with timescale, and the right of appeal. The warning should also state that the employee is at risk of a final written warning if there is no improvement. ACAS say that the employee should be told how long the warning will remain current and recommend in the guide a six month period.

- > **Final Written Warning**
This is appropriate where there is no improvement within this timescale set on the first warning or if the behaviour is serious enough. Similar information should be given to that required on a first warning. This should also indicate the risk of dismissal if there is no improvement. ACAS's suggestion is that 12 months is an appropriate period to keep such a warning active.

- > **Dismissal**
This results from gross misconduct or if the employee repeats offences or fails to improve after a final warning.

APPEALS

The opportunity to appeal is essential to natural justice. The ACAS Code says employees should be informed of their right of appeal and appeals should be heard without unreasonable delay.

The appeal should be heard by someone appropriate, ideally a senior manager, who has not been previously involved in the disciplinary procedure.

The size of an organisation will partly dictate what is practicable.

Where it is not possible to have a different person hearing the appeal the individual involved must act as impartially as possible.

Employees are entitled to be represented at the appeal hearing. If new evidence arises, the employee or his or her representative should be given an opportunity to comment and it may be necessary to adjourn the appeal to investigate.

GROUND FOR APPEAL ARE VARIOUS

- Procedural irregularity
- Too severe a penalty
- New evidence coming to light
- Unfairness generally etc

The employer's appeal procedure may dictate how the appeal should be run. Both the ACAS Code and the statutory dispute resolution procedures appear to expect employees to appeal if they are unhappy with the decision.

Failure to appeal may adversely affect compensation arising from a successful claim.





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The post April 2009 regime does not require a grievance to be brought before a claim may be made. However, the ACAS Code seems to expect formal grievances to be brought if it is impossible to resolve matters informally. There is a risk of compensation being reduced if the employee wins any case when he or she had not first brought an internal grievance. The Code is unclear whether employees have to bring a grievance once they have left the employment.

The employer has a duty to give employees an opportunity to obtain, reasonably and promptly, redress of any grievance that they may have. This was established in the case of *W A Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516, EAT. Employers should deal with grievances consistently and promptly.

Please note that this is a basic guide, for more information please contact corporatelaw@taylor-rose.co.uk