



## Employment alert

### Draft DDP replacement has been published

#### Background

As regular readers will be aware, the [Gibbons Review](#) told the Government what employers and their advisers already knew: that the Disciplinary and Dismissal Procedure ('DDP') was causing more (not fewer) Tribunal claims.

Its many and complex rules were being challenged by employers and employees alike, which led to a huge body of conflicting cases about what the DDP meant. This made it hard for lawyers to advise clients on likely outcomes to disputes, drove up legal costs and did nothing to improve the lives of busy HR staff.

#### Current Code and DDP to be replaced by a new Code

Gibbons said that the DDP should be abolished and the Government listened. It will go in April 2009.

Replacing it will be the principles that any unreasonable failure to follow a new Acas Code of Practice on Discipline and Grievance will:

1. Not itself make a dismissal unfair, but will help a Tribunal to judge whether a dismissal was fair/unfair. This is similar to how a breach of the Highway Code does not itself make one's driving careless or dangerous but will influence the Court's own assessment; and
2. Allow the Tribunal to adjust an unfair dismissal award by up to 25% in favour of the person who suffers the failure to follow the Code.

Since an unfair dismissal claim can result in a compensatory award of up to £60,600, following the Code's principles could save you up to £15,150.

We first analysed the likely effects of this legislative change in our January 2008 employment alert.

The new Acas Code of Practice will be very short and will set out a number of good practice principles to follow, rather than the DDP's prescriptive list of rules. The current Code of Practice runs to 26 pages; the new Code looks like being half that length despite replacing both the current Code and the DDP.

The [Draft Code](#) is currently undergoing consultation (if you send Acas your views on it they will be listened to). It has three sections:

1. An introduction containing general principles relevant to disciplinaries and grievances
2. A section on disciplinaries
3. A section on grievances

#### How the new Code will differ

There is little that is new in the draft Code, in the sense that if you follow the Acas guidance and the DDP now you will mostly comply with the new Code after April 2009. For example here is some of the new material extracted from the draft Code (on the left) and the current position (on the right):

## New Draft Code

*“Rules and procedures for handling disciplinary and grievance situations should be set down in writing, be specific and clear and be agreed wherever applicable”.*

*“Keep written records”.*

*“Wherever possible the appeal should be dealt with by a manager who is more senior than the manager who conducted the first meeting”.*

## What it replaces

*“Rules should be specific, clear and recorded in writing. They also need to be readily available to employees, for instance on a notice-board or, in larger organisations, in a staff handbook or on the intranet. Management should do all they can to ensure that every employee knows and understands the rules, including those employees whose first language is not English or who have trouble reading. This is often best done as part of an induction process”.*

*This replaces three paragraphs and eight bullet points.*

*“As far as is reasonably practicable a more senior manager not involved with the case should hear the appeal. In small organisations, even if a more senior manager is not available, another manager should hear the appeal, if possible. If that is not an option, the person overseeing the case should act as impartially as possible. Records and notes of the original disciplinary meeting should be made available to the person hearing the appeal”.*

However, there are some proposals which may or may not affect employers for example:

## New Draft Code

*“The employee should be told of a specified period after which a warning will be disregarded”.*

*“An employee has the right to be accompanied at any **disciplinary** meeting”*

*“It is good practice to allow the employee to be accompanied to **investigatory** meetings”.*

## What it replaces

*This is new but most employers do this anyway out of common sense.*

*“Allow employees to be accompanied at **disciplinary** meetings”.*

Presumably it will still be safe not to allow an employee to be accompanied to investigatory meetings as this is only “good practice”, although potentially, for a larger employer to refuse accompaniment to an investigatory meeting could make a dismissal unfair. This is one of the issues that remains to be confirmed

## General Principles

The DDP contains some general principles which apply to the three-step procedures:

- Each step must be taken without unreasonable delay.
- The timing and location of meetings must be reasonable.
- Meetings must be conducted in a manner that enables both employer and employee to explain their cases.
- In the case of appeal meetings the employer should, as far as is reasonably practicable, be represented by a more senior manager than attended the first meeting.

The Draft Code adopts the same idea:

- Issues should be dealt with **promptly**. Meetings and decisions should not be unduly delayed.
- Employers should act **consistently** and ensure that like cases are treated alike.
- Appropriate **investigations** should be made, to establish the facts of the case.
- Any grievance or disciplinary meeting should, so far as possible, be conducted by a

manager who was **not involved** in the matter giving rise to the dispute.

- Where the employer is raising a **performance** problem the immediate manager should be involved.
- An employee should be **informed** of the basis of the problem and have an opportunity to **put their case** in response before any decisions are made.
- An employee has the right to be **accompanied** at any disciplinary or grievance meeting.
- An employee should be allowed to **appeal** against any formal decision made.

Will the Tribunals still apply the old rules in practice?

The new Code will be much shorter than the current Code and DDP. There will be some material formerly taken into account in assessing the fairness of a dismissal which is no longer set out anywhere. For example, with regard to suspensions:

#### **New Draft Code**

*"In those cases where a period of suspension with pay is considered necessary, this period should be kept as brief as possible".*

#### **What it replaces**

*"In certain cases, for example in cases involving gross misconduct, where relationships have broken down or there are risks to an employer's property or responsibilities to other parties, consideration should be given to a brief period of suspension with full pay whilst unhindered investigation is conducted. Such a suspension should only be imposed after careful consideration and should be reviewed to ensure it is not unnecessarily protracted. It should be made clear that the suspension is not considered a disciplinary action".*

If you suspend an employee, will Tribunals be content with the fact that you have given the matter some thought and considered the suspension necessary or will they continue to go behind your decision, asking whether relationships had broken down or property was at risk? ie is a shorter Code good news for employers (it reduces the number of rules to follow) or bad news (it keeps some rules hidden from view). Only time will tell.

#### Conclusion

BrookStreet des Roches LLP gives the Draft Code a cautious welcome.

On the one hand, simplifying the DDP/Acas Code of Practice to a short set of general principles reduces the scope for technical legal arguments with an uncertain outcome. On the other hand, it puts the fairness/unfairness of a dismissal firmly back in the Tribunal's hands, so the parties still have little certainty about whether they have acted reasonably and fairly or not.

On balance we think that this merely changes one form of uncertainty for another (which is a neutral step) and it should simplify Tribunal claims for both parties (a positive step which should make claims cheaper for employers to defend).

When the final Code of Practice is published, we'll let you know and provide you with guidance about any changes you need to make to your HR practices.



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