

Guidance on Dealing with Disciplinary Issues

It is rare in any organisation that all employees operate to the required standard of performance, or always conduct themselves in an appropriate manner. For this reason, it is important for organisations to have policies and procedures setting out the standards expected and the process for dealing with shortfalls in performance and conduct.

The Importance of a Procedure

Having a disciplinary procedure enables an organisation to set out the behaviour expected of its employees and provides a process to ensure consistency and fairness in approach. The aim of the procedure should not be punishment, but improvement of an employee's behaviour or conduct. Sometimes this can be achieved by an informal discussion or counselling. A more formal process may have to be applied if the informal process does not bring about improvement, or the nature of the employee's misconduct means that informal action is inappropriate.

The ACAS Code provides guidance to both employers and employees and sets out key principles that should apply when handling a disciplinary or grievance matter. Although the ACAS Code applies to both conduct and performance issues and,



whilst the principles of the Code should be applied for both, we would advise that organisations have two separate procedures, one for dealing with conduct issues and one for dealing with performance issues. This is because performance issues do not always involve deliberate misconduct or inaction by the employee, but may represent an inability to achieve the expected standard. Accordingly, it is good practice to adopt a more supportive approach in performance/capability cases.

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The ACAS Code of Practice

Where an employee has been dismissed for a conduct issue and the matter proceeds to an employment tribunal, the tribunal will have regard to whether there is a potentially fair reason for dismissal and whether the organisation has followed a fair procedure. In deciding whether a fair procedure has been followed, the employment tribunal will look to see whether the organisation has followed its own procedure, but is also obliged to consider whether the relevant provisions of the ACAS Code of Practice have been adhered to.

If an employer has failed to follow the ACAS Code, any award may be increased by up to 25 percent. Similarly, if an employee has failed to follow the ACAS Code then any award may be reduced by 25 percent.

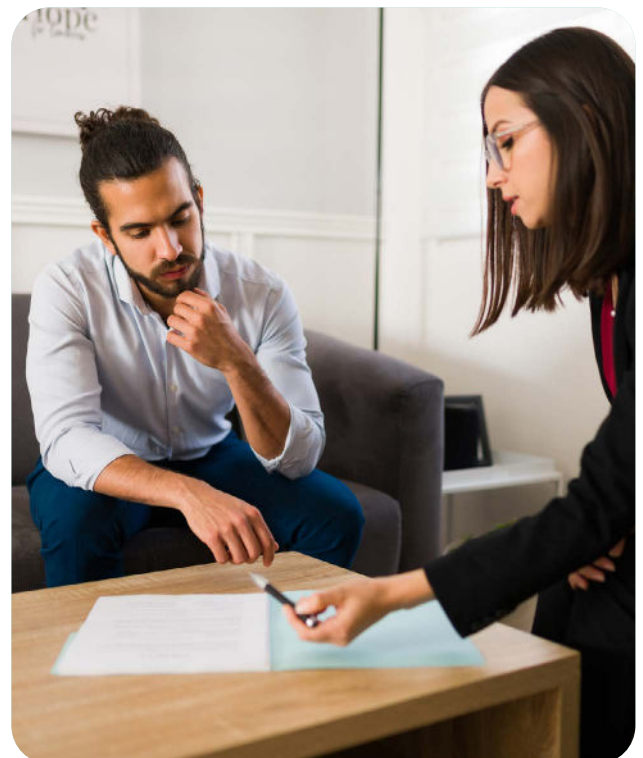
Disciplinary Rules

The ACAS Code provides that an organisation should set its rules and procedures down in writing and that they should be clear. Any organisation looking to discipline an employee for a conduct issue must be able to show that the employee knows the standard of conduct expected. For this reason it is important that an organisation sets its rules out in writing.

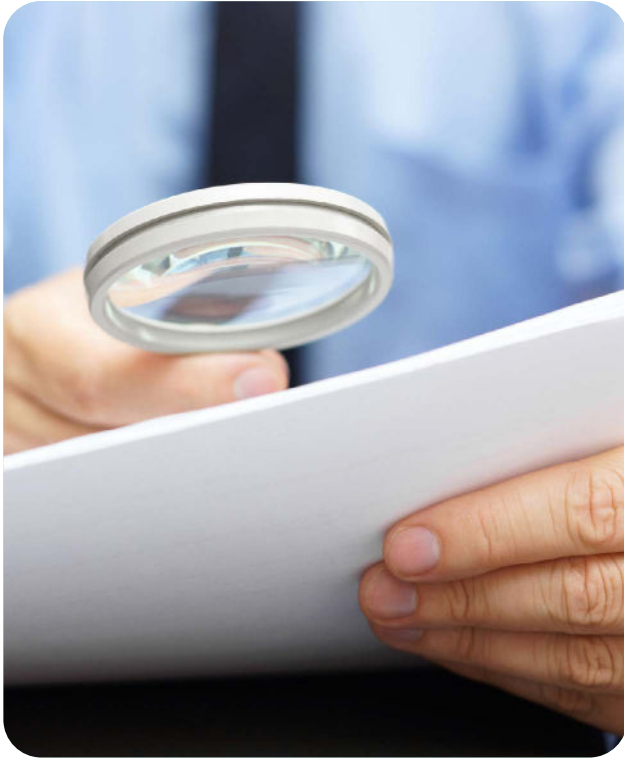
It is for each organisation to decide upon its own disciplinary rules but, typically, an organisation will have rules covering health and safety, time-keeping, use of organisational facilities, discrimination, bullying and harassment, absence reporting and other acts or omissions which could constitute gross misconduct. The [ACAS Guide](#) which accompanies the Code advises that rules are more likely to be effective if those covered by them, and those who are operating them, accept them as reasonable.

There should be one set of disciplinary rules applying to all employees within the organisation, regardless of position, unless there is a compelling reason why different rules should apply. Many organisations start new employees on a probationary period. It may be that the disciplinary procedure makes separate provision for employees in the probationary period allowing the employer to use a compressed approach to disciplinary issues.

On the basis that most probationary periods are for three or six months, an employee dismissed during the probationary period would have insufficient service to claim unfair dismissal (providing that the employee does not claim that he was dismissed for an 'automatically unfair' reason or for a reason relating to political opinion or affiliation). However, it is sensible to apply a fair procedure in any event, as employees with less than the requisite service to claim unfair dismissal are still able to bring other claims, such as claims for discrimination.



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There is no requirement for disciplinary rules and procedures to actually form part of the employee's contract. In fact, it is easier for an organisation if disciplinary rules are not contractual, as this enables the organisation to change and update the rules from time to time without obtaining the employees' agreement to the change. Any changes or amendments should nonetheless be communicated to the workforce.

Further, keeping disciplinary rules and procedures non-contractual prevents an employee from claiming, in addition to any unfair dismissal claim, that the dismissal was in breach of contract (wrongful dismissal) because the disciplinary process had not been followed correctly.

Communicating the Rules

All employees are entitled to a written statement of employment particulars, which for employees starting on or after **06 April 2020** should be given on or before the first

day of employment. This provision does not require employees to be provided with a copy of the disciplinary rules, but they should be given a written note about disciplinary rules and procedures and how to obtain them.

Even better would be to provide all employees with a copy of the disciplinary rules when they start employment, and during the employment provide written notification of any changes, ideally obtaining a signed receipt from the employee. This would help an organisation demonstrate that an employee was notified of the rules.

The ACAS Guide provides that special attention should be paid to communicating the rules to employees whose reading ability or ability to read English is limited, who have a disability which may impact on their ability to read or understand the rules and to those without recent experience of the work environment.

Applying the Disciplinary Process

The ACAS Code provides that there are key elements to a fair disciplinary process. They are as follows:

1. Establish the facts of each case

No disciplinary action should be taken until a proper investigation has been carried out. The level of investigation will vary depending on the circumstances of the case. However, any investigation should be carried out promptly and without unreasonable delay.

It may be necessary to suspend an employee whilst an investigation is carried out. An organisation should avoid suspending an employee as a 'knee-jerk' response but should consider whether suspension is appropriate and necessary given the circumstances (for example, where their

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presence at work may inflame a situation or where they could interfere with the investigation). Any suspension should be on full pay and it should be made clear that suspension is not, in itself, a disciplinary action. The suspension period should not be unreasonably long, and if it becomes necessary to extend the suspension period, then the employee must be kept informed.

For misconduct cases, the ACAS Code states that 'where practicable, different people should carry out the investigation and the disciplinary hearing'. The investigation may involve gathering evidence and/or taking statements from witnesses, as well as an investigation meeting with the employee. Although it is not strictly necessary to give an employee advance notice of an investigative meeting, unless the organisation's procedure provides for this, giving notice is best practice.

There is no statutory right to be accompanied at an investigative meeting. However, an organisation's own procedure or custom and practice may provide that employees are permitted to be accompanied during an investigation. In any event, consideration should be given to whether it may be appropriate in some circumstances to allow an employee to be accompanied at this stage, e.g. because of the employee's disability; any difficulties understanding English, if the employee is under 18 years old or if the matter could potentially result in dismissal.

No disciplinary action should be taken at the investigative stage, prior to any disciplinary hearing being conducted. Once the investigation is complete, it is then for the organisation to decide whether or not the matter should proceed to a disciplinary hearing.



2. Inform the employee of the problem

If it is decided that there is a case to answer, the employee should be notified in writing. The notification should advise the employee of the alleged misconduct using express terminology. No action can be taken for misconduct that has not been clearly put to the employee prior to the disciplinary meeting. The notification should provide the employee with sufficient information to understand the case against them and the possible disciplinary outcome so that the employee can prepare a response. The notification should include copies of any written evidence and it is prudent to list in the notification all documents enclosed.

The employee should be given written notice of the time and venue for the disciplinary hearing, sufficiently in advance of the hearing to allow the employee to prepare. Some disciplinary procedures provide minimum periods of notice of a disciplinary hearing. The notice required must be reasonable, but this will vary depending on not only the seriousness of the matter but the amount of documentation that the employee has to consider ahead of the disciplinary hearing.

In the written notification the employee should be advised of the right to be accompanied.

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3. Hold a meeting with the employee to discuss the problem

A disciplinary hearing should take place with the employee without delay, provided that the employee has had sufficient time to prepare. Consideration should be given to whether or not any reasonable adjustments may be required if the employee is disabled.

The ACAS Code states that both 'employers and employees (and their companions) should make every effort to attend the meeting'. If an employee is unable to attend due to illness or circumstances beyond their control, the employer should rearrange the meeting. The ACAS Code does provide that if an employee continues to be unavailable for a disciplinary hearing, the organisation may make a decision in the employee's absence. However, any compelling reasons for continued unavailability should be considered, and allowances should be made in certain circumstances. The employee should be informed that a decision may be made in their absence and consideration needs to be given to all the available evidence.

Where practical, the person conducting the disciplinary hearing should not have been involved in the investigation process and a member of staff or HR should be present to take notes of the hearing.

At the hearing the complaint against the employee should be explained and the evidence presented. The employee should be given the opportunity to state their case and respond to the allegations. The ACAS Code states that the employee should 'be given a reasonable opportunity to ask questions, present evidence and call witnesses'. If either the organisation or the employee wishes to call witnesses, they should give the other party advance notice.

It may be necessary to adjourn the hearing, either to investigate points further or because the employee becomes upset or angry. The hearing should always be adjourned before any decision is made to allow for a review of the meeting and documentation. It is also advisable to check the employee's disciplinary record and to ensure, with the guidance of HR, that action being taken is consistent with previous instances of a similar nature.

4. Allow the employee to be accompanied at the meeting

An employee has a right to be accompanied by a companion if the hearing could result in a formal warning being issued, the taking of some other disciplinary action (e.g. suspension without pay or demotion) or could result in the confirmation of a warning or some other disciplinary action (i.e. appeal hearings). The employee may be accompanied by a companion of their choosing who is either a fellow worker, trade union representative or an official employed by the trade union. Where the trade union representative is neither an employee of the

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organisation nor an employed official of the trade union, they must have been certified by the union as being competent to accompany a worker and can be required to produce these credentials prior to the hearing.

The companion may confer with the worker and if the employee wishes, may put the employee's case, sum up the case and respond on the employee's behalf to any view expressed at the hearing. The companion is not allowed to answer questions on behalf of the employee.

If the chosen companion is unable to attend the hearing on the proposed hearing date, the employee can suggest an alternative time and date, but it must be reasonable and no more than five working days after the day originally proposed.

5. Decide on appropriate action

An adjournment should always take place to consider whether the case has been made out and whether disciplinary action is appropriate. The length of the adjournment will vary depending on the circumstances and matters to be considered.

The ACAS Code states that 'where misconduct is confirmed, or the employee is found to be performing unsatisfactorily, it is usual to give the employee a written warning'. It provides that if there is a further act of misconduct within the timescale set, then this would normally result in a final written warning.

If the nature of the misconduct is sufficiently serious, and the procedure allows for it, an organisation may apply a final written warning as the first disciplinary sanction. Any warnings given should set out the nature of the conduct, what change is required and set out how long the warning will remain 'live'. The employee should be advised of the consequences of any further misconduct.

All decisions should be taken at the appropriate level of seniority (often specified in the organisation's disciplinary procedure). If the decision is made to dismiss the employee for misconduct, the employee should be advised as soon as possible of the reasons for the dismissal, the date on which their employment ends, what the notice period is, and whether the employee is to work their notice or be paid in lieu. As with all disciplinary action, the employee should be informed of the right of appeal.

Where the conduct is serious, for example an act of gross misconduct, the decision made may be to dismiss the employee without notice and without pay in lieu of notice for a first offence. It is important to note that, just because an act of gross misconduct is believed to have been committed, dismissal is not an 'automatic' sanction. It is still necessary to consider and explain the reasons why dismissal is an appropriate sanction.

Before deciding on a disciplinary penalty, all circumstances should be considered, including but not limited to the following:

- ⦿ Whether the rules advise what the likely penalty would be for the conduct in question
- ⦿ What penalties have been applied in similar cases in the past
- ⦿ The employee's disciplinary record
- ⦿ The circumstances of the case and whether they make it appropriate to apply a lesser sanction than would normally apply
- ⦿ Whether the sanction is reasonable in all the circumstances

The ACAS Guide provides that any relevant circumstances should be taken into account and gives the following as examples; 'health or domestic problems, provocation, justifiable

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ignorance of the rule or standard involved or inconsistent treatment in the past’.

If the matter is one that would normally warrant dismissal, an organisation may wish to consider alternatives to dismissal such as suspension without pay, demotion or loss of seniority or disciplinary transfer provided that the organisation is able to impose such a penalty under the disciplinary rules and/or contract of employment. Alternatively, the employee may be prepared to agree to the sanction as an alternative to dismissal.

Particularly where the decision made is to dismiss, whether with notice or summarily on grounds of gross misconduct, it is strongly advisable to meet the employee to communicate the decision, the reasons for the dismissal, when the dismissal takes effect and how to exercise their right of appeal. This should then be confirmed in writing. Where dismissal is only communicated by letter, the date of dismissal may be delayed if the employee has not read, or had a reasonable chance to read, the letter.

6. Provide employees with an opportunity to appeal

The right of appeal should apply after any disciplinary sanction has been applied. The ACAS Guide suggests that an organisation may wish to set a time limit for employees to lodge an appeal and suggests five working days. If an employee lodges an appeal outside of the timescale set out in your procedure, you should avoid automatically disallowing the appeal, but consider whether it is appropriate to consider the appeal outside the time period.

Normally, once a dismissal has taken place and has been communicated to the employee, this will have the effect of ending the contract of employment. Some contracts



do provide that if an employee appeals a dismissal decision, the employment will be treated as continuing until the outcome of the appeal hearing. However, this is unusual.

Where an employee appeals, an appeal hearing should take place without unreasonable delay. The ACAS Code states that the time and place should ideally be agreed. The appeal should be dealt with impartially by ensuring, wherever possible, that the person conducting the appeal has not been previously involved in any stage of the disciplinary process. The right to be accompanied (see above) applies to the appeal hearing also.

The appeal hearing could either review the original decision (taking into account the particular grounds of appeal put forward by the employee) or take the form of a complete rehearing. A complete rehearing can be helpful if the previous process is clearly flawed, as the rehearing may serve as an opportunity to rectify earlier mistakes. If new matters arise during the hearing, it may be appropriate to adjourn the hearing for further investigation. In any event, the appeal should always be adjourned prior to any decision being made.

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Whether or not the appeal outcome is fed back to the employee in person, it should also be confirmed to the employee in writing. The outcome might be to overturn the original decision or to apply a lesser sanction, but not to apply a greater penalty. If further, more serious matters come to light, a new disciplinary hearing should be convened.

Special Cases

The ACAS Code provides that there are some circumstances requiring special consideration, for example, when dealing with a trade union representative under the disciplinary procedure. In those circumstances, whilst the normal disciplinary procedure will apply, the ACAS Code advises that, with the employee's agreement, you should discuss the matter with an official employed by the union. Care needs to be taken that applying the disciplinary process is not seen as an attack on the union, and to ensure that action is not taken against an employee for carrying out their union activities, which is unlawful.

Another special case provided for in the ACAS Code is where an employee is charged with, or convicted of, a criminal offence. This must not automatically be treated as reason for disciplinary action but instead consideration should be given to whether the nature of the charge or offence has an effect on either the employee's suitability to carry out their role, or on their relationships with their employer, colleagues or customers (See guidance below on criminal conduct by employees and potential employees).

If the matter warrants disciplinary action, an organisation does not need to await the outcome of a prosecution before progressing the matter themselves. However it is prudent to consider what impact the investigation will have on any criminal proceedings.

There may be circumstances where the nature of a criminal offence does not affect the employee's suitability to continue working but the employee is unable to attend work either because they are in custody, on remand or the nature of the bail conditions prevents them from carrying out their role. In these circumstances an organisation may have to decide whether or not they are able to keep the job open bearing in mind the needs of the business, how long the employee is likely to be away from work and how the role can be covered.

Care needs to be taken where an employee's disability may be a factor in relation to their misconduct. If disciplinary action is taken but cannot be justified, the employee may have a claim for disability discrimination.

Record Keeping

Any investigative, disciplinary or appeal hearing minutes should be given to the employee in a timely manner. Where possible, it is sensible to ask the employee to sign minutes at the end of the meeting.

The ACAS Guide advises that organisations should keep records of any disciplinary cases that they deal with. The records should include:

- ⦿ The complaint against the employee
- ⦿ The employee's defence
- ⦿ The findings made and actions taken
- ⦿ The reason for the actions taken
- ⦿ Whether an appeal was lodged
- ⦿ The outcome of the appeal
- ⦿ Whether any grievances were lodged during the disciplinary procedure
- ⦿ Any subsequent developments
- ⦿ Notes of any formal meetings

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Such records should be kept confidential and, to ensure compliance with the Data Protection Act 2018, kept no longer than is necessary. However, as a minimum we would advise that such records be kept for at least six months. For most employment tribunal claims (whether unfair dismissal or discrimination) an employee has three months to bring a claim (although there are circumstances when the Tribunal can extend this time period).



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If your organisation would benefit from expert practical advice tailored to your specific needs and to learn more about the service, discuss your requirements, or obtain a quotation please contact the Weightmans HR Rely team at HRRelTeam@weightmans.com.