

Disciplinary procedure

This client guide considers the need for a disciplinary procedure, the implications of not having one, and how such a procedure should operate.

Why have a disciplinary procedure?

Disciplinary rules and procedures are important in any workplace to set out the boundaries of acceptable conduct and satisfactory performance, and to ensure fair and equitable treatment of employees who transgress these boundaries.

Since 1977 there has been a Code of Practice on disciplinary practice and procedures issued by ACAS. A revised version of the *ACAS Code of Practice on Disciplinary and Grievance Procedures* came into effect on 6 April 2009. The Code must be taken into account by an Employment Tribunal in situations to which it applies. An employer's failure to comply with the provisions of the Code may render unfair a dismissal that would otherwise be a fair one and, if the Employment Tribunal considers the failure to be unreasonable, could result in any compensation awarded by an Employment Tribunal being increased by up to 25%.

It is also important that employees know what standards of conduct and performance are expected of them. The written particulars of employment that must be provided to every employee under the provisions of the Employment Rights Act 1996, must contain any disciplinary rules that do exist (or refer employees to a reasonably accessible document that contains these), and indicate the person to whom employees can apply if they are dissatisfied with any disciplinary decision. There is no exemption for small employers.

If an employment contract contains a disciplinary procedure that is contractual, then failure to follow this will be a breach of contract and may result in the employee's resignation and a claim for constructive dismissal. In addition, all employment contracts contain an implied duty of mutual trust and confidence. Failure to operate a disciplinary procedure in a fair and reasonable manner when applying a disciplinary sanction may also result in a resignation and a claim that mutual trust and confidence has been breached.

It is a legal requirement for employers to have a written disciplinary policy and procedure and for it to be provided to all employees. In addition, we recommend that all managers receive training in applying this procedure, something which is also required by the revised ACAS Code of Practice.

What should the procedure include?

ACAS guidance emphasizes that disciplinary procedures should not be primarily viewed as a means of imposing sanctions, but rather they should encourage improvements in employees' conduct or performance.

A disciplinary procedure should be in writing and to comply with the revised ACAS Code should:

- ensure no action is taken until the matter has been properly investigated
- provide for employees to be sufficiently informed of the complaint against them and other relevant information in good time before a disciplinary meeting is held, so that they have the opportunity to prepare for the meeting
- provide for a formal disciplinary meeting to be held at which the complaint against them is explained by the employer, who should go through the evidence that has been gathered

- allow the employee to be given the opportunity to state their case, ask questions, present evidence and call relevant witnesses before any decision is reached
- summarise the types of disciplinary action that might be taken and give relevant examples, particularly for what might be considered gross misconduct
- state the level of management that has authority to take various forms of disciplinary action
- provide for all matters to be dealt with as quickly as possible
- ensure that, except for gross misconduct, no employees are dismissed for a first breach of discipline
- set out an employee's right to be accompanied at disciplinary and appeal meetings by a fellow employee or trade union official (see below)
- ensure employees are told in writing of the outcome of the meeting and are given an explanation for any disciplinary action taken against them
- provide a right of appeal and specify the procedure to be followed

Written minutes should be taken of all meetings and a copy provided to the employee. Throughout the procedure both the employer and employees should act consistently, should raise and deal with issues promptly and should not unreasonably delay meetings, discussions or confirmation of those decisions.

For misconduct that falls short of gross misconduct, the disciplinary procedure should provide for different levels of warnings should the conduct not improve, before disciplinary action such as demotion or dismissal is taken. Prior to commencing the formal disciplinary procedure managers should consider whether, in appropriate cases, an informal discussion might achieve the desired outcome. Where formal action is taken, employees should be told of the duration of any warning and the consequence of further misconduct while the warning is 'live'.

The employee's right to be accompanied at disciplinary hearings

There is a statutory right for employees to be accompanied at a disciplinary hearing by a companion, who may be a fellow worker or a trade union official. The role of the companion is limited essentially to addressing the hearing to put the employee's case, responding to views expressed and conferring with the employee, but he/she may not answer questions on the employee's behalf.

This right to be accompanied is not limited to employees but applies to all workers, including someone providing services personally under a contract with another party who is not their client or customer, as well as agency workers, home workers and those in crown employment (other than in the armed services).

While the employer may set the time and date of any disciplinary hearing, it is obliged to postpone it for up to five working days at the request of the employee concerned if his/her chosen companion cannot attend on the date first proposed by the employer.

Failure by an employer to allow the employee to be accompanied, or to agree to a postponement, entitles the employee to make a complaint to a tribunal and, if this is upheld, to receive an award of up to two weeks' pay. It is also likely to be deemed an unreasonable failure to comply with the ACAS Code of Practice with the resulting penalty increase.

Statutory disciplinary procedure

For all disciplinary processes commencing and dismissals occurring prior to 6 April 2009, a statutory dismissal and disciplinary procedure (now repealed), required compliance with a minimum standard. The procedure has now been effectively replaced by the ACAS Code of Practice on Disciplinary and Grievance Procedures referred to above.

The statutory procedure also applied even where the dismissal contemplated was by reason of redundancy or non-renewal of a fixed-term contract, however this is no longer the case under the revised Code of Practice.

If you have recently dismissed an employee and are unsure as to the procedure you should have followed or how to deal with an appeal, we can advise you further.

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