

IR REPS BRIEFING

NEW DISCIPLINARY, DISMISSAL AND GRIEVANCE PROCEDURES

This brief outlines the new laws in relation to disciplinary, dismissal and grievance procedures in the Employment Act 2002 that came into force on 1 October 2004.

***IT IS ESSENTIAL THAT SOR
REPRESENTATIVES READ THIS BRIEF AND
ARE AWARE OF THE NEW PROVISIONS.
FAILURE TO FOLLOW THEM IS LIKELY TO
RESULT IN MEMBERS NOT BEING ABLE TO
REGISTER AN EMPLOYMENT TRIBUNAL
CLAIM AND /OR REDUCTION IN
COMPENSATION.***

Introduction

In order to reduce the number of claims taken to employment tribunals the government has introduced new 'dispute resolution procedures' to encourage employers and employees to resolve disputes internally. The new procedures are contained in the *Employment Act 2002 (Dispute Resolution) Regulations 2004* and came into force on 1st October 2004.

From this date all employers must have dismissal, disciplinary and grievance procedures in place that comply with the statutory requirements. Employers and employees must follow these procedures. Failure to do so could affect the outcome of any employment tribunal claim.

The procedures set out a ***minimum standard***. Most NHS Trusts will have agreed much more comprehensive procedures with the recognised trade unions, including the SoR. These procedures can still be used provided that they are '*not inconsistent*' with the new procedures i.e. as long as the basic steps are covered. The new procedures should not be used to undermine the existing procedures or erode pre-existing collective agreements.

NB. You should always contact your Regional Officer if there is a possible tribunal claim. The SoR cannot undertake to pursue an application if the Regional Officer was not contacted prior to the application being submitted.

1 CHARACTERISTICS OF THE PROCEDURES

- i The new law is designed to encourage employers and employees to discuss their problems before resorting to the tribunals. A lot of the new provisions are quite complicated and it is likely that it will take a while for these procedures to be fully understood. Case law will determine the exact scope of the procedures.
- ii Only employers may instigate the new disciplinary and dismissal procedures, while only employees may instigate the new grievance procedures.
- iii The responsibility lies with the employer to inform staff about these new laws and to change their procedures. The employer must tell employees about the new 3-step process and the alternate modified 2-step process, and when it applies and where they can find information on it.

1.2 THE FOLLOWING CHARACTERISTICS APPLY TO BOTH THE DISCIPLINARY AND DISMISSAL PROCEDURES AND THE GRIEVANCE PROCEDURES:

i 3-STEP STANDARD PROCEDURE

- There is a minimum 3-step process.
- Failure to follow this process may result in a penalty should a dispute reach a tribunal.

ii 2-STEP MODIFIED PROCEDURE

- Employees that are no longer in employment can use a modified 2-step grievance procedure.
- A modified 2-step dismissal procedure applies to rare cases of gross misconduct dismissals ONLY, not dismissals for any other reason.

2 GRIEVANCE PROCEDURES FOR EMPLOYEES

- i The grievance procedure allows an employee to raise concerns he or she has about their job with their management. These concerns could be about the work itself, the employee's working conditions or about the people the employee works with. The employer is allowed to say that a particular concern does not fall within the grievance procedure. ACAS cites as an example, that an individual's request for a pay rise is unlikely to be the subject matter of a grievance, unless a right to an increase is specifically provided for in the contract or the request raises an issue about equal pay.
- ii An employee should try to raise his or her concerns informally with the person specified in the grievance procedure, usually their line manager. If this is not possible, or if the employee's problem is with that person, then he or she should go to the next most senior person.
- iii Although these first discussions are informal, an employee should keep a brief note of any discussions they have had, noting the date and time, who they spoke to, and the main points covered. These will be useful if the problem is not resolved at this stage and more formal procedures have to be adopted.
- iv An employee should begin a formal grievance procedure if his or her employer fails to resolve the matter to their satisfaction.

IF AN EMPLOYEE DOES NOT START A FORMAL PROCEDURE (i.e. SEND A STEP 1 LETTER) OR FAILS TO COMPLETE THE PROCEDURE, A CLAIM TO AN EMPLOYMENT TRIBUNAL MAY NOT BE ADMISSIBLE.

2.1 STANDARD 3-STEP GRIEVANCE PROCEDURE

The standard grievance procedure applies in all cases where the employee is still in employment and in most cases where the employee is no longer employed.

STEP 1: Put it in writing

The employee must send a written explanation of their grievance to the employer stating the basis for their complaint.

STEP 2: Meet and Discuss

- 1 The employer should invite the employee to a face-to-face meeting to discuss the issue.
- 2 The employer must be given time to look into the complaint, but should not delay for an unreasonable amount of time.
- 3 The employer and employee should take all reasonable steps to attend.
- 4 The meeting must be held at a time and place that are reasonable for the employee and anyone accompanying him or her.
- 5 After the meeting, the employer must inform the employee of their decision and offer them the right of appeal.

STEP 3: APPEAL

- 1 The employee must inform the employer of their wish to appeal against the employer's decision.
- 2 The employer must then invite the employee to a second meeting and as far as is reasonably practicable the appeal should be with a more senior manager than at the first meeting.
- 3 The employer must give the employee their final decision after the meeting.
- 4 If the employee **does not appeal**, but goes straight to an employment tribunal with their complaint, and wins, any money they are awarded may be reduced by between **10% and 50%**.

NB. Members are entitled to be accompanied at each stage by an SoR representative.

2.2 THE MODIFIED 2-STEP GRIEVANCE PROCEDURE

This applies where:

- (i) The employee has ceased to be employed by the employer; **and**
- (ii) The standard grievance procedure had not been commenced, or if it had been commenced had not been completed before the last day of the employee's employment; **and**
- (iii) Once the employer has been made aware of the grievance, the parties have agreed in writing that the modified grievance procedure should apply in relation to that grievance.

STEP 1: Statement of grievance

- The employee must send a written explanation of their grievance to their former employer.

STEP 2: Response

- The former employer writes back to the employee, answering the points she or he has raised.

2.3 POINTS TO NOTE IN RELATION TO THE GRIEVANCE PROCEDURES

- 1 **Unreasonable delay:** Each step and action must be taken without unreasonable delay.
- 2 **Timing and location:** The timing and location of the meeting must be reasonable.
- 3 **Explain case:** The meeting must allow the employer and the employee to explain their case.
- 4 **Appeal:** Where there is an appeal meeting if at all possible it should be heard by a more senior manager than at the first meeting.
- 5 **Right to be accompanied:** The employee has the right to be accompanied to both meetings by a colleague or a trade union official.
- 6 **Non-attendance:** If the employee or the person accompanying him/her cannot attend this meeting, for a reason which was not foreseen, then the employer must arrange another meeting and the employee should attend it.
- 7 **Disabled access:** Where the employee or person accompanying them is disabled, the employer must take this into account and make reasonable provision to ensure they can participate fully.

AN EMPLOYMENT TRIBUNAL APPLICATION WILL NOT BE ACCEPTED UNLESS AN EMPLOYEE LODGES A GRIEVANCE

If an employee's application to an Employment Tribunal is based on a ***grievance*** with their employer or former employer, and the statutory GP applies, ***their claim will not be accepted at all unless:***

- i. The employee put their grievance in writing to the employer and then allow at least 28 days to pass before putting in a claim to the tribunal office; **or**
- ii. A valid reason is given on the claim form explaining why the employee thinks this legal requirement does not apply in their case.

2.4 FAILURE TO FOLLOW THE GPS

Penalties if the EMPLOYEE fails to follow the GPs:

- Any award made to the employee is reduced by a minimum of 10% up to a maximum of 50% where the employee fails to comply with any requirements or failed to exercise the right to appeal under the GP.
- A reduction would not be made if it would be unjust or inequitable.

Penalties if the EMPLOYER fails to follow the GPs:

- Any award made to the employee is increased by a MINIMUM of 10% up to a MAXIMUM of 50% where the employer fails to comply with any requirements under the GP.
- An increase to the award would not be made where it would be unjust or inequitable.

3 DISCIPLINARY AND DISMISSAL PROCEDURES

- 1 The DTI has pointed out that it is still advisable to resolve a dispute informally. This is in line with the ACAS Code of Practice and SoR policy. However where this does not work, an employer can use the new process to resolve the dispute. These procedures set a minimum standard and an employer may have a system in place that is similar and which they continue to use.
- 2 All organisations must follow the minimum statutory dismissal and disciplinary procedures (i.e. including small organisations).
- 3 It is important that an employer continue to act REASONABLY throughout, whether or not these procedures are applicable.
- 4 The statutory DDP does not as yet form a part of an employee's contract but employers are still obliged to follow this statutory procedure. The Government plans to bring s.30 of the Employment Act 2002 into force, which will make these procedures form part of an employee's contract.

3.1 STANDARD DISMISSAL AND DISCIPLINARY PROCEDURE (THE 3-STEP PROCEDURE)

STEP ONE - Put it in writing

The employer must send the employee a **written** explanation of the conduct, capability or other circumstances that have led the employer to consider dismissing or taking disciplinary action against the employee.

STEP TWO - Meet and discuss

- The employer should invite the employee to a face-to-face meeting to discuss the issue.
- The employee must be given time to consider the facts of the complaint against him/her.
- The employer and employee should take all reasonable steps to attend.
- After the meeting, the employer must inform the employee of their decision and offer them the right of appeal.

STEP THREE - APPEAL

- The employee must inform the employer if he or she wishes to appeal.
- The Appeal may happen after sanctions have already been imposed.
- The employer must then invite the employee to a second meeting and the employer should try to field a more senior manager than at the first meeting.
- The employer must give the employee their final decision after the meeting.

NB. Members are entitled to be accompanied at all stages by an SoR representative.

THE STANDARD DISMISSAL AND DISCIPLINARY PROCEDURE APPLIES TO:

1 Dismissals: EXCEPT

- i Some collective dismissals
- ii Some constructive dismissals
- iii Some gross misconduct dismissals
- iv Dismissal where employment cannot continue for reasons beyond anyone's control.

2 **Disciplinary action: EXCEPT**

- i Oral warnings
- ii Written warnings (The Act clearly states that this is outside the procedure. However, an employer should follow his or her own procedure).
- iii Suspension on full pay

3.2 **THE MODIFIED 2-STEP PROCEDURE (APPLIES TO DISMISSALS ONLY)**

- This applies to cases of gross misconduct DISMISSALS only.
- These situations have to be very exceptional.

STEP ONE - Put it in writing

- Send the employee a written explanation of the alleged misconduct that led to their dismissal.
- Also include at the same time the evidence for this decision
- Inform the employee at this time of his/her right to appeal.

STEP TWO – APPEAL

- If the employee wishes to appeal, he or she must inform the employer
- The employer must invite the employee to a meeting to discuss the appeal.
- The employer must give the employee their final decision after the meeting.

NB. Members are entitled to be accompanied at all stages by an SoR representative.

3.3 POINTS TO NOTE IN RELATION TO DDPS

- **Unreasonable delay:** Each step and action must be taken without unreasonable delay.
- **Timing and location:** The timing and location of the meeting must be reasonable.
- **Advance Information:** The employer must ensure the employee has all the relevant information before the meeting.
- **Explain case:** The meeting must allow the employer and the employee to explain their case.
- **Appeal:** Where there is an appeal meeting, the employer should try to have a more senior manager than at the first meeting.
- **Right to be accompanied:** The employee has the right to be accompanied to both meetings by a colleague or a trade union official.
- **Non-attendance:** If the employee or the person accompanying him/her cannot attend this meeting, for a reason which was not foreseen, then the employer must arrange another meeting and the employee should attend it.
- **Disabled access:** Where the employee or person accompanying them is disabled, the employer must take this into account and make reasonable provision to ensure they can participate fully.

3.4 FAILURE TO FOLLOW DISMISSAL OR DISCIPLINARY PROCEDURES

Penalties if the EMPLOYER fails to follow the dismissal or disciplinary procedures:

- The dismissal becomes automatically UNFAIR (i.e. where the employee has been employed for a year or over and has the right to claim unfair dismissal).
- A mandatory MINIMUM of 4 weeks' pay is awarded to the employee.
- Any additional compensation is increased by a MINIMUM of 10% up to a MAXIMUM of 50% where the employer fails to comply with any requirements under the DDPs.
- An increase to the award is not made where it would be unjust or inequitable.

Penalties if the EMPLOYEE fails to follow the dismissal or disciplinary procedures:

- Any award made to the employee is reduced by a minimum of 10% up to a maximum of 50% where the employee fails to comply with any requirements or failed to exercise the right to appeal under the DDPs.

A REDUCTION IS NOT MADE IF IT WOULD BE UNJUST OR INEQUITABLE.

4. More Information

If you require further help or information please contact your Regional Officer. More details of the new procedures can be found on the ACAS website at www.acas.org.uk .