

**Berg Kaprow Lewis**

Discipline and grievance issues

Recent changes in legislation make it absolutely vital that you now follow the correct procedures in disciplinary and grievance matters. If you fail to do so, you could find yourself judged to have dismissed someone automatically unfairly.

If you have not revised your disciplinary and grievance procedures recently, this is the moment to do it. Good procedures will not only enable you to stay on the right side of the law; they will also enable you to deal with disciplinary and grievance issues consistently and fairly, with a view to sorting them out before they become serious.

This briefing covers:

- The legal requirements.
- Where the new procedures apply.
- Drawing up disciplinary rules.

1 Establishing the principles

The new procedural requirements are in addition to existing requirements, not a replacement for them.

1.1 Make sure employees can **find out** about your disciplinary rules.

- Say in your terms and conditions where employees can see the rules.
- Some people put them in a handbook.
- Other people make sure they are prominently displayed on the premises. You cannot reasonably complain if someone breaks a rule, if they had no way of knowing that the rule existed.

1.2 Your rules must be **reasonable**.

- The seriousness of the offence should be assessed according to the damage done.
- Ensure your rules are not discriminatory. For example, by requiring more formal dress from men than women.

1.3 Your rules must be **applied** fairly and reasonably.

- Investigate thoroughly before you lay any disciplinary charges.
- Give the employee time to consider his or her response.
- Give the employee an opportunity to make representations.
- Take time to consider your findings and carry out a follow-up investigation if required.
- Any appeal should, if possible, be heard by someone senior, who was not involved in the first hearing.

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- In deciding on penalties, it is important to be consistent, but it is even more important to be reasonable — you can take mitigating circumstances into account. If you are going to treat people differently for the same offence, you need to be able to explain why.

1.4 You must now use specific disciplinary and grievance **procedures**.

- Your procedures must be written down. Small businesses are no longer exempt.
- They must be as good or better than the minimum standard established by law.
- A three-stage procedure is now required for most disciplinary and grievance issues.
- Failure to use the required procedures could be very expensive (see the box on page 3).

2 Setting the rules

2.1 Identify the **areas** in which you need disciplinary rules. Typically these will be:

- Work performance, including sub-standard work.
- Attitude and attendance issues such as slacking, poor timekeeping, absenteeism,

negligence and reckless disregard for safety or hygiene regulations.

- Theft, including pilfering and fraud.
- Offensive behaviour, including abuse, harassment, discrimination and violence.
- Inappropriate behaviour, including drinking, drug-taking, gambling, smoking in prohibited areas or, inappropriate dress.

2.2 Decide how you are going to **classify** different offences. In many small companies, this will involve using three categories:

- Minor offences.
- More serious misconduct.
- Gross misconduct.

2.3 Determine what constitutes **misconduct** — ie behaviour that is unacceptable to you or unacceptable in the context of work.

- You may want to spell out rules completely banning gambling, cash collections and the distribution of political literature, or enforcing a 'clear desk' policy.
- But many rules will be matters of degree.

2.4 Define what acts are so serious that they constitute **gross misconduct** — entitling the employer to jump straight to the final stage of the disciplinary procedure at which the employee risks dismissal without notice (after proper investigation, an opportunity to explain, and the application of other fair procedures).

- Typical offences are dishonesty, theft, taking bribes, gross insubordination, abuse of drink or drugs, using someone else's password, introducing viruses into the company's computers, downloading Internet pornography, sending malicious emails, and racial or sexual harassment.
- Particular industries and companies will have their own sacking offences.
- Beware of jumping to conclusions. You cannot sack an employee who has been charged with theft or other criminal acts committed outside work without your own investigation.

The fact that an offence is listed in your handbook as gross misconduct is not conclusive. A tribunal will decide for itself whether the offence was 'gross' and if the employer's response was reasonable.

➡ Employment law is complex and is changing rapidly. This briefing reflects our understanding of the basic legal position as known at the last update. Obtain legal advice on your own specific circumstances and check whether any relevant rules have changed.

➡ See Dismissing employees.

Dealing with grievances

A You are now **required** to have grievance as well as disciplinary procedures.

- As with the disciplinary procedures, a three-step process is required.
- The employee must explain what the grievance is, in writing.
- You must arrange a face-to-face meeting to discuss it.
- If the employee is not happy with the outcome, he or she can appeal.

B A '**two-step procedure**' is available where the employee has already left.

- You do not have to arrange a face-to-face meeting. But you must respond to the grievance in writing.

C Employees who fail to use the grievance procedure will have any claim for constructive dismissal **disallowed**.

- But you must respond to any grievance within 28 days, or they can go ahead.
- The idea is to force employers and employees to talk, rather than resorting to the courts.

“Phone calls are becoming a tricky issue. Rules regarding phone calls must be reasonable and take into account the employee's personal circumstances, such as the need to be contactable by a carer for an elderly relative or by a childminder.”

Alexandra Davidson, Berwin Leighton Paisner solicitors

3 Handling disciplinary issues

3.1 Do not give untrained managers the power to make major disciplinary decisions.

- Many cases are lost because managers depart from accepted procedures.
- Anyone launching disciplinary action should read the Acas handbook, Discipline at Work (0870 242 9090) www.acas.org.uk.

3.2 Investigate thoroughly before deciding on disciplinary action.

- Ask witnesses for their view of events and take a written statement if possible.
- In some gross misconduct cases, that if

Ignoring statutory procedures

A If you fail to use the **correct disciplinary procedures** in dismissing anyone who could claim unfair dismissal, the dismissal will automatically be judged unfair (if they take it to a tribunal), whether it was justified or not.

- To qualify to claim unfair dismissal, employees must usually have at least one year's service with you.
- But there is no minimum service requirement for people who are claiming unfair dismissal on the grounds of discrimination.
- Nor is there any minimum service requirement where people are claiming they have been unfairly dismissed for one of the 'inadmissible' reasons, such as being pregnant, belonging to a trade union, or pointing out imminent risks to health and safety (see **Dismissing employees**).

B If you fail to use the **correct grievance procedures** in responding to grievances, and the net result is that an employee claims constructive dismissal (ie a fundamental breach of the employment relationship on your part), this dismissal too will automatically be judged unfair.

- Constructive dismissal claims can no longer be brought unless the employees in question have first tried to sort the problem out by raising a grievance. But if they do raise a grievance and you ignore it, or deal with it unfairly or unreasonably, there will be an automatic finding against you.

C If you failed to use the correct procedures, and there is an automatic finding against you, the tribunal has powers to **increase the award** to the employee by between 10 and 50 per cent.

substantiated, are likely to result in summary dismissal, employees should be suspended on full pay for a brief period while you investigate. Review the suspension regularly to assess whether it is still appropriate. Make it clear that suspension does not constitute disciplinary action or indicate you think the employee is guilty.

3.3 Grade the sanctions you are considering according to the seriousness of the offence.

- For example, some offences might merit a verbal warning, some a written warning and some a final written warning.
- Serious offences might merit dismissal or some other action.
- A minor offence might become more serious if it was persistently repeated, despite earlier warnings.

3.4 Minor issues (eg occasional lateness) can often be tackled **informally**, without triggering the disciplinary procedure.

- Discuss the problem, giving the employee a chance to tell his or her side of the issue.
- Explain that this is not a warning, but that you will keep a file note of the meeting. Appraisals offer a chance to deal with minor disciplinary problems and defuse grievances.

3.5 For serious or repeated offences, follow the **formal procedure**.

3.6 If an employee's behaviour or performance fails to improve after appropriate warnings, there may be no alternative to **dismissal**.

- Give appropriate notice, in line with statutory rights or the employee's contract.
- Whenever you dismiss an employee, give the reasons in writing and enclose copies of any supporting evidence. This will often deter the employee from bringing a claim.

3.7 Keep a **detailed log** of all disciplinary action and full records of steps taken to investigate and address the causes of the problem.

4 The Code of Practice

Your guide to disciplinary procedures is the Acas Code of Practice. Tribunals must refer to it in all disciplinary dismissal cases and at any other time when it appears relevant. To comply with the Code of Practice, you should:

4.1 Put your disciplinary **procedure** in writing.

There are three Acas Codes of Practice available from the Stationery Office at £2.95 each (0870 600 5522) or through Acas (0870 242 9090).

“Even letters received post termination and outside of contractual time limits may constitute a 'stage 1 grievance letter'.”
Jim Givens,
HR Management Solutions

Ensure it is at least as good as the statutory minimum (see 5).

4.2 Say what disciplinary **actions** may be taken and provide for issues to be resolved.

4.3 Say who has the **authority** to take action.

4.4 Make it clear that employees will not be dismissed for a **first breach** of discipline, unless there has been gross misconduct.

Acas issue a code, to guide people through the legislation. See www.acas.org.uk/publications/pdf/CP01.pdf.

5 Statutory procedures

Statutory procedures must be used for any disciplinary sanction (other than warnings or suspension on full pay).

5.1 For these offences, your disciplinary procedures must incorporate the **'three-step' minimum**.

- You must explain to the employee concerned what the problem is, in writing, including the details on which the allegations are based.
- You must then have a face-to-face meeting to discuss it.
- You must give him or her an opportunity to appeal against the finding.

5.2 There are **exceptions** to which the 'three-step' requirement does not apply.

- Where factors beyond the control of the parties make it impracticable to complete the procedure. For example, when one of the parties has gone to live abroad.
- Where all employees have been dismissed, and offered re-engagement on new terms.
- Where there are collective redundancies.
- Where someone is unfairly dismissed for official (protected) industrial action.
- Where the business suddenly closes down.
- Where either party has reasonable grounds for fearing violence or harassment, or damage to property.
- In certain cases, where someone has been dismissed using the two-stage 'modified' procedure (see 5.3).

5.3 The **'modified procedure'** can be used only in very exceptional circumstances.

- The modified procedure involves two steps. Explain to the employee, in writing, what the offence is and why you believe him or her to be guilty of it.

You also arrange an appeal, if asked to do so.

- It is not yet clear in what circumstances the 'modified' procedure can be used. Take legal advice first.

6 The disciplinary hearing

6.1 Employees should be given sufficient **notice** to prepare for a formal hearing. What is appropriate will depend upon the complexities or otherwise of the matter under review. Hearings should not normally be held on the same day as notification.

6.2 Respect the employee's **rights**. For example, their right to give their side of the story.

6.3 Make clear the **consequences** if there is no improvement (eg penalties or dismissal).

6.4 Compose any **written warning** after the hearing, not before.

- Verbal warnings are usually valid for three to six months, while final warnings may remain in force for 12 months or more.
- Where an improvement is required, specify what improvement and how it will be measured (see 7).
- State the duration of any written warning in the warning letter.

7 Going for improvement

Aim to improve behaviour or performance, not to punish the employee.

7.1 Be **constructive** and positive.

- Give a first warning, but accompany it with the offer of training.
- Counselling may be worth considering, if family or social difficulties underlie behaviour and performance problems.

7.2 Stress that it is the **behaviour** you are attacking, and not the person.

7.3 Devise an **action plan** for improvement to tackle ongoing problems.

7.4 Set the **timescale** for improvement after a hearing.

- Leave a stated amount of time for improvement between warnings.
- Tribunals insist that the time allowed and the degree of improvement demanded must be reasonable.

Expert contributors

Thanks to **Jim Givens** (HR Management Solutions, 01695 421980, www.humanresourcesclick.net); **Alexandra Davidson** (Berwin Leighton Paisner solicitors, 020 7760 1000).

Further help

There are other Directors' Briefing titles that can help you. These briefings are referred to in the text by name, such as **Dismissing employees**.

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