

INFORMATION
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FDF Response to Draft ACAS Code of Practice on Discipline and Grievance

Draft ACAS statutory Code of Practice on discipline and grievance

Under the provisions of the Employment Bill, the key purpose of which is to implement the recommendations of the Gibbons Review of Employment Dispute Resolution, the three-step statutory procedures will be repealed. The Bill also contains a provision allowing tribunals to increase or decrease compensation awarded by tribunals by up to 25% in all of the main tribunal jurisdictions (i.e. not limited to unfair dismissal claims) where either party has unreasonably failed to comply with a statutory Code of Practice.

Attached to this paper is the FDF response to the publication by ACAS of the draft statutory Code of Practice on discipline and grievance which plays a central role in the new legal framework. Employment tribunals will have to take the Code into account when considering liability in relevant cases but the terms of the Code will also have considerable significance because of the discretion being given to tribunals to adjust compensation for non-compliance with them. Our response also contains comments on the proposed non-statutory ACAS guidance on handling discipline and grievances at work, designed to supplement the Code. The two documents can be accessed via the ACAS website:

‘Draft Code of Practice on discipline and grievance’,
<http://www.acas.org.uk/index.aspx?articleid=2060>

and

‘Discipline and grievances at work: draft ACAS Guide’
<http://www.acas.org.uk/index.aspx?articleid=2080>

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FDF Response to the ACAS Consultation document: ‘Draft ACAS Code of Practice – Disciplinary and Grievance Procedures’

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INTRODUCTION

The Food and Drink Federation is the principal representative organisation for companies in the UK food and drink manufacturing industry, which has some 470,000 employees. FDF’s response is based on consultation with member companies via the Employee Relations and Efficiency Committee (ERE). We understand our response will be made public.

We deal below separately with the draft statutory ‘Code of Practice on discipline and grievance’ and the draft non-statutory Guide: ‘Discipline and grievances at work’.

Our views in response to the latest consultation exercise are given below.

General Comments

FDF welcome the fact that the Code is relatively short and that it reflects the simplicity of the statutory 3-step procedures which it will replace. This means that those employers who presently follow them will not have to change significantly their practices or procedures.

We believe the opportunity should not be lost, when devising the Code, to encourage tribunals to concentrate more on the substance of what the employer did, rather than how. We believe this can best be achieved if the Code guides employers and employees and, by extension, tribunals on the core elements of natural justice.

With regard to drafting, we are concerned to ensure that there is as little ambiguity in the document as possible. Points of advice should be phrased as precisely as possible; the drafting is of critical importance because tribunals will be required to have regard to the Code in reaching decisions on liability and on whether there should be an uplift.

The Code focuses on discipline and grievance handling. We believe, therefore, that it is inappropriate to include in it advice on handling performance related issues. The code refers to disciplinary action being taken for both conduct and performance issues. This seems like a retrograde step; a few years ago best practice indicated that the more enlightened employers should have separate procedures for these issues. Many employers have moved towards this and will want to retain this approach. They believe it is far more pro-active and constructive to manage performance issues other than through the relatively blunt instrument that is a

disciplinary procedure. Having a separate procedure is not a softer option and can still lead to dismissal but it is more appropriate.

Right to be accompanied

It states that it is good practice to permit someone to be accompanied at an investigation meeting but offers no explanation as to why. The Code should refer to the statutory right to be accompanied but it should not go further and make the right to be accompanied one of the key elements of a formal process as in paragraph 6. There is already a free standing remedy available where an employer breaches the statutory right; there is a danger that tribunals may also adjust compensation by up to 25% if the right to be accompanied is breached.

Special circumstances

Given that the Code is intended to give basic advice only, the topics covered under ‘special circumstances’ should be dealt with entirely in the Guide given the complexities of each of the topics covered.

Foreword

It makes it clear that ETs can adjust awards where the code has not reasonably been followed. This clarity is welcome.

It also makes it clear that recourse to ETs is a last resort and that where an issue is not resolved employers and employees should consider using a third party. This third party reference is a change in emphasis and we wonder if Tribunals will be expecting employers to demonstrate that they have considered it and why they have not pursued it? We refer to paragraph 5 ‘Recourse to an employment tribunal should only be a last resort’. We do not accept that the 25% uplift should apply to the ‘last resort’ advice.

“Many potential disciplinary issues can be resolved informally”:

We do not accept that this advice should engage the power to adjust compensation. As drafted, tribunals may be persuaded by an argument that the particular employer should have tried to deal with the particular disciplinary issue informally, whether minor or not. Employers who decide to handle matters formally rather than informally should not be at risk of a 25% uplift.

Written rules and procedure

Regarding paragraph 3 of the Code, an employer who does not have a written rule or procedure for handling discipline or grievance, or has not agreed one with the relevant trade union or works council, should not be at risk of a 25% uplift if it nevertheless follows the basic principles of natural justice set out in the Code in an individual case.

The draft Code uses the phrase ‘be agreed wherever applicable with trade unions’. We do not accept that rules have to be “agreed” with employees as, ultimately, it is for the employer to determine what the rules governing its operation are.

Para 6: Elements of a fair process

- In the event that ‘poor performance’ remains in the Code, the requirement that an immediate manager be involved on performance problems is unnecessarily prescriptive and goes beyond what we believe should be the scope of the Code. Further, the advice should be more positively stated, for example “should normally be involved”.
- Regarding how employers should inform employees of the allegations against them, the Code should be more prescriptive. The words “Normally, this should be done in writing”, should be added here.
- Currently we are advised and encouraged that with reference to disciplinary cases, the person chairing the hearing should, where possible, be different to the person who conducted the investigation. In the new code, there seems to be a different approach:

"Any grievance or disciplinary meeting should, so far as possible, be conducted by a manager who was **not involved** in the matter giving rise to the dispute."

- It would be good to get clarity on this because as it stand it is not clear.
- Paragraph 9 should be rephrased to make clear that there are two separate phases: an investigation and then a disciplinary hearing, this important distinction is not explained clearly enough for a lay reader.
- Paragraph 20: the suggestion that an employer might move direct to a final written warning where the misconduct is serious or harmful applies to all organisations. We suggest the reference to small organisations is removed.
- Paragraph 23: Replace the phrase ‘summary dismissal’ (which is not explained) with ‘dismissal without notice or pay in lieu of notice’. See also Paragraph 85 of the Guide.
- We believe employees should be obliged to put their appeal in writing (see also paragraph 97 of the Guide).

Grievance

- Whilst there is a reference to trying to resolve matters informally in the Introduction, it would be useful to also have it in this section.
- It states that *"It is good practice to consider dealing separately with issues involving bullying, harassment or whistleblowing."* but offers no guidance on how.
- We consider that it should be one of the core principles of the grievance section that, where an employer has a grievance procedure, the employee should follow it.
- Paragraph 31: We suggest the advice to employees should be more forceful; rather than ‘This is best done in writing’, say ‘The employee should put the grievance in writing’.

- Paragraph 32: In our experience, most grievance procedures provide that where a grievance relates to the worker's line manager, it should be raised with the manager's manager, where possible, rather than with any other manager. (See also the sample procedures in the Guide).
- Paragraph 40: The wording in this paragraph differs from the equivalent paragraph relating to appeals in a disciplinary context. We consider that the wording should be the same.

Guidance

Some of the points made above about the Code have a knock on effect to the relevant sections of the Guide.

Relationship between the Code and the Guide:

We suggest the task of the Guide is to graft on to the core principles set out in the Code any other matters regarded as necessary to good practice for the handling of discipline and grievances. The fact that the Guide deals with absence generally and sickness absence in particular seems out of context. There will be instances of unauthorised absence which have a disciplinary context and it is right to refer in the Guide to such situations. However, generally speaking and particularly as ACAS already publishes guidance on these topics, we consider that including them is unnecessary and makes the Guide unwieldy.

The Guide would also be more user friendly if the opportunity were taken to cut out a lot of the repetition. We appreciate why there is repetition between the two main sections, i.e. on discipline and grievance, but not why there is so much within those two topics.