



# Disciplinary and grievance issues

Complying with the new procedures  
Employment, pensions and benefits: briefing 112

## Summary

This briefing provides an overview of The Employment Act 2002 (Dispute Resolution) Regulations 2004 (the regulations), which came into force on 1 October 2004. The regulations impose minimum procedures that must be followed during a disciplinary or grievance process. In some cases the procedures must be completed before tribunals will hear a claim. There are penalties for those who do not follow these procedures.

The Employment Act 2002 (Dispute Resolution) Regulations 2004 (the regulations) came into force on 1 October 2004. They impose minimum procedures that must be followed during a disciplinary or grievance process and, in some cases, that must be completed before tribunals will hear a claim. There are penalties for those who do not follow these procedures.

The government hopes that the new procedures, introduced against a backdrop of rising numbers of employment tribunal claims, will encourage both parties to view litigation as the last resort. However, companies that do not implement the correct procedures may face increased costs and claims.

The regulations set out:

- standard and modified dismissal and disciplinary procedures;
- standard and modified grievance procedures; and
- general requirements applying to the conduct of disciplinary and grievance procedures.

## Who is covered by the regulations?

Employers and employees alike are bound by the new regulations. Advisory, Conciliation and Arbitration Service (ACAS) guidance suggests it would be good practice to consider extending access to disciplinary and grievance proceedings to all workers, even though this is not required.

## Standard dismissal and disciplinary procedure

This three-step procedure applies where an employer dismisses an employee on grounds of conduct, capability, redundancy, retirement or expiry of a fixed term contract. It also applies to any sanction short of dismissal, such as demotion or loss of pay or seniority on grounds of capability of conduct. It does not apply to any action that forms part of a workplace procedure, such as a written or oral warning or suspension on full pay. The standard procedure will, however, apply to suspension without pay or on reduced pay because the reduced or withheld pay is a conduct or capability related action that is additional to the suspension.

The *first step* requires the employer to put in writing the circumstances that could lead to the employee's dismissal or disciplinary action. This must be sent to the employee. Employers should obviously keep a copy of the letter.

The *second step* requires the employer to invite the employee to a hearing to discuss the matter. The employer must ensure that the employee has sufficient time between receipt of the letter or email and the meeting to consider his response. What will be reasonable depends on the circumstances – the more serious the charge, the longer the time that is likely to be required. After the meeting, the employer must inform the employee of its decision and tell him that he has the right to appeal.

If the employee informs the employer that he wishes to avail himself of this right, the *third step* requires the employer to arrange an appeal meeting and inform him of the outcome. If possible, a more senior person should conduct the appeal hearing.

### **Modified dismissal and disciplinary procedure**

In practice, use of this modified procedure will be rare and employers would be unwise to rely on it other than in exceptional circumstances. It applies where:

- the employer dismissed the employee by reason of his conduct without notice;
- the dismissal occurred at the time the employer became aware of the conduct or immediately afterwards;
- the employer was entitled to dismiss the employee by reason of his conduct without notice or payment in lieu of notice; and
- it was reasonable for the employer to dismiss the employee before enquiring into the circumstances.

The modified procedure consists of two steps. The *first step* requires the employer to put in writing the circumstances of the alleged misconduct that has led to the dismissal; the evidence relied on at the time of dismissal for thinking that the employee was guilty of the misconduct; and telling him that he has a right of appeal. This statement must be sent to the employee.

If the employee decides to appeal, the *second step* requires that he inform his employer, who should then invite him to an appeal hearing conducted, if possible, by a more senior person. This need not take place before the dismissal takes place. The employee must be notified of the outcome.

### **What happens if the statutory dismissal and disciplinary procedures are not followed?**

If the employer fails to follow the relevant procedure, any dismissal is automatically unfair. This may entitle the employee to an extra four weeks' pay as a minimum basic award, subject to the statutory cap (currently £270 per week) and assuming that the employee has the minimum year's service necessary to bring a claim. Any compensation may be adjusted in the employee's favour by at least 10 per cent and possibly up to 50 per cent. However, a dismissal is not fair just because the employer

has followed the correct procedure. Conversely, if failure to follow the procedure is the employee's fault, any compensation will be reduced by between 10 per cent and 50 per cent. If there is no award, however, there is no additional penalty.

### **Situations when the statutory disciplinary procedures do not apply**

- Any action that is not covered in the statutory procedure, such as a written or oral warning.
  - A number of employees are dismissed but the employer offers to re-engage all of them before or upon termination. This is designed to apply when dismissals are taking place to effect a change to terms and conditions of employment.
  - The employee is making 20 or more redundancies and has a duty to consult under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.
  - At the time of the employee's dismissal he is taking part in an unofficial strike or other unofficial industrial action or official action after the protected period.
  - The reason for the dismissal is that the employee took protected industrial action.
  - The employer's business suddenly ceases to function due to an unforeseen event, such as a fire that destroys the premises.
  - The employee could not continue to work without contravention of the law (eg the employee is a non-EU citizen who no longer has a valid work permit).
  - A dismissal procedures agreement operates.
  - There is a significant threat to person or property if the procedure is followed; one party reasonably fears harassment or violence (mere stress or anxiety is not sufficient); it is not practicable to apply the procedures within a reasonable period (perhaps because of the employee's illness); or there are national security considerations. (These exemptions also apply to statutory grievance procedures.)
- Whether there is complete exemption from the statutory procedure, or the procedure applies but the parties are regarded as having complied with it depends on the circumstances. This issue is only relevant to the time within which a complaint has to be lodged with an employment tribunal.

## Standard grievance procedure

This three-step procedure applies to any complaint by an employee about any act that the employer takes or is contemplating taking against him that could form the basis of a complaint to an employment tribunal under one of a number of heads of jurisdiction. It is likely to have most relevance to discrimination and equal pay claims but will also apply to areas such as working time and unlawful deduction of wages.

The *first step* requires the employee to give the employer written notification of the grievance and explain the basis for it. The *second step* requires the employer to invite the employee to a meeting where the grievance can be discussed. The employer must inform the employee of the decision taken as a result of the meeting and offer him the right of appeal. The appeal forms the *third step*. The employer must arrange an appeal meeting, if possible to be conducted by a more senior person, and inform the employee of the outcome.

## Modified grievance procedure

This two-step procedure applies to all situations where the standard procedure would otherwise apply were it not that employment has already ended and *either* the employer was not aware of the grievance before employment ended *or* the standard procedure had not been started or completed when employment ended. Both parties must also provide written agreement to use the modified procedure. If either party does not agree, the standard procedure applies. The *first step* requires the employee to put his grievance into writing and send it to the employer. The *second step* requires the employer to send a written response to the employee, setting out its decision.

## Grievances to which the statutory procedures do not apply

- Where employment has ended, neither of the grievance procedures were begun by that point, and since the end of employment it has not been reasonably practicable (eg because of illness) for the employee to send the step one letter.
- Where one of the collective or agreed dismissal and disciplinary procedures applies. For more details, see the section on overlapping procedures.

## Grievances where the parties are treated as having complied with the statutory procedures

- Where the grievance counts as a collective grievance because a recognised trade union or employee representative body raises it on behalf of two or more employees.
- Where the grievance is raised in writing before the appeal meeting of a dismissal and disciplinary procedure.
- Where one party behaves in such a violent or unpredictable manner that the other cannot be expected to sit down with them and follow the procedure.
- Where the grievance procedure is not begun or completed because it is not reasonably practical. Factors like serious illness might qualify here because they are beyond the control of either party.

## What happens if the statutory grievance procedures are not followed?

An employee cannot bring an employment tribunal claim based on a grievance without waiting 28 days from sending the employer the written statement. In other words, if an employee wants to make a discrimination complaint, it must be raised with the employer first. Failing to do so means that the employment tribunal will not have jurisdiction to hear the claim. However, the fact that an employer fails to arrange the second step meeting does not prohibit the employee from bringing an employment tribunal claim based on a grievance. As a general rule, all the employee need do is fulfil the first step and wait 28 days. After that, he can bring a claim provided he is not out of time.

Failure by either party to complete the relevant procedures will usually result in any compensation awarded being increased by between 10 per cent and 50 per cent (depending on whether it was the employee's failure that meant the procedure was not completed). There is no additional penalty if there is no award. Failure by the employer to complete the relevant procedure where discrimination is the alleged grievance could have a particularly serious impact at tribunal, as compensation for discrimination is uncapped.

## General requirements applying to conduct of disciplinary and grievance procedures

- Every step of the proceedings must be undertaken without undue delay.
- The meeting and any subsequent appeal must be held at a reasonable time and location. The employee must make every reasonable effort to attend.
- The employee is entitled to be accompanied at the meeting and any subsequent appeal by a fellow worker or trade union representative. Failure on the employer's part to acknowledge this right entitles the employee to bring a claim for compensation.
- The employer should be prepared to postpone the meeting if the representative is unable to attend. If this person is unable to attend the second suggested meeting, the employer does not need to rearrange for a third date, although it would be good practice to do so, as it would go towards establishing fairness in accordance with normal principles.
- Meetings must enable both employer and employee to put their cases.
- Although the normal time limit for bringing tribunal claims is three months, this limit will be extended by a further three months if there are reasonable grounds for believing that procedures under the regulations are being followed.

## Overlap between the disciplinary and grievance procedures

Although the regulations separate the dismissal and disciplinary procedures from the grievance procedures, there may be situations where the procedures will overlap. As far as possible, however, the regulations try to ensure that unnecessary repetition is avoided as in the following examples.

- Constructive dismissal is excluded from the ambit of the dismissal and disciplinary procedures. A constructively dismissed employee should rely on the grievance procedures instead.
- If the action taken by the employer is dismissal, the matter does not fall under the grievance procedure. Following the dismissal and disciplinary procedure should be sufficient – the employee cannot raise a grievance about the dismissal.

- If the employer takes action (other than dismissal) affecting the employee that is not on the grounds of conduct or capability there is no obligation to initiate the dismissal and disciplinary procedures. The employee may only bring a grievance about such action if he feels that disciplinary action taken by the employer is either unlawfully discriminatory or is being taken for a different reason to that expressed to be the reason for the disciplinary process.

An employee who raises a grievance at any step before step three of the dismissal and disciplinary procedure will be treated as having complied with the grievance procedure and need take no further action. He will be entitled to bring a subsequent claim of discrimination, for example. However, the grievance procedure must be completed in full if the grievance is raised during or after step three of the dismissal and disciplinary procedure.

Letters and meetings under the statutory procedures can be multi-purpose. For example, an employer who is writing to invite an employee to a step two meeting can use the same letter as the step one letter in relation to another disciplinary matter (should the situation arise).

## Notifying employees about the new procedures

Employers must set out the statutory dismissal and disciplinary and grievance procedures in the written statement that all employees must receive after one month's service. Employers are permitted to refer to another document, such as the staff handbook. If the employer fails to notify or supplies inadequate notification, the tribunal has an absolute discretion to order the employer to pay either two or four weeks' pay as compensation.

## What else should employers do?

It is important that managers and HR are familiar with the new requirements. This will help them decide whether existing procedures are at least equivalent to the new minimum standards. It will also help ensure that those responsible for initiating or following the procedures do so in a timely and efficient manner. Failure to follow each step properly can be expensive.

As discussed, dismissal cases will result in a finding of automatic unfair dismissal and could cost up to £55,000 in compensation in addition to the basic award, while discrimination awards are potentially unlimited.

### **Is there anything else to be aware of?**

Yes – employers should be aware of the ACAS Code of Practice, an updated version of which came into force on the same date as the regulations. It takes account of the new statutory procedures and is intended to provide practical advice for employers (especially small businesses), employees and their representatives. Although the Code does not have legal force, employment tribunals and ACAS arbitrators will take it into account when considering relevant cases.

The Department of Trade and Industry has also produced guidance to the regulations that contains a few, brief practical examples. One set is aimed at lawyers and HR practitioners; the other at small businesses. It is available from [www.dti.gov.uk/er/resolvingdisputes.htm](http://www.dti.gov.uk/er/resolvingdisputes.htm).

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