

DISCIPLINE AND GRIEVANCE CODE OF PRACTICE – CONSULTATION OUTCOME

Introduction

1. The draft Code of Practice on discipline and grievance was issued for consultation on 2 May and the consultation period ended on 25 July. In total 172 responses were received from a wide range of businesses, trade unions, employers organisations, legal bodies and individuals.
2. The views expressed on the Code varied widely. However, in general it could be summarised that employers tended to like the shorter, principles based Code issued for consultation, whilst trade unions expressed disappointment that more of the existing Code of Practice had not been retained. Legal bodies were most concerned about the effect on the Code of the provision in the Employment Bill for Tribunals to adjust awards by up to 25 per cent for unreasonable failure to follow the Code.
3. In considering the comments made on the draft Code, the Acas Council has been careful to attempt to strike a balance between the different and often diametrically opposed views expressed. In so doing, however, it has at all times been guided by two considerations.
 - 3.1 The first is the need to ensure that the final version of the Code is workable, both for the existing section 207 of the Trade Union and Labour relations (Consolidation) Act 1992, which provides for the Code to be taken into account by Employment Tribunals in relevant cases, *and* the proposed new section 207A, which provides for the 25 per cent adjustment awards where appropriate.
 - 3.2 The second (which is inevitably related to the first) is that the Code meets its primary aim, which is to promote the improvement of employment relations in the workplace.
4. There were many hundreds of specific drafting comments received during the consultation and it would not be feasible or appropriate to set them out here. However the following paragraphs do seek to explain the main changes made to the Code in the light of the consultation exercise and the principal reasons for these changes. For ease of reference the explanations follow the main sections of the Code.

AMENDMENTS MADE TO CODE

Foreword¹

5. There have been a number of amendments made to the foreword to the Code in the light of comments received during the consultation period.

¹ NB the Foreword is not itself part of the Code, as will be apparent from the opening paragraph.

6. The opening paragraph has been revised to make it clear that the Code applies only to disciplinary and grievance situations and not to redundancies or the termination of fixed term contracts (FTC). Currently employers and employees are required to follow the statutory process when making individuals redundant or terminating a FTC². When the statutory procedures are revoked this requirement will cease. The question has been raised as to whether the Code should, in effect, take over the requirement. The Council debated the issue of coverage but felt that, on balance, the Code should not cover redundancies and terminations of FTCS. The Acas Code has never covered these situations in the past and its purpose, as seen by the Council, is to provide assistance with disciplinary and grievance situations, which Council considered raised different issues to particular forms of dismissal situations such as redundancies and the terminations of FTCS.

7. An extra paragraph has been added to the foreword to make the legal basis of the Code clear. Understandably, many of those commenting on the draft Code raised queries about 25 per cent adjustment provision that will apply to the Code and the foreword has been expanded to provide a fuller explanation of this provision

8. The fourth paragraph has been amended to make it clear that employers and employees should 'seek' rather than 'do all that they can' to resolve issues in the workplace. A number of people commenting in the consultation said that the phrase 'do all that they can' was a very high test for the parties to pass and might possibly deter some people from making legitimate Tribunal claims. The Council was persuaded by this argument and has adjusted the text accordingly. Following on from this, the Council has also decided to remove the reference to an employment Tribunal being used only as a last resort. The fourth paragraph has also been amended to say a little more about third party mediation and who might carry it out.

9. On the question of third party mediation a number of those responding to the consultation felt that the issue should be mentioned in the Code itself rather than the foreword. The Council did consider this point before issuing the draft Code for consultation but felt there was a danger that if mediation were to be mentioned in the Code, even in suitably cautious language, there was a danger that failure to use mediation might attract a 25 per cent penalty in some instances. Given that mediation is an entirely voluntary process this situation would be regrettable and the Council has therefore decided to leave the reference to mediation in the foreword and not include it in the Code.

10. An extra paragraph has been added to the foreword referring to dealing with cases informally. The Council considered whether informality should be dealt with in the main body of the Code but, as with mediation, was concerned that, in view of the 25 per cent adjustment provision, parties might be penalised for not trying to deal with situations informally in the first instance. This would be difficult for Tribunals to apply and could lead to uncertainty and confusion, which would not promote good employment relations. The Council accordingly decided that the Code should confine its guidance solely to the formal handling of disciplinary and grievance situations.

² That is because the EA 2002 (Dispute Resolution) Regs 2004 state that the current statutory procedure applies to all dismissals save (relevantly) collective redundancy dismissals.

11. Similarly, to avoid a disproportionate impact of the 25% adjustment provision, the Council also decided to move references to keeping written records and considering having separate bullying, harassment and whistleblowing procedures to the foreword. Given, however, that these are still important issues to be considered, Council considered that reference should be made to these matters in the foreword.

12. Finally at the end of the foreword a new paragraph has been added emphasising the importance of the Acas Guide and suggesting that employers and employees would be well advised to read it if they are to get the full picture on how to handle disciplinary and grievance situations in the workplace.

Introduction

13. Paragraph 1 of the introduction has been expanded to give definitions of disciplinary situations and grievances. It also reinforces the point, referred to earlier, that the Code does not apply to redundancy dismissals or the termination of FTCs. The Council felt that these changes were necessary so that users (including Tribunals considering whether or not to make an adjustment to an ET award) are clear precisely which situations the Code covers and which it does not. This also serves to address a concern raised by many consultees as to the lack of definition of disciplinary and grievance situations.

14. Paragraph 2 has been amended to make it clear that it is not only important to develop rules and procedures but also to use them. The paragraph has also been amended to make it clear that rules and procedures should be developed with the *involvement* of employees and where appropriate their representatives rather than with their *agreement*. In the light of comments received during the consultation, the Council felt that having to obtain agreement was seen too stringent a requirement.

15. Para 3 has been amended to make the issues Tribunals take into account when considering relevant cases a little clearer.

16. Paragraph 4 has been amended. Firstly, to make the point that *both* employers and employees have obligations placed on them by the Code. Secondly, the references to what sort of managers should be involved in cases has been removed as this seemed to cause a lot of confusion amongst those responding to the consultation and the points are covered elsewhere in the Code.

Keys to handling disciplinary issues in the workplace

Establish the facts of each case

17. At the request of a number of respondents to the consultation exercise this section has been expanded to give further guidance on investigations and who should conduct them.

18. The reference to allowing a person to be accompanied at a formal investigatory meeting has also been changed to make it clear that, whilst this is not a statutory right,

it is a right that employers consider allowing under their own procedures or in specific cases.

Inform employee of problem

19. This section has been expanded to give more guidance on the sort of information employees should be provided with in advance of any disciplinary meeting including any written evidence that will be used at the hearing.

Hold a meeting with the employee to discuss the problem

20. This section has been amended to provide more guidance on what the employee can do at the meeting and how witnesses should be dealt with. The section also now, as a result of the consultation, adds an obligation on all parties to make every effort to attend the disciplinary meeting.

Allow employee to be accompanied at the meeting

21. Many of those responding to the consultation exercise said that they found this section too short and wanted more detail particularly on making a reasonable request to be accompanied and on what the companion could do at the disciplinary hearing. The section has therefore been expanded to provide this extra detail.

22. In providing guidance on the issue of accompaniment in the Code the Acas Council is conscious that there is the possibility that employers may face the possibility of a double penalty for the same offence. By this we mean that an employer might be penalised under the Employment Relations act 1999 for not abiding by the right of accompaniment and then face a further penalty of a 25 per cent increase in any compensatory award under the Code for the same offence. Generally, however, Council considered that Employment Tribunals are experienced enough in dealing with such 'double jeopardy' situations to take a commonsense approach, so as to avoid this being an issue in practice. In the light of this the Council decided that the issue of accompaniment should be covered in the Code.

Decide on appropriate action

23. Paragraph 20 has been amended slightly to allow for the fact that even spent warnings may still be relevant in some cases. This follows from the *Airbus v Webb* case, which was mentioned by a number of respondents to the consultation exercise.

24. A new paragraph 21 has been inserted, giving more guidance on the important dismissal stage in the disciplinary process.

25. Paragraph 22 has been amended to give a bit more clarity to the position surrounding gross misconduct cases and a new paragraph 24 has been added to cover those situations where employees refuse to attend a disciplinary interview.

Provide employees with an opportunity to appeal

26. This section has been amended to make it clear that employees are expected to appeal where they feel that any disciplinary action taken against them is wrong or unjust.

27. The section has also been expanded to make it clear that the employer should deal with appeals impartially and that any appeal hearing should be conducted by a manager not previously involved in the case.

Special cases

28. The wording of this section has been changed slightly to avoid any suggestion that decisions about trade union representatives have already been taken before the FTO is approached. It has also been changed to give some more guidance on what happens in criminal offence cases.

Keys to handling grievances in the workplace

Let the employer know the nature of the grievance

29. This section has been amended to make it clear that employees should raise a grievance formally, without undue delay, with their line manager if they have a concern that cannot be resolved informally. The section also makes clear that the grievance should be raised in writing and that it should explain the nature of the grievance. The Council has made these changes so as to address the point raised by a number of consultation respondents that there should be an obligation on employees to raise grievances with their employer rather than take the case to a Tribunal as a first resort.

Hold a meeting with the employee to discuss the grievance

30. This section has been slightly amended to place a requirement on all parties to make every effort to attend the meeting. An extra sentence has also been added making it clear that the meeting may need to be adjourned if any investigation is considered necessary.

Allow the employee to be accompanied at the meeting

31. As with the same section in the discipline part of the Code these paras have been expanded to provide more information on the right to be accompanied. This was a request made by many of those responding to the consultation exercise.

Decide on appropriate action

32. The Council has amended this section to make it clear decisions on the grievance should be communicated to the employee in writing and that employees should be informed that they can appeal if they are not happy with the decision reached. The

Council concluded that it is right for decisions should be communicated in writing as this lessens any scope for doubt or confusion. It was also felt that it is right that the employee be reminded of their right to appeal.

Allow the employee to take the grievance further if not resolved

33. This section has been amended to place an obligation on an employee to appeal if they are not content with any decision that has been made. The amendment has been made to meet the point that employers and employees should do all that they can to resolve disputes in the workplace before they become Tribunal cases.

34. A new sentence has also been added to the effect that appeal decisions should be communicated to the employee in writing. This has been done to help ensure clarity.

Overlapping grievance and disciplinary cases

35. This is a completely new section that has been inserted to deal with those situations where a grievance is raised during the course of a disciplinary process. Many of those responding to the consultation exercise felt that the revised Code should cover this point, particularly as it is covered in the current statutory procedure. The Council agreed with this view.

36. The old paragraph that used to stand here in the Code on having separate bullying and whistleblowing procedures has been moved to the foreword.

Collective grievances

37. This is a new section that Council decided to add to the Code to meet the point made by a number of respondents to the consultation that, unless specific provision is made for collective grievances, there was a danger that the 25 per cent adjustments provision might be applied where such grievances not to be handled individually. Given that it cannot be in the interests of good industrial relations to encourage a proliferation of individual grievances when the issue in question can be addressed collectively, Council felt that this was an important addition.

Acas
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