

technical factsheet 153

Disciplinary and dismissal procedures

It is very important for employers to ensure that they follow a good procedure in disciplining and dismissing employees. No matter how good the substantive reason for a dismissal, it is likely to be unfair if a good procedure is not properly followed.

A framework of proper procedure for redundancy dismissals is set out in factsheet 155

After April 1 2009, with misconduct dismissals, the standard is set by the **ACAS Code of Practice on Disciplinary Practices and Procedures in Employment** (can be found on www.acas.org.uk), and with dismissals for incompetence and incapability employers must also follow the framework of the code. Although it is not legally binding failure to follow it will count against an employer in judging the fairness of the dismissal. Account is taken of the size and resources of the employer in judging this.

THE CODE

The general rules that employers should follow are:

The Code concentrates on disciplinary situations, which include misconduct or poor performance. It is legitimate to use a separate procedure to deal with performance issues, but the basic principles of fairness must be followed.

Principles

- Disciplinary and grievance policies should be laid out in writing
- Where possible, employees should be involved in the development of policies
- Managers should be made aware of them
- Often formal action is necessary, but what is reasonable or justified will depend on size and resources of employer

However, disciplinary matters should be dealt with fairly:

- (1) Employers and employees should deal with matters **promptly** eg meetings and decisions under the procedure
- (2) Employers and employees should act consistently
- (3) Employers should carry out any necessary investigations, to establish the facts
- (4) Employers should inform employees of basis of the problems and given them an opportunity to put their case before decisions are made
- (5) Employers should allow employees to be accompanied
- (6) Appeal against any disciplinary sanction should always be allowed

DISCIPLINE

Establish the Facts

- Investigate without delay
- Either
 - Hold an investigatory meeting without unreasonable delay, or
 - Collate evidence
- If a disciplinary meeting results, a different person should investigate and conduct disciplinary if possible
- There is no statutory right to be accompanied at investigatory meeting, but employer procedure might allow it

- if employer is suspending with pay, should be as short as possible, kept under review and the suspension itself is not disciplinary action

Inform the employee

- if disciplinary meeting is to be held, inform the employee in writing with enough information to be able to defend himself, and possible consequences, and
- copies of any written evidence, including statements to be included, and
- notify employee of time and date and venue, and
- advise employee of right to be accompanied

Hold the Meeting

- without unreasonable delay, but give enough time for the employee to prepare his or her case
- employers and employees should make 'every effort' to attend meeting
- the employer
 - explains the complaint
 - listens to employee's response
 - gives employee the opportunity to ask questions, present evidence and call witnesses
 - gives employee opportunity to challenge employer's witnesses
- where either party intends to call witnesses, they should give notice to the other side

Right to be accompanied

There is statutory right to be accompanied where meeting could result in:

- formal warning being issued; or
- taking of some other disciplinary action or
- the confirmation of such (ie appeal hearings)

The companion can be a workmate, TU Rep or official employed by TU (if a TU rep, they must be certified by Union as competent to accompany worker)

The companion **can**

- address the hearing to sum up the employee's case
- respond on behalf of the worker to any views expressed at the meeting
- confer with the employee during the hearing

The companion **cannot**

- answer questions on the worker's behalf
- address the hearing if the worker does not want this, or
- prevent the employer from explaining its case

Decide on Appropriate Action

- inform employee in writing
- usual sanction is written warning, first or final
- should set out in writing
 - nature of misconduct/poor performance and
 - what is required to improve
 - The timescale for this
 - How long the warning will last
 - Consequences of repetition
- If it is a dismissal, the employee should be informed

- Reasons
- Date of termination of contract
- Period of notice
- Right of appeal
- If gross misconduct has taken place
 - Only an employee with the appropriate authority can take that decision
 - There must still be a fair process
 - Generally what constitutes gross misconduct should be set out by the employer
- Where an employee is persistently unable to attend a disciplinary hearing without reasonable cause, the employer should take a decision on the evidence available

Opportunity to appeal

- Should be heard without unreasonable time and delay
- Ideally at an agreed time and place
- Employees should set out grounds for appeal in writing
- Where possible should be held by someone not previously involved in case
- Workers have statutory right to be accompanied
- Result should be conveyed to employee in writing

DEALING WITH GRIEVANCES

The employee should let the employer know the nature of the grievance

If the employee is not able to deal with grievance informally, it should be raised formally with a manager who is not the subject of the grievance

Should be

- in writing, and
- set out the nature of the grievance

Employer holds a meeting

- formal meeting should be held without unreasonable delay
- employers/employees and companions should make every effort to attend
- employees should be allowed to explain
 - their grievance
 - how they think it should be resolved
- adjournment may be necessary if investigation is needed

Allow employee to be accompanied

- this applies where the employee is complaining about the employer breaking a duty which is owed to the employee, which will be most usual cases
- chosen companion is as above with disciplinary, and all rules about selection and what s/he can do at meeting are the same

Employer must decide on appropriate action

The employer must decide and then communicate it to the employee, and where appropriate set out the action that the employer intends to take

Employee should be informed that they have a right to appeal

- grounds of appeal should be set out in writing
- without reasonable delay

- meeting should be set without unreasonable delay and at time and place that should be notified to employee in advance
- should be heard without unreasonable delay
- by someone not previously involved in the case if possible
- there is statutory right to be accompanied
- outcome should be communicated to employee in writing without unreasonable delay

Overlapping grievance and disciplinary cases

Where an employee raises a grievance during the disciplinary process, the disciplinary process may be temporarily suspended in order to deal with the grievance

Where the two are related it may be appropriate to deal with them concurrently

Collective grievances

This is not appropriate for grievances raised by 2+ people to a trade union – they should be dealt with by the organisation's process.

How does this new procedure differ from what was in place before April 1 2009?

Disciplinary and Dismissal

The situation was that there was a three step procedure which was a statutory Disciplinary and Dismissal Procedure (DDP). The elements of it are in the new non-mandatory Code, and consist of:

- a letter to the employee setting out the grounds of complaint, and the possible consequences ie dismissal
- a meeting to deal with the matter, at which the employee has a right to be accompanied
- A right of appeal against the sanction

If the employer failed to follow the three step procedure in relation to a dismissal

- the dismissal was automatically unfair
- any compensation paid was liable to be increased by between 10-50%

However, even where the employer did follow the DDP, it did not make the dismissal fair; if the tribunal thought that overall the procedure was otherwise defective, it would still find the employee to have been unfairly dismissed.

If the DDP was not completed due to the fault of the employee, s/he would also find that any eventual award would be reduced by between 10-50%

Grievances

The employee was required to raise any grievance s/he might have in relation to employment with the employer before taking the matter to tribunal. This would be followed by a meeting, with a right of appeal against any decision. A failure to follow this would prevent the employee proceeding to tribunal. Again, any failure to complete the procedure by either party would lead to an increase or reduction in damages.

Both the DDP and Statutory Grievance procedures had modified versions designed to deal with cases of gross misconduct and resignation respectively, but they still had to be completed in order to avoid sanction by the tribunal.

How does the change affect my firm?

If you have good disciplinary and grievance procedures which complied with the previous law, you will not need to change them.

All employers must still ensure that the written statement of terms and conditions contains these procedures, or they are in an employee handbook which is reasonably accessible

There are a couple of changes you could or should make:

- There is no mention of oral warnings in the new procedure and you might wish to remove them from your disciplinary procedure.
- You should ensure that in respect of each stage of your formal disciplinary procedure you
 - Write to the employee outlining the issue
 - Hold a meeting
 - Give the employee a right of appeal against any disciplinary sanction

Many larger companies have already been doing this, but most small ones have only done this when dismissal was likely.

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