



All Change: The New ACAS Code on Disciplinary and Grievance Procedures

From **6 April 2009** the Statutory Disciplinary and Grievance Procedures are abolished. In their place is the revised ACAS Code of Practice on Disciplinary and Grievance Procedures ('the Code'), which is supplemented by the revised non-statutory ACAS Guide on discipline and grievances at work ('the Guide'). Both documents are available from the ACAS website.

What is the ACAS Code?

The Code sets out principles and guidance for employers and employees for handling disciplinary and grievance situations.

The Code contains the core principles of the new regime. The fairness of any dismissal will be heavily dependant on whether an employer has followed the principles enshrined in the Code when dismissing the employee. A failure by an employer to comply with the Code will not, on its own, render an employer liable for a claim but it will be taken into account by the tribunal when considering whether or not the employer acted fairly. However, simply following the Code will not necessarily make a dismissal fair. The law on unfair dismissal is primarily concerned with whether or not an employer has acted reasonably in all the circumstances. Whether or not the employer has complied with the Code will be taken into account by tribunals, but it will not be the only determining factor.

The Code does not apply to dismissals on the grounds of redundancy or the non-renewal of a fixed term contract on its expiry. It applies to grievances and to disciplinary situations, which includes misconduct, poor performance and capability issues.

The Guide, which accompanies the Code, is much longer and gives employers 'best practice' advice for dealing with discipline and grievances in the workplace. Unlike the Code, an employment tribunal is not required to take the Guide into account when considering whether or not an employer has acted reasonably, but in practice it is likely to be influential.

General Provisions

The Code states that in any disciplinary or grievance situation:

- Employers and employees should raise issues promptly and deal with issues without unreasonable delay
- Employers and employees should act consistently
- Employers should carry out the investigations necessary to establish the facts
- Employers should inform employees of the problem and allow them to put their case
- Employers should allow employees to be accompanied at formal disciplinary and grievance meetings
- Employers should allow employees to appeal any formal decisions.

Where formal action is needed, exactly what action is reasonable or justified will depend on all the circumstances of the particular case. Tribunals will take into account the size and resources of an employer when deciding on relevant cases and will recognise that it may sometimes not be practicable for all employers to take all of the steps set out in the Code.

The Guide elaborates on the principles set out in the Code. It recommends that, where possible, matters should be resolved informally. Employers should make every effort to engage in two-way discussions with employees. Criticism should be constructive and consideration should be given at every stage as to whether independent mediation may be helpful.

Disciplinary Matters

The Code sets out a number of obligations in relation to disciplinary issues, including the following key points:

- The employer should notify the employee of the disciplinary case to answer and invite him or her to a meeting, in writing. The employee must be given sufficient information about the alleged misconduct or poor performance to prepare his or her case, including copies of any written evidence (which may include witness statements).
- The employer must hold a meeting with the employee to discuss the problem.
- Employers and employees should make every effort to attend disciplinary meetings.
- Where practicable, different people should carry out the investigation and disciplinary hearing.
- The employee should be allowed to be accompanied at the meeting, by a colleague, trade union representative or official. Guidance is included on what amounts to a reasonable request to be accompanied, and what the companion is permitted to do in the meeting.
- The employee should be allowed to state their case and answer allegations. They should have a reasonable opportunity to ask questions, present evidence and call relevant witnesses.
- The employee should be informed of the outcome in writing.
- There must be a right of appeal against disciplinary decisions.
- Employees who wish to appeal against disciplinary action and dismissals should do so in writing and specify the grounds of appeal.
- Employers should notify the employee of the outcome of the appeal, in writing, as soon as possible.
- Any period of suspension with pay in misconduct cases should be as brief as possible and imposed only after careful consideration. It should be made clear that the suspension is not an assumption of guilt.

Grievances

The Code sets out requirements for employers and employees in relation to grievances, including the following:

- If a grievance cannot be resolved informally, the employee should raise the matter formally and without unreasonable delay with a manager. The formal grievance should be put in writing and set out the nature of the complaint.
- Once an employee has raised a grievance, the employer should hold a meeting with him or her to discuss the matter.
- As with disciplinary hearings, the employee should be given the right to be accompanied at a grievance hearing.
- Employers and employees must make every effort to attend grievance meetings.
- The employer should decide on appropriate action which should be communicated to the employee, in writing, without unreasonable delay.
- The employee should be given the right of appeal against the employer's decision.
- If the employee is unhappy with the employer's decision he or she should appeal. This must be done in writing and the grounds for appeal specified.
- The employer should notify the employee of the outcome of the appeal, in writing, without unreasonable delay.

Rules and Procedures

The Code states that employees and, where appropriate, their representatives, should be involved in the development of rules and procedures to govern disciplinary and grievance situations. It also emphasises the importance of employees and managers understanding what the rules and procedures are and how they should be used in practice. The Guide suggests that it is good practice to develop disciplinary rules in consultation with employees (and their representatives), and employees should ideally be provided with a copy. It also recommends that training should be provided to those responsible for using and operating the rules and procedures.

Overlapping Disciplinary and Grievance Issues

The Code addresses the issue of overlapping disciplinary and grievance procedures by providing that where an employee raises a grievance during a disciplinary process, the disciplinary process may be temporarily suspended to deal with the grievance. In circumstances where the grievance and disciplinary issues are related it may be appropriate to deal with them concurrently.

Therefore, employers have a certain amount of discretion under the Code to handle overlapping disciplinary and grievance situations in the most appropriate way, depending on the circumstances.

Changes to Compensation

Under the old statutory procedures, a tribunal was *required* to adjust any award of compensation by between 10% and 50% if either party has acted in breach of the procedures. Following the repeal of the statutory procedures, there will be a *possible* adjustment of up to 25% for failure to follow the Code but it will not necessarily follow that the tribunal will make this adjustment. It has the discretion to make the adjustment if it considers it just and equitable to do so.

What Does This Mean in Practice?

Repeal of the statutory dispute resolution procedures will largely result in a return to the position as it was prior to their introduction in 2004. However, there are some important differences to bear in mind, not least the risk that a tribunal will apply an uplift of up to 25% to any compensation it awards if an employer fails to abide by the Code.

There is no longer any claim for automatically unfair dismissal for a failure to follow the basic three stage procedure. As has always been the case, employers must establish a potentially fair reason for a dismissal and act reasonably when dismissing. To act reasonably an employer must follow a fair procedure.

A dismissal will now be held to be unfair if the employer fails to follow a fair procedure, even if that failure has made no difference to the outcome and it would still have dismissed had it followed a fair procedure. This is a return to the position established in the case of *Polkey*. It will therefore be important for employers to ensure that they act reasonably and dismissals are carried out according to a generally fair procedure.

However, although a dismissal will be held to be unfair if a fair procedure is not followed, the amount of compensation may be reduced to reflect the chance that the employer would have dismissed the employee in any event, even if it had followed a fair procedure. This is known as the *Polkey* reduction.

With respect to grievance procedures, there is no longer a requirement for employees to raise a grievance in order to bring a claim in the tribunal. However, grievance procedures will remain important. Notwithstanding the requirements of the Code, employers have a general implied contractual duty to allow employees a reasonable opportunity to obtain redress of any grievance. Failure to do so could amount to a breach of that duty, entitling the employee to resign and claim constructive dismissal.

Why the Change?

The Code is aimed at promoting the resolution of disciplinary and grievance issues in the workplace and ensuring that issues are dealt with in accordance with the basic requirements of fairness. This was the original aim of the statutory dispute resolution procedures, but in practice they had the opposite effect of increasing applications to employment tribunals.

Both the disciplinary and grievance procedures set out in the Code essentially retain the basic three-step process in the old statutory procedures, therefore in practice it may have little impact on how employers deal with disciplinary and grievance issues.

However, the Code is far less prescriptive than the old rules, setting out a number of broad principles rather than a set procedure. It is intended to be simpler for employers to follow, but places very few obligations on employees. It remains to be seen whether or not it provides a clear route for resolving disputes in the workplace and whether the number of tribunal claims will drop as a result.

Going, Going, Not Quite Gone

The statutory dismissal and disciplinary procedures will continue to apply after 6 April 2009 if, **on or before 5 April 2009**, the employer has:

- Complied with step one or two of the statutory procedure (sent a letter inviting the employee to a meeting, or holding a meeting); or
- Taken relevant disciplinary action against the employee (action short of dismissal that is based on conduct or capability, other than the issue of a warning or suspension on full pay); or
- Dismissed the employee.

The statutory grievance procedures will continue to apply where the action that is the subject of the employee's complaint took place **wholly before 6 April 2009**.

The statutory grievance procedures will also continue to apply where the action to which the grievance relates **started on or before 5 April 2009** and continues beyond that date, but only if the employee presents a claim to the tribunal or submits a valid grievance:

- On or before 4 July 2009 for most claims
- On or before 4 October 2009 for equal pay or redundancy pay claims.

As a result of the transitional arrangements employers must continue to comply with the statutory procedures for some time after their repeal where the dispute arose before the repeal, or the procedure has already commenced.

What Do You Need To Do?

Disciplinary and grievance policies and procedures should be checked to ascertain whether or not they comply with the revised Code and Guide. It is likely that most policies and procedures, provided that they comply with the requirements of the old statutory procedures and the existing ACAS Code, will require little amendment. However, the following points are noteworthy:

- Clarification on how collective grievances will be dealt with may be needed.
- Provisions may need to be added to specify how overlapping disciplinary and grievance issues will be dealt with.
- It would be advisable to remove any commitment to dealing with grievances by ex-employees.
- Clarification on the use of witness evidence may be required.
- The Code and the Guide encourage the use of mediation in the workplace. This may need to be addressed in disciplinary and grievance policies and procedures.
- Related policies and procedures should also be compliant with the revised Code and Guide. For example, performance/capability and bullying and harassment policies and procedures may contain disciplinary and grievance provisions. These should be consistent with the revised disciplinary and grievance policies and procedures.

For more information on the Code and how it might affect your business please contact a member of the employment team on:

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