



Acas consultation

**on the revision of
paragraphs 15 and 36 of the
Acas Code of Practice on
Disciplinary and Grievance
Procedures**

December 2013

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Introduction

1. Earlier this year, the Employment Appeal Tribunal's ruling in the case of *Toal and anor v GB Oils* (which concerned the refusal of GB Oils to allow Mr Toal and a colleague to be accompanied at a grievance hearing by a companion of their choice) suggested that Acas' Code of Practice on Disciplinary and grievance procedures did not accurately reflect the law on the statutory right of accompaniment.
2. Section 10 of the Employment Relations Act (ERA)1999 states that workers have a right to be accompanied at a disciplinary or grievance hearing where they are invited to such a hearing and make a reasonable request. What constitutes a reasonable request is not defined in the Act but, in its Code of Practice, Acas states that it would not normally be reasonable for a worker to insist on being accompanied by a companion who would have to come from a remote geographical location if someone suitable and willing was available on site, or whose presence would prejudice the hearing.
3. In the EAT's ruling in *Toal*, however, it was stated that if a worker has been invited to a disciplinary or grievance hearing then, provided they have made a reasonable request to be accompanied at the hearing, they have the right to choose whoever they like as a companion - so long as the companion is from one of the categories set out in section 10 of the ERA 1999, ie, a fellow worker, a person employed by a trade union or a trade union representative who has been certified in writing by the union as having experience of, or having been trained in, acting as a worker's companion at disciplinary and grievance hearings.
4. Given this ruling, Acas recognises that the current wording in its Code suggests an erroneous interpretation of the law and has therefore decided to amend the Code to take account of the EAT's ruling.

The Acas Code and the right of accompaniment

5. The right of workers to be accompanied at disciplinary and grievance hearings is dealt with in two places in the Code of Practice. The first, in paragraphs 13 to 16, relates to disciplinary hearings, the second, in paragraphs 34 to 37, relates to grievance hearings. Guidance on making a reasonable request to be accompanied is covered in paragraphs 15 and 36. The wording in these two paragraphs is exactly the same as follows:

"To exercise the right to be accompanied a worker must first make a reasonable request. What is reasonable will depend on the circumstances of each individual case. However it would not normally be reasonable for workers to insist on being accompanied by a companion whose presence would prejudice the hearing nor would it be reasonable for a worker to ask to be accompanied by a companion from a remote geographical location if someone suitable and willing was available on site."

Proposed amendment

6. Having considered the EAT judgement carefully Acas is proposing to amend the wording of paragraphs 15 and 36 to read as follows:

“To exercise the right to be accompanied a worker must first make a reasonable request. What is reasonable will depend on the circumstances of each individual case, although workers are free to choose any fellow worker, trade union representative or official as set out in paragraph 14 (or 35) as a companion. In making their choice, however, workers should bear in mind the practicalities of the arrangements. Thus, it may neither be sensible nor helpful to request accompaniment by a colleague from a geographically remote location when someone suitably qualified is available on site; nor to be accompanied by a colleague whose presence might prejudice the hearing or who might have a conflict of interest. A request to be accompanied does not have to be in writing or within a certain time frame but workers should consider how they make their request so that it is clearly understood and provides enough time for it to be considered by their employer.”

7. This revised wording makes clear that workers have a right to choose whoever they like as a companion, so long as they come from one of the defined categories of companion. However, it retains the good practice point that workers should have some regard to the effect that their choice of companion will have on the disciplinary or grievance process itself. Acas feels that this is an important point to make both to encourage workers to consider their choice of companion and who might best be suited to support them at the hearing, and to discourage requests for accompaniment that may disrupt the process and may not actually be in the worker’s own best interests.

8. The revised wording also attempts to give some guidance on what is meant by the Act’s reference to “making a reasonable request” by including some indications of the manner in which requests to be accompanied might be made.

9. Comments are invited on the wording of revised paragraphs 15 and 36 and also on what “making a reasonable request” might or might not involve. To set the new paragraphs in context a copy of the complete discipline and grievance Code of Practice with the revised paragraphs 15 and 36 included is attached.

10. Acas considered whether it should take this opportunity to revise other aspects of the Code. However, it felt that it would not be appropriate to undertake a major revision of the Code at this time, primarily because the Code was subject to a major revision only a few years ago and further substantive change now would be disruptive to the wider business community. A substantive revision of the Code would also take more time to achieve and it was felt important to amend the Code to take account of the EAT decision as soon as possible.

11. Although comments are not being sought on the Discipline and Grievance Code as a whole at this point in time, Acas will continue to keep the Code under review and will consider a more substantive revision if there seems to be a demand for it.

How to Respond

12. Comments on the revised paragraphs 15 and 36 can be sent by post or fax to:

George Boyce
Acas National
22nd Floor,
Euston Tower
286 Euston Road
London NW1 3JJ

Fax: 020 7210 3691 or by **Email to** dgconsult@acas.org.uk.

The closing date for responses is **7 January 2014**.

13. Acas recognises that this is a shorter period for consultation than is normal with Codes of Practice. However, given the importance of amending the Code to reflect the EAT decision as soon as possible and the fact that comments are only being sought on changes to two paragraphs within the Code the Acas Council feels that the short timescale is justified.

14. When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

Confidentiality and Data Protection

15. Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004. If you want information, including personal data that you provide, to be treated as confidential, please be aware that under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

16. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on Acas.

17. Acas will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.



DRAFT:
Acas Code of Practice 1

Disciplinary and Grievance Procedures

Foreword

The Acas statutory Code of Practice on discipline and grievance is set out at paras 1 to 45 on the following pages. It provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace. The Code does not apply to dismissals due to redundancy or the non-renewal of fixed-term contracts on their expiry. Guidance on handling redundancies is contained in Acas' guide "Handling small-scale redundancies – a step-by-step guide" and in its advisory booklet 'How to manage collective redundancies'.

The Code is issued under section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992 and was laid before both Houses of Parliament on xxxx. It comes into effect by order of the Secretary of State on xxxxx and replaces the Code issued in 2009.

A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings. However, employment tribunals will take the Code into account when considering relevant cases. Tribunals will also be able to adjust any awards made in relevant cases by up to 25 per cent for unreasonable failure to comply with any provision of the Code. This means that if the tribunal feels that an employer has unreasonably failed to follow the guidance set out in the Code they can increase any award they have made by up to 25 per cent. Conversely, if they feel an employee has unreasonably failed to follow the guidance set out in the Code they can reduce any award they have made by up to 25 per cent.

Employers and employees should always seek to resolve disciplinary and grievance issues in the workplace. Where this is not possible employers and employees should consider using an independent third party to help resolve the problem. The third party need not come from outside the organisation but could be an internal mediator, so long as they are not involved in the disciplinary or grievance issue. In some cases, an external mediator might be appropriate.

Many potential disciplinary or grievance issues can be resolved informally. A quiet word is often all that is required to resolve an issue. However, where an issue cannot be resolved informally then it may be pursued formally. This Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most instances.

Employers would be well advised to keep a written record of any disciplinary or grievances cases they deal with.

Organisations may wish to consider dealing with issues involving bullying, harassment or whistleblowing under a separate procedure.

More comprehensive advice and guidance on dealing with disciplinary and grievance situations is contained in the Acas booklet, 'Discipline and grievances at work: the Acas guide'. The booklet also contains sample disciplinary and grievance procedures. Copies of the guidance can be obtained from Acas.

Unlike the Code employment tribunals are not required to have regard to the Acas guidance booklet. However, it provides more detailed advice and guidance that employers and employees will often find helpful both in general terms and in individual cases.

The Code of Practice

Introduction

1. This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.

- Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.
- Grievances are concerns, problems or complaints that employees raise with their employers.

The Code does not apply to redundancy dismissals or the non renewal of fixed term contracts on their expiry.

2. Fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations. These should be set down in writing, be specific and clear. Employees and, where appropriate, their representatives should be involved in the development of rules and procedures. It is also important to help employees and managers understand what the rules and procedures are, where they can be found and how they are to be used.

3. Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.

4. That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- Employers and employees should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers and employees should act **consistently**.
- Employers should carry out any necessary **investigations**, to establish the facts of the case.
- Employers should **inform** employees of the basis of the problem and give them an opportunity to **put their case** in response before any decisions are made.
- Employers should allow employees to be **accompanied** at any formal disciplinary or grievance meeting.
- Employers should allow an employee to **appeal** against any formal decision made.

Discipline

Keys to handling disciplinary issues in the workplace

Establish the facts of each case

5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

7. If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure.

8. In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.

Inform the employee of the problem

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible 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.

10. 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.

Hold a meeting with the employee to discuss the problem

11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

12. Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

Allow the employee to be accompanied at the meeting

13. Workers have a statutory right to be accompanied by a companion where the disciplinary meeting could result in:

- a formal warning being issued; or
- the taking of some other disciplinary action; or
- the confirmation of a warning or some other disciplinary action (appeal hearings).

14. The chosen companion may be a fellow worker, a trade union representative, or an official employed by a trade union. A trade union representative who is not an employed official must have been certified by their union as being competent to accompany a worker.

15. To exercise the right to be accompanied a worker must first make a reasonable request. What is reasonable will depend on the circumstances of each individual case, although workers are free to choose any fellow worker, trade union representative or official as set out in paragraph 14 as a companion. In making their choice, however, workers should bear in mind the practicalities of the arrangements. Thus, it may neither be sensible nor helpful to request accompaniment by a colleague from a geographically remote location when someone suitably qualified is available on site; nor to be accompanied by a colleague whose presence might prejudice the hearing or who might have a conflict of interest. A request to be accompanied does not have to be in writing or within a certain time frame but workers should consider how they make their request so that it is clearly understood and provides enough time for it to be considered by their employer.

16. The companion should be allowed to address the hearing to put and sum up the worker's case, respond on behalf of the worker to any views expressed at the meeting and confer with the worker during the hearing. The companion does not, however, have the right to answer questions on the worker's behalf, address the hearing if the worker does not wish it or prevent the employer from explaining their case.

Decide on appropriate action

17. After the meeting decide whether or not disciplinary or any other action is justified and inform the employee accordingly in writing.

18. Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.

19. If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.

20. A first or final written warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with timescale). The employee should be told how long the warning will remain current. The employee should be informed of the consequences of further misconduct, or failure to improve performance, within the set period following a final warning. For instance that it may result in dismissal or some other contractual penalty such as demotion or loss of seniority.

21. A decision to dismiss should only be taken by a manager who has the authority to do so. The employee should be informed as soon as possible of the reasons for the dismissal, the date on which the employment contract will end, the appropriate period of notice and their right of appeal.

22. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct.

23. Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but might include things such as theft or fraud, physical violence, gross negligence or serious insubordination.

24. Where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause the employer should make a decision on the evidence available.

Provide employees with an opportunity to appeal

25. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.

26. The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.

27. Workers have a statutory right to be accompanied at appeal hearings.

28. Employees should be informed in writing of the results of the appeal hearing as soon as possible.

Special cases

29. Where disciplinary action is being considered against an employee who is a trade union representative the normal disciplinary procedure should be followed. Depending on the circumstances, however, it is advisable to discuss the matter at an early stage with an official employed by the union, after obtaining the employee's agreement.

30. If an employee is charged with, or convicted of a criminal offence this is not normally in itself reason for disciplinary action. Consideration needs to be given to what effect the charge or conviction has on the employee's suitability to do the job and their relationship with their employer, work colleagues and customers.

Grievance

Keys to handling grievances in the workplace

Let the employer know the nature of the grievance

31. If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.

Hold a meeting with the employee to discuss the grievance

32. Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.

33. Employers, employees and their companions should make every effort to attend the meeting. Employees should be allowed to explain their grievance and how they think it should be resolved. Consideration should be given to adjourning the meeting for any investigation that may be necessary.

Allow the employee to be accompanied at the meeting

34. Workers have a statutory right to be accompanied by a companion at a grievance meeting which deals with a complaint about a duty owed by the employer to the worker. So this would apply where the complaint is, for example, that the employer is not honouring the worker's contract, or is in breach of legislation.

35. The chosen companion may be a fellow worker, a trade union representative or an official employed by a trade union. A trade union representative who is not an employed official must have been certified by their union as being competent to accompany a worker.

36. To exercise the right to be accompanied a worker must first make a reasonable request. What is reasonable will depend on the circumstances of each individual case, although workers are free to choose any fellow worker, trade union representative or official as set out in paragraph 35 as a companion. In making their choice, however, workers should bear in mind the practicalities of the arrangements. Thus, it may neither be sensible nor helpful to request accompaniment by a colleague from a geographically remote location when someone suitably qualified is available on site; nor to be accompanied by a colleague whose presence might prejudice the hearing or who might have a conflict of interest. A request to be accompanied does not have to be in writing or within a certain time frame but workers should consider how they make their request so that it is clearly understood and provides enough time for it to be considered by their employer.

37. The companion should be allowed to address the hearing to put and sum up the worker's case, respond on behalf of the worker to any views expressed at the meeting and confer with the worker during the hearing. The companion does not, however, have the right to answer questions on the worker's behalf, address the hearing if the worker does not wish it or prevent the employer from explaining their case.

Decide on appropriate action

38. Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken.

Allow the employee to take the grievance further if not resolved

39. Where an employee feels that their grievance has not been satisfactorily resolved they should appeal. They should let their employer know the grounds for their appeal without unreasonable delay and in writing.

40. Appeals should be heard without unreasonable delay and at a time and place which should be notified to the employee in advance.

41. The appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case.

42. Workers have a statutory right to be accompanied at any such appeal hearing.

43. The outcome of the appeal should be communicated to the employee in writing without unreasonable delay.

Overlapping grievance and disciplinary cases

44. Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.

Collective grievances

45. The provisions of this Code do not apply to grievances raised on behalf of two or more employees by a representative of a recognised trade union or other appropriate workplace representative. These grievances should be handled in accordance with the organisation's collective grievance process.

