

ACTIVITY 30: Knowing your grievance policy

Handling disciplinary cases – seven steps approach

Taking a careful step-by-step approach to any complex workplace issue is always recommended, even more so if you are representing individual union members on discipline or grievance problems.

Depending on the seriousness some effort is usually required in representation cases. Union reps combine knowledge, ability and tenacity in equal measure with the aim of explaining someone's complaint or problem as effectively as they can.

Reps should avoid 'going it alone' on these matters although discretion is important and people's wishes have to be respected. If possible sharing difficulties within the union team can help improve decision-making. It should also never be forgotten that the opportunity to speak up on behalf of someone stems from the union organisation behind you.

In supporting someone through a case the union rep is involved in interviewing, investigating, checking facts, reassessing, explaining, advising, empathising, following procedures, anticipating management arguments and advocacy. How does this happen? Here is a step-by-step walk through of the disciplinary process. This takes into account the worker's legal 'right to be accompanied'.

Seven Step Approach

1. A trade union member raises a disciplinary problem (or grievance) with their union rep.
2. The union rep interviews the member to discover key information such as who, what, where, when and why.
3. Through the member the union rep makes him or herself known to management as the 'accompanying person'.
4. The union rep tries to find out about management's attitude towards the case. Checks facts and if possible finds out the "worst-case scenario".
5. The union rep consults with fellow reps. On behalf of the member the strongest case possible is built and tested in discussion.
6. The union member is interviewed again. The facts are checked and the representation strategy agreed. The union rep prepares a written checklist for the hearing.
7. The formal meeting with management. Through questioning and a summarising statement the union the rep is able to speak up for the member. Careful notes need to be taken for future reference, perhaps an appeal.

Why have disciplinary procedures?

They are there to:

- Help and encourage employees to improve rather than just as a way of imposing punishment
- Inform the employees of the complaint against them, and provide an opportunity for them to state their case before decisions are reached.
- Allow employees to be accompanied before disciplinary hearings
- Allow employers to establish the facts and take action that is reasonable in the circumstances.
- Ensure that dismissal does not take place for a first offence unless gross misconduct has been established.
- Provide a written explanation of any disciplinary action and make sure employees know what improvement is expected.
- Give the employee an opportunity to appeal
- Deal with issues as thoroughly and promptly as possible
- Encourage consistency of action

From: ACAS Code of Practice No. 1 Disciplinary and Grievance procedures

Through the use of procedures:

- Fairness and consistency in the treatment of individuals is possible.
- Orderly employment relations can be established.

Disciplinary procedures can be used to deal with two key problems. They are both potentially fair reasons for dismissal.

Misconduct

Here the employer believes the employee's behaviour falls below acceptable standards. Poor timekeeping for example.

Capability

Refers to an employee's performance and their ability to do their job to the required standard It could cover inability to perform functions and tasks as a result of sickness and disability. The issue of capability ought generally be treated more sympathetically by management than misconduct especially if it involves genuine illness.

The Requirement for Procedures

The Employment Act (Disputes Resolution) Regulations 2004 obliges all employers to have disciplinary, dismissal and grievance procedures which form part of the contract of employment and are either given to employees or readily available to them. Procedures must at least comply with the ACAS statutory minimum procedure.

Handling grievances and disciplinary cases – some preliminaries

When a member or members come to you as their rep you may need to consider the following points before agreeing to represent them:

- Is the case viable? Seek advice and discuss possible outcomes with the member
- Explore options with the member and find out what outcomes they are seeking
- Think about whether the member needs representation at a higher level within Unite than you can provide. Refer to senior rep or branch officer.
- Examine whether a case is an individual or collective one and discuss what role the member can play in planning and preparing the case.
- Consider whether the branch equality officer or other representative of a self organised group should be involved.
- Think about whether you are too close to the problem or are faced with a conflict of interest in the case. If so, refer to another rep or branch officer.
- What happens if a member is unhappy about you representing them?
- Can or should you refuse to represent them? Again, seek advice from your branch if you are unsure
- If it is a collective issue plan how you will involve members right from the start

Types of problems:

- Disciplinary cases – management take action or plan to take action against a member for their conduct at work. There should be an agreed procedure for management to follow. Make notes and keep in a safe place.
- Individual grievances – a member has a complaint about some aspect of work practice, conditions or working arrangements or about how they are being treated by a supervisor or colleagues. An agreed procedure allows the complaint to be raised and investigated fully. Individual problems might raise collective negotiating issues.
- Collective problems or grievances – sometimes these can be dealt with in the first instance by informal meetings with management. If not procedures will apply.

Problems members face in the workplace might be the result of circumstances beyond the workplace. You might want to help through referral to the employer's support services e.g. Occupational health or Unite's Welfare service. Some of these problems might raise collective negotiating issues relating, for instance, to work-life balance.

- Health and safety problems – these can be dealt with through local discussion and negotiation. Reps who are also safety reps will be aware of legislative provision and the trade union approach to health and safety.
- Professional issues – some issues get referred to as “professional” which seems to suggest that they are not of legitimate trade union concern. Examples are service quality, training and qualifications. Unite's view, however, is that they should be subject to joint consultation and negotiation.

- Grading – in some sectors there is an agreed procedure for giving grades to posts and mechanisms for mounting appeals.
- Harassment – there should be an agreed procedure for dealing with harassment complaints.
- Capability/ill-health – reps should be aware of the sickness procedure and ensure it is fair and is applied in a fair way.
- Individual or collective – many problems are experienced as personal problems. These may be indicative of wider problems which individual members are reluctant to bring to the rep’s attention. One of the most important parts of the rep’s job is to look for patterns in the existence of problems experienced “under the radar” which, when collated, can be dealt with through collective action.

Health, safety and welfare problems

Trade union health and safety representatives need to be aware that health, safety and welfare problems cover a wide range of problems at work.

Some are obvious:

- Unguarded machines.
- Bad lighting.
- Obstructions.
- Fire risks.
- Poor welfare facilities.

Others are hidden, like the long-term damage to health from:

- Noise.
- Stress.
- Dusts, substances, bacteria.
- Passive smoking.
- Repetitive working.
- Shift work.
- Vibration.

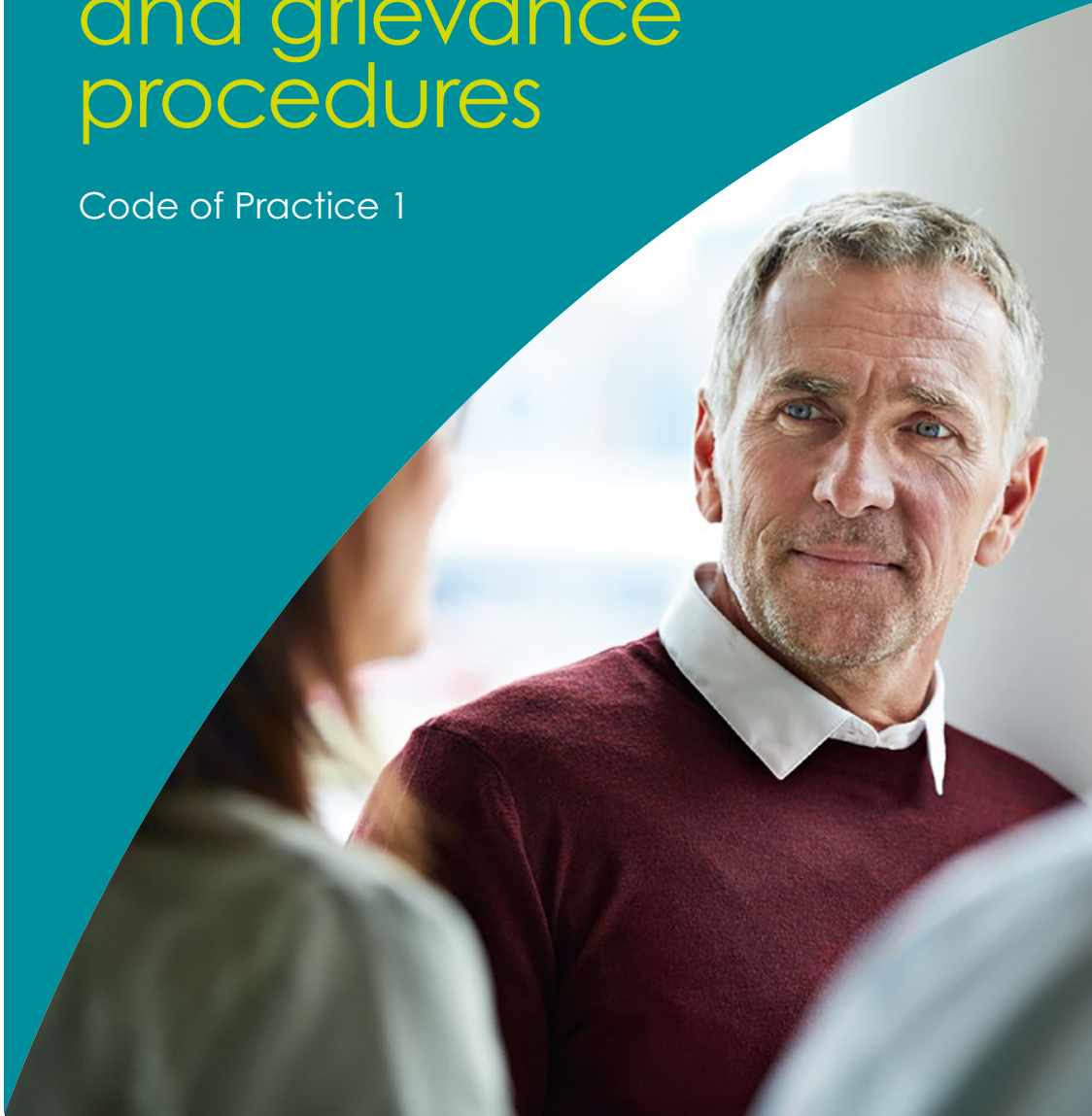
Some may not have been traditionally thought of as health and safety issues:

- The way work is organised.
- Sexual and racial harassment.
- Bullying.
- Staffing levels.
- Lone working.
- The concentration of women workers in particular jobs and facing particular hazards.

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for everyone

Code of practice on disciplinary and grievance procedures

Code of Practice 1



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Note to reader

When dealing with requests to postpone a disciplinary hearing to accommodate the attendance of a worker's companion, readers of the Code will wish to be aware of the Employment Appeal Tribunal judgement in the case of Talon Engineering Ltd v Smith. Guidance on this issue is contained in the Discipline and Grievances at Work Guide which can be found on the Acas website.

Foreword

The Acas statutory Code of Practice on discipline and grievance is set out at paragraphs 1 to 47 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 large-scale 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 16 January 2015. It comes into effect by order of the Secretary of State on 11 March 2015 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 Code of Practice

Introduction

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 grievance 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 downloaded from the Acas website at www.acas.org.uk/ discipline.

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.

- 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.

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

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.

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 statutory right is to be accompanied by 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. Employers must agree to a worker's request to be accompanied by any companion from one of these categories. Workers may also alter their choice of companion if they wish. As a matter of good practice, in making their choice workers should bear in mind the practicalities of the arrangements. For instance, a worker may choose to be accompanied by a companion who is suitable, willing and available on site rather than someone from a geographically remote location.

- 15 To exercise the statutory right to be accompanied workers must make a reasonable request. What is reasonable will depend on the circumstances of each individual case. A request to be accompanied does not have to be in writing or within a certain timeframe. However, a worker should provide enough time for the employer to deal with the companion's attendance at the meeting. Workers should also consider how they make their request so that it is clearly understood, for instance by letting the employer know in advance the name of the companion where possible and whether they are a fellow worker or trade union official or representative.

- 16 If a worker's chosen companion will not be available at the time proposed for the hearing by the employer, the employer must postpone the hearing to a time proposed by the worker provided that the alternative time is both reasonable and not more than five working days after the date originally proposed.

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

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

19 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.

20 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.

21 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.

22 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.

23 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.

24 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.

25 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

26 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.

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

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

the appeal hearing as soon as possible.

Special cases

- 30 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.
- 31 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

- 32 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

- 33 Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.
- 34 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

- 35 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