

DEALING WITH DISCIPLINES AND GRIEVANCES

1. Introduction

This bulletin updates EMP/080/2011 and will assist you in representing members in discipline and grievance hearings, especially where they have the potential to become employment tribunal cases.

In the vast majority of cases you will be able to settle the issues through internal procedures. However, in a small number you will not be able to obtain a satisfactory resolution. In those cases it may be necessary to initiate legal proceedings. This guide will help to ensure the strongest possible case can be made at an employment tribunal (ET).

Please remember – there is not always a legal route to solving workplace problems. Organising around issues should be the first stage, with legal redress being the last resort.

2. ACAS Code of Practice No 1: Disciplinary and grievance procedures

A revised code of practice (CoP) came into force in March 2015, and while it does not have statutory force, ETs are required to consider its principles when making decisions.

In addition, any award of compensation made by a tribunal can be adjusted by up to 25% for a failure to abide by the CoP. The adjustment can be a penalty on either side. So, where an employer disregards the principles, the award may be increased. Equally, where an employee or their representative disregards them the award can be reduced. As a consequence it is important you understand the principles contained within the CoP. ACAS has also produced a more detailed guide. Should you wish to read either document they are available from the ACAS website at www.acas.org.uk

Your company procedures should reflect the principles of the CoP. Where the procedure has been in place for a number of years it may be worth making sure it remains in compliance with the revised CoP.

3. Discipline

It follows from the emphasis that ETs will place on compliance with the CoP that representatives must conduct all members' cases in a reasonable manner. Strategies and tactics designed to delay completion of the disciplinary process should therefore be avoided, including issuing an

unjustifiable grievance as a delaying tactic.

This is not merely a matter of CoP compliance. It is in the interests of your member. Being involved in one internal procedure will inevitably be a stressful experience for them. Wilfully engaging them in a second procedure will just add to their stress levels while at the same time antagonising the employer - precisely the wrong attitude you want them to adopt during the disciplinary procedure that will inevitably follow.

In all cases accurate records should be kept. As a representative you should be provided with copies of all materials the employer intends to rely on when making their decision about the outcome of the case and of the penalty if one is to be imposed. If that penalty could be dismissal, then you need to be especially vigilant.

4. Legal tests in unfair dismissal - conduct

4(i) Investigation

When disciplinary charges are laid against an employee the employer must carry out a thorough investigation into the events that led to the issuing of charges.

There is no set formula for the investigation. However, it should be reasonable in all of the circumstances facing the employer. This means parties and witnesses should be interviewed and any relevant documents identified and examined.

The investigating officer should produce a report but play no decision making part in the rest of the disciplinary procedure. The investigation report should be provided

to the disciplinary hearing officer and copied to the employee.

4(ii) Hearing

In all situations the employee must be sent a letter inviting them to the disciplinary hearing. As a minimum the letter should set out the charges. It should give the time, date and venue of the hearing and if termination of employment is a potential outcome should include a warning that the hearing could lead to the employee's dismissal. The date for the hearing should allow the employee time to prepare their defence.

While it is best practice to advise the employee they have the right to be accompanied, a failure to do so would not make a dismissal unfair. However, if an employee requests a representative and the employer refuses to allow one that would be a serious breach of the CoP and an ET would take that into account in reaching their decision.

The hearing officer should not have had any previous involvement in the case and should allow the employee to answer the case against them. The decision to dismiss should be made on the basis of the investigation report and take into account the defence and any mitigation offered by the employee or their representative.

The decision to dismiss must only be taken by a manager with the authority to levy such a penalty and it should be within the band of reasonable responses for an employer considering this type of case.

A tribunal cannot, in such circumstances, decide that the dismissal is unfair, nor can it decide

that it would have made a different decision. It is bound by higher court decisions NOT to put itself in the place of the employer but can only apply the reasonable responses test.

The company's discipline procedure should provide an indication of when dismissal would be warranted. It should stipulate the types of offences the employer considers to be gross misconduct and provide the steps to be taken in relation to the issuing of warnings for a series of lesser offences.

4(iii) Appeal

The letter confirming the decision to dismiss should confirm the date of dismissal, detail any consequential arrangements and advise of the right to appeal the decision. It should provide a timescale for lodging the appeal and detail to whom the appeal should be sent.

The appeal hearing should be arranged without undue delay. The appeal officer should have taken no part in the preceding stages of the case and should normally be a more senior manager than the hearing officer.

The outcome of the appeal should be given in writing, again without delay.

5. Legal tests in unfair dismissal – capability

In a capability dismissal the stages described above should be mirrored. There would normally, however, be more than one hearing before any decision to dismiss is made.

For a capability dismissal to be fair an employee whose performance is identified as problematic must be given

an opportunity to improve. This may be through additional training, mentoring, coaching, closer management or more rigorous target setting and monitoring. It is for this reason that more than one capability (performance management) meeting may be necessary.

Where the capability issue is related to poor attendance or performance through sickness, then again there must be opportunities to improve.

A tribunal would expect to see evidence of medical assessment and advice and of adjustments considered and made if the employee is disabled under the Equality Act 2010 (EQA) before dismissal is considered. However, where there are no adjustments that can reasonably be made, or where, despite adjustments there has been no improvement in attendance or performance, then the dismissal may still be fair.

There is case law to say employers are not expected to be charities when faced with a disabled employee who, despite assistance, cannot perform their full contractual duties or tasks and where there is no prospect of them being able to do so in the reasonably foreseeable future.

Once the dismissal notice has been sent to the employee there must be an appeal with the same standards as detailed in 4(iii) above.

6. Grievances

In principle, grievances should always be resolved at the lowest possible level. So, the first recourse will normally be an attempt at an informal resolution – face to face, explain the problem and ask for the behaviour to stop.

If access to the formal procedure is necessary, then the grievance should be submitted promptly, in writing and with sufficient detail to allow the employer to understand the problem. It must be a problem that the employer has the power to resolve.

A meeting should be arranged without undue delay and every effort should be made by the employee and their representative to attend. Following the meeting the employer should set out in writing what action they intend to take to resolve the grievance and advise of the right to appeal that decision.

If the employee is not satisfied and submits an appeal the hearing should be arranged without delay and again every effort should be made to attend it. The outcome of the appeal should be communicated in writing and within a reasonable time frame.

7 Overlapping grievance and disciplinary cases

Where a grievance is raised during the conduct of a disciplinary process the employer may suspend the disciplinary procedure, but equally it can opt to deal with both procedures concurrently if there is a link between the two issues. Using a grievance as a delaying tactic is therefore unlikely to be effective but will certainly add stress to the process.

8 Discrimination claims

Various categories of workers are protected against discrimination or have the right to request specific advantageous treatment based on their status.

Just as is the case for unfair dismissal, success at an ET in a discrimination case can only be achieved when the

legal tests are met. The employer must have been given the opportunity to correct the situation. This means if you feel a case in which you are involved includes any aspect of discrimination you **MUST** ensure relevant questions are raised during the conduct of the internal proceedings – and they are put at the earliest possible opportunity.

It will never be possible to win a discrimination claim at tribunal if the employer has not been given the opportunity to address the complaint. If the discrimination claim is only raised with the employer at a late stage in the internal proceedings, then it may undermine the case at tribunal.

Much of the terminology used within the field of discrimination is also used more generally in everyday language. Because of this it can give rise to unreasonable expectations of what is required to win a discrimination case at tribunal.

Therefore, particular notice should be taken of the explanations detailed in sections 8(v) of the terms: discrimination, indirect discrimination, harassment and victimisation.

8(i) Protected characteristics

Employees must not be treated less favourably on the grounds of any of the following:

- age
- disability
- gender reassignment
- marriage and civil partnership
- maternity and pregnancy
- race
- religion and belief

- sex
- sexual orientation.

8(ii) Other protections

There are also protections in place for part-time and agency workers.

If you are dealing with less favourable treatment for a member in one of these categories you should seek the assistance of your regional organising team as soon as the refusal is communicated to the member.

8(iii) Burden of proof

There are a number of difficulties facing a claimant in any type of discrimination case. The first is that the burden of proving discrimination has taken place rests initially with the claimant. To do so the claimant must have sufficient evidence from which an ET can draw an inference that discrimination has taken place.

Only once the claimant has discharged that burden will the tribunal look to the employer for a non-discriminatory explanation for the treatment.

It follows that it is not sufficient in a discrimination case for the employee to assert they are a member of one of the protected groups and do not like the treatment meted out to them.

They need to demonstrate a causal link between their status and the employer's actions and to identify the nature of the disadvantage resulting from them.

8(iv) Comparators

One of the ways to demonstrate a causal link is to identify a real or hypothetical comparator. A real comparator is a fellow worker who is

not part of the same protected category but who is otherwise in the same or very similar circumstances and has been treated more favourably. If no real comparator is available then the claim can be based on a hypothetical comparator - except in part time working cases where the legislative wording is more specific than in the other discrimination statutes.

There is no reason to identify a comparator in a pregnancy related discrimination case. It is automatic sex discrimination to treat a pregnant woman less favourably than another worker.

8(v) Types of claim

There are four types of discrimination claims that can be brought: direct discrimination, indirect discrimination, harassment and victimisation.

8(v)(a) Direct discrimination

This occurs where a detriment is applied to an employee purely because of their protected characteristic. For example, someone is refused promotion because of their gender, race or other characteristic.

8(v)(b) Indirect discrimination

This occurs where the employer introduces a provision, criterion or practice (PCP) that applies equally to all employees, but has a differential and disadvantageous impact on a specific category of worker. The employee must be a part of the disadvantaged group and must have suffered the disadvantage. For example, when introducing a new shift pattern a company requires all employees to work a three shift system. However, working that shift

system will be more difficult for an employee with caring responsibilities, and most of them are women.

8(v)(c) Harassment

This occurs where a worker with a protected characteristic is subjected to treatment that has the intention or effect of undermining their dignity at work. It can be a one off event, or a series of events.

Other than for trade union harassment the motive of the harasser is irrelevant.

In the specific case of trade union harassment, the test is more restrictive. Here, the only test is the intent of the employer and a claimant would have to show that the employer meant for their actions to undermine the union or to stop the individual being a union member or active within it.

8(v)(d) Victimisation

This occurs where an employer treats a worker less favourably because they have attempted to exercise a statutory right associated with EQA and related ET proceedings. For example, they have submitted a discrimination claim or have agreed to act as a witness for a colleague who has submitted a discrimination claim or they have had an equal pay conversation with a colleague or union representative. There is no analogous claim where the original complaint to the tribunal does not include a type of discrimination or Whistleblowing

9 Accessing legal advice

If you believe at any time during or after the completion of the internal procedures that there is a potential ET claim you will need to advise your

regional organising team of the reasons for your belief. You should support your belief by pointing to the legal tests identified above and be prepared to explain how the company has failed to comply with them.

In discrimination cases you will need to demonstrate the discrimination claim has been raised with the employer and explain why you believe they have failed to remedy the situation.

The organiser will then seek an initial judgement from the employment rights adviser about whether there is a good chance of success at an ET. Once the employment rights adviser has agreed there is a good case the union's lawyers will be provided with the details of the case and asked to conduct further investigation and, if necessary, submit a claim to tribunal.

At no time should a member be told they have a good case or that the union will positively provide them with legal representation unless their case has been reviewed and evaluated by an authorised member of TSSA's paid staff.

If, following consideration by the employment rights adviser the decision is made not to forward the case to our lawyers a detailed letter explaining that decision will be sent to the member. The letter will include a reminder of the relevant time limit associated with the case and details of how to make an appeal against the decision not to provide legal support.

10 Early conciliation

Before a claim can be submitted to an ET an early conciliation (EC) form must be completed and sent to ACAS. A conciliator will then be appointed

and will attempt to broker a settlement of the claim.

If settlement is not possible then the claimant – or their representative – will be issued with a reference number and only then can an ET1 be completed. The reference number **MUST** be included in the ET1. The time limit for making a claim will be dislodged by the time taken for conciliation.

10(i) Dismissals

While there are five potentially fair reasons for dismissal they are all covered by the same time limit of three calendar months. The clock begins to tick with the effective date of dismissal. Within three calendar months, less one day of that date - and no other date - the ACAS EC form must be submitted, and then the claim form be submitted in line with the extension of time caused by the EC process. Therefore, where an appeal procedure is taking place you need to remember that it is the date of termination – and not the date of any final decision following the appeal that is the relevant date for the ticking clock.

See below for the special exemptions of dismissals that require a claim for interim relief.

For dismissal cases the tribunal has no discretion to allow a late claim to be heard.

10(ii) Discrimination

For all of the discrimination heads of claim the time limit is again three months, with any extension of time due to the EC process. The clock begins to tick on the date that the discriminatory act took place. If there is a series of discriminatory acts then the clock begins again at the date of the last act.

Unlike in dismissal cases the tribunal does have the right to exercise some discretion where a claim is lodged late. However, that right is circumscribed and should never be relied on. The discretion can only be applied when it is just and equitable for the tribunal to do so.

Two considerations will weigh on the tribunal in making the decision. The first will be the explanation from the claimant as to why it was not possible to lodge the claim within the statutory time limit. A reason will need to be substantial – non-awareness of the time limit or forgetfulness will not be sufficient. Hospitalisation for a considerable portion of the three months has, in the past, been held to be a good reason, and indeed, sets the standard in terms of order of magnitude.

The reason for this is that the “just and equitable” test requires the tribunal to be fair to both parties. Therefore they must weigh the advantage to the claimant of allowing the claim against the disadvantage to the employer of doing so. Once the time limit has passed the employer has the right to consider that they will not have to account for their actions at tribunal and that right will not be lightly set aside.

10(iii) Equal pay

There is a longer time limit of six months for equal pay claims.

The clock begins to tick in one of three circumstances – when the employment ends, when the underpaid employee ceases to do the work she claims is not being paid equally, for instance if she is promoted or changes her work role, or after a TUPE transfer.

10(iv) Redundancy payment

Where an employee is made redundant but the company fails to make a statutory redundancy payment there is a six months time limit running from the effective date of termination. Statutory redundancy payments are only payable to employees with a minimum of two years continuous service. Where a company ceases to trade a claim can be made to the Secretary of State.

10(v) Interim relief

This is an exceptional remedy confined to dismissal on certain limited specified grounds – whistleblowing, for requesting a representative at a discipline or grievance hearing or for fulfilling any union representative role.

At seven days the time limit is dramatically shorter than for any other claim. If the order is made the effect is to convert the dismissal into a suspension on full pay until the full tribunal hearing is held.

11 Time limits

All claims to an ET tribunal must be made within specific time limits, although different claims are governed by different rules.

All tribunal claims must be made using the claim form (ET1) that can be found on the website at www.employmenttribunals.gov.uk and be sent in by electronic submission. It is important to appreciate that the day ends at 23.59. A form submitted at midnight will be assigned the next day's date as its submission date.

12 Appeal to the EC

Where legal support for a member is declined they have the right to appeal to the executive committee (EC). The process requires that the member attend a branch meeting where the issues and the decision are discussed. If the branch then agrees to support the appeal the branch secretary should write to the general secretary outlining the grounds for the appeal. The general secretary will then arrange for the issues to be dealt with at the next EC meeting.

However, the time limit clock for an employment tribunal claim will be running and therefore the member should be advised to secure their rights to a tribunal hearing by submitting a claim on their own behalf.

Further Information

More information on this and other equality matters is available from:

- ❑ Val Stansfield, Employment Rights Adviser at stansfieldv@tssa.org.uk or 020 7529 8046
- ❑ the TSSA Helpdesk – 0800 328 2673

The information given here is for general guidance only and should not be regarded as a complete or authoritative statement of the law.