Discipline and grievance procedures

Member resource

The law is stated as at 06 April 2009
Please click on the individual questions below to see the answers.

- **What legislation covers discipline and grievances at work?**

Most of the provisions governing discipline and grievances at work are historically found in:

- the Employment Act 2002
- the Employment Act 2002 (Dispute Resolution) Regulations 2004 (SI 2004/752)

Aspects of this legislation which cover the statutory dispute resolution procedures have been widely criticised and although the procedures had only been in force for under five years they were repealed in their entirety from 6 April 2009 under the Employment Act 2008.

Therefore from 6 April 2009 the important provisions governing discipline and grievances at work are to be found in:

- the Employment Act 2008, and
- the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2008.

As explained in the questions below, the new Acas code of practice on disciplinary and grievance procedures (New Acas code) is also of crucial importance. See the question below on what employers must do to follow the new Acas code.

Other points to note on the changes include the following:

- Employers and employees should do all that they can to resolve disciplinary and grievance issues themselves and should consider using a third party (for example a mediator or an arbitrator) to help resolve the problem, ending up in an employment tribunal as a very last resort.
- The rule laid down in the case of *Polkey v. A. E. Daunton Services Ltd [1988] ICR 142, HL* is being fully reinstated. This applies to cases where a dismissal may be technically unfair on procedural grounds, but if the correct procedures had been followed then the dismissal would have taken place anyway. In such cases the tribunal can reduce or eliminate the compensatory award to reflect the fact that the dismissal would have gone ahead anyway. (Between October 2004 and 6 April 2009 dismissals were automatically unfair if an employer has not completed the statutory procedures and the employer's failure to comply with other procedures would not be taken into account if the employment tribunal was satisfied that following them would have had no effect on the employer's decision to dismiss).

For matters arising before 6 April 2009 employers should have followed the statutory procedures in their previous form; after that date they should follow the new Acas code (and if appropriate, their own discipline and grievance procedures). If employers are uncertain which rules apply to the problem in the workplace see our the question below on the transitional arrangements.

Numerous other pieces of legislation cross refer to discipline and grievance issues. Some important examples include the:

- Employment Rights Act 1996 as amended
- Employment Rights Dispute Resolution Act 1998
- Employment Relations Act 1999
- Employment Rights Act 2004.

The Employment Act 2008 is not applicable to Northern Ireland.The Department has published detailed guidance for HR professionals on dealing with disputes at work and key information for employers. The nibusinessinfo.co.uk website also provides a range of resources on disciplinary, grievance and dismissal procedures.

- Go to DELNI website
- Go to nibusinessinfo.co.uk

- **What regime should an employer follow in a disciplinary or grievance situation before and after 6 April 2009?**

The regime an employer should follow in a disciplinary or grievance situation depends upon whether the issue concerned arose before, or after, 6 April 2009. From 1 October 2004, statutory procedures were introduced into the workplace to encourage the resolution of dismissal, disciplinary and grievance disputes. These statutory procedures were removed when the relevant provisions of the Employment Act 2008 came into force on 6 April 2009. However, some situations may have arisen while the statutory procedures were in force. Accordingly in the short term, employers should be familiar with both the old and new regimes. Eventually all matters will be dealt with under the new regime. The different regimes are dealt with under separate headings below:

On or before 5 April 2009

For matters arising before 6 April 2009 employers must continue to follow the statutory procedures in their previous form.

The statutory disciplinary procedures applied when an employer contemplated dismissing or taking 'relevant disciplinary action'. The grievance procedures applied when the employee raises concerns, problems or complaints with their employer. For examples of when the procedures apply, see the question below on checking if employers' policies complied with the statutory minimum in force before 6 April 2009.

The procedures were compulsory and had to be followed by all employers and employees before 6 April 2009. They represented a minimum standard of practice which had to be followed or certain consequences ensue - see the question below on what happens if the statutory procedures or the new Acas code of practice on disciplinary and grievance procedures have not been followed.

There were two sets of procedures: standard, and modified for use in special circumstances such as for former employees. However, it is clear that parties should have attempted to use the standard procedures where possible.

The time limits for making a claim to an employment tribunal were extended to accommodate the statutory procedures - see our Tribunal claims and compromise FAQ.

- Go to the Tribunal claims, settlement and compromise FAQ

On or after 6 April 2009

From 6 April 2009 the mandatory 'three-step' processes for disciplinary, grievance and dismissal procedures were repealed. This does not mean that employers will stop following the letter/meeting/appeal structure. Stages similar to these steps remain important after the reforms. In many cases an employer's own internal procedure requires them to follow a pattern which is very similar to the three statutory steps. In addition the reasonable behaviour required by Acas emphasises the importance of written notification of disciplinary matters and grievances, meetings and appeals.

What the changes meant, is that the Acas code of practice on disciplinary and grievance procedures becomes even more important. Employers and employees must follow the new Acas code to ensure a reasonable standard of behaviour. An employment tribunal will consider the procedure that has been followed by the employer or employee in dealing with the disciplinary matter or grievance. If the new Acas code has not been followed the tribunal has a discretion to adjust awards up or down between 0 and 25% in relation to either party. For more information see the question below on what employers must do to follow the new Acas code.

The Government website, Business Link, has practical information on handling disciplinary and grievance issues on or after 6 April 2009.

- Go to Business Link

BERR, CIPD and Acas have also produced a joint guide on the new regime.

- Read guide

For a summary of the key changes, an at-a- glance comparison between the statutory procedures and the new Acas code and a number of action points for HR practitioners see our factsheet.

- View factsheet

The Employment Act 2008 is not applicable to Northern Ireland.The Department has published detailed guidance for HR professionals on dealing with disputes at work and key information for employers. The nibusinessinfo.co.uk website also provides a range of resources on disciplinary, grievance and dismissal procedures.

- Go to DELNI website
- Go to nibusinessinfo.co.uk

(**For information on how to decide which regime should be used in a disciplinary or grievance situation and the transitional arrangements see the relevant question below).**

- **What must an employer do to follow the new Acas code of practice on disciplinary and grievance procedures?**

Employers should always have adhered to the reasonable behaviour enshrined in the Acas code of practice on disciplinary and grievance procedures. However, this becomes even more crucial after 6 April 2009 when employment tribunals become empowered to adjust awards to take into account non-compliance with the new code of practice. (New Acas code).

The following points are helpful, concerning the key points of the new Acas code:

- The code is a concise one which aims to focus on the key principles behind the handling of disciplinary and grievance issues.
- The code must be followed from 6 April 2009.

- In addition to the code Acas has published detailed non-statutory guidance on handling workplace disciplinary and grievance issues.
- The code does not apply to dismissals by reason of redundancy.
- See Redundancy FAQ
- The code does not apply to the non-renewal of fixed-term contracts on their expiry.
- The code has four sections - a foreword, some key principles, a section on discipline and a section on grievances.

Disciplinary matters

The new code contains essentially the same principles as the existing and previous codes. For example in disciplinary matters the following principles are involved.

Investigation

With disciplinary matters the employer should investigate and must:

- establish the facts of each case,
- investigate potential disciplinary matters promptly,
- make clear that a meeting that is merely investigatory may lead to disciplinary charges,
- allow employees to be accompanied in certain cases (and inform employees of the separate statutory right to be accompanied in appropriate cases). For more information see the question below on companions.
- keep any period of suspension with pay very brief,
- inform the employee of the problem with them,
- if it is decided that there is a disciplinary case to answer, the employee should be notified in writing.

Meeting

If there is a case to answer the employer must hold a meeting with the employee to discuss the problem and the employer should:

- ensure the notification (including copies of witness statements) contains sufficient information to let the employee know what the alleged problem is and its possible consequences,
- hold the meeting promptly while allowing the employee reasonable time to prepare their case,
- allow the employee to set out their case, call any witnesses and answer any allegations,
- ensure that where possible a different manager conducts the meeting to the person conducting the investigation,
- allow the employee to be accompanied at the meeting by a trade union official or colleague when requested (this remains a statutory right where the disciplinary meeting could result in a formal warning being issued or disciplinary action being taken) - for more information see the question below on companions,
- consider arranging for someone who is not involved in the facts of the matter to take a note of the meeting and to act as an observer concerning the events of the meeting,
- consider arranging for an interpreter where the employee has difficulty speaking English,
- keep a careful written record including the nature of the problem, what was decided and actions taken, the reason for the actions, whether an appeal was lodged and any subsequent developments. (Records are confidential and be kept in accordance with the Data Protection Act 1998 which gives individuals the right to request and have access to certain personal data),
- give copies of meeting records to the employee, including copies of any formal minutes that may have been taken,
- consider whether any reasonable adjustments are necessary to accommodate employees, witnesses companions etc who may be disabled.

For further information on witnesses and the right to be accompanied see the separate question below on what information should an employer give to an employee before a disciplinary or grievance meeting.

It is also sensible to provide for what will happen in the event of failure to attend meetings - see our question below on the failure of an employee to attend a meeting.

After the meeting

After the meeting the employer should then decide on appropriate action and inform the employee accordingly. The new Acas code emphasises the following points which apply after the meeting:

- If the employee is found guilty of misconduct or poor performance they should be given a written warning.
- A further act of misconduct or failure to improve within a set period would normally result in a final written warning.
- If misconduct or performance is sufficiently serious, the employer may move directly to a final written warning.
- Any warning should set out the nature of the misconduct or poor performance and the change required (with a timescale).
- The employee should be told of a specified period after which the warning will be disregarded and that failure to improve, within the set period following a final warning, may result in dismissal or some other penalty such as demotion.
- A fair disciplinary process, including a right of appeal, should always be followed even in cases where gross misconduct has occurred.
- Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct.

Appeal

Employers must provide employees with an opportunity to appeal and:

- appeals should be heard promptly,
- the appeal should be dealt with by a senior manager,
- workers have a statutory right to be accompanied at appeal hearings,
- employees should be informed in writing of the results of the appeal hearing as soon as possible and a written record should be kept as explained above,
- large organisations may wish to allow a further appeal to an even higher level of management.

Overlapping grievance and disciplinary cases

Where an employee raises a grievance during the disciplinary procedure the latter may be temporarily suspended in order to deal with the grievance. The grievance procedure would then be followed. If the grievance and disciplinary issues are related it may be appropriate to deal with both matters together.

Similar provisions are contained within the new Acas code to deal with grievances.

Grievances

Grievances are concerns, problems or complaints that employees raise with their employers. Issues that may cause grievances include problems concerning terms and conditions of employment or working practices, health and safety, work relations, bullying and harassment, or discrimination. With grievance matters the following principles are involved.

Initial stages

Before dealing with a formal grievance:

- Management should be trained in handling grievances and be familiar with the provisions of the grievance procedure.
- The employee should let the employer know the nature of the grievance in writing.
- Employers should carry out promptly any necessary investigations to establish the facts behind the grievance.
- In appropriate minor cases employers should offer to deal with matters informally if this is acceptable to the employee.
- Consider use of external mediators to help resolve grievances although this may be offered once the meeting has taken place.
- If a formal meeting is to take place, allow employees to be accompanied (and inform employees of this as it is separate statutory right).
- Where the grievance is against the line manager the employee should be able to approach another manager or the personnel department and who to approach should be outlined in the grievance procedure.
- Consider arranging for someone who is not involved in the facts of the matter to take a note of the meeting and to act as a observer concerning the events of the meeting.
- Consider arranging for an interpreter where the employee has difficulty speaking English.
- Consider whether any reasonable adjustments are necessary to accommodate employees, witnesses companions etc who may be disabled.

Meeting

- Hold a meeting with the employee to discuss the grievance ideally within five working days.
- Allow the employee to be accompanied at the meeting.
- Remember that during a grievance hearing it is the employee who has raised the complaint and that the meeting is not the same as a disciplinary hearing. A willingness to listen may lead to an amicable solution.
- Allow the employee to explain the grievance and how they feel it should be resolved.
- Consider how to resolve the problem and allow for the employee to have some pent up frustration and anxiety.
- Tell the employee when they might reasonably expect a response if one cannot be made at the meeting.
- Decide on appropriate action to resolve the grievance, and inform the employee either in the meeting, or later without unreasonable delay and in any event confirm that action writing.
- If the employee's grievance is not upheld the reasons for that should be carefully explained.
- The employee should be informed that they can appeal if they are not happy with the decision or action taken.
- Keep a careful written record including the nature of the grievance , what was decided and actions taken, the reason for the actions, whether an appeal was lodged, any subsequent developments.(Records are confidential and be kept in accordance with the Data Protection Act 1998 which gives individuals the right to request and have access to certain personal data.).
- Copies of meeting records should be given to the employee including copies of any formal minutes that may have been taken.

Appeal

Employers must provide employees with an opportunity to appeal if they are unhappy with the decision and:

- appeals should be heard promptly,
- the appeal should be dealt with by a more senior manager than at the previous meeting,
- workers have a statutory right to be accompanied at appeal hearings,
- employees should be informed in writing of the results of the appeal hearing as soon as possible and a written record should be kept as explained above.
- Large organisations may wish to allow a further appeal to an even higher level of management.

The new code, non-statutory guidance and other information are available on the Acas website.

- Go to Acas website

- **What happens if the statutory disciplinary and grievance procedures or the new Acas code of practice on disciplinary and grievance procedures are not followed?**

The statutory dispute resolution procedures were repealed on 6 April 2009, under the Employment Act 2008. (The Act does not apply to Northern Ireland). However for issues arising on or before 5 April 2009 the old statutory procedures still apply. Accordingly employers need to be familiar with consequences of failure to follow the old and new regimes. These consequences are dealt with under separate headings below:

On or before 5 April 2009

If an employer dismissed an employee without completing the statutory procedure, and if the failure was wholly or mainly attributable to the employer then:

- Any dismissal was automatically unfair (subject to the usual qualifying conditions, for example the 12 month qualifying period).
- The dismissed employee will receive at least four weeks' pay in compensation.
- Compensation for the employee may be increased by between 10 per cent and 50 per cent. (In exceptional circumstances compensation may be adjusted by less than 10 percent).

See also the question on the effect of an employer's failure to follow the statutory procedures on compensation payable in a discrimination claim in our Discrimination FAQ.

- Go to Discrimination FAQ

If an **employee** does not meet the requirements set out in the statutory procedures then:

- Any award made to them can be reduced by at least 10 per cent and may be reduced by up to 50 per cent.
- In cases where the grievance procedure applies, the tribunal will refuse to accept any claim the employee attempts to present until they have initiated the grievance procedure.

On or after 6 April 2009

From this time onwards, employment tribunals will consider if the employer has followed the new Acas code of practice on disciplinary and grievance procedures (New Acas Code) and if they have not, then the tribunal may adjust any awards made by up to 25 per cent for unreasonable failure to comply with any provision of the code.

A tribunal will consider why the employer or employee failed to follow the new Acas code and the extent to which this failure was unreasonable. Relevant factors include the size of the employer's organisation. If the tribunal finds the employer culpable then the award may be increased by between 0 and 25 per cent. If the tribunal finds the employee to be at fault then the award may be decreased by between 0 and 25 per cent. The new Acas code is supported by guidance which does not form part of the revised code, but has been prepared by Acas to help employers and employees understand the new Acas code and how to reflect it in their procedures and behaviour. See the question above on what employers must do to follow the new Acas code on discipline and grievance procedures.

(For information on how to decide which regime should be used in a disciplinary or grievance situation and the transitional arrangements see the relevant question above).

- **How does an employer decide whether to use the old dispute resolution procedures, or the new regime, in a disciplinary or grievance situation and what are the transitional arrangements?**

With effect from 6 April 2009, the statutory dispute resolution procedures were repealed under the Employment Act 2008. (The Act does not apply to Northern Ireland). After this time employment tribunals will consider if the employer has followed the revised Acas code of practice on disciplinary and grievance procedures. For further details of the content of these procedures go to the question above on what regime should an employer follow in a disciplinary or grievance situation.

The changes made in April 2009 were substantial, and in some cases will present employers with difficulties in deciding whether the old or new regime applies. Difficulties may arise especially with workplace issues which emerge at around the same time as the changes come into effect.

Our guidance set out below can be used to help employers decide if the old or the new regime applies. (Of course, employers should take the usual steps to try and prevent all disputes escalating in the first place):

- Once an unavoidable dispute has arisen the employer should identify a 'trigger' event to ascertain whether the old or new (post 6 April) regime applies.
- In most disciplinary or dismissal cases the trigger date will be the date when the employer sent the letter inviting the employee to a meeting to address the problem. (If no such procedure has been followed, then the trigger date may be an actual dismissal date, or a date when disciplinary action was taken).
- In most grievance cases the trigger event will be the date of the action which the employee has a grievance about.

Once the crucial trigger date has been identified then:

- Where the trigger event takes place on or before 5 April 2009 the old three step statutory dispute resolution procedures will apply.
- Where the trigger event takes place on or after 6 April 2009 the new regime will apply.

Problem areas

There will inevitably be numerous employment tribunal cases which entail a difference of opinion between the employer and ex-employee as to which rules apply. Some employers who have failed to follow the old regime will inevitably argue that the trigger event arose on or after 6 April 2009. The following points may be of help in problem areas:

- Under the old regime a three month extension to the time for presenting a claim applied in many cases. This will continue be the case to those cases where the trigger event takes place on or before 5 April 2009.
- Some claims to which the old regime applies will still be being pursued into 2010 (because of how long it can take for cases to reach a hearing and because the extension rules apply as explained above). This means that some employers may be dealing with one situation to which the old rules apply and another situation which is subject to the new regime.
- Employers and employees cannot elect which arrangements apply.
- In cases which fall around the transitional time it may be prudent for the employer to state to the employee which regime they think applies and why. Although in many cases employers will be following their own company procedure which will hopefully comply with both the old statutory procedures and the revised Acas code.
- If in doubt, employers should attempt to follow their own procedures, the old statutory three step procedure and the recommendations of the revised Acas code. This is not as arduous as it may seem as the revised Acas code merely encompasses what is reasonable behaviour anyway.

Continuing acts

Where the employee complains about something which started on or before 5 April 2009, but carries on after 6 April 2009, the situation is that the old regime will apply initially; provided that:

- the employee submits a written grievance or employment tribunal claim on or before:
  - 4 July 2009 for claims with a three month time limit (for example an unfair dismissal or discrimination claim) or
  - 4 October 2009 for claims with a six month time limit (for example an equal pay claim).

Examples of cases to which the old regime applies

- An employee is sent a step 1 letter on 2 March 2009 inviting her to a meeting to discuss a very serious problem with her work. All stages of the statutory procedure are followed and she is eventually dismissed in late April 2009. She makes an unfair dismissal claim in June 2009. When the employment tribunal hears the case the old regime will apply as the trigger event (the step 1 letter) took place before 5 April 2009.
- An employer embarks upon a continuing course of action against an employee, including taking some of her better quality work away from her. This starts in March 2009 and continues after 6 April 2009. The employee submits a written grievance about this in May 2009. The old regime applies as the act commenced before 5 April and the employer's conduct continued, and the employee raised her grievance before the 4 July 2009 cut off point.

Examples of cases to which the new regime applies.

- An employer sends a letter to an employee on 6 April 2009 inviting him to a meeting to discuss a very serious problem with his work. The employee is eventually is eventually dismissed in late April 2009 and makes an unfair dismissal claim in June 2009. When the rmployment tribunal hears the case, the new regime will apply as the trigger event (the letter) took place on or after 6 April 2009.
- An employer embarks upon a continuing course of action against an employee, including taking some of his better quality work away from him. This starts in March 2009 and continues after 6 April 2009.The employee eventually submits a written grievance about this on 5 July 2009. The new regime applies as the written grievance was submitted after the 4 July 2009 cut off point.

Further guidance on the transitional arrangements and examples can be found on the BERR website.

- View guidance and examples

- **How does an employer check if their disciplinary and dismissal policy and procedure complied with the statutory minimum before 6 April 2009?**

Before the reforms which come into force from 6 April 2009 under the Employment Act 2008, disciplinary policies had to comply with the statutory minimum. (The Act does not apply to Northern Ireland). Most disciplinary policies complied with the statutory minimum as it contained very basic standard elements. The table below contains the key elements of the standard disciplinary and dismissal procedure which must be followed in cases of, for example:

- dismissal on grounds of capability
- dismissal on grounds of conduct
- dismissal by reason of redundancy
- not renewing a fixed term contract

- disciplinary suspension, where the employee is suspended without pay or on reduced pay.

Step One: Letter	The employer set down in writing the nature of the employee's conduct, capability or other circumstances that may result in dismissal or disciplinary action, and sends a copy of this statement to the employee. The employer had to inform the employee of the basis for their complaint.
Step Two: Meeting	The employer invited the employee to a hearing at a reasonable time and place where the issue can be discussed. The employee and employer had to take all reasonable steps to attend. The employee had a right to be accompanied in the meeting by a trade union representative or colleague of their choice. After the meeting, the employer had to inform the employee about any decision, and offer the employee the right of appeal.
Step Three: Appeal	If the employee wished to appeal, they must inform the employer. The employer had to invite the employee to attend a further meeting to appeal against the employer's decision. The employee had a right to be accompanied in the meeting by a trade union representative or colleague of their choice. The final decision must be communicated to the employee. Where possible, a more senior manager should attend the appeal hearing.

Stages similar to the above still remain important after the reforms which came into force on 6 April 2009. Although the statutory procedures are abolished after that date, reasonable behaviour remains crucial.
The new Acas code of practice on disciplinary and grievance procedures emphasises the importance of written notification of the problem with the employee, meetings and appeals. For information on how to check if a disciplinary or grievance procedure complies with the revised Acas code see the relevant question above.

(For information on how to decide which regime should be used in a disciplinary or grievance situation and the transitional arrangements see the relevant question above).

- **How does an employer check if their grievance policy and procedure complied with the statutory minimum in force before 6 April 2009?**

Until the reforms which came into force from 6 April 2009 under the Employment Act 2008, grievance policies had to comply with the statutory minimum. Most existing grievance policies will comply with the statutory minimum as it contains very basic standard elements. The table below contains the key elements of the standard grievance procedure which must be followed in cases where an employee is concerned about any action their employer has taken, or is contemplating taking, towards them, including for example:

- a change in the terms and conditions of employment
- the introduction of new working practices
- organisational changes eg a new manager
- health and safety issues
- relationships at work - including personality clashes
- discrimination
- bullying
- harassment
- equal opportunities

- organisational change
- being suspended even if on full pay.

Step One: Letter	The employee set out the grievance in writing and sent a copy of this statement to the employer. The employee had to inform the employer what the basis for the grievance was and the employer had to have reasonable opportunity to consider it.
Step Two: Meeting	The employer invited the employee to attend a meeting to discuss the grievance at a reasonable time and place. Both parties must take reasonable steps to attend. The employee had a right to be accompanied in the meeting by a trade union representative or colleague of their choice.
Step Three: Appeal	If the employee wished to appeal, they must inform the employer. The employer must invite the employee to attend a further meeting to appeal against the employer's decision. The employee had a right to be accompanied in the meeting by a trade union representative or colleague of their choice. The final decision must be communicated to the employee. Where possible, a more senior manager should attend the appeal hearing.

Stages similar to the above remain important after the reforms come into force on 6 April 2009. Although the statutory procedures were abolished after that date reasonable behaviour remains crucial. The Acas code of practice on disciplinary and grievance procedures emphasises the importance of written notification of grievances, meetings and appeals. For details of what an employer must do to follow the Acas revised code see the relevant question above.

(For information on which regime should be used in a disciplinary or grievance situation before and after 6 April 2009 and the transitional arrangements see the relevant question above).

- **What should a dismissal, disciplinary and grievance policy and procedure contain?**

Before 6 April 2009 a dismissal, disciplinary and grievance policy and procedure should contain at least the three statutory steps and ideally, reasonable elements over and above that statutory minimum.

From 6 April 2009, under the Employment Act 2008, the statutory minimum procedure was removed and replaced with non-prescriptive Acas guidelines which reflect reasonable behaviour. (The Act does not apply to Northern Ireland). Employers should therefore ensure that dismissal, disciplinary and grievance policies and procedures reflect the new Acas code of practice on disciplinary and grievance procedures.

Most organisations will have existing policies which do comply with the new Acas code. However, employers should review disciplinary and grievance procedures to check they do not contradict its provisions. A point for particular consideration is to ensure that internal processes encompass a mediation stage. As always, managers should be trained in how to deal with problems at an early stage to stop them escalating.

Elements including the following should be considered:

- Provision for dealing with minor matters informally.

- Encouraging the use of mediation to resolve disputes where appropriate.
- The need for the prompt handling of issues.
- Need for clarity and unambiguousness.
- Clarification of who is covered for example employees, agency workers, temps etc.
- Confirmation of action that can be taken and by whom.
- Dismissal should be by senior management only.
- Clearly identify matters that amount to gross misconduct.
- Ensure no dismissal for first breach of discipline, unless matter of gross misconduct.
- Confirm the decision, reasoning and right of appeal in writing.

The need to ensure policies and procedures are communicated to all employees is important especially if English is not their first language.

The new Acas code is to be used as a benchmark by employment tribunals when considering the fairness or otherwise of an employer's procedure and actions. For further information on employers should do to follow the new Acas code see the relevant question above.

- **What was the modified statutory minimum dismissal and disciplinary procedure in force before 6 April 2009?**

The table below contains the key elements of the modified (special circumstances) statutory minimum dismissal and disciplinary procedure which applied to claims where the trigger event took place on or before 5 April 2009. For more information see the question on what regime to use in a disciplinary or grievance situation and the transitional arrangements.

It was unusual for the modifed procedure to apply, but it had to be followed in most cases where the standard procedure was not applicable. (For more information on when this procedure can be used, see the question below on whether an employer could choose to follow the modified procedure after dismissal in cases of gross misconduct.)

Step One: Letter	The employer had to write down and send to the employee: o the nature of the alleged misconduct that has led to the dismissal. o the evidence for this decision, and o the right to appeal against the decision. .
Step Two: Appeal	If the employee wished to appeal, they must inform the employer. The employer must invite the employee to attend a hearing to appeal against the employer's decision, and the final decision must be communicated to the employee. The employee had a right to be accompanied in the meeting by a trade union representative or colleague of their choice.

The modified procedure was removed in its entirety when reforms under the Employment Act 2008 were implemented. Before 6 April 2009, employers had to follow the procedures in their previous form.

- **Can an employer simply dismiss an employee in cases of gross misconduct?**

It is a common misconception that an employer can simply dismiss an employee in cases of gross misconduct. If an employer does this, there is likely to be a claim for unfair dismissal. It is almost always unfair to dismiss an employee instantly, without first going through some form of procedure even in a case of apparently obvious gross misconduct.

The rules governing disciplinary and grievance hearings changed with effect from 6 April 2009 under the Employment Act 2008. (The Act does not apply to Northern Ireland). However, the position concerning gross misconduct is similar under the new and old regimes. Employers do need to be familiar with both regimes as the consequences of failure to follow the procedures are different. For the consequences of failure to follow the regimes see the question above on what happens if the statutory disciplinary and grievance procedures or the Acas code on disciplinary and grievance procedures are not followed.

On or before 5 April 2009

Until 6 April 2009, employers had to follow the standard disciplinary procedure, even in cases of gross misconduct. It was not acceptable to just choose to follow the modified procedure. For details of the standard procedure see the above question on how does an employer check if their disciplinary and dismissal policy and procedure complies with the statutory minimum in force before 6 April 2009?

However, before 6 April 2009 the modified procedure was appropriate for a small minority of gross misconduct dismissals where:

- The employer has dismissed the employee without notice on the basis of his or her gross misconduct and
- the dismissal took place at the time the employer became aware of the gross misconduct (or immediately after) and
- the employer was entitled to dismiss for gross misconduct without notice or payment in lieu of notice and
- it was reasonable for the employer to dismiss without investigating the circumstances.

On or after 6 April 2009

A fair disciplinary process must still be followed even in cases where gross misconduct has occurred; as emphasised in the new Acas code of practice on disciplinary and grievance procedures (New Acas code). The new Acas code emphasis that:

- Disciplinary procedures should give an indication of the type of misconduct which fall into the category of 'gross misconduct'.
- It is still important to follow a fair procedure as for any other disciplinary offence.
- The facts of the case must be established before taking any action, holding a meeting with the employee and allowing the employee the right of appeal.
- It should be made clear that dismissal is a possibility.
- A short period of suspension with full pay may be permissible to help establish the facts or to allow tempers to cool.
- Any period of suspension should be kept under review.

Examples of gross misconduct might include:

- theft or fraud,
- physical violence or bullying,

- deliberate and serious damage to property,
- serious misuse of an organisation's property or name,
- deliberately accessing internet sites containing pornographic, offensive or obscene material,
- serious insubordination,
- discrimination or harassment,
- bringing the organisation into serious disrepute,
- serious incapability at work brought on by alcohol or illegal drugs,
- causing loss, damage or injury through serious negligence,
- a serious breach of health and safety rules and,
- a serious breach of confidence.

After the disciplinary process has been completed

An employer should not dismiss employees who have committed gross misconduct, whatever the circumstances. The following factors should be borne in mind before deciding to dismiss:

- How was the rule which has been broken communicated to employees?
- Was this the first offence and how significant is the rule that has been breached?
- Has there been a reasonable investigation?
- Did the company follow a fair procedure?
- Was the employee given sufficient details of the allegations against them?
- Was the employee given adequate opportunity to respond to allegations made against them?
- Were there any mitigating circumstances to be considered such as provocation or length of service?
- Have employees been treated consistently?

A good example of an unfair dismissal despite clear gross misconduct and a clear disciplinary rule regarding gross misconduct can be seen in *Laws Stores Ltd v Oliphant [1978] IRLR 251, EAT*. The employee was a till operator who was dismissed for gross misconduct when she failed to register a sale. The dismissal was in accordance with an agreed disciplinary procedure that stated till irregularities were always gross misconduct. The Employment Appeal Tribunal upheld an employment tribunal finding that the dismissal was unfair in the circumstances of the case, given the severity of the penalty for a one-off unexplained incident where it had been accepted that no dishonesty was involved.

(For information on how to decide which regime should be used in a disciplinary or grievance situation and the transitional arrangements see the relevant question above).

- **What was the modified statutory minimum grievance procedure in force before 6 April 2009 and when can an employer agree to use it?**

The table below contains the key elements of the modified (special circumstances) statutory minimum grievance procedure which applied to claims where the 'trigger event' took place on or before 5 April 2009. For further information concerning the trigger event see the question above on which regime to use in a disciplinary or grievance situation and the transitional arrangements.

This procedure could be followed in cases where the standard grievance procedure would otherwise apply but where the employment has ended and certain criteria are satisfied.

Step One: Letter	The employee had to set out in writing and send to the employer: o the nature of the grievance and

	o the basis for it.
Step Two: Appeal	The employer had to set out their response in writing and send a copy of it to the employee.

The modified (two-step) grievance procedure applied in circumstances where it would be irrational to oblige the parties to follow the standard procedure, including attending meetings, where there was no continuing employment relationship and the parties have no interest in following the procedures. It applies where the employment had ended and:

- o either the employer was not aware of the grievance before the employment ended, or
- o if the employer was so aware, the standard grievance procedure had not started or had not been completed by the time the employment ended, and
- o the parties agreed in writing that the modified, rather than the standard, grievance procedure applied.

The modified procedure was removed in its entirety when the Employment Act 2008 was implemented. Before 6 April 2009, employers had to to follow the procedures in their previous form.

- **What is an employer's position if an employee subsequently attempts to raise an issue in the employment tribunal which they did not refer to in their grievance?**

The statutory procedures concerning grievances were removed when the provisions of the Employment Act 2008 come into force on 6 April 2009. (The Act does not apply to Northern Ireland). However for issues which arose on or before 5 April 2009 the statutory procedures still apply. Accordingly, employers need to be familiar with consequences of failure to follow the old and new regimes.These are dealt with under separate headings below.

On or before 5 April 2009

There were quite a few cases concerning the employer's position where an employee subsequently attempts to raise an issue at an employment tribunal which they did not refer to in their grievance. The starting point is that the employer can argue that the tribunal should refuse to hear any claim if the claimant has not initiated the statutory grievance procedure first.

Employers should, therefore, scrutinise an employee's ET1 claim form to ascertain the nature of their complaints and compare it to the grievance. If there is a crucial element missing, for example a discrimination claim which was not mentioned in the grievance procedure, then the employer may be successful in claiming that the tribunal should not hear that aspect of the complaint. Although tribunals will not easily deny employees a hearing, they have done so in some cases. For example, in the case of *Noskiw v Royal Mail Group plc* (unreported, ET 2602639/04, 7 March 2005), Mr Noskiw's claim for disability discrimination was rejected on the basis that he had not properly raised a grievance. He had sent an e-mail to his employer complaining about aspects of his treatment in particular a pay review, but he had crucially omitted any reference to disability discrimination in his grievance. The employer was therefore successful in preventing him from pursuing that aspect of the claim.

However, it is important to note that although employees may be prevented from pursuing a tribunal claim if they have not raised their complaint in a Step One letter, relatively little is required from an employee to initiate the grievance procedure - see the question below on which communications an employer should treat as a grievance.

On or after 6 April 2009

The statutory procedure was removed in its entirety when the Employment Act 2008 was implemented. If an employee has not raised a written grievance that will not prevent the employee from presenting a tribunal claim However, it will still be important for employees to raise proper grievances with their employer before presenting a tribunal claim as the revised Acas code of practice on disciplinary and grievance procedures specifies that they should do so. Employees who do not follow the code may see their compensation being reduced by up to 25% in appropriate cases.

(For information on how to decide which regime should be used in a disciplinary or grievance situation and the transitional arrangements see the relevant question above).

- **Which communications should an employer treat as a grievance?**

Any communication which contains a problem or complaint that the employees raises with their employer should potentially be treated as a grievance. If an employer is in doubt about whether the employee is raising a formal grievance, that issue could always be clarified with the employee by asking them directly.

Before 6 April 2009, employers were required to follow the statutory grievance procedure. There are numerous cases concerning those procedures which provide some guidance as to what constitues a grievance. Although these cases are primarily of historical interest, once the statutory procedures are removed in their entirety under the Employment Act 2008, they provide some guidance as to the wide range of communications which constitute grievances. (The Act does not apply to Northern Ireland). It is best practice for employers to handle minor matters informally if possible, but to be prepared to treat any problem with due concern as a potential grievance.

The key points which employers should note concerning grievances arising from previous caselaw are:

- Grievances can be contained in a wide variety of written communications, for example, a letter making a general moan or grumble, emails, resignation letters, in a letter from the employee's solicitor (even if a letter threatening proceedings) and a flexible working request
- If a grievance does not mention the legal basis of the claim at all, the employer may have a chance of having a subsequent claim barred, at least temporarily.
- Employees do not need not set out a detailed statement of grievance in detail but there must be sufficient for the employer to appreciate that a relevant grievance has being raised.
- Employers should scrutinise an employee's ET1 claim form to determine the nature of the complaint and compare it to the grievance.

The following are examples of the numerous cases under the statutory procedures which clarify whether the employee has intiated the grievance procedure:

- *Canary Wharf Management Limited v Edebi [2006] ICR 719, EAT*. A security officer wrote in 2004 to his employer complaining that he was exposed to traffic fumes and had therefore suffered asthma. In that letter he referred to the Disability Discrimination Act 1995 seeking reasonable adjustments to his job. He wrote again in 2005 with a number of other complaints about conditions, facilities and pay but he did not specifically mention the asthma again. He later claimed disability discrimination, constructive dismissal and unlawful deduction of wages. By making reference to his health issues among the other list of complaints, the 2005 letter was not enough to raise a disability discrimination complaint. The case demonstrated that although the employee need not set out a technically detailed statement of grievance for it to constitute a Step One letter, there must be a sufficiently clear complaint for the employer to spot that a relevant grievance is being raised.
- *Commotion Ltd v Rutty [2006] IRLR 171, EAT*. In this case, it was held that a written request for flexible working under the Employment Rights Act 1996 section 80F can count as a Step One grievance letter even though there was no specific reference to a grievance..
- *Martin v Class Security Installations Limited (unreported EAT/0188/06/DM).* The Employment Appeal Tribunal (EAT) found that a resignation letter and a solicitor's letter were both sufficient to

constitute a Step One letter even although the solicitor's letter implied that a grievance would follow in due course.

- *Shergold v Fieldway Medical Centre [2006] IRLR 76*. It was held that a resignation letter was sufficient to initiate the statutory grievance process as long as the 'grievance' is set out in writing. The tribunal commented that it is not necessary to state that a letter is a grievance, or is an invocation of a grievance procedure. It was also stated that the grievance need not be identical to subsequent proceedings, but there must be material similarity if the statutory procedures are to be complied with.
- *Kennedy Scott Ltd v Francis (unreported, UK/EAT/0204/07 3 May 2007, EAT)* In this case the employer argued that the employee had failed to comply with Step One of the statutory requirement as the employee had trouble writing and the employer had made the written note of his grievance for him. The employer tried to argue that the statutory requirements had not been met and therefore the employment tribunal had no power to hear the race and sex discrimination claims. The EAT agreed with the employee so that it appears that Step One will be complied with even if the employer has summarised the grievance in writing for the employee.

(For information on on how to decide which regime should be used in a disciplinary or grievance situation and the transitional arrangements see the relevant questions above).

- **What is the employer's position if an employee fails to attend the meeting fixed by an employer to consider a disciplinary or grievance issue?**

The statutory procedures concerning grievances were removed when the provisions of the Employment Act 2008 came into force on 6 April 2009. (The Act does not apply to Northern Ireland). The tribunals will now consider if the employer has followed the new Acas code of practice on disciplinary and grievance procedures (new Acas code). However, for issues arising on or before 5 April 2009 the statutory procedures do still apply. Accordingly employers need to be familiar with consequences of failure to attend meetings under the old and new regimes.These are dealt with under separate headings below.

On or before 5 April 2009

Under the statutory minimum disciplinary or grievance procedures, if the employer, the employee or the employee's companion cannot reasonably attend a meeting, the meeting had to be rearranged if the reason was unforeseeable for example illness. The employer was obliged to rearrange the meeting at least once. If the meeting falls through a second time for unforeseeable reasons, neither party is under any further obligation under the statutory procedures. Both parties were treated as having complied with the relevant statutory procedures so, if applicable, the normal time limit for making a tribunal application may be extended.

However, if a party did not attend the meeting and the failure could be reasonably foreseen, then the parties will not be under any further obligation under the statutory procedures. The tribunal may choose to attribute responsibility for that failure by using the 10-50% margin for adjusting unfair dismissal awards.

On or after 6 April 2009

The guidance accompanying the revised Acas code recognises that there may be occasions when an employee is unable or unwilling to attend a meeting. This may be for genuine illness or perhaps because the employee wishes to avoid the meeting due to anxiety concerning the issues to be discussed.

The whole tenor of the Acas code concerns reasonable behaviour. Therefore employers need to consider all the facts, the reason for the absence and decide how to proceed. It is helpful if organisation has its own disciplinary and grievance policy which addresses failure to attend meetings.

Where there has been a failure to attend a meeting Acas recommend taking into account the following:

- the seriousness of the disciplinary issue under consideration,
- the employee's disciplinary record (including current warnings),
- general work record,
- work experience,
- position and length of service (although sensible employers will not treat employees differently on grounds of length of service to avoid age discrimination claims),
- medical opinion on fitness to attend the meeting,
- treatment of similar cases in the past.

After repeated failures to attend meetings the employer should inform the employee that there is no alternative, but to make a decision in the employee's absence on the evidence available. Obviously an employer should keep a careful record of the employee's failure to attend the meetings and the attempts to reconvene those meetings.

It is important for employees to attend meetings with their employer as the new Acas code specifies that they should do so. From 6 April 2009 employees who do not follow the code may see their compensation being reduced by up to 25% in appropriate cases.

(For information on which regime should be used in a disciplinary or grievance situation before and after 6 April 2009 and the transitional arrangements see the relevant question above).

- **What information should an employer give to an employee before the disciplinary or grievance meeting?**

The rules governing the information that an employer give to an employee before the disciplinary or grievance hearing changed under the Employment Act 2008, with effect from 6 April 2009. (The Act does not apply to Northern Ireland). However the information which needs to be provided to an employee before the meeting is essentially the same under the new and old regimes. However employers do need to be familiar with both regimes as the consequences of failing to follow the procedures are different. For the consequences of failure to follow the regimes see the questions above on what happens if the statutory disciplinary and grievance procedures or the new Acas code of practice on disciplinary and grievance procedures (new Acas code) are not followed and transitional period between the two regimes. The nature of the information to be supplied is provided in more detail below:

Information

Employers should always include a fairly detailed description of the allegations in the letter inviting the employee to a disciplinary meeting (or in grievance cases, details of their response to the employee).

Employers should enclose with that letter as much supporting detail as possible, for example statements of any witnesses (which may be dealt with anonymously in appropriate cases - see also the questions below on witnesses and witness statements and bullying and harassment and anonymous witness evidence)

Other information which the employer should consider disclosing to the employee may include emails and letters. The evidence an employer will often ultimately rely upon is the verbal account given by other employees, summarised in the form of a witness statement. The law relating to 'evidence' is complex and the nature of evidence is often misunderstood by employees. Evidence can include, for example:

- evidence in documentary form,
- verbal explanations given by witnesses in a tribunal or court,
- other evidence such as information on the hard drive of a computer, photographs, CCTV footage or a sound recording.

It is not necessary to enclose all the information or evidence the employer has. However to ensure that any resulting dismissal is perceived to be fair, it is crucial to disclose to the employee as much material as possible in advance of the hearing. This should include copies of any documents, witness statements or other evidence the employer intends to rely upon. See also the question below for further information concerning witness statements.

The new Acas code confirms that the notification to the employee before any meeting should contain sufficient information about the alleged misconduct or poor performance and the consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting.

Some case law guidance concerning supply of information under the statutory procedures will remain relevant after 6 April 2009. For example:

- A common sense approach should always be taken. It is therefore acceptable for additional information explaining the basis of the allegation to follow in verbal or written form after the initial letter, but before the disciplinary meeting, although this is not ideal. (See *YMCA Training v Stewart [2007] IRLR 185, EAT*).
- The employer should supply enough information so that the employee knows what the allegations against him are. For example in *Draper v Mears Ltd [2006] IRLR 869, EAT* an employee was dismissed for breaching the employer's no drinking alcohol policy, because he had consumed alcohol before using a company van for personal use. The letter which was sent to the employee ambiguously referred to conduct which failed to ensure the health and safety of oneself and others, this was insufficient.

- **What is the role of witnesses and witness statements at a disciplinary or grievance meeting?**

There are three distinct categories of persons who may be present at the disciplinary or grievance meeting and employees may be confused as to their roles:

- There will often be a witness who has some information about the issue under discussion. For example, an employee who witnessed a fight between other employees, or who saw another employee being bullied. The witnesses may have information which supports the employer's version of events or the employee's version.
- There may be another employee for example from the personnel department who has been invited by the employer to take a careful note of the matters discussed, who should not be a witness to any of the events giving rise to the hearing.
- There may also be a companion invited by the employee –see the question below on the role of the companion.

Obviously the role of witnesses should not be confused with that of the companion or the impartial note taker. The companion is there to support the employee, whereas witnesses have seen or heard something relevant to the dispute. The three roles above are all quite distinct and this question primarily concerns the role of witnesses who have some information about the facts leading to the incident under discussion. The witness statements mentioned in the question above are merely a written account of what that these witness of fact say actually happened.

As well as being provided with copies of witness statements prior to the meeting with the employee, there should be an opportunity for both the employer and the employee during the meeting to call witnesses in person. It has always been best practice to disclose witness statements in advance (and then allow the witnesses to be called at a disciplinary or grievance meeting if required). The new Acas code of practice on disciplinary and grievance procedures has encouraged this by stating that employees should have a reasonable opportunity to call witnesses and give advance notice to the employer of the witnesses they intend to call.

Previously many disciplinary or grievance meetings have taken place without the employer and employee calling witnesses in person, for example, reaching a decision by just relying on the written statements themselves. Although there is no absolute right to call witnesses, if the employee asks for them to be present the employer should allow it, or be prepared to argue that witnesses were inappropriate in the circumstances.

In practice, many meetings will still proceed without witnesses attending in person, either because it is not necessary or appropriate, or because witnesses will be reluctant to become involved particularly if they still work for the employer. Witnesses should not be pressurised by the employee into providing evidence. Similarly they should not be warned against giving evidence by the employer, if the employee has requested the presence of the witness.

If witnesses do attend, then the employer and employee must be allowed to verify and question then about the information they have provided. Different witnesses may have different versions of what happened and the employer must decide which witness is to be believed. (In some cases there is a risk that the meeting then starts to seem more like a tribunal hearing and will increase the length and acrimonious nature of the dispute.)

In unusual cases witness evidence may be considered anonymously, although the evidence may then be treated as having less substance. For more information go to the question below on investigating cases of bullying and harassment on the basis of anonymous witness statements.

(For information on how to decide which regime should be used in a disciplinary or grievance situation and the transitional arrangements see the question above).

- **Can an employer or employee insist that there is an electronic recording of the meetings in disciplinary and grievance procedures?**

No, neither an employer or an employee can insist on making an electronic recording of any disciplinary or grievance meeting.

Although it is rare, the employer and employee may agree that a sound recording is to take place, or the employer's own procedure may give employees the right to record hearings. For example, it may be appropriate for an employer to agree to a recording where the employee is disabled and requests such a recording as a reasonable adjustment to the usual procedure to enable them to cope with the process.

The more common course of action for producing a record of meetings is for another employee (who is not involved in the issues giving rise to the hearing) to attend and take notes on a confidential basis. A full copy of those notes will then be provided to the employee after the hearing and an agreed record produced and signed by both parties. The employee and their companion are also free to take notes during the hearing.

The statutory procedures were removed in their entirety from 6 April 2009, under the Employment Act 2008. (The Act does not apply to Northern Ireland). The course of action suggested above during any disciplinary or grievance meeting takes a reasonable approach which is appropriate both before and after 6 April 2009.

- **What is the role of the companion at the meetings in disciplinary and grievance procedures?**

During the meeting stages of the disciplinary grievance and dismissal procedures, employees (and indeed workers) have a right to be accompanied by a trade union representative or a colleague. Failure to allow the employee to bring a companion will lead to an automatically unfair dismissal claim. Workers must make a reasonable request to their employer to be accompanied.

The right to be accompanied applies to meetings where a formal warning may be issued, or some other disciplinary action (such as suspension without pay, demotion or dismissal) could take place. It also applies to the confirmation of a warning or some other disciplinary action (such as an appeal hearing).The right does not apply to informal discussions or investigatory meetings, although an employer may choose to grant an

employee's request to be accompanied at any meeting.

If the companion is a colleague, the employer must give that person time off work to attend the hearing.

Legal representatives

Unless the employer agrees, an employee is not usually permitted to take a solicitor along to such meetings. An employer can therefore insist upon the basic legal position and say only a trade union representative or a colleague is permitted. However, if the employer adopts a best practice approach they may voluntarily allow the employee to be accompanied by a lawyer if the employee wishes to instruct one. Indeed, as explained below an employer may voluntarily allow the employee to choose a family member as a companion.

In the past some employees who have been refused their request to have a lawyer present have alleged that this is a breach of Article 6 of the European Convention on Human Rights (right to fair trial). Case law has confirmed that it is generally not a breach of Article 6 for an employer to refuse to allow a legal representative at a disciplinary hearing (see Kulkarni v Milton Keynes Hospital NHS Trust 2008 IRLR 949). Although recent case law has suggested that in certain limited cases the employee may be entitled to be represented by a lawyer at a disciplinary hearing. This is likely to be where the disciplinary meeting could lead to very serious consequences such as the employee's name being added to the register of those unsuitable to work with children - *R (on application of 'G') v Governors of 'X' School (unreported EWHC 504 18 March 2009, HC*).

Acas states that when workers are selecting a companion, it would not be reasonable to insist on being accompanied by a colleague whose presence would prejudice the hearing or who might have a conflict of interest.

Acas also reinforces the fact that the employer must mention the right to be accompanied in the written communication prior to the meeting being held and a good practice approach would allow the companion to participate as fully as possible in the hearing, including asking witnesses questions. However, the actual law states that the employer must permit the companion to do any or all of the following:

- address the hearing
- put or sum up the employee's case
- respond on the employee's behalf to any view expressed at the hearing
- confer with the employee during the hearing.

The employer does not have to allow the companion to answer questions on behalf of the employee.

If it is not reasonably practicable for the companion to attend a meeting then the employer should re-schedule it. The employee must propose an alternative date within five days and, if acceptable, the employer must then invite all parties to attend at this new time.

Statutory provisions

Note that the right to be accompanied arises under the Employment Rights Act 1999 and therefore pre-dates the statutory minimum disciplinary and grievance procedures. Although on 6 April 2009 the statutory procedures were abolished under the Employment Act 2008, the right to be accompanied still applies in the same way where an employer subjects a worker to an internal grievance or disciplinary hearing. (The Employment Act 2008 does not apply to Northern Ireland). A worker may be accompanied by a member of their family if the employer agrees, although there is no statutory right to insist upon that if the employer does not agree. Employers may specify in the organisation’s disciplinary or grievance procedure that the employee may be accompanied by a partner, spouse or legal representative.The new Acas code of practice on disciplinary and grievance procedures (new Acas code) provides confirmation of the right to be accompanied and guidance on how it should be applied. For information on what employers must do to follow the new Acas code see the question above.

For the distinction between employees and workers see our Employee status FAQ.

- Go to the Employee status FAQ

(For information on which regime should be used in a disciplinary or grievance situation before and after 6 April 2009 and the transitional arrangements see the relevant question above).

- **Are there exceptions to the statutory grievance procedures in force before 6 April 2009? For example if an employee refuses to follow the procedure claiming to be sick or intimidated?**

Yes, the statutory grievance procedures did not apply if there were reasonable grounds to believe complying with them would result in threats, for instance because the employer was violent, abusive or behaved unacceptably. Similarly, the employee did not have to follow the procedure if they could prove that factors beyond the employee's control made it impossible to go through procedures, for example genuine sickness. If it can be shown that they were malingering to avoid going through the procedures then any compensation the employee received would be reduced.

The statutory procedures were removed in their entirety from 6 April 2009 under the Employment Act 2008. (The Act does not apply to Northern Ireland). Until then, employers had to follow the procedures in their previous form.

(For information on how to decide which regime should be used in a disciplinary or grievance situation and the transitional arrangements see the relevant questions above).

- **Does a disciplinary procedure have to be followed before issuing oral or written warnings to an employee or suspending them on full pay?**

The rules governing disciplinary and grievance procedures are changed with effect from 6 April 2009 under the Employment Act 2008. (The Act does not apply to Northern Ireland). However, the position concerning oral and written warnings is essentially the same under the new and old regimes. Employers do need to be familiar with both regimes as the consequences of failure to follow the procedures are different. For the consequences of failure to follow the regimes the question above on what happens if the statutory disciplinary and grievance procedures or the revised Acas code on disciplinary and grievance procedures are not followed.

On or before 5 April 2009

In accordance with the statutory procedures, actions falling short of dismissal such as warnings (oral or written) or suspension on full pay did not attract the statutory minimum **disciplinary** procedure, but an employee who feels aggrieved by the action was entitled to initiate the minimum **grievance** procedure.

However, a suspension without pay or with reduced pay was a form of disciplinary action to which the minimum standard statutory disciplinary procedures applied. With respect to suspensions with reduced or no pay, until the statutory procedures are repealed the most cautious course of action was to follow the statutory procedures before the suspension - see below.

It was not automatically unfair if an employer fails to follow the statutory procedures before the suspension as long as the required procedures were followed in relation to the dismissal itself. In *A to B Travel Ltd v Kennedy (unreported, UKEAT/0341/06 11 October 2006, EAT)* the Employment Appeal Tribunal emphasised that suspension is distinct from dismissal.

If a disciplinary policy has set time periods after which warnings will expire, this should be adhered to. However, in certain circumstances it may be relevant to consider the conduct in the event of a repetition.

On or after 6 April 2009

The statutory procedures were removed in their entirety on 6 April 2009 under the Employment Act 2008. After the reforms employers should follow the new Acas code of practice on disciplinary and grievance procedures (new Acas code) before issuing oral or written warnings to an employee or suspending them on full pay.

The new Acas code envisages that before issuing a formal warning employees will have been informed in writing of what is alleged and have had the opportunity to state their case at a disciplinary meeting with the right to appeal against any disciplinary penalty.

Depending on the outcome of the meeting the employee may be given a written warning or performance note which will be recorded, but disregarded after a specified number of months of satisfactory service. Workers, of course, have the usual statutory right to be accompanied by a companion where the disciplinary meeting could result in a formal warning being issued; or the confirmation of a warning or some other disciplinary action. See question above on the role of the companion.

(For information on to decide which regime should be used in a disciplinary or grievance situation and the transitional arrangements see the relevant question above).

- **If an employer dismisses an employee for an act of gross misconduct and the employee subsequently proves their innocence, will the employee automatically succeed in an unfair dismissal claim?**

An employer who has dismissed an employee should have followed:

- the standard disciplinary and dismissal procedure before 6 April 2009 or,
- the new Acas code of practice on disciplinary and grievance procedures (new Acas code) on or after 6 April 2009.

If the employer has not followed the above regimes, there is a risk that the dismissal may be automatically unfair (before 6 April 2009) or normally unfair.

An employer will be able to defend a 'normal' (that is non-automatic) unfair dismissal claim if they can show they genuinely believed that the employee was guilty of misconduct. The employer should have reasonable grounds for their belief based upon reasonable investigation This test was established in *British Home Stores Ltd v Burchell [1980] ICR 303, EAT* and is valuable guidance to employers when considering the sufficiency of the reason for dismissal for misconduct. Once the reason has been established, a tribunal must then turn their attention to considering whether or not the employer acted reasonably with regard to all the circumstances of the case, in treating this as sufficient reason to dismiss. A tribunal cannot substitute its own view, that is what they would have done had they been the employer; instead it must only consider the issue of whether the employer acted reasonably.

The statutory procedures were removed in their entirety on 6 April 2009 under the Employment Act 2008. (The Act does not apply to Northern Ireland). Until then, employers had to follow the procedures in their previous form. After the reforms employers will still have to show reasonable grounds for their belief based upon a reasonable investigation and follow the revised Acas code. For information on what an employer must do to follow the revised Acas code see the relevant question above.

(**For information on how to decide which regime should be used in a disciplinary or grievance situation and the transitional arrangements see the relevant question above).**

- **Can an employer take disciplinary action against several employees when they cannot prove which employee committed the conduct in question?**

Where two or more employees are suspected of misconduct and the employer, despite investigation, cannot discover who is to blame, it may be fair to dismiss several employees in relation to the same incident without the dismissal being unfair. The employees would be dismissed on a reasonable suspicion. (See *Monie v Coral Racing Ltd [1981] ICR 109, CA*).

In the case of *Parr v Whitbread plc t/a Threshers Wine Merchants [1990] IRLR 39, EAT* the EAT set out 5 principles as a guide for employers faced with the prospect of multiple dismissals:

  - Would the conduct if committed by an individual justify dismissal?
  - Was it reasonable to identify this particular group of employees as having been capable of committing the conduct complained of?
  - Could each individual in isolation have committed the act?
  - Has the employer conducted a thorough investigation?
  - As a result of the investigation is it reasonable to believe that more than one person was involved?
  - Given the evidence, can the employer identify the culprit?
- **How should an employer deal with a complaint of bullying?**

The first step in dealing with bullying or harassment in the workplace is to follow the organisation's grievance procedure with respect to the bullying, and the organisation's disciplinary and dismissal process with respect to the alleged perpetrator. A well drafted policy will always include informal stages which should be followed in appropriate cases. Some organisations have an express policy dealing with bullying which should correspond with the stages in the disciplinary and grievance process.The following additional points should be emphasised:

  - All employees and managers should be fully aware of the provisions of the policy and trained in its implementation.
  - The procedures should be followed consistently with respect to all such allegations.
  - The policy should also incorporate procedures which correspond with the equal opportunities policy so that racial, sexual harassment etc can be identified and dealt with in a sensitive way.
  - The policy should state that harassment and bullying is not and will not be tolerated within the organisation and define what constitutes bullying and harassment.

The organisation’s grievance procedure should be followed and all such procedures should cater for the possibility that the line manager may be the source of the grievance and therefore nominate an alternative senior member of management to hear the grievance. The following steps will be essential:

Investigation

  - A thorough investigation undertaken with care and sensitivity.
  - Investigations into allegations of bullying should be as thorough and impartial.
  - The employer must protect the rights of both the alleged harasser and the person making the complaint and, therefore, confidentiality is crucial.
  - Reference to a trained confidential counselling service as well as dealing with the grievance will help the employer’s position. The counsellor should have no direct role in the grievance procedure.
  - The investigation may begin with a thorough confidential interview with the complainant to ascertain the facts:
    - Who was involved?
    - Were there witnesses?

        - When and where did the incident occur?
        - An indication of what the employee wants to happen, e.g. disciplining the person concerned, reallocation of duties, reorganisation of team members, relocation etc.
    - Moving the employee will only be appropriate where the complainant asks for that rather than continuing to work with the alleged bully.

Further steps

- Explain the procedure in full to the complainant, and follow that procedure to the letter.
- Prepare written statements from all witnesses in the investigation.
- Interview the alleged harasser confidentially and keep a record of that.
- Advise the harasser of the allegations against them and the disciplinary procedure if necessary, listening to their version of events, allowing them to be accompanied if required.
- A copy of the complainant's written statement may be given to the alleged harasser who should be afforded an opportunity to reply to the allegations.

Action

- Following the initial interviews (depending on the strength of evidence) if the complaint is valid the employer should take prompt action to stop the bullying.
- Action taken by the employer may include suspension on full pay and/ or invoking the full disciplinary and dismissal procedure which may lead to dismissal in serious cases.
- A verbal warning or written may be appropriate in minor isolated cases.
- Monitor the ongoing relationship between both employees after the incident.

If the employer does not know who to believe and there is a total conflict of evidence a very detailed investigation should be undertaken. The senior manager handling the grievance should talk to all witnesses in an effort to ascertain whether or not the alleged incident occurred. The employer only has to have a reasonable belief based on a thorough investigation. It does not matter if the employer is subsequently proved to be wrong as long as they had a genuine belief that the incidents occurred at the time they take action.

- **Can employers investigate cases of bullying and harassment in the workplace on the basis of anonymous witness evidence?**

An employer should deal with a complaint of bullying in the usual way by following the organisation's grievance process with respect to the bullying and the disciplinary and dismissal process with respect to the employee who is alleged to be the perpetrator. See the question above on dealing with a complaint of bullying.

This issue of evidence has been discussed on a number of occasions in relation to the disciplinary process. In considering whether witness statements should be anonymous consideration needs to be given to balancing the interests of the parties, the need to protect informants and the right of the employee to a fair hearing. The following points can be used as guidance.

- Statements should be in writing (these may be edited to remove names and preserve anonymity) and be made available to the employee or their representatives.
- Statements need to be accurate with regard to date, time and place of each incident, the employee's observations and any other relevant details.
- Is there any corroborative evidence?
- Has the informant any reason to fabricate evidence, for example, a jealous jilted lover?
- Is the informant's fear genuinely sufficient to not require them to be involved in the disciplinary process further?

- If at any stage in the disciplinary process the employee raises issues to be put to the informant then the employer should consider an adjournment so the relevant question can be put.
- In cases involving informants careful notes must be taken of the disciplinary hearing.

These guidelines came from the case of *Linfood Cash & Carry v Thomson [1989] IRLR 235, EAT*.

- **How far can an employer take into account misconduct that occurs off-duty when contemplating disciplinary action?**

Conduct that occurs outside of the workplace can justify a dismissal. However the conduct must be of particular relevance to the job in question.

In relation to criminal charges an employer will still be required to conduct a full and thorough investigation which may include suspension of the employee. It is not necessary to refrain from any such action until the outcome of the criminal proceedings is known; indeed such a delay could render a potentially fair dismissal unfair. However, it is extremely important that an employer carries out their own investigation. Some of the issues employers need to consider when contemplating dismissal in such circumstances are:

- Is there an express term in the contract or the disciplinary policy governing offences outside the workplace?
- What is the nature of the misconduct and does this have a bearing on the role performed by the employee? (For example, a care assistant in a residential home of the disabled facing prosecution for assault.)
- Will there be an effect on the reputation of the company given the nature of the business?
- Does the incident involve or affect other employees?

An example of these points was the case of *The Post Office v Liddiard [2001] EWCA Civ 940 (7 June 2001) (*reviewed in IDS Brief No 690, August 2001, pp 6-7). The tribunal had found that employer had unfairly dismissed a convicted football hooligan. However, the Court of Appeal decided the tribunal had not considered the issue central to the case, namely whether the employee's conduct which led Post Office to believe that they had been brought into disrepute was a sufficient reason for the dismissal.

- **Are there any future developments expected in the area of statutory disciplinary procedures and grievance procedures?**

Yes, from 6 April 2009, under the Employment Act 2008, the statutory dispute resolution procedures were repealed. (The Act does not apply to Northern Ireland).

The details of the new legislation and its implications are dealt with in the other questions above.

Tribunal procedure and other changes

As well as removing the statutory disciplinary and grievance procedures the Employment Act 2008 abolished the fixed periods within which Acas must conciliate. In anticipation of this, Acas announced on 1 April 2008 that it would conciliate in all cases regardless of whether the fixed conciliation period has already expired.

Acas have also been given extra funding (estimated to be some £37 million) to amongst other things, operate a helpline for potential employee claimants and respondents to answer individual employment questions and expand provision of early conciliation.

A review of the statutory dispute resolution procedures suggested significant further changes to employment tribunal procedure to try and deter claims, including increased use of mediation and other forms of solving disputes. Tribunal chairmen are also given the power to sit alone in more types of case with the parties consent. The types of case covered will encompass unlawful deductions from wages, contract cases, redundancy, national minimum wage and probably holiday pay cases.

However the other potential changes recommended in the review do not all form part of the Employment Act 2008. The further changes may include the following:

- A free early dispute resolution service(where appropriate mediation) before a tribunal claim is lodged, for those disputes likely to benefit from it.
- An advice service to potential employee claimants and respondents, through an adequately resourced helpline and the internet.
- Offering explanations of the realities of tribunal claims and the potential benefits of alternative dispute resolution.
- Redesign of the employment tribunal application process, so that potential claimants access it through the helpline and receive advice on alternatives when doing so.
- Simplification of the employment tribunal claim and response forms, removing requirements for unnecessary and legalistic detail and encouraging claimants to give a succinct statement or estimate of loss.
- Unification of the time limits on employment tribunal claims and the grounds for extension of those limits.
- Giving employment tribunals enhanced powers to simplify the management of cases where many claimants are pursuing the same dispute with the same employer.
- Encourage employment tribunals to engage in active, early case management.
- Review the circumstances in which it is appropriate for employment tribunal chairs to sit alone, in order to ensure that lay members are used in a way that adds most value.
- Increased employment tribunals' powers to deal with weak and vexatious claims.

Case law developments

Until the Employment Act 2008 is implemented, employers had to apply the statutory procedures in their previous form. There will be cases arising in 2009 on:

- the statutory procedures relating to disputes before 6 April 2009 will continue to emerge into 2009,
- the confusion between the old and new regimes, and
- whether the revised Acas code has been followed.

This case law concerning disciplinary and grievance issues will therefore continue to be a source of future developments for the forseeable future.

For details of developments since this update see our Recent developments section.

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