Think Ahead ACCA

Technical factsheet

Disciplinary, dismissal and grievance procedures

This factsheet is part of a suite of employment factsheets and a pro forma contract and statement of terms and conditions that are updated regularly. These are:

The contract of employment
The standard statement of terms and conditions
Working time
Age discrimination
Dealing with sickness
Managing performance
Disciplinary, dismissal and grievance procedures
Unlawful discrimination
Redundancy
Settlement offers
Family-friendly rights
Employment status: workers

It is important for employers to follow a fair procedure in disciplining and/or dismissing an employee. If a fair process is not followed, then any dismissal is likely to be unfair, no matter how good the employer's reason for terminating the employment. Most formal action of this kind will require the employer to follow the Acas code, which is explained below.

The code does not cover redundancy, and a framework of proper procedure for redundancy dismissals is set out on Acas's website.

In cases where it is applicable, the code is not legally binding, but tribunals will take into account the employer's failure to follow it when deciding whether it has acted reasonably. Any decision by an employer to depart from the code must be for good reason, either because of the particular circumstances of the employee, or of the organisation.

Additionally, failure to follow the basic principles of the code set out below may result in financial penalties at any future tribunal hearing. In fact, the tribunal has the power to increase awards against the employer by up to 25% for an unreasonable failure to comply. A similar penalty can apply to the employee; if they unreasonably fail to follow the code by, for example, not lodging a grievance before resigning or before taking legal action, then any award may be reduced by up to 25%.

The code concentrates on dismissal situations. The process for dealing with grievances is set out later in this factsheet, and the employer should have a separate policy for this.

In practice, where an employee is being dismissed for misconduct or where the dismissal relates to a competence problem, employers should use the standard procedure set out in the Acas Code of Practice on Disciplinary Practices and Procedures in Employment (to be found at acas.org.uk). The code does apply to both, but many employers use two separate policies for misconduct (usually called 'disciplinary procedure') and competence ('usually called 'performance management' or 'capability' procedure). They both follow the Acas principles, but the tone is slightly different; the disciplinary procedure is more penal in nature and the capability procedure concentrates on encouraging the employee to succeed. However, the structure relating to, for example, number of meetings is the same, and the basic principles of the code and of fairness must be followed in relation to all such dismissals. Suggested procedures where an employee is being dismissed for performance reasons are set out in *Technical factsheet: Managing performance*.

Dismissals for sickness and incapacity are different again and are discussed in *Technical factsheet: Dealing with sickness*. It has been held that dismissals for sickness/incapacity need not comply with the Acas code, although the procedure used must be fair. Recently, in *Mr Brian Ikejiaku v British Institute of Technology*, it was decided that the code does apply to dismissals that have taken place because of whistleblowing, and this was confirmed in *SPI Spirits (UK) Ltd v Zabelin*.

THE ACAS CODE

The basic principles are set out below.

DISCIPLINARY ACTION: THE PROCESS

The recommended procedure under the code and the policies used by the business should conform to this basic structure. As stated above, these principles apply to misconduct and performance dismissals but **not** specifically where the dismissal relates to sickness or incapacity. The focus in the latter case is on consultation with the employee about their medical condition, their treatment and prognosis, and any reasonable adjustments that the employer should make. For details on this, see the relevant factsheets.

The rest of this factsheet is concerned with disciplinary action in the two areas to which the code applies. The general principles are as follows:

- Disciplinary 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 the size and resources of the employer.

However, disciplinary matters should be dealt with fairly, following these general principles:

1. Employers and employees should deal with matters promptly. For example, meetings and decisions under the procedure should be held without undue delay.
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 the basis of the issue and give them an opportunity to put their case before decisions are made.
5. Employers should allow employees to be accompanied to the disciplinary hearing.
6. Appeal against any disciplinary sanction should always be allowed.

In more detail, an employer faced with a disciplinary matter should take the following steps:

What kind of misconduct?

There are generally three types of misconduct, which depend on the seriousness of the matter, and which will have different implications:

- Gross misconduct – this is extremely serious, may be described in the employer's policies or handbook, and, if proven, will generally result in dismissal.
- Serious misconduct – this is misconduct that might very well normally be found to justify dismissal but there are mitigating factors which the employer is prepared to take into account. Where this is proven, the sanction will often be a final written warning, with the threat that any repetition is likely to lead to dismissal.
- Minor misconduct – this misconduct is less serious in nature, but still warrants a formal sanction and will generally lead to a first written warning, if proven.

Suspension

Where gross misconduct is alleged, it will normally be appropriate to suspend the employee while the investigation is taking place. It is highly advisable for employers to provide for suspension in the contract of employment, and to indicate how pay will be calculated during that time. Suspension should not be an automatic reaction, and the employer should carefully consider whether suspension is really necessary and why. The reasons will often be a perceived threat to the business or to other employees, the fact that it may be more difficult to investigate with the employee present at the workplace, or the fact that relationships at work have broken down.

Suspension should usually be with pay and should be for as short a time as possible, and kept under review. It should be made clear that the suspension itself is not disciplinary action, and should not result in a disproportionate adverse effect on the employee. (This was found to be the case in the recent case of *Upton-Hansen Architects Ltd v Ms X Gyftaki*.) Suspension should not be used arbitrarily or in a draconian manner. Someone suspended from work will always be treated with suspicion by their colleagues – and they might well be innocent. Employers should give thought to what they will tell the rest of the team to explain the employee's absence. It is suggested that the employer might well state that they are absent due to personal circumstances.

Acas has published updated guidance for employers on suspension. In particular, it reminds employers that suspension can trigger or worsen existing mental health conditions. The guidance provides useful suggestions for supporting employees' mental

health while they are suspended. This is important since employers still have a duty of care to these employees, and do not want to face an action for personal injury or negligence where it is alleged that poor treatment in relation to suspension has led to psychiatric damage.

The guidance emphasises the importance of considering alternatives to suspension, which will help to lower risks to the suspended employee while protecting the integrity of any investigation and the wellbeing of colleagues. The ultimate decision will depend on the circumstances, but employers would be well advised to comply with this guidance where they have decided that suspension is the appropriate action to take.

Once that decision is taken, the employer should then decide whether to proceed with formal disciplinary action by taking the following steps:

Establish the facts

Investigate without delay

- Either
  - hold an investigatory meeting where necessary with the employee, without unreasonable delay, and, where relevant, interview any witnesses, and/or
  - collate any evidence.
- Make a decision as to whether formal disciplinary action should be taken.
- If a disciplinary meeting results, the person who conducted the investigation should not also conduct the disciplinary, if at all possible. In some very small firms, where the issue is particularly contentious, it may be appropriate to use an independent consultant to deal with the formal hearing or any appeal.
- There is no statutory right to be accompanied at an investigatory meeting (as opposed to a formal disciplinary meeting) but the employer's procedure might allow it.
- The manager who has carried out the investigation will usually give evidence to the disciplinary hearing setting out what they have found in the course of their investigation.

Inform the employee

- If a disciplinary meeting is to be held, inform the employee in writing with enough information about the allegation so that they can defend themselves. It is important that the employer sets out all the allegations that are being made in as much detail as

possible. In the recent case of *K v L*, the employer failed to state in the allegation letter that a teacher's conduct might cause reputational damage to the school and the dismissal was held to be unfair when his employment was terminated for that reason.

- If it is possible that the employee may be dismissed, it needs to be stated in the letter.
- The employer must
  - include copies of any written evidence, including statements, and
  - notify the employee of time, date and venue, and
  - advise the employee of their right to be accompanied (see below).

Hold the disciplinary meeting

- Hold the meeting without unreasonable delay but give enough notice for the employee to prepare their case; 48 hours is usually considered an absolute minimum.
- Employer and employee should make 'every effort' to attend the meeting as arranged.
- The employer
  - explains the complaint
  - listens to the employee's response
  - lays out its case, with any witnesses giving evidence, including the investigating manager
  - gives the employee the opportunity to ask questions, present evidence and call witnesses
  - gives the employee the opportunity to challenge the employer's witnesses.
- Where either party intends to call witnesses, they should give notice to the other side.

Right to be accompanied

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

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

Therefore, all formal disciplinary meetings and appeals carry this right. The companion can be a workmate, trade union (TU) representative or an official employed by the TU. If a TU rep, they must be certified by the union as competent to accompany the worker. A recent amendment to the code reflects current case law and establishes that, once the employer has concluded that the employee is reasonable in asking for a companion (and

it would be very rare for this not to be reasonable), then the choice of the companion is for the employee alone, and their choice cannot be challenged by the employer.

Employers may wish to be flexible about allowing employees with a disability or with language difficulties to be accompanied by someone from outside the business, such as a family member, but employees do not have a right to legal representation.

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
- prevent the employer from explaining its case.

Decide on appropriate action

- Inform the employee in writing of the nature of the action to be taken, if any.
- If the employer feels it is justifiable in the circumstances, they can decide on any disciplinary sanction. This would normally be either a verbal warning (these are still contained in many employers' procedures and can still be used, but they are no longer in the guidance and can be removed from disciplinary procedures), or a first or final written warning. Alternatively, the employer may decide that dismissal may be an appropriate sanction
    - where gross misconduct is found to have taken place or
    - where the employee was already on a final warning for misconduct which has then been repeated.

- The employer should set out in writing
    - the nature of misconduct and, where the sanction is a warning,
        - what is required for the employee to improve or what must not be repeated
        - the timescale for this
        - how long the warning will last (normally verbal warnings last six months and

written warnings one year; this should be provided in the employer's disciplinary procedure)
        - consequences of repetition
        - right of appeal.
- If it is a dismissal, the employee should be informed of
    - the employer's reasons
    - date of termination of contract
    - period of notice, if any; there will be no notice for gross misconduct but otherwise it must be worked and paid, or paid in lieu
    - 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 in their policies, but certain types of conduct are generally considered to be gross misconduct even if there is no policy, eg dishonesty or violent conduct.
- Where an employee is persistently unable or unwilling to attend a disciplinary hearing without reasonable cause, the employer should take a decision on the evidence available.

Opportunity to appeal

- The appeal should be heard without unreasonable delay.
- The appeal should ideally be at an agreed time and place.
- Employees should set out grounds for appeal in writing.
- Where possible, the appeal should be held by someone not previously involved in the case.
- There is a statutory right to be accompanied.
- The result should be conveyed to the employee in writing.

It is important to remember that a defective procedure is likely to make a dismissal unfair where it would have otherwise been fair on the facts. A recent example of how not to conduct a disciplinary procedure is contained in *Ms M Jones v Vale Curtains and Blinds*.

DEALING WITH GRIEVANCES

A grievance is a concern, problem or complaint at work that is raised by the employee. It does not necessarily have to be in writing, though many employers ask employees to set their complaint out in writing once it is made. This could be about such matters as the employee's terms and conditions, what they are being asked to do, the way they are being treated or some perceived unfairness in decision-making, or some form of unlawful discrimination, bullying or harassment. Employers should note that a failure to deal promptly with a grievance, especially a serious one, may well entitle the employee to leave and claim unfair constructive dismissal. For an example of this, see *Graham v Eddie Stobart*.

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

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

- be in writing and
- set out the nature of the grievance.

The employer holds a meeting

- A formal meeting should then be held without unreasonable delay.
- Employers/employees and companions should make every effort to attend.
- Employees should be asked to explain
  - their grievance
  - how they think it should be resolved, ie what resolution they are seeking.
- Adjournment may be necessary if investigation is needed.

Allow the employee to be accompanied

- This applies where the employee is complaining about the employer breaking a duty that is owed to the employee, which will be the subject of most grievances in practice.
- The chosen companion is as explained above with disciplinary meetings; all rules about selection and what companions can do at the meeting are the same.

The employer must decide on appropriate action

The employer must decide on what happens now, communicate it to the employee and, where appropriate, set out the action that it intends to take. The employee should be informed that they have a right to appeal:

- The grounds for appeal should be set out in writing.
- This should be done without unreasonable delay; many employers require the grounds for appeal to be set out within five days of communicating the result of the meeting.
- The meeting should be set without unreasonable delay and at a time and place that should be notified to the employee in advance.
- The appeal should be heard without unreasonable delay, by someone not previously involved in the case if possible.
- There is a statutory right to be accompanied, as set out above.
- The outcome should be communicated to the employee in writing without unreasonable delay.

Overlapping grievance and disciplinary cases

Where an employee raises a grievance during the disciplinary process, the 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 procedure is not appropriate for grievances raised by two or more people to a trade union; they should be dealt with by the organisation's process.

Where should the disciplinary and grievance procedures be set out?

All employers must still ensure that the written statement of terms and conditions contains these procedures, or they are appended at the end of contracts or statements, or they are in an employee handbook that is reasonably accessible.

If your policies were drafted before 2009 – when the Acas procedure was amended – there are a couple of changes you could or should consider:

- There is no mention of verbal/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. This practice needs to be amended to cover all formal meetings under both procedures.

DISMISSAL AND RE-ENGAGEMENT

There has been a considerable discussion in the press recently about this practice, which is often referred to as 'fire and re-hire'. It was brought to public attention by the actions of P&O in sacking a section of its workforce in March 2022. The term covers a specific set of circumstances where an employer seeks to change the terms and conditions of their workforce or a subset of their workforce, usually on economic grounds. It will often be where the employer is in financial difficulties or where a certain historic term(s) has become untenable in modern conditions, perhaps because it hampers the employer's competitiveness in the market.

The process that the employer must go through to do this is outside the scope of this factsheet, but the government has produced a Code of Practice on Dismissal and Re-engagement, which has recently been brought into law via the The Code of Practice (Dismissal and Re-engagement) Order 2024.

The code sets out the steps to be followed in these circumstances, and also that although it is not legally binding, failure to follow it may result in any tribunal award being increased by up to 25%.

Following the change of government in 2024, the new administration has signalled its intention to make fire and re-hire more difficult going forward. It is likely that the code of practice will be repealed, and the legislation will restrict the legality of this practice to situations where the only alternative is the insolvency of the employer. This is by no means certain at the moment, nor do we have any idea when this change might be introduced.