

## **Contents**

- 1. Conciliation and Mediation**
- 2. Grievance Procedure**
- 3. The Procedure**
- 4. Key features**
- 5. Lack of procedures**
- 6. The Employment Relations Act 1999 s. 10 – 15**
- 7. The concept of Natural Justice**
- 8. The penalty for non-compliance**
- 9. Other legislation**
- 10. The Grievance Policy Document**
- 11. The Proceedings**
- 12. The Race Relations (Amendment) Act 2000**
- 13. Discipline Procedure**
- 14. Common problems**
- 15. Three important Acts**
- 16. Contracts**
- 17. Disciplinary Procedures – Links to Grievance Procedures**
- 18. Discrimination**
- 19. Natural Justice**
- 20. Penalties**
- 21. Sanctions**
- 22. Dismissal**

**23. Exemptions**

**24. Gross Misconduct**

**25. Appeals**

**26. Paperwork**

**27. Time Limits**

**28. Abandonment of Procedures under the Act**

**29. Fault**

**30. History**

## **1. Conciliation and Mediation**

Before resorting to formal procedures from the employee/volunteer or from the Council it is the policy of the Council that discussions between both parties should be entered into with the express purpose of resolving the matter through a process of mediation seeking conciliation. Where necessary the Council will seek the services of an external expert to forward this process to reach a conclusion satisfactory to both parties in the dispute.

## **2. Grievance Procedure**

The objective is to have in place a framework for dealing swiftly and in a fair and consistent manner with a complaint from an employee/volunteer that has not been dealt with by the process of good management in the workplace. Having a formal grievance procedure acknowledges the rights of employees/volunteers to be treated fairly and to be able to seek redress for a grievance that is related to their employment/volunteering opportunity.

## **3. The Procedure – 3-step Grievance Procedure**

**Step-1:** The employee/volunteer sets down in writing and submits to the employer the alleged grievance;

**Step-2:** A meeting must be held with the employee/volunteer for a discussion of the matter. Afterwards the employer must tell the employee/volunteer the decision and that he/she has the right of appeal. Both the decision and the right of appeal must be confirmed in writing.

**Step-3:** If the employee/volunteer exercises his/her right of appeal there must be another meeting to hear the appeal. The final decision must then be given and confirmed in writing.

## **Modified 2-Step Procedure After Employment Has Ended**

**Step-1:** The employee/volunteer sets down in writing and submits to the employer the alleged grievance;

**Step-2:** The employer gives his response in writing.

The 3-Step process will not apply where it is clearly unreasonable to do so as the employee/volunteer has left. In which case, the modified 2-Step procedure will apply and it is agreed in writing by both parties. This is an agreement not to have a face-to-face meeting, perhaps for reasons of long travel times, or that the employee/volunteer is now working/volunteering elsewhere and time off to attend a meeting would be difficult.

A House of Lords ruling relating to a case of Discrimination has made it possible for a complaint of discrimination to be brought against a former employer after the employee has left

#### **4. Key Features**

These should be part of the Terms and Conditions in the employee/volunteer's contract

- Must be seen to be fair and reasonable
- Matters must be quickly dealt with (3-5 working days)
- Must let the employee/volunteer express his/her grievance to a senior person
- Given an opportunity to make clear the grievance
- Get (if possible) a swift resolution of the problem through conciliation
- Ensure that swift action matches swift promises – and are kept.
- Provide the employee/volunteer with all information necessary for them to progress their grievance to an arbitrating body, if necessary
- Provides for an appeal

#### **5. Lack of Procedure**

The results of a lack of a formal procedure can be several. Crucial are:

- Employment Tribunal Cases
- Damage to the Council
- Potentially expensive legal consequences
- Disciplinary Proceedings
- Needless loss of an employee

The Law and Employee Rights (some)

- Employment Rights Act 1996
- Employment Relations Act 1999
- Employment Act 2002
- Dispute Resolution Regulations 2004
- Protection from Harassment Act 1997
- Health and Safety at Work Act 1974
- Management of Health and Safety at Work 1999
- The Sex Discrimination Act 1975
- The Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626 and as amended 2000
- Equal Pay Act 1970 (Amendment) Regulations 2003, SI 2003/1656
- Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/166
- Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660
- Disability Discrimination Act 1995 (Amendment) Regulations 2003 SI 2003/1673
- Working Time Regulations 1998 (SI 1998/1833)
- National Minimum Wage (Enforcement Notices) Act 2003
- Equal Pay Act 1970

#### **6. The Employment Relations Act 1999 s.10-15**

This Act requires employers to allow an employee to be accompanied by a person of their choice at a grievance meeting. Self-employed people are covered by this provision.

- The employee is protected against victimisation by the employer through seeking grievance procedures

- The chosen person may address the hearing on behalf of the employee/volunteer, ask questions and be given time in private to confer with the employee/volunteer
- The rights do not extend to answering questions on behalf of the employee/volunteer
- Failure to allow an employee/volunteer to be accompanied may result in a complaint to an Employment Tribunal and, possibly, a quite substantial award made against the Council.

## **7. The Concept of Natural Justice**

The following are time-tested benchmarks that, if not followed, inevitably work to the disadvantage of an employer at the Employment Tribunal stage:

- Grievance procedures should be fair and seen to be fair
- A complete investigation of the matter should be carried out by a non-involved individual to establish the facts of the matter
- Every employee/volunteer has a right to be heard
- It is the facts that matter
- Any employee/volunteer who has any special needs requirements should be provided with all necessary assistance to permit them to have a fair and just hearing

An employee/volunteer who has brought a grievance should not subsequently be disadvantaged

## **8. The Penalty for Non-Compliance**

Any employer that does not comply faces an almost certain breach of contract claim by an employee/volunteer. The employee/volunteer will be entitled to resign and claim constructive unfair dismissal. In addition, at an appearance before a Tribunal failure to comply with the steps set down will almost certainly result in a finding against the party who has failed to comply. Tribunals will also have the ability to, in effect, fine that party.

## **9. Other Legislation**

- Data Protection Act 1998
- Freedom of Information Act 2000
- Public Interest Disclosure Act 1998

Both the Data Protection Act and the Freedom of Information Act have implications in the area of record keeping and access. Records in relation to Grievance (and Disciplinary) matters are classified as confidential. Neither the public, nor other members of the organisation without a specific need to know, have access.

A copy of the record of the proceedings and results must be given to the Employee/volunteer

## **10. THE GRIEVANCE POLICY DOCUMENT**

The aim of our Grievance Policy is to resolve any grievance as swiftly and fairly as possible. We will deal with any matter relating to employment and volunteering opportunities. You have the right to be accompanied by a person of your own choosing who may speak on your behalf, ask questions, but not answer questions put directly to you. We will make every effort to accommodate any person who has special needs if we are advised of the situation. You have the right to appeal against any decision.

## **11. The Proceedings**

- The time and place must be notified and agreed with adequate time to prepare and attend
  - It should not be at some venue that is particularly inaccessible
  - Provision should be made for any person with a disability or whose first language is not English
  - The proceeding should not be interrupted for any reason, except for Health & Safety
  - The person accompanying the employee/volunteer should be notified
  - The person accompanying the employee/volunteer must be given time off to attend
  - A written record of the proceeding must be kept
  - The procedure must be the same for all employees/volunteers
  - The proceedings should not be held in quasi-judicial language or process but be simple to follow and understand addressing the facts
  - The proceedings should be timely
  - Allow for the proceedings to be conducted by an impartial external facilitator
- Any employee/volunteer who presents with a grievance should be encouraged in the first instance to resolve the matter, if possible, by informal discussion with a colleague/senior employer representative. Wherever possible conciliation of the dispute should be sought, using the services of a skilled mediator and arbitrator if necessary. Where this matter is difficult then the services of an impartial mediator/arbitrator are recommended.

## **12. The Race Relations (Amendment) Act 2000**

All employers should note the necessity of making every effort to ensure the equality of every aspect of the procedure for any person who is of ethnic origin other than English. Under the provisions the Act all Local Councils have a General Duty to comply. As colleagues will be aware that extends to the collection of statistics and completing returns on an annual basis. Any employing Council that did not make every effort to comply with the Act would be in a potentially very serious breach. The possibility is a complaint either to an Employment Tribunal or to the Equal Opportunities Commission.

## **What Comes Next?**

When every aspect has been explored the appropriate remedial action, if justified, should be taken. This may mean making changes to procedures, working practices or the behaviour of others. It is essential that what is agreed to be done is seen to be done. So,

\*Consider implications and costs

- Do not allow too much time to elapse before making clear what is expected
- Agree and publicise workable solutions
- Monitor the results
- Record and learn for the future

## **13. DISCIPLINE PROCEDURE**

New law – Employment Act 2002 – Dispute Resolution Regulations 2004

Within this Act is the provision for changes to the way in which Employment Tribunals work. A corollary of this is that a 3-stage, or 2-stage modified process (after the employment has ended), of bringing a case to them is required of an employer/employee. Put simply, it is that a full internal and if possible, conciliation process takes place within an organisation to try and sort out problems and reconcile issues before the matter reaches the stage of a Tribunal hearing.

### **The Procedure – 3-Step Dismissal Disciplinary Procedure**

**Step-1:** The employer sets down in writing and gives to them the complaint of the employee/volunteer's conduct, capability or other matter that could result in disciplinary action or dismissal;

**Step-2:** A meeting must be held with the employee/volunteer for a discussion of the matter. After the employer must tell the employee/volunteer the decision and he/she will have the right of appeal. Both the decision and the right of appeal must be confirmed in writing;

**Step-3:** If the employee/volunteer exercises his/her right of appeal there must be another meeting to hear the appeal. The final decision must then be given and confirmed in writing.

### **Modified 2-Step Procedure after employment has ended**

**Step-1:** The employer informs the ex-employee/volunteer in writing details of the alleged misconduct that has led to his/her dismissal, what evidence there was for the decision to dismiss, and the right of appeal against the decision;

**Step-2:** If the employee/volunteer wishes to exercise his/her right of appeal then a meeting must be convened. The final decision must then be given and confirmed in writing.

Disciplinary matters will come about in any workplace from time to time. There will be a number of reasons why this occurs. One cause, amongst others, is where the relationship of mutual trust and respect between the employee/volunteer and the employer has broken down, or been broken down. Employers should take every possible step through good management practices and procedures to ensure that this situation has not been reached by being ineffective in their management of work and employees/volunteers (See Grievance Procedures).

Disciplinary proceedings are not to be considered as a first step (Excepting exceptional circumstances of Gross Misconduct), or purely as a means of imposing strictures on an employee/volunteer, especially if the first thought is that it is a means of dismissing the person. This is bad management and might well be a fast track route to an Employment Tribunal with a case of Unfair Dismissal.

#### **14. Common Problems**

These are often arisen from a few situations:

- Failure to follow instructions
- Breaches of Council policy
- Breaches of regulations governing conduct in the workplace
- Behavioural and conduct problems
- Breaches of confidentiality
- Failure to comply with lawful requirement of the employer
- Unauthorised absence
- Misuse of Council property/facilities
- Failure to comply with workplace targets

However, a distinction should be drawn between the conduct of any employee/volunteer and their capability. In the case of a problem due to capability there needs to be a very careful consideration of the factors. These may be lack of skill or knowledge; illness or some unrecognised disabling factor, or some external factors non-workplace based having an influence on performance in the workplace (serious home-based problems). An employer should always explore the factors with care and sensitivity. If the matter is based in lack of skill or knowledge then the employer has a duty to ensure that by training, mentoring, guidance, the employee/volunteer has an opportunity to improve. The matter can then be re-assessed after a reasonable interval.

#### **15. Three Important Acts**

- Employment Rights Act 1996
- Employment Relations Act 1999
- Employment Act 2002

If you end up in front of an Employment Tribunal because you have dismissed someone they will expect you as the employer to be able to show under the first that:

- You have a clear reason for dismissal related to the employee/volunteers conduct
- That you have acted reasonably and fairly in treating this as a sufficient reason to dismiss the person



The second Act requires that you will have made every effort to ensure that the employee/volunteer is aware that someone may accompany them to the disciplinary hearing. This applies even if you are classed as self-employed.

- The Act enshrines the principle that no person will be victimised as a result of acting as a representative of the person before the disciplinary hearing
- The employer must postpone the hearing for up to five working days from the day after the hearing was called for if the chosen representative is not available
- The representative may ask questions of the hearing panel and speak on behalf of the employee brought before the panel, but may not answer questions put to the employee

The third Act (Dispute Resolution Regulations 2004) ensures that the employer has to have in place a formal process with a policy laying down procedures that is made known to all employees.

## **16. Contracts**

The disciplinary procedures and appeals process should be incorporated into the wording of a current contract and the stages of the disciplinary process must be spelt out (or specific reference made to where the employee may access the policy document or staff handbook). If this is not adhered to exactly then an employee/volunteer may be able to bring a case of breach-of-contract. There should always be reference to whom an appeal can be made against a disciplinary decision. Where this is not included a letter setting out the matter should be given to the employee and a signed copy kept by both parties.

## **17. Disciplinary Procedures – Links to Grievance Procedures**

It is likely that the Council will have both sets of procedures built into the contracts of their employees. Both should be carefully followed for the reasons given above. However, if as the result of a disciplinary hearing an employee/volunteer decides to bring a grievance about the conduct of any person handling the disciplinary matter, they are entitled to use the grievance procedure to do so.

## **18. Discrimination**

It is essential to carefully observe the principles of the legislation that applies to matters of discrimination. There is a particularly sensitive area where there may be circumstances of disability, learning difficulties, or relating to a person who does not have English as a first language, or gender. Every effort must be made to ensure that all steps are taken to provide whatever assistance is needed to the person concerned in the interest of natural justice. Under the Disability Discrimination Act requirements implemented in 2004 relating to employing bodies all reasonable adjustments to the workplace must be made to permit an employee/volunteer with a disability to perform the functions of a job. This extends to any place in which they may be required to attend a disciplinary/grievance/appeals hearing.

## **19. Natural Justice**

No disciplinary hearing or the decision of a disciplinary hearing will be found to be safe if the following main principles are not observed:

- The employee/volunteer must be informed fully of the matter in writing that is considered to warrant a disciplinary hearing
- The matter must be investigated fully and thorough by an unbiased investigator
- The employee/volunteer must be given reasonable time to prepare a defence (5-7 days)
- The precise allegations should be read out at the start of the hearing
- The employee/volunteer must be given adequate time to answer the allegations
- The employee/volunteers representative/friend should be in possession of all the documentation that has been given to the employee/volunteer
- The employee /volunteer (or representative) should be allowed to challenge any matters that will be used by the employer to make their decision
- The panel hearing the matter must keep an open mind and not prejudge the matter

There must be the opportunity for the employee/volunteer to appeal any decision to a non-involved third party

- Wherever possible the panel hearing the matter should have a gender and racial balance of members

It is worth remembering that the proof required in a disciplinary matter is not that of the Courts where the standard is: Beyond All Reasonable Doubt. The standard before a disciplinary hearing, or indeed an Employment Tribunal, is: On the Balance of Probabilities.

## **20. Penalties**

The range of situations that bring people before a disciplinary hearing can be many. They can vary from the vexatious to the extremes of damage to the Council or other employees/volunteers. Penalties should therefore be graded: In general it is also a matter of natural justice and good management that will apply what is appropriate.

## **21. Sanctions**

So, grade sanctions to what is appropriate and taking into account the employee/volunteer track record. The following is suggested as a guideline:

1st problem & minor - Verbal warning given by Chairman

2nd time & minor - Further verbal warning from Chairman

More serious matter - 1st written warning from Council

2nd time & serious - Final written warning from Council

Gross misconduct - suspension on full pay and hearing

It is not, of course, necessary to proceed through each level to the top, as it were. Depending on the severity of the matter the procedure can, after proper consideration, go to any high stage immediately.

## **22. Dismissal**

The statutory procedure will apply to:

- Conduct
- Capability
- Redundancy
- Expiry of a Fixed-Term Contract

### **23. Exemptions**

1. Where the employer's business ceases abruptly;
2. Long term illness; the government expects these occurrences to be rare

### **24. Gross Misconduct**

This will be a substantial matter and is usually clearly recognised as such i.e. Theft, deliberate harm to or misuse of/to Council property, causing harm to a fellow employee/volunteer, member of the public etc.

In a case of this nature and after the usual proper preliminary investigation an employee should immediately be suspended on FULL PAY. They should not be sacked out of hand. To suspend without pay or dismiss summarily could rebound with a claim for unfair dismissal on the grounds that the matter was pre-judged and unfair. (Particularly if, on investigation, the employee /volunteer are exonerated). Even if an employee/volunteer is found guilty in a criminal court of an offence the matter (unless a prison sentence follows) is not one of automatic dismissal. The employer should convene a Disciplinary Hearing in the normal manner to consider the implications and facts in relation to the possibility of continuing employment.

### **25. Appeals**

A feature of natural justice and also inherent in the new requirements under the Dispute Resolution Regulations 2004 is that insofar as is possible the matter giving rise to discipline and grievance procedures should be manifestly seen to be fair. To ensure fairness a Council should form a separate Grievance and Disciplinary Hearing Panel and an Appeals Panel. Naturally the members of the Appeals Panel should not be contaminated by being part of any of the proceedings of the Grievance and Discipline Panels. Part 3 of Schedule 3 of the Act requires that in an Appeals Panel the employer should, as far as it is reasonably practical, be represented by a more senior manager than attended the first meeting. This may be difficult for a local council and makes the segregation of the members of the Appeals Panel from those of the Disciplinary and Grievance Panel more crucial to a manifestly fair and reasonable decision. In some cases, with very small local councils it might be wise to ask an independent member from a neighbouring local council to sit on the panel. In addition; to ensure fairness, any serious matter should be investigated by an independent investigator competent in such work and whose report should be sent to both parties in the matter for consideration before further proceedings. This will be an option that an Employment Tribunal might well ask questions about, should a case reach them, where the internal processes of an organisation (possibly a number of local councils) do not have the knowledge and skills to conduct a procedure in a matter that will ensure that it is seen to act fairly and reasonably and

comply with the law. Failure on either party to follow the law and spirit of the Act, the presentation of a facetious or vexatious case, or even a badly presented case can result in the imposition of fines on either party to a maximum of £5000 under the Act, or, as stated previously, seriously affect the amount of the award made for or against either party.

## **26. Paperwork**

It is a requirement that all paperwork associated with the matter of a Disciplinary or Grievance hearing is kept under the Confidential Information classes of both the Data Protection Act 1998 and the Freedom of Information Act 2000.

First Written Warning: This should be kept on file for six months then destroyed and the employee advised of the fact.

Final Written Warning: This should be kept on file for 12 months then destroyed and the employee advised of the fact.

## **27. Time Limits**

An employee cannot submit an employment tribunal application unless they have sent their employer a Step-1 letter and waited 28 days for a response. This procedure applies to both current and former employees. Time limits may be extended to allow procedures to be completed. Where the employer fails to meet the statutory requirements an employment tribunal may increase or decrease the awards made as previously stated.

## **28. Abandonment of Procedures under the Act**

It will be recognised as reasonable to discontinue proceedings where one party has made all reasonable attempts to comply but has been prevented from doing so.

The exemptions are specified:

Unacceptable behaviour by one party through violence or abuse. The test will be that of a reasonable belief that harm would result to one party, their goods and property or another person through actual, or threat of, assault; or that one party has subjected the other party to harassment. The definition that will be used is that one party creates a hostile, intimidatory, humiliating or degrading and offensive set of conditions.

**NB** – Given changes in the reduction of emphasis given to stress in cases brought before the courts where stress is put forward as a major detriment then stress or anxiety engendered in one party will not usually be regarded as a sufficient cause to warrant exemption from the laid down procedure

## **29. Fault**

If the statutory procedure is abandoned because of a reason outlined in the exception above, then the fault of either party will be taken into account by an Employment Tribunal. Where the case is that of dismissal and the employer is at fault, then the dismissal will automatically be considered unfair.

### **30. History**

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