Chapter 11
Disciplinary and grievance

11.0 Disciplinary and grievance

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11.1 Introduction

11.1.1 Fair and consistent application of disciplinary and grievance procedures lies at the heart of good management. It also assists employers in ensuring that they do not fall foul of unfair dismissal rules. In order for a business to operate efficiently and therefore profitably, employees must understand the standards of behaviour that are required of them and the likely consequences of not meeting those standards. In addition, employees have to understand what rules and procedures they are expected to follow in the course of their employment. This chapter should be read in conjunction with 12.0 Dismissal - fair or unfair which contains detailed guidance on how to avoid unfairly dismissing an employee.

11.1.2 Grievance procedures and the proper handling of those procedures ensure that employees have an appropriate means of registering complaints or dissatisfaction with some aspect of their employment and to have the complaint resolved fairly and promptly. This chapter sets out the basic procedures and principles that employers should follow in order to ensure best practice and also to guard against unfair or constructive unfair dismissal liability.

11.1.3 Reference to disciplinary matters in this chapter relates to acts of misconduct as opposed to capability and/or performance issues. In practice, there can be overlap between behaviour that is properly regarded as misconduct and other behaviour that relates to an employee's performance or capability. The correct processes to be followed in respect of performance and capability are set out in Chapter 12.

11.2 Some general disciplinary considerations

11.2.1 ACAS Code of Practice

The ACAS Code of Practice in relation to disciplinary and grievance matters is designed to assist employers, employees and their representatives in dealing with disciplinary matters and grievance in the workplace promptly and fairly. Tribunals pay close attention to the extent to which the processes followed by the employer have complied with the ACAS Code. An employer who departs from the general guidance contained in the Code without good reason runs the risk of liability for unfair dismissal.

If an employer fails to follow the Code without justification then that employer risks the employee's compensation being increased by 25% if his or her tribunal claim is successful. Conversely, if a Tribunal feels an employee has unreasonably failed to follow the guidance set out in the code it can reduce any award by up to 25%.

11.2.2 Internal procedures

It is good practice for employers to develop their own written rules and procedures. Statements of terms and conditions of employment issued to employees must contain either disciplinary and grievance procedures or information to enable the employee to access the procedures if they are not contained within the body of the contract document itself. Disciplinary procedures should set out the types of behaviour and conduct that the employer regards as misconduct and gross misconduct. Ideally, examples of the types of behaviour that would attract those labels should be incorporated into the document. The document should also set out the basic procedures that the employer will follow in disciplinary situations. The procedure should also set out the range of sanctions or penalties that the employer may impose together with general guidance as to the type of misconduct that will attract a particular penalty or sanction. The procedure should also set out the rules governing appeals against disciplinary sanctions.

The procedure should contain some guidance or information on which grades of management or staff have the authority to dismiss.

11.3 Disciplinary investigations

11.3.1 The nature and extent of an investigation into possible misconduct will depend very much on the nature of the misconduct itself. Some cases will involve detailed examination of documents and the taking of witness statements from a number of employees. In other situations, the only investigatory step is to interview the alleged wrongdoer. A thorough and well-documented investigation into the facts of a particular case underpins a fair and reasonable process.

11.3.2 Who should investigate? Ideally the individual who investigates an allegation of misconduct should not then subsequently chair the disciplinary hearing and make a decision on whether a sanction or penalty is appropriate. In smaller businesses it is not always possible to separate these two functions. An investigator subsequently chairing a disciplinary hearing does not necessarily render any disciplinary sanction imposed unfair. The guiding principle is that if an investigator chairs the disciplinary hearing, then that individual must be capable of impartiality and objectivity at the point of chairing the hearing, notwithstanding prior involvement in the investigation. Best practice is to separate these two functions wherever possible.

11.3.3 Written records

It is important for an employer to maintain written records of investigations. This will assist in the handling of the disciplinary hearing and any subsequent appeal that may become necessary. An employer is required to ensure that an employee fully understands the detail of the allegations he or she faces. It is easier to do that if the detail of the evidence and allegations are in writing. Again, the extent and formality of written documentation will depend on the nature of the investigation itself. Best practice is to incorporate all investigatory material into one report with all relevant documents or statements being attached to that report.

11.3.4 Witness statements

11.3.4.1 Most investigations require employers to seek views, input or evidence from employees other than the alleged wrongdoer. It is prudent for any information obtained from other employees to be presented in the form of a written statement so that there can be no debate or confusion at a later stage of the disciplinary procedure about what that employee's evidence is. Some employers obtain signed written statements from employees although strictly speaking this is not a mandatory part of the fair procedure. If a statement is signed that will discourage a witness from changing or withdrawing his or her statement. A witness should always be advised of why the statement is being taken.

11.3.4.2 Difficulties can arise when employees express concerns about the alleged wrongdoer finding out about their involvement in the investigatory process. Employees sometimes fear reprisals or general damage to their working relationship with a colleague or superior. Written statements can be anonymised in order to protect the identity of the employee however, often the identity of the employee is effectively disclosed by the content of the statement.

11.3.4.3 Difficulties can arise in using anonymised statements. It is sometimes said that if statements are anonymised, the alleged wrongdoer is prevented from properly responding to the statement. For example, it may be a relevant consideration that an individual who provided a witness statement had a grudge against the employee who is subject of the investigation. That might reduce the weight that the employer places on that statement. If the identity is not disclosed then the employee can be prevented from casting doubt on information provided as a result of the poor relationship with that other employee. The guiding principle in these situations is that as long as the employee has had full and proper disclosure of the nature of the allegations that he or she faces, then the fact that some or all of the witness statements are anonymised does not necessarily render the process unfair. This can be a difficult area for employers and advice should be taken if such issues arise.

11.3.5 Interview with alleged wrongdoer

It is essential to incorporate into the investigation a meeting with the alleged wrongdoer in order to put the allegations to him or her. This ensures that the employer has sought input from the alleged wrongdoer before it is decided that he or she has a case to answer at a disciplinary hearing. Again, best practice is for a written record to be kept of responses made by the employee during the investigatory meeting. An investigatory meeting should not be confused with the disciplinary hearing itself. Although in practice there can be an element of duplication between an investigatory meeting and a subsequent disciplinary meeting no action should be taken against an employee during or after an investigatory meeting. A disciplinary sanction should only be imposed after the disciplinary hearing takes place.

11.3.6 Conclusion of investigation

Once the employer has gathered all information relevant to the allegations it is then for the employer to decide, on the basis of the evidence gathered, whether or not the employee has a case to answer. If there is a case to answer then the employer must call a disciplinary hearing. If the employer decides there is no case to answer or there is insufficient evidence to justify further proceedings then the matter may be at an end. This should be communicated to the employee in writing without delay.

11.3.7 Informal resolution

The employer may conclude that whilst there is some evidence of wrongdoing, it is not serious enough to justify formal disciplinary proceedings or action. In such cases, it may suffice for the employer to provide the employee with an informal warning as to future conduct. In some cases it may be appropriate to provide further training, coaching or advice on the standard of conduct that is expected. If the informal resolution fails to deal with the problem and the employee commits further acts of misconduct then it will be to the employer's credit that it had tried to resolve the matter without disciplinary action. A brief note should be kept of any agreed informal action for future reference. It is sensible to review the informal action taken to ensure that the required improvement in behaviour has taken place.

11.4 Paid suspension

11.4.1 Paid suspension is not itself a disciplinary sanction. Suspensions in the context of disciplinary procedures should always be neutral in nature. It is not necessarily appropriate for an employee to be suspended in every case particularly if the allegations appear to be less serious in nature. If, however, it appears to the employer that the investigation may be hampered by the employee's ongoing presence in the workplace then it is appropriate for the employee to be suspended, irrespective of the nature of the allegations. If an act of misconduct involves a heated exchange or fall out between colleagues then suspension may be appropriate to allow the employees to calm down. That may avoid possible further conflict. Employers must never suspend employees as a "knee jerk" reaction to allegations. Recent cases suggest that employees, who are suspended in such circumstances, may argue that the suspension is a breach of trust and confidence. It is not a requirement that the suspension be absolutely necessary having considered all the circumstances, but an employer must ensure that they have reasonable and proper cause for taking such action, before suspending. Careful consideration should be given to any decision to suspend an employee.

11.4.2 Suspension – possible gross misconduct

Most employers suspend employees who face allegations of possible gross misconduct. In such cases dismissal is a potential outcome and therefore it is prudent to allow the employee time away from work to consider his or her defence in advance of the disciplinary hearing. There are also cases where the employee's ongoing presence in the workplace during the investigation is not appropriate, for example, if the allegation is one of harassment or victimisation of a fellow employee, or wilful damage to the employer's property. If an investigation might be hampered by the employee's ongoing presence in the workplace then suspension is appropriate.

11.4.3 Pay during suspension

It is not lawful to suspend an employee without pay. To do so would be to breach the employee's contract of employment. Contractual provisions that seek to reserve the right to suspend without pay are unenforceable. During any period of suspension an employee is entitled to full pay. In addition, suspension is not a sanction in itself and therefore to penalise an employee financially during suspension would be in effect to impose a sanction before the case has been heard.

11.4.4 Written confirmation of suspension

The employer should confirm the suspension in writing. The letter should contain a general statement of the allegations faced and the reason for the suspension. It should also state that suspension is on full pay and, if possible, give an indication of the likely length of suspension.

11.4.5 Conditions of suspension

It is important that the employer clarifies at the beginning of the suspension any conditions that it wishes to attach to the suspension. In certain circumstances it may be appropriate to remind the employee that he or she should not engage in any work related activity. It would be appropriate to remind the employee that he or she should not attempt to contact any clients or suppliers during the suspension. It may be prudent to advise the employee that colleagues, particularly those who may be giving witness statements, should not be contacted. Employers will also have to consider the ongoing use of company mobile phones, laptops and blackberries during the period of suspension, as well as access to the computer systems. If all access for these items is denied during suspension it can give an employee scope to argue that these measures are evidence that a decision to dismiss has already been reached. Employers have to balance these considerations with the risk that its property may be damaged or computer system interfered with. Employers should seek advice in relation to the conditions of suspension.

11.4.6 Duration of suspension

The length of suspension will depend very much on the investigatory steps that the employer has to carry out. It should be no longer than is reasonable for investigations to be properly carried out. If the progress of the investigation is likely to be delayed, for example, by the absence of a key witness on holiday, then that fact should be communicated to the employee.

11.5 Disciplinary hearing

11.5.1 Once the investigation has concluded, if the employer is satisfied that there is a case to answer and that informal action will not suffice then a disciplinary hearing must be convened. The disciplinary hearing provides a further opportunity for the employee to respond to or refute the allegations. In cases where the misconduct is effectively admitted by the employee, the disciplinary hearing provides an opportunity for the employee to put forward any mitigating factors or justification for the behaviour before a sanction is imposed. Accordingly, even in situations where the facts appear to be beyond dispute, it is still essential for a disciplinary hearing to be convened before action is taken.

11.5.2 Written notification

Irrespective of whether or not the employee is suspended, he or she should receive written notification of the date, time and location for the disciplinary hearing. All relevant documentation and witness statements gathered during the investigation process should be sent to the employee at this time, if that has not already been done. The letter should explain the employee's right to representation (see 11.5.3 Representation at the hearing). If, having regard to the nature of the allegations, the employer is of the view that dismissal is a possible outcome then the letter should state that fact. That alerts the employee to the fact that his or her job is at stake which in turn will help to focus the employee's attention on making full responses at the disciplinary hearing. The letter should also identify the individual who is to chair the disciplinary hearing and any other individual who is to attend as a minute-taker or in an advisory capacity from the employer's side.

11.5.3 Representation at the hearing

Employees have a legal right to be accompanied at a disciplinary hearing by either a colleague, an employed official of a trade union or someone certified by the trade union as being competent in accompanying employees to disciplinary hearings. It is common for the representative to be referred to as the 'witness' or 'companion'.

11.5.4 When does the right apply

Employees have the right to be accompanied to meetings that could result in:

- a formal warning being issued to a worker;
- taking of some other disciplinary sanction or other action; or
- the confirmation of a warning or some other disciplinary action.

There is no right to representation at informal discussions, counselling sessions or investigatory meetings.

11.5.5 The role of the representative

The role of the representative is generally to assist the employee in defending the allegations. The representative is allowed to make general statements in support of the employee's position, sum up the case and also to confer with the employee. The representative can also comment on procedural aspects however he or she is not permitted to answer questions which are put directly to the employee.

11.5.6 Other companions

Contracts of employment and internal disciplinary procedures may permit a wider category of individuals to accompany employees to disciplinary and grievance hearings. An employer should take great care when extending rights of representation beyond colleagues and trade union representatives.

11.5.7 Can an employee request any colleague

An employee's request to be accompanied by a colleague must be reasonable. What is reasonable will depend on all the circumstances. Recent case law has confirmed that reasonableness only applies to the request to be accompanied and does not relate to the employee's choice of companion. An employer cannot interfere with the employee's choice of companion. The ACAS Code of Practice has been updated to reflect this change in the case law, therefore failure to allow a companion where a reasonable request has been made could result in the employee's compensation being increased by 25% if his or her tribunal claim is successful.

Chosen companions cannot be compelled to attend hearings or become involved to any extent. That is a matter for the individual and employers should not seek to exert pressure on an employee who has been asked to act as a representative who refuses to become involved.

11.5.8 Timing of hearing

A disciplinary hearing should not take place too soon after the conclusion of the investigation. The employee must be given a reasonable period of time after the conclusion of the investigation to consider the witness statements and other documents gathered during the investigation. What is reasonable will depend on the amount of material that the employee has to understand.

11.5.9 Postponement of disciplinary hearing

11.5.9.1 An employer must agree to postpone a disciplinary hearing upon the request of an employee if the chosen representative is not available at the date and time fixed for the hearing. The employee must propose an alternative date not more than five days from the original date. For these purposes, working days exclude Saturdays, Sundays and some public/bank holidays. The employer must also act reasonably in considering the request even if the requested postponement is beyond the five day period. Failure to do so could render any subsequent dismissal unfair on procedural grounds.

11.5.9.2 Employees often seek postponements for reasons other than the availability of their representative. It is common for postponement to be sought to provide the employee with more time to consider the allegations and evidence with which he or she is faced. Although there is no absolute legal obligation on an employer to postpone in these circumstances, it is prudent nevertheless for a postponement to be granted. This protects the employer from allegations that it did not allow sufficient time for the employee to prepare his or her defence.

11.5.9.3 If an employee facing disciplinary proceedings is medically certified as incapable of attending the disciplinary hearing for a prescribed period then there is little or nothing that the employer can do to progress the procedure until the employee is certified as fit to attend.

11.5.10 Police investigations

11.5.10.1 There may be circumstances whereby an employee's alleged conduct at work or outside of work results in a police investigation and potential criminal prosecution. In such circumstances an employer is not required, by law, to delay any internal investigation or disciplinary hearing.

11.5.10.2 Whether it may be appropriate to suspend the employee until conclusion of the police investigation or criminal process will depend on the circumstances. The employee would be entitled to full pay during suspension, unless the employer has a contractual right otherwise (see 11.4 Paid suspension). However, an employer cannot rely solely on the outcome of external processes and must ensure that it has sufficient evidence to form a reasonable belief to take action or dismiss. This was highlighted in a recent case involving a school teacher who was dismissed following a police investigation into indecent images found on their computer. The police decided not to prosecute as they could not establish that the teacher was responsible for the images as they were found on a shared device. The school requested the evidence against the teacher from the police, and received highly redacted documents that did not confirm the allegations. Fearing reputational damage, the school took disciplinary action and dismissed the teacher. It was held that it was unfair for the school to dismiss the employee as it was not reasonable to dismiss the teacher based on concern that they might have committed the criminal offence.

Disciplinary hearing

11.5.11 Employee's failure to attend

What can an employer do if an employee simply fails to attend the hearing without any form of notification? The employer should contact the employee to establish that he or she did in fact receive notification of the date, time and location of the disciplinary hearing. Employers should also seek confirmation of the reason for non- attendance. Another date, time and location should be arranged directly with the employee and confirmed in writing. If the employee fails to attend this subsequent disciplinary hearing without good reason then he or she should be warned that any further failure to attend the hearing will result in a decision being made on the information available.

11.5.12 Conduct of the hearing

At the commencement of the hearing, the chair should make the introductions and establish that the employee has received the investigatory documentation and understands the nature of the allegations. It is recommended that someone accompanies the chair of the disciplinary hearing to take a minute of the hearing (see 11.8.1 Minutes). If the employer has an HR department, it is usual for a member of the HR department to take minutes and act in an advisory capacity. There is no set format for the conduct of the hearing. The guiding principle is that the employee is given every opportunity to respond to the allegations and comment on evidence. The chair may wish to ask a number of questions in relation to explanations given by the employee. Insofar as possible, this should be done in a neutral and non-confrontational fashion. The chair should consider any written material or documents that the employee brings to the hearing in support of his or her case. Depending on the extent of such documentation that may require an adjournment.

11.5.13 Witnesses at the hearing

The ACAS Code of Practice states that employees should be given the opportunity to call relevant witnesses to the hearing in support of their case. If either party intends to call witnesses, then the witnesses should be given appropriate advance notification of the date, time and location of the hearing. Difficulties can arise where witnesses called either by the employer or the employee are reluctant to attend the hearing. In those circumstances, further guidance should be sought.

11.5.14 Conclusion of hearing – adjournment

Once all the allegations have been put to the employee and all relevant material has been presented in response, the hearing is effectively at an end. The chair should always ask the employee or the representative if there is anything else he or she wishes to say. The employee or the representative should be given an opportunity to sum up the case. In straightforward factual cases involving minor misconduct it may be possible for the outcome to be decided and confirmed to the employee at the conclusion of the hearing. In most cases, however, it is more appropriate for the hearing to be adjourned so that the chair can consider the representations made by the employee prior to reaching a decision. It is often the case that the employee or his or her representative raises a factual or procedural issue which requires further investigations. In those circumstances, adjournment is appropriate. The length of the adjournment depends on the reason for it. If the chair simply requires some time to reflect upon the answers and information given by the employee then an adjournment of an hour or two may be appropriate. If, on the other hand, further investigations are required, then it is more appropriate for the disciplinary hearing to be adjourned until another date.

11.5.15 Reconvened hearing

If further investigations are carried out it is often necessary for the disciplinary hearing to be reconvened so that the results of those further investigations can be shared with the employee and his or her responses sought. That is not always the case. It depends very much on the nature of the additional information sought. If the additional investigations carried out are simply clarification of dates, times or minor details of a witness's statement then it is likely that the employer will be in a position to arrive at a decision without reconvening the disciplinary hearing. If, on the other hand, the additional investigations involve matters of substance then it is more likely that a reconvened hearing is appropriate.

11.5.16 Making the decision

At the conclusion of the disciplinary hearing or any reconvened hearing, it falls to the chair to consider all of the information and arrive at a decision. The chair must firstly decide on whether or not on balance the allegations have been proved or proved to some extent. Once the chair is satisfied that the employee is culpable to some extent, consideration must then be given to the appropriate penalty in the circumstances. The chair must consider all relevant background circumstances and also any existing live disciplinary warnings. Consideration should also be given to any mitigating circumstances. Employees often cite personal, domestic or health difficulties as explanations or justifications for acts of misconduct. Employers should weigh up to what extent the behaviour was caused or influenced by such external factors. Account should also be taken of the terms of the disciplinary procedure rules and in particular whether or not a particular type of conduct attracts a particular type of sanction. Regard should also be had to the sanctions imposed on other employees in the past for the same or similar offences. Employers are obliged to adopt a consistent approach to the imposition of sanctions. If an employer wishes to impose a more serious sanction than a particular type of conduct has attracted in the past then it must set out very clearly the justification for doing so. Ultimately the decision must be proportionate to the conduct and must be reasonable in all the circumstances.

11.5.17 Communicating the decision

Once a decision is arrived at, the chair should write to the employee setting out the decision and the reasons for it. The letter should also advise the employee of the period over which the warning will remain live and of the right of appeal and the time period in which that right must be invoked.

11.6 Types of sanction

11.6.1 The sanction imposed depends very much on the seriousness of the conduct and the nature and extent of any mitigating factors. There is a range of possible sanctions available to employers. Employers are more familiar with reference to terms such as verbal, written and final written warning. The ACAS Code however does not make specific reference to these types of warning. The framework of sanctions for misconduct is set out in the ACAS Code.

11.6.2 First formal action – misconduct

In cases of misconduct employees should be given a written warning setting out the nature of misconduct and the change in behaviour required. The warning letter should advise that any further acts of misconduct might lead to further disciplinary action including the imposition of a final written warning. A record of the warning should be kept but it should be disregarded for disciplinary purposes after a specified period.

11.6.3 A final written warning

If the employee has a current warning about misconduct then further misconduct or unsatisfactory performance, whichever is relevant, may warrant a final written warning. A final written warning may also be appropriate where the first offence is sufficiently serious but would not justify dismissal. The warning should also make it clear to the employee that any further misconduct during the life of the final written warning may result in further disciplinary proceedings, possibly dismissal. The warning should also contain guidance on the improvement in behaviour that is required.

11.6.4 Dismissal without notice

It is important to note that it is still necessary for employers to follow a fair procedure even in cases of gross misconduct where guilt appears clear-cut. Dismissal without notice or without payment in lieu of notice is appropriate only for acts of gross misconduct. What is gross misconduct? Behaviour or conduct that is so serious that it undermines the existence of the contract of employment itself is categorised as gross misconduct. Although the range of behaviour that can be regarded as gross misconduct is virtually limitless, disciplinary procedures should set out a series of examples of behaviour that the employer will regard as gross misconduct. Examples (but not necessarily an exhaustive list) of behaviour amounting to gross misconduct are as follows:

- theft or other acts of dishonesty
- (e.g. fraudulent claims for hours which have not been worked on timesheets);
- insubordination;
- acts of violence;
- wilful or negligent damage to an employer's property;
- victimisation or harassment of colleagues;
- offences relating to alcohol or illegal drugs;
- criminal or other behaviour tending to bring the employer's business into disrepute;
- serious breaches of confidence; or
- serious breaches of health and safety rules.

Where a finding of gross misconduct is made, an employer should always consider any mitigating circumstances that should be taken into account when determining the appropriate disciplinary sanction, and not automatically decide to dismiss.

11.6.5 Dismissal with notice

Generally no employee should be dismissed for a first breach of discipline except for most cases of gross misconduct. That said, the courts have held that just because misconduct is considered less serious than gross misconduct does not mean that a dismissal for that reason will be unfair, even if the employee has received no prior warnings. Despite this, employees should generally be given prior warning before dismissal where the conduct is not considered to be gross.

When an employee has a live final written warning and has committed a further act of misconduct not amounting to gross misconduct, dismissal may still be an appropriate and fair sanction. An employee who is dismissed in these circumstances must be given notice of termination of employment or must receive a payment in lieu of notice entitlement. The reason for this is that the act which triggered the dismissal was not in itself an act of gross misconduct and therefore the employer is not entitled to dismiss without notice or payment in lieu of notice. If the dismissal is for misconduct rather than gross misconduct, the employee must either be given notice of termination or receive a payment in lieu of notice.

11.6.6 Demotion

Demotion on a temporary or permanent basis is only a permissible sanction where the employer has reserved the right in the employee's contract of employment to impose demotion as a sanction. If no such right has been reserved, then the imposition of a demotion may give the employee grounds to assert that his or her contract of employment has been breached. That in turn could give rise to a potential claim for constructive dismissal.

11.6.7 Unpaid suspension

It is open to an employer and employee to agree a limited period of unpaid suspen- sion as an alternative to dismissal. This can only be done with the agreement of the employee. Employers may reserve the contractual right to impose a limited period of unpaid suspension. Advice should be taken when considering exercising such a right.

11.6.8 Written reasons for dismissal

It is an integral part of a fair disciplinary procedure that the outcome of the disciplinary hearing is communicated to the employee with reasons to support the decision. There is a legal obligation on employers to provide employees with the relevant qualifying period (please see Qualifying Period) with written reasons for dismissal. Such written reasons must be supplied within 14 days of the request being made, unless it is not reasonably practicable to do so.

Types of sanction

11.6.9 How long do warnings last?

There are no prescribed legal time limits for the duration of warnings. However, a useful guide is 3 to 6 months for first formal action and 12 months for a final written warning. Once these periods have expired the warning is no longer 'live' and cannot be taken into consideration when imposing sanctions in any subsequent disciplinary process involving the same employee. Although an employer need not remove warnings from an employee's file when they expire, it should be borne in mind that the Data Protection Act states that personal data should not be kept for longer than is necessary. Warnings will often constitute personal data. If an employee received a written warning ten years ago and has not been in trouble since, the employer must ask itself why it continues to keep the warning on file.

11.7 Appeals

11.7.1 The right to appeal

Employees have the right to appeal against any disciplinary decision. A failure on the part of an employer to advise an employee of his or her right to appeal, or to conduct an appeal, will render a dismissal unfair. It is a fundamental cornerstone of natural justice that the right to appeal is given and any failure to do so may be deemed an unreasonable failure to follow the ACAS Code and result in up to a 25% uplift in any compensation awarded by an Employment Tribunal.

11.7.2 Invoking the right

It is sufficient that an employee indicates to the employer that he or she wishes to appeal against the disciplinary decision or sanction. There is no legal requirement on an employee to set out the precise basis on which the appeal is lodged although it can be helpful to the appeal process that follows if an employee is invited to do that.

11.7.3 Late appeals

Most disciplinary procedures have a prescribed period of time in which an appeal must be lodged. Typically, this is 5 working days from the date of communication of the disciplinary decision. If the employee is, for example, a day or two late in intimating the appeal, whilst from a strict contractual and procedural point of view the employer would be entitled not to hear the appeal, to refuse to do so may be to risk a finding of unfair dismissal. It may be different if an appeal is lodged a significant period of time after the disciplinary sanction is imposed. However, an employer's process is unlikely to be prejudiced by a delay of a few days, particularly if the employee has a reasonable explanation for why the appeal was lodged late.

11.7.4 Who hears the appeal?

The ACAS Code advises that appeals should be heard by an individual who has not been previously involved in the disciplinary process. It is also recommended that, where possible, this person occupies a higher level in the employer's hierarchy than the initial decision-maker. That way it cannot be said that the appeal chair simply arrived at the same conclusion as the initial chair to avoid undermining a superior. With small and family businesses, this is not always possible and on very rare occasions an employer is left with no alternative but for the original decision-maker to also hear the appeal. That is far from the accepted practice and should only happen where there is absolutely no possible alternative.

11.7.5 Appeal as re-hearing

Where a disciplinary sanction has been imposed and the employee appeals citing procedural defects and possible bias or lack of objectivity on the part of the chair of the hearing, it is prudent for the appeal to be conducted as an entire re-hearing of the allegations, rather than simply an examination of the appeal points raised by the employee. Procedural defects that would otherwise render a dismissal unfair can sometimes be rectified by an appeal that takes the form of a complete re-hearing. For example, where an employee is dismissed without proper investigation or inquiry, the dismissal will be unfair unless it can be shown that the subsequent procedure at appeal was sufficiently robust as to provide the overall fairness that the law requires.

11.7.6 Right to representation

An employee who appeals has the same right to representation as with disciplinary hearings. The rules in relation to representation set out at 11.5.3 Representation at the hearing apply equally to appeal hearings.

11.7.7 Outcome of appeal

There is a range of possible outcomes. The original sanction or decision may be upheld. The appeal may be upheld on the basis that the allegations were not proved or that the sanction imposed was too severe in the circumstances. A successful appeal may result in no disciplinary action at all or the imposition of a lesser sanction. One outcome which should not be considered is the imposition of a more serious penalty than was issued at the disciplinary hearing.

11.7.8 The effect of a successful appeal against dismissal

If an employer decides to dismiss without notice or payment in lieu of notice, that dismissal is often referred to as 'summary dismissal'. In cases of summary dismissal, the dismissal takes effect when the fact of the dismissal is communicated to the employee, be that by letter or face-to-face. If a dismissal is with notice, then the dismissal takes effect at the expiry of that notice period. Unless a particular employer's disciplinary procedure provides to the contrary, the contract of employment is therefore terminated and does not continue during the appeal process. What happens therefore if an employee's appeal is upheld and he or she is told they can come back to work? A month or more may have elapsed since the dismissal. In those circumstances the contract of employment is regarded as suspended during the appeal process. When the employee returns, the dismissal in effect disappears and continuity of employment dates from the original start date, not the date of reinstatement. Unless the contract of employment or disciplinary procedure provides otherwise there is no right to back dated pay or wages for the period after dismissal and before reinstatement took effect though in practice employees can be reluctant to return unless repayment of lost wages is made. Employers should ensure that disciplinary procedures spell out very clearly the impact of dismissal and appeals on the existence of the contract of employment.

11.7.9 New evidence

Particularly in dismissal cases, it is quite common for an employee to produce evidence or information at or before the appeal hearing which was not presented at the disciplinary hearing. Such information and material should be considered at the appeal notwithstanding the fact that the chair of the disciplinary hearing reached a decision without having that material in mind. Tribunals emphasise that employers should not take an overly legalistic approach to appeal processes and that includes not ruling out information not previously referred to.

11.7.10 Communication of appeal outcome

Once the decision on appeal has been reached, that should be communicated to the employee without delay.

11.8 Miscellaneous disciplinary issues

11.8.1 Minutes

Parties tend to take their own minutes of disciplinary and appeal hearings. Particularly where proceedings are not tape recorded, parties' respective written minutes can differ greatly. Although it is not always possible to do so, it is advisable that employers at least seek to agree a set of minutes with the employee. Much valuable time can be wasted during the appeal process and beyond by the parties disputing over what was said and not said at the initial hearing. A copy of the prepared typed minutes should be given or sent to the employee as soon after the applicable hearing as is possible with an invitation to the employee to propose additions or corrections. If, upon reflection, what the employee proposes strikes the employer as an accurate reflection of what was said at the hearing then there is scope for the parties to have an agreed set of minutes. Of course, this is not always possible and there are often areas in which parties simply cannot agree on what was said. In those circumstances, it is typically the case that the subject matter of the alleged omissions or inaccuracies of the minutes forms part of the appeal process.

11.8.2 Investigatory material – data protection issues

Issues can arise over the lawfulness of material that is gathered during an investigation. For example, if evidence takes the form of e-mails sent or received by the alleged wrongdoer or CCTV footage showing the employee and other third parties, that evidence is required to have been gathered in a way that did not infringe the Data Protection Act or other rules relating to monitoring of employee communications. If material is gathered in an unlawful manner then that in itself can render a dismissal unfair. This is a particularly difficult and technical area and if such issues arise then advice should be taken.

11.8.3 Written record of proceedings

It is prudent for employers to keep a written record of disciplinary proceedings. Such written records may be required if disciplinary action or dismissal is subsequently challenged at an employment tribunal. Records should be kept of all written communications between employer and employee during the process, minutes of hearings and documentary evidence used. Such documents may constitute personal data for the purposes of the Data Protection Act and they must be stored in the manner prescribed by the act. Accordingly, the records must be accurate and confidentiality should be maintained. Documents should not be kept any longer than is necessary and the employee has the right to access the documents by making a data subject access request. A fuller explanation of these issues is contained in 9.0 Data protection.

11.8.4 Covert recordings of meetings

With mobile phones and other portable devices commonly having audio recording functions, it is easy for an employee to covertly record disciplinary hearings which they may look to rely upon at a later date. Whether or not such evidence would be admissible at an Employment Tribunal will depend on the circumstances, but employers would be best placed to try to avoid such a situation arising.

To help do so it is therefore recommended that employers state in their policies and procedures that covert audio recordings at work are not permitted unless expressly authorised. An employer may wish to state that such an occurrence would amount to an offence of gross misconduct. An employer may have a fair reason to justify dismissal if an employee is caught covertly recording. In addition, taking a formal minute of any meeting and making it clear that formal minutes are being taken and will be shared, should also help to argue against any such covert recording being capable of being produced and relied upon at a disciplinary hearing.

If either an employer or employee wish to make an audio recording then best practice would be to obtain consent from the other party, or for the employer to reserve the right to do so in their disciplinary procedure. An audio recording may be useful for producing a minute of a hearing or be considered a reasonable adjustment for a disabled employee (see 6.4.10 Duty to make reasonable adjustments). There are GDPR considerations as to the taking of a recording and the use of the recording. Typically, express informed consent is required, and a record retained of that consent having been obtained.

11.9 Grievance issues

11.9.1 Sound management of the workforce

11.9.1.1 Aggrieved employees tend not to be particularly productive. Their dissatisfaction, if unresolved, can have a knock-on effect on colleagues and generally morale can suffer. Ultimately, if an aggrieved employee cannot satisfactorily resolve his or her grievance then resignation is usually the result as he or she takes up employment elsewhere. Skills and experience are lost to the employer who then has the additional cost of recruiting replacements. The loss of the employee is therefore an expensive event, irrespective of whether or not constructive dismissal proceedings are raised in the wake of the resignation.

11.9.1.2 Grievances often arise out of an employee's relationship with one or more colleagues. It is vital that the employer intervenes to resolve such issues before relationships are irreparably damaged. Productivity suffers as a result of unresolved grievances.

11.9.1.3 A recent case involving an employee who was bullied by his line manager, provides a prime example of the importance of an employer intervening to resolve issues before relationships are damaged beyond repair. In this particular case, the employee was so badly affected by the initial bullying incident that they were signed off work for a period of time with stress. When the employee returned to work, they noticed that he was being treated "coldly" by senior managers (some of whom would completely ignore him). Concerns were raised about the employee's performance at work. The employee offered to resign instead of going through the capability procedure. In their subsequent ruling on constructive dismissal, the Tribunal ruled in favour of the employee, noting that there had been no support or steps implemented in ensuring that the employee's wellbeing was taken into account following the incident and period of bullying.

11.9.2 ACAS Code of Practice on discipline and grievance

The ACAS Code stipulates that it is preferable for employee grievances to be resolved informally without the need for recourse to more formal procedures. This is not always possible, and therefore the guide sets out the recommended procedures to enable the grievances to be resolved fairly and without delay.

11.9.3 Establishing the nature of the grievance

Grievances can arise in a number of ways. Employees can complain informally to their line managers or their feelings can be aired openly in front of colleagues. Employee grievances are not always set out in writing and labelled 'formal grievance'. Grievances which are not specified in writing can be difficult to manage and resolve. Employers should not ignore an employee's obvious feelings of unhappiness simply because the employee has failed to invoke the formal grievance procedure. If an employer becomes aware that an employee is aggrieved at a particular aspect of his or her employment or relationships with superiors or colleagues then it is best practice to sit down with that employee on an informal basis to discuss the nature of the grievance and to establish whether or not the matter is capable of informal resolution. The employee should be asked whether or not he or she wishes the issue be dealt with via a formal grievance procedure. If the employee does wish to pursue a formal grievance then he or she should be invited to set out the factual basis of the grievance in writing.

11.9.4 Grievance procedure

11.9.4.1 It is best practice for employers to have a written grievance procedure and for employees to be made aware of its existence. There is a statutory obligation on employers to advise employees within 2 months of the commencement of employment of the identity of the individual to whom a grievance should be directed.

Grievance issues

11.9.4.2 The procedure should set out clearly the way in which the grievance should be raised and the procedural steps that the employer will follow in order to resolve the grievance. The ACAS Code of Practice suggests the following steps should form part of a grievance procedure:

- a grievance should be submitted in writing;
- a meeting to discuss the grievance with the employee in question should be arranged without unreasonable delay;
- the employee should be given every opportunity to explain the nature of the grievance and the resolution which is being sought;
- if the meeting raises issues that require further investigation, then the meeting should be adjourned so that those investigations can be carried out;
- the grievance meeting should be reconvened and any further information obtained through the investigations should be shared with the employee;
- the employer should then reflect upon all of the information and reach a conclusion as to whether or not the employee's grievance is well-founded;
- if the grievance is well-founded then that fact should be communicated to the employee in writing together with the proposed resolution;
- often grievance meetings and reconvened grievance meetings focus on the factual background to the grievance rather than on resolution and it is sensible for an employer, when a grievance is well-founded, to ensure that the resolution of the grievance has been discussed face to face;
- if the employer concludes that the grievance is not well-founded, then that fact should also be communicated to the employee;
- the employee has the right to appeal against any decision that his or her grievance is unfounded or against the proposed resolution;
- the employer should specify the time period for lodging the appeal;
- the appeal should be lodged in writing and an appeal hearing convened without unreasonable delay at a date, time and place notified to the employee in advance;
- the appeal should be dealt with, wherever possible, by a manager with no previous involvement in the matter and preferably at a higher level of seniority than the initial decision-maker; and
- the outcome of the appeal should be communicated to the employee in writing without unreasonable delay.

11.9.5 Representation at grievance hearings

The ACAS Code of Practice summarises the provisions in relation to an employee's right to be accompanied at grievance meetings. The Code outlines as follows:

- workers have a statutory right to be accompanied by a companion at a grievance meeting which deals with a complaint about a duty owed by the employer to the worker. This would apply where the complaint is, for example, that the employer is not honouring the worker's contract or is in breach of legislation;
- the chosen companion may be a fellow worker of their choice, an official employed by the trade union of which they are an official or any other official of a trade union who has been reasonably certified in writing as having the necessary experience and training to accompany a worker at a hearing;
- in order to exercise the right to be accompanied, an employee must first make a reasonable request. The ACAS Code of Practice provides that as long as the identity of the companion chosen by the employee falls within the limits set out
- above the employee has the right to request a companion be present regardless of the reasonableness of their choice of individual.
- the companion should be allowed to address the hearing and sum up the worker's case, respond on behalf of the worker to any views expressed at the meeting and to confer with the worker during the hearing. The companion does not, however, have the right to answer questions on the worker's behalf, address the hearing if the worker does not wish it, or prevent the employer from explaining their case.

11.9.6 Miscellaneous grievance issues

11.9.6.1 Dissatisfaction with resolution

An employer may uphold an employee's grievance but may be unwilling to accept the resolution which the employee seeks. For example, an employee may insist that a colleague is disciplined or dismissed. The employer may be of the view that it would not be appropriate to do that and that an informal resolution would be better. The employer is not compelled to adopt the resolution proposed by the employee simply because the grievance is well founded. In such circumstances the employee should be allowed to appeal the decision to refuse to implement the resolution sought. If an employer refuses to accept the resolution sought by the aggrieved employee it should explain very clearly why that is the case. The employee should be provided with sufficient time to lodge a written appeal against any decision reached or against any flaws they feel were apparent in the hearing process. The employer should include information regarding the lodging of appeals within their written procedures.

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11.9.6.2 Vexatious grievances

If, after a grievance process has been exhausted, there is evidence that the grievance was raised for vexatious reasons or in bad faith, it is open to the employer to instigate the disciplinary procedure with a view to investigating the motives behind the raising of the grievance. It is not sufficient to give rise to a disciplinary process that the factual basis of the grievance was rejected. Great care should be taken in such situations. Employees should not be penalised or victimised for raising a grievance. There has to be evidence that the grievance was raised in bad faith, for example, to make trouble for another employee.

11.9.6.3 Overlapping grievance and disciplinary procedures

It is reasonably common for an employee facing disciplinary proceedings to raise a grievance. ACAS guidance suggests that the disciplinary proceedings should be suspended pending completion of the grievance process. If, however, the subject matter of the grievance is effectively the same or is closely related to the subject matter of the disciplinary process then it is appropriate to deal with both issues within the confines of the disciplinary process. For example, an employee who is suspended pending disciplinary proceedings may have a number of complaints about the manner in which the employer has handled the investigation and suspension. The employee may raise those concerns in the form of a grievance against the employer. In essence, the grievance is related directly to the disciplinary process and therefore it would be appropriate for the employer to deal with the employee's complaints regarding procedures followed at the disciplinary hearing and any subsequent appeal.

11.10 Social media

11.10.1 Social Media

11.10.1.1 Social media has become a daily part of people's lives and many organisations have also adopted it to communicate with their existing or potential customer base. Even though many employees within the engineering sector will not be required to utilise social media as part of their duties, it is important that employers look to manage social media use both within and outside the workplace to avoid the potential risks that can arise.

11.10.2 Social media use in the workplace

Employees may be required to have access to and update an employer's social media account. These accounts are often an opportunity to reflect the employer's values and ethos. Strict guidelines should be set on what content can be posted and by whom, for example ensuring that authorised individuals are aware that posts cannot reflect their personal opinions. An employer must also have in place mechanisms to retrieve passwords to the social media accounts that may have been set up and operated by a specific employee.

Social media use is often encouraged of employees on platforms such as LinkedIn in order to engage with customers or potential customers. An employer should consider what happens to ownership of the contacts if the employment relationship ends.

Employers often have in place the ability to monitor employees' use of their IT systems, including using social media. Employees must be made expressly aware of an employer's right to monitor their online activity, especially where there is personal use of social media permitted. This is particularly relevant when considering both GDPR (see 9.5.4 Monitoring at work) but also an individual's European Convention of Human Rights under Article 8 9right to private life). An employee should have reasonable expectation of privacy for any private correspondence they may send at work. However, this does not extend to any messages that an employee may post that are publicly available and case law has focussed on dispelling the commonly held myth that posts to social media accounts that are "private" (in terms of the settings applied on the platform) are also "private" in law and may not be used in disciplinary proceedings; that is not correct. The tribunals and courts are comfortable finding that information posted to the internet is typically "public" and its use typically not a breach of the right to privacy.

11.10.3 Social media use outside the workplace

Although an individual outside the workplace is most likely to use social media for personal use, this in itself can crate risks for employers. If an employee's personal social media account is readily identifiable with their employment, any personal posts they make may result in potential reputational damage to the employer depending on the content. An employer may also be faced with a situation where a disgruntled employee directly or indirectly refers to their employer in posts. An individual's right to freedom of expression under Article10 of the European Convention of Human Rights will be relevant so long as any post or comments do not impact the reputation or rights of others, which will include those of an employer and other employees. Therefore, employers need to make employees aware that personal use of social media outside the workplace may be monitored and, depending on the circumstances, may result in disciplinary action.

11.10.4 Social media and misconduct offences

An employer may want to take disciplinary action against employees in circumstances where they are accused of:

- Using social media for the purposes of bullying and harassment;
- Disclosing confidential information (e.g. customer names, trade secrets or sharing photographs that may include confidential matters);
- Writing critical comments about the employer, other employees or customers; or
- Writing or publishing offensive material which brings the employer into disrepute.

There are no specific rules that distinguish the way an employer should treat social media misconduct (see 12.6 Misconduct). What will be key in such situations is to ensure that the employee was aware that such conduct could result in disciplinary action. This is most likely achieved through implementation of a social media policy.

11.10.5 Social media policy

It is highly recommended that employers put in place a social media policy. Such a policy should include:

- Clear guidance for employees on what they can and cannot say about the organisation;
- Clarity throughout about the distinction between business and private use of social media;
- If the employer allows limited private use in the workplace, it should be clear what this means in practice;
- If employees' use will be monitored and to what extent; and
- When breaches of the social media policy will result in disciplinary action and what sanctions may be implemented, e.g. up to and including dismissal.

11.10.6 Contracts of employment

An employer should ideally also ensure that their contracts of employment adequately protect and empower the business to deal with social media issues. For example, consideration should be given to actions on termination of employment, including providing passwords to employer social media accounts and the requirement for an employee to remove any business names and contacts acquired during their employment from their private social media accounts. Post termination restrictions may also be used to prevent an employee from re-engaging with such clients for a specific period of time after their employment has been terminated.