

# **WRIGLEYS**

**- SOLICITORS -**

## **EMPLOYMENT LAW FOR CHARITIES SEMINAR**

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### **The Statutory Discipline and Grievance Procedures And The Draft ACAS Code**

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All employers will from October 1st 2004 be required to ensure that Disciplinary and Grievance Rules and Procedures are in place.

The rules must be clear, recorded in writing and readily available to workers whether this is on a notice board, staff handbook or on internal computer systems. An employer must do all that they can to ensure that every worker knows and understands the rules and that they are aware of the likely consequences of breaching the rules. Specifically where an employer seeks to suggest that certain acts may amount to gross misconduct and warrant summary dismissal these should be given particular precedence.

That said it is good practice to promote the Disciplinary Procedures as a way of encouraging improvement amongst workers whose conduct or performance is unsatisfactory rather than as a means of imposing a sanction or leading to dismissal.

The new Statutory Rules reinforce that the procedures should promote discussion between an employer and a worker in order to identify any cause of complaint and to facilitate working together to resolve that issue. Only once there has been any reasonable dialogue on the issue, and that includes the employer having properly identified the areas of complaint and allowing the employee an opportunity to respond, should any decision to be taken. That decision should clearly be communicated to the worker to ensure that there is no misunderstanding either of what decision the employer has taken or as to the consequences of that decision.

Whilst the statutory process promotes dialogue it does not require that an employer and a worker actually reach agreement. The employer's decision must be notified to the worker who

will then either have an opportunity to raise a grievance or if the decision is already part of the grievance procedure will have an opportunity to appeal against that decision but ultimately the employer's decision is final subject only, in the case of dismissal, to the assessment of the Tribunal as to whether that decision in all the circumstances was fair.

The main principles that underpin the new statutory approach to dispute resolution is to encourage employers and employees to discuss disputes in the work place and promote alternative ways of resolving them and thereby to enable the Tribunal system to work more effectively.

As the Employment Rights Act 1996 currently stands employers with less than 20 employees are not required to provide employees with any written particulars on the disciplinary and grievance procedures which they use. The new rules will apply to all employers. DTI statistics suggest that over three quarter of a million employers have either inadequate or non-existent procedures and that over one third of Tribunal claims based on work disputes involve situations where the claimant and the employer have not discussed the problem at all.

The Statutory Dismissal Procedure will apply to all dismissals not just those relating to conduct or performance. It will apply to dismissals on grounds of redundancy, termination for health reasons, non-renewal of a fixed term contract and even retirement.

The procedure will also apply where the employer is contemplating any disciplinary action short of dismissal. Here the procedures seek to distinguish between normal work place procedures, such as an oral or written warning or suspension on full pay to allow investigations, and disciplinary penalties. For example a disciplinary suspension, where the employer is suspended without pay or reduced pay, will attract the Statutory Disciplinary Procedure. An investigatory suspension will not although the employee would be entitled to initiate the Statutory Grievance Procedure, particularly if the employer doesn't have the right to suspend.

The Statutory Procedure does not define what may amount to "action short of dismissal" but it will in all likelihood include the imposition of performance targets as part of the identification of what an employee must achieve to avoid further disciplinary action, transfer or demotion following a disciplinary warning and the loss of seniority, status or benefits.

This leaves employers in a very difficult situation in that the Statutory Disciplinary Procedure does not apply to the normal issue of warnings but it will apply where in consequence of that

warning some disciplinary sanction is imposed. Employers will need to have a greater regard for the options available to them when initiating a disciplinary process in order to avoid the need having gone through its own internal procedures and having reflected upon all the circumstances to decide to impose a disciplinary sanction to then have to implement the Statutory Procedure. It will be far easier and employers are advised to have one process which incorporates the Statutory Procedure for all types of disciplinary action.

Now is an appropriate time for all employers to consider a review of their disciplinary procedures. Before the Tribunals begin to make award adjustments.

### **The Standard (Three Step) Statutory Disciplinary Procedure**

The new Statutory Disciplinary Procedure has three main elements.

- Step 1.           The employer must send to the employee a written statement outlining the basis of the complaint and the circumstances that may lead to a dismissal or other disciplinary action.
- Step 2.           There must be a meeting followed by notification of any action to be taken.
- Step 3.           There must be an appeal process.

### **The Modified (Two Step) Dismissal Procedure.**

The Modified Dismissal Procedure applies in exceptional circumstances where:

1.       the employer dismissed the employee without notice on the basis of the employees conduct;
2.       the dismissal took place at the time the employer became aware of the gross misconduct (or immediately afterwards);
3.       the employer was entitled to dismiss for gross misconduct without notice or payment in lieu; and
4.       it was reasonable for the employer to dismiss without investigating the circumstances.

In such circumstances the Modified Dismissal Procedure must be completed in full. Failure to do so may result in any dismissal being found automatically unfair and an award adjustment being applied.

The Procedure requires: -

- Step 1. The employer must provide a written statement identifying the right of appeal, and outlining the alleged misconduct that led to dismissal and the evidence relied upon.
- Step 2. An appeal hearing following which the decision must be communicated to the employee.

### **Exceptions to the Statutory Disciplinary Procedure**

There are only limited circumstances where an employer has no need to comply with the statutory procedure and generally those are in circumstances where the individual characteristics of the employee will not play any real role in the decision to dismiss such as in -

#### **1. Collective redundancies**

Where an employer wishes to make 20 or more employees at the same establishment redundant within a 90 day period there is a statutory obligation to consult representatives.

For redundancies where the statutory obligation to consult does not arise the statutory disciplinary procedure will apply.

#### **2. Where all employees are dismissed and offered re-employment in the same or a suitable alternative position.**

A dismissal and re-employment is often used as a mechanism for re-issuing contracts or changing terms of conditions of employment.

#### **3. Industrial action dismissals**

Where an employer seeks to dismiss employees engaged in a lawfully organised industrial action the Employment Relations Act 1999 sets down steps that an employer must take before the employer can fairly dismiss strikers. Those requirements are to be modified in

the current Employment Relations Bill which will seek to make clearer the minimum requirements necessary for an employer to promote settlement of any dispute.

But where an employer may seek to make selective dismissals amongst strikers engaged in a lawfully organised industrial action this exception would not apply and the statutory disciplinary procedure will apply.

**4. Constructive dismissals**

Constructive dismissals are not covered by the Statutory Disciplinary Procedure. In general terms this is because circumstances which may give rise to constructive dismissal are so wide and particular to the individual circumstances it cannot be said that the employer intended to dismiss rather than the employer's actions had that effect.

In cases of constructive dismissal the employee will be required to follow the Statutory Grievance Procedures.

**5. The employer's business ceases unexpectedly**

For example the premises may burn down and it may become impractical to continue employment.

Alternatively, continued employment may breach a legal duty or restriction. For example it is unlawful to employ someone with certain medical conditions in a number of industries or a valid driver's licence may be an essential qualification for the position.

**6. A dismissal procedure agreement exists**

Where the employee is covered by a dismissal procedure agreements, designated by an order under Section 110 of the Employment Act 1966 the Statutory Disciplinary Procedures will not apply.

**Exceptions for the Modified Dismissal Procedure Only**

Where an employee has been dismissed in circumstances where the Modified Dismissal Procedure applies they are free to present an Employment Tribunal claim straight away. If the employee presents the application before the employer sends out the Step 1 letter under the

Modified Dismissal Procedure, the Procedure will not apply and no award adjustment will be made.

If the employer sends the Step 1 letter to the employee before the Tribunal complaint has been presented then the Modified Procedure will be followed.

## **Circumstances in which the parties are treated as having complied with the Statutory Disciplinary Procedure**

### ***Interim Relief***

In certain situations where an employee may seek to claim automatic unfair dismissal (for example in working time cases, and where dismissal relates to trade union membership or activities and protected disclosures) the employee can make a claim under section 128 of the Employment Rights Act 1996 for interim relief. The Tribunal has power, where it considers it likely that at the full hearing it would uphold the complaint, to order immediate reinstatement or make an order for the temporary continuation of the contract of employment. The application for interim relief has to be made within seven days of dismissal and both parties will be treated as having completed the appeal stage of the Statutory Disciplinary Procedure.

### ***Appropriate Procedure***

In some industries more sophisticated dispute resolution procedures exist, which may include appeals to be heard by external panels comprising employer and union representatives. If such an 'appropriate procedure' has been agreed by two or more employers or an employers association and at least one independent trade union then this kind of external appeal will have complied with appeal stage in the Statutory Disciplinary Procedure. It will however still be necessary to follow the Step 1 (Advanced Notice of Complaint) and Step 2 (Meeting).

It must be remembered that even though the Statutory Disciplinary Procedure may not need to be followed in a particular case it does not mean to say that no procedures need be followed. The usual considerations of fairness will apply.

## **The Statutory Grievance Procedure**

A grievance for purposes of the Statutory Grievance Procedure is “complaint by an employee about action which an employer has taken or is contemplating taking in relation to him”. It will include actions of a third party (a work colleague) in cases where the employer could be vicariously liable for those actions and the Statutory Grievance Procedures apply in relation to any grievance by an action by an employer that could form the basis of a Tribunal claim.

Once again there is a standard three step procedure.

- Step 1. The employee must provide a written statement outlining their complaint.
- Step 2. A meeting must be held to discuss the employee's complaint following which the employer must inform the employee about any decision.
- Step 3. There must be a right of appeal and final decision.

## **The Modified (Two Step) Statutory Grievance Procedure**

The Modified Procedure will apply in circumstances where the Standard Procedure would otherwise apply but where employment has already ended and either

- 1. the employer was not aware the grievance before the employment ended; or
- 2. if the employer was aware the Standard Grievance Procedure had not started or had not been completed.

Both parties must agree in writing that the Modified rather than Standard Grievance Procedure shall apply.

The Procedure requires: -

- Step 1. The employee must set out in writing the nature of their complaint and send it to the employer;
- Step 1. The employer must set out a response in writing and send it to the employee.

Employers must be aware that they must respond to any grievance raised. Failure to do so may result in an increase in award

### **Exceptions to the Statutory Grievance Procedure**

The Statutory Grievance Procedure will not apply if

1. It is not reasonably practicable following the end of employment, in circumstances where: -
  - 1.1 employment has ended;
  - 1.2 No grievance has been commenced by that point; and
  - 1.3 Since the end of employment it has become not reasonably practicable for the employee to send a Step 1 letter to initiate the process.
  
2. The Statutory Disciplinary Procedures apply -

If the Statutory Disciplinary Procedures apply then the employee would be required to raise any concerns during that process including using the appeal process. However the Statutory Grievance Procedures will still apply where the employee feels that the employer's action would amount to discrimination or contrary to the employer's written statement the employee does not feel that it has been taken on conduct or capability grounds, for example where it is perhaps an issue of a personality clash with a work colleague or manager rather than an ability to do the job.

### **Circumstances where the parties are treated as having complied with the Statutory Grievance Procedure.**

1. Where the grievance was raised in writing during the Statutory Disciplinary Procedure.

If the grievance was raised in writing during the Statutory Disciplinary Procedure then, as has already been stated, the Statutory Grievance Procedures will only apply where the employer takes action on conduct or capability of grounds but the employee feels that this is discriminatory or action has been taken for some other unstated reason.

Provided the employee sets out their grievance, in writing, before the appeal, the appeal meeting will take place of the grievance meeting and allow the parties a chance to address the employee's complaint in the context of the Statutory Disciplinary Procedure. In such circumstances the parties are treated as having complied with the requirements of the Statutory Grievance Procedure.

If the Step 1 Grievance Letter is received after the appeal hearing then the Statutory Grievance Procedure will apply.

2. The Grievance Procedure is not completed because it is not reasonably practicable.

This refers to circumstances arising following the end of employment which means that it has ceased to be reasonably practicable for one or both of the employer and employee to comply with the remainder of the procedure.

3. The grievance has been raised collectively.

This will only refer to a complaint on behalf of at least two employees by an appropriate representative who is either an official of a recognised trade union or an elected employee representative. It does not refer to two or more employees who bring a grievance based upon substantially the same circumstances or in connection with the same issue.

4. An alternative collectively agreed dispute resolution procedure exists and the employee raised a grievance using that procedure.

The procedure must have been agreed by two or more employer's or an employer's association of at least one independent trade union where the employee is entitled to raise a grievance with an independent dispute resolution body.

It is significant to note the distinction between circumstances in which the Statutory Grievance Procedure does not apply and those where it is deemed to have been satisfied. In the latter the automatic time extension to Tribunal claims will apply.

## **Exemptions to the Statutory Procedures**

There will be no requirement to start or complete any Statutory Procedure if one party reasonably believes there is a significant threat, harassment or it is not reasonably practicable to go through the procedures within a reasonable period or that there are issues of national security.

## **Other Matters relating to the Statutory Procedures**

### ***Re-arranging meetings***

If a meeting or appeal hearing cannot take place because the absence of one of the parties (or a companion) and that absence was not reasonably foreseeable at the time the meeting was arranged then the meeting must be re-arranged. If however either party did not attend a meeting and that failure could have been foreseen then neither party will be under any further obligation and a Tribunal may choose to attribute responsibility with an appropriate impact on any award.

If the employee's companion cannot reasonably attend the meeting Section 10 of the Employment Relations Act 1999 may apply. This provides that the employee must propose an alternative date within five days.

The employer is obliged to re-arrange the meeting once but if the meeting falls through a second time for unforeseeable reasons neither party will have any further obligations. In such circumstances neither party will be deemed at fault and no adjustment of award would be made. Both parties will be treated as having complied with the Statutory Grievance Procedure (including the extension on the time limit for making a Tribunal application).

### ***Inadequate, or non-existent statement of particulars***

Where a Tribunal finds that the employer's statement on discipline and grievance procedures is either non-existent, incomplete or inaccurate the Tribunal is required to award compensation of two or four weeks pay unless the Tribunal considers that to do so would be unjust or inequitable.

### ***Admissibility***

If an employee wishes to submit an Employment Tribunal claim based on a grievance an employee must have written a Step 1 letter and allow 28 days before presenting a claim otherwise it will not be admitted.

Where a complaint arises out of the Statutory Disciplinary Procedure ie dismissal there is no requirement to raise a grievance and the complaint may proceed to the Tribunal as it has in the past.

***Extension to the Tribunal time limit***

Sending a Step 1 Statutory Grievance Letter will automatically extend the time limit for presenting a complaint to the Employment Tribunal for three months from the end of the existing Tribunal time limit.

Time limits for presenting claims to the Employment Tribunal are typically three months from the date of the act complained of. Accordingly with the time extensions granted under the Statutory Grievance Procedures the first an employer may hear of a complaint may be the receipt of a Stage 1 Grievance Letter from the employee no later than 28 days after three months following the event.

The Tribunal retains its discretion to consider any application out of time.

During the consultation process on the new procedures it was recommended that the Tribunal should maintain their existing time limits but provide that any Tribunal claim should be stayed pending completion of the relevant Statutory Procedure. This suggestion was not taken up and it seems likely that the Tribunal will again have to deal with the issue of whether or not an application has been issued in time and the relevant criteria satisfied. In general terms however where an employee has been dismissed ie sacked from his position and not subject to constructive dismissal, the usual (three month) time limit will apply. In all other circumstances an employee will need to raise a Stage 1 Statutory Grievance Letter before proceeding with any Tribunal claim.

To make matters even more difficult for both employers and employees there will undoubtedly be an increase in claims in particular of harassment because of its subjective nature which will allow the employee to dispense with the Grievance Procedure, but the time limit extension will apply so that employers must now wait for the expiry of six months rather than the standard three months to be able to say with any degree of certainty whether or not a Tribunal claim will be brought.

Without a doubt, a claim for constructive dismissal arising out of discrimination will include an element of harassment. In such a case the exemption may apply and any Tribunal application

would need to be made within the normal (3 month) time limit.. If in claiming discrimination a claim for harassment isn't included then the employee may be to extend the time limit for making their Tribunal application.

Note that where one of the exceptions to the Statutory Procedures applies there will be no Tribunal time limit extension. Where the relevant procedure is deemed to have been completed then the time extension will apply.

The time limit will also be extended in circumstances where the employee had reasonable grounds for believing that the disciplinary procedure is still on-going at the point when the normal Tribunal time limit will expire. The time limit will be extended by three months. The Statutory Disciplinary Procedure does not apply to constructive dismissals and accordingly this can only apply to situations where a dismissal has taken place, which the employee may claim as unfair, and the employee has pursued an appeal. It remains to be seen whether the time extension arises automatically or only where the appeal process is still on-going at the time that the Tribunal time limit would normally expire at the point three months following dismissal.

### ***Adjustment of Awards***

If the employer failed to follow the Statutory Disciplinary Procedure the dismissal is automatically unfair and the dismissed employee is entitled to receive at least four weeks pay and compensation. If the compensation award made by the Tribunal is greater than four weeks no additional payment is made for the automatically unfair dismissal.

Failure to complete the Statutory Procedure will affect the award with an increase or decrease in compensation by between 10% and 50% where failure is attributable to one of the parties.

### ***Reversal of Polkey Rule***

If an employer fails to follow the Statutory Disciplinary Procedure a dismissal will be automatically unfair. If there are procedures beyond the Statutory Procedure which apply but the employer fails to follow those then Tribunals are obliged to disregard any failure by the employer provided that following such additional procedural actions would have had no effect on the decision to dismiss.

The Statutory Procedures are the required minimum standard and the question whether or not the employer has followed those procedures goes to the issue of fairness. Separately there is the issue of whether the employment contract contains any other procedures which need to be

followed, or by way of example the contract sets out time limits for the various stages of an employers own disciplinary or grievance procedure. Failure to follow those additional requirements may still lead to a claim of breach of contract, with corresponding damages, where following contractual procedures may have delayed any dismissal. Following this rule change the failure to follow the contractual procedure will play less of a part in determining the question of whether the dismissal was, in all the circumstances, unfair.

### ***Transitional Arrangements***

The Statutory Procedures will not become a contractual requirement. The Government proposes a review of the impact of the regulations in 2006 following which a decision on the Statutory Procedures being implied as a contractual term will be taken.

### **Other matters relating to the draft ACAS Code of Practice – Disciplinary and Grievance Procedures**

The ACAS Code of Practice does not have contractual force but is an important document which Tribunals will refer to when assessing whether an employer has acted fair and reasonably in its treatment of an employee during any disciplinary or grievance process.

It must be remembered that whilst failure to follow the new Statutory Disciplinary Procedures will render a dismissal automatically unfair following the statutory process will not mean that the dismissal is fair.

The Code also does not have the status of an “appropriate agreement” referred to as an exception to the statutory requirements as the ACAS Code does not in itself have the status of a document agreed to by two or more employers or an employers representative and an independent trade union unless expressly adopted.

### ***Companions***

All workers have the right to be accompanied to a disciplinary or grievance hearing and must make a reasonable request to the employer if they want to be accompanied.

Disciplinary hearings include meetings where either disciplinary action or some other action related to dismissal (such a redundancy) might be taken against the worker. Appeal hearings are also covered.

An informal discussion or counselling session is not classified as a disciplinary hearing unless it will result in a formal warning. An investigation meeting, usually as part of the disciplinary process will also not be a disciplinary hearing and accordingly no right to be accompanied exists.

A grievance hearing is a meeting at which an employer deals with a complaint about a duty owed by them to a worker whether that duty arises from statute or common law (for example under the contract of employment). The ACAS Code gives examples such as a request for a pay rise which is unlikely to fall within the definition unless the right to an increase is specifically provided for in the contract. If an employee was seeking parking facilities, again, unless provided for in the contract, this would not normally amount to a grievance unless for example the worker was disabled and needed a car to get to and from work, where the issue may be one of whether the employer was meeting obligations under the Disability Discrimination Act. In the latter case the disabled worker may be entitled to request a companion.

### ***Who can be a companion?***

Workers can choose any official from a trade union to accompany them regardless of whether that union is recognised in the work place or not.

Alternatively the companion can be a fellow worker. Fellow workers who act as companions are entitled to be paid time off to prepare for going to the hearing

### ***The companion's rights***

The companion has a legal right to address the hearing but does not have the right to answer questions for the worker.

### ***Failure to allow a companion***

An employer who ignores a worker's right to be accompanied can be liable to pay compensation of up to two weeks pay. Employers must also be careful not to disadvantage workers for using their right to be accompanied or for being companions as this can lead to a claim in the Employment Tribunal including a claim for unfair dismissal.

## **In conclusion**

With any change comes uncertainty.

In view of the possibility of an increased award it is likely that we will see an increase in attempts by employees to find fault in the disciplinary or grievance process. Employers will need to be more vigilant in ensuring that they provide sufficient detail about the nature of the complaint and in identifying at as early a stage as possible that dismissal is either contemplated or may be a result.

Employers need to find that balance between ensuring that they allow a reasonable length of time for the employee to consider the case against them and to respond to the employer's information, whilst ensuring that they do not allow the process to become unreasonably delayed.

Employers will need to give more thought to the way in which the meeting is to be conducted, where and when it is to be held and which individuals can take part in the meeting to avoid any complaint that they have created an intimidating environment or one which has prevented the employee from fully explaining his or her position.

Most of all employers need to ensure that their managers are trained and aware of the new procedures which they must follow.

All of these factors have played a part in the issue of fairness for some time. Now they carry a much more significant financial penalty.

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