

EAST HERTS COUNCIL

LOCAL JOINT PANEL – 18 MARCH 2009

REPORT BY SECRETARY TO THE EMPLOYER'S SIDE

6B UPDATE ON THE NEW ACAS CODE OF PRACTICE 1:  
DISCIPLINARY AND GRIEVANCE PROCEDURES

WARD(S) AFFECTED: None

" D" RECOMMENDATION – that the report be noted.

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1.0 Purpose/Summary of Report

1.1 To outline the changes in Disciplinary and Grievance Policies required by the Employment Act 2008 reflected in the new ACAS Code of Practice and detail actions being taken by Human Resources to ensure the Council complies.

2.0 Contribution to the Council's Corporate Priorities/Objectives

**Fit for purpose, services fit for you**

*Deliver customer focused services by maintaining and developing a well managed and publicly accountable organisation.*

3.0 Background

3.1 On 6 April 2009 the Employment Act 2008 will replace the statutory dismissal, discipline and grievance procedures (the Statutory Procedures) with a new ACAS Code of Practice on handling discipline and grievances (the Code).

4.0 Report

4.1 With the introduction of the Employment Act 2008 the main change is the departure of the three-step statutory disciplinary, dismissal and grievance procedures and their replacement with the new ACAS Code of Practice on discipline and grievance.

4.2 The new ACAS Code of Practice retains the principle of minimum procedures and in substance still follows the three-step notice, meeting and appeal process, but is more flexible in its approach.

The crucial change though is that employees and employers will not face the prospect of automatic penalties if they fail to comply with the Code.

- 4.3 LGE advisory bulletin provides a summary of the changes and offers guidance on dealing with disciplinary and grievance matters under the new ACAS Code (Appendix A, pages 6.11 – 6.22).
- 4.4 East Herts current disciplinary and grievance procedures were reviewed in August 2006. The disciplinary, grievance and capability policies are currently being updated to reflect best practice, the Employment Act 2008 and ACAS Code of Practice. Following consultation with Unison the policies will be reported at the Local Joint Panel in June 2009.
- 4.5 East Herts will continue to use its current policies after the introduction of the new Code, until the revised policies have been approved. This does not pose a risk to the Council as the new Code is generally less prescriptive than the old procedures and the current policies are stringent enough to comply. The few exceptions where the Code is more exacting are already covered by our policies and custom and practice.
- 5.0 Consultation
- 5.1 Unison will be consulted on the revised policies.
- 6.0 Legal Implications
- 6.1 As outlined in the report
- 7.0 Financial Implications
- 7.1 None
- 8.0 Human Resource Implications
- 8.1 As outlined in the report
- 9.0 Risk Management Implications
- 9.1 Failure to comply with the Council's Disciplinary and Grievance Policies could potentially leave the Council liable to claims at Employment Tribunal.

## Background Papers

- Code of Practice 1: Disciplinary and Grievance Procedures:  
<http://www.ACAS.org.uk/CHttpHandler.ashx?id=961&p=0>
- East Herts Council Disciplinary Policy and Procedure 2006
- East Herts Council Grievance Procedure 2006

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LGE advisory **bulletin**

Employment Relations

no. 548

**February 2009 update**

*"Rarely can legislation have been so counter-productive. Provisions designed to reduce tribunal disputes have spawned satellite litigation in which arcane and complex points of law have been argued, frequently so remote from reality that they would surprise even the most desiccated Chancery lawyer conjured up by the imagination of a Charles Dickens".*

*Mr Justice Elias, President of the EAT, commenting on the statutory procedures.*

To the relief of many, on 6 April 2009 with the implementation of the Employment Act 2008, we will see the departure of the three-step statutory disciplinary, dismissal and grievance procedures and their replacement with a new Acas Code of Practice on discipline and grievance.

To say that the statutory procedures will not be missed is somewhat of an understatement, mainly due to the harsh consequences for those who fail to follow the procedures. Most dismissals that do not follow the statutory procedures are automatically unfair and result in an automatic increase to awards of 10% or more. This is the case even where the formal nature of the statutory dismissals procedures is simply not appropriate, such as at the end of a lengthy redundancy process where a substantial number of meetings and correspondence have already taken place. If an employee fails to submit a written grievance in accordance with the statutory procedures, they are barred from issuing a tribunal claim about their complaint. So what has been the result? Employees making sure they submit grievances and disputes resolved before they reach the tribunal stage? No. The result has been tribunals bending over backwards to consider any written complaint, however informal, as a grievance. This has left employers in the difficult position of possibly having to treat all written complaints as formal grievances, to avoid the risk of ignoring a statutory grievance.

The new Acas Code, while setting out procedures which in substance still follow a three-step notice, meeting and appeal process, is more flexible in its approach and will only apply to misconduct and poor performance matters, and grievances. The crucial change though is that employees and employers will not face the prospect of automatic penalties if they fail to comply with the Code and Acas have been given the resources to allow them to focus on resolving disputes at an earlier stage.

This special advisory bulletin provides a summary of the changes and offers guidance on what it is hoped will be a common sense approach to dealing with disciplinary and grievance matters under the new Acas Code.

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## Summary

On 6 April 2009 the Employment Act 2008 will replace the statutory dismissal, discipline and grievance procedures (the Statutory Procedures) with a new Acas Code of Practice on handling discipline and grievances (the Code). The Code still places obligations on employers and employees to follow disciplinary and grievance procedures, but the penalties for any failure to comply with the revised procedures will be less harsh.

## Background

The Statutory Procedures came into force in October 2004 and introduced mandatory "three step processes" for disciplinary and dismissal matters, and grievances brought by an employee. The Statutory Procedures have attracted much criticism as their mandatory nature has often resulted in disproportionate penalties for employers, disputes becoming formalised and additional litigation in employment tribunals concerning the technical application of the procedures. One of the key problems with the Statutory Procedures is that where the employer or the employee respectively fails to use the relevant Statutory Procedures, an employment tribunal is required to increase or decrease any award by between 10% and 50%. This has resulted in awards against employers being increased, for relatively minor procedural errors. Further, a failure to follow the Statutory Procedures when dismissing will in the majority of cases make that dismissal automatically unfair and if an employee fails to submit a grievance under the Statutory Procedures, they may be barred from submitting an employment tribunal claim about their complaint.

## The Employment Act 2008

The Employment Act 2008 will make the following changes to the way workplace disputes are handled. It will

- Repeal the Statutory Procedures for dealing with discipline, dismissal and grievance issues as set out at sections 29-33 of the Employment Act 2002.
- Repeal section 98(A) of the Employment Rights Act 1996, which provides that a failure to follow the Statutory Procedures where required in dismissing, makes that dismissal automatically unfair.
- Restate the "Polkey" principle so that if an employer fails to follow a fair dismissal procedure the dismissal will be unfair, but compensation awards can be reduced by as much as 100% to reflect the likelihood that dismissal would have resulted if a fair procedure had been followed.
- Insert a new section 207A into the Trade Union and Labour Relations (Consolidation) Act 1992 providing that where the new Acas Code of Practice applies, tribunals will have a discretionary power to adjust awards by up to 25%, if they consider that an employer's or employee's failure to comply with the Code was unreasonable.
- Amend Acas' obligations to provide conciliation services.

## The Acas Code of Practice I: Discipline and

The new Code (the full name of which is 'ACAS Code of Practice I: Discipline and Grievance') retains the principle of minimum procedures but takes a less

## Grievance

prescriptive approach than the Statutory Procedures. It is intended to be “light touch” so that employers and employees can within its framework take a flexible approach to handling disciplinary and grievance matters. A full copy of the Code (although marked draft) can be found at: [www.acas.org.uk/CHttpHandler.ashx?id=961&p=0](http://www.acas.org.uk/CHttpHandler.ashx?id=961&p=0).

The Code is also accompanied by comprehensive advisory guidance. Further details of that guidance are set out at page 9 below.

Turning back to the Code, it sets out five key elements of fairness being that:

1. matters should be raised and dealt with promptly;
2. parties should act consistently;
3. employers should carry out the necessary investigations to establish the relevant facts;
4. employers should inform employees of the basis of the problem and allow the employee to put their case; and
5. employees should be allowed to be accompanied at any formal disciplinary or grievance meeting.

## *Disciplinary matters*

The Code sets out the process for disciplinary matters, which is:

1. establish the facts of each case;
2. inform the employee of the problem;
3. hold a meeting with the employee;
4. at that meeting, allow the employee to be accompanied;
5. decide on the appropriate action; and
6. provide the employee with an opportunity to appeal.

Aside from the general principles of fairness and the procedure set out above, employers should note the following points, although many of them should already be reflected in local authorities’ procedures and practices:

- The Code only covers misconduct issues, poor performance and grievances. Therefore, it will cover disciplinary warnings and misconduct and poor performance dismissals, but unlike the Statutory Procedures, not dismissals for other reasons, for example, individual redundancies and ill-health dismissals.
- In misconduct cases the Code provides that where practicable, different people should carry out the investigation and the disciplinary hearing.
- Unlike the Statutory Procedures, the Code advises that the notification of a disciplinary meeting must tell employees about their right to be accompanied.
- Employees and the person that accompanies them are obliged to make “every effort” to attend the meeting.
- Where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause, the employer should make a

decision on the evidence available.

### *Grievance matters*

The procedure in the Code for dealing with grievances mirrors that for disciplinary matters and is:

1. the employee should set out in writing the nature of the grievance;
2. the employer should hold a meeting with the employee;
3. the employer must allow the employee to be accompanied at that meeting by a colleague or trade union representative;
4. the employer must decide on appropriate action; and
5. the employer must allow the employee to take the grievance further if not resolved.

As with the disciplinary procedures, employees must make “every effort” to attend meetings although unlike the disciplinary procedures, the Code does not require employers to tell employees that they have the right to be accompanied at grievance meetings, however, such an obligation to tell employees should be implied. Unlike the Statutory Procedures, where employees were only required to submit their grievance in writing, the Code states that employees must also raise grievances “formally”. This should help to avoid confusion for employers and the raft of litigation which has arisen to determine whether a grievance within the meaning of the Statutory Procedures has been brought where employees raise complaints in writing, but in an informal manner and without identifying the matter as a formal grievance. Unlike under the Statutory Procedures, where an employee fails to raise a grievance, they will still be able to submit a tribunal claim, however, it is likely that if the employee were to succeed in such a claim, the tribunal would exercise its discretionary power to decrease any award by up to 25%.

It is important to note that the grievance provisions do not apply to collective grievances raised on or behalf of two or more employees by a trade union or workplace representative under a collective grievance process. In such cases the collectively agreed processes should be followed. Further, where there are overlapping grievance and disciplinary cases, disciplinary cases may be suspended in order to deal with the grievance, or if both cases are related it may be appropriate to deal with the issues together.

### *Discretionary power to adjust awards*

The Code does not offer any specific guidance for employment tribunals on whether a party should be found to have unreasonably failed to comply with the Code and whether they should exercise their power to adjust awards by up to 25%. All the Code states is that “what is reasonable or justified will depend on all the circumstances of the case” and “employment tribunals will take the size and resources of an employer into account” when determining what steps should have been taken under the Code.

As a result, it is probable that there will be period where the parties will be unclear on whether or not a failure to comply with the Code will be assessed as unreasonable, and an adjustment to an award will be made. However, over



time case law should develop on this point that will help the parties interpret their obligations and the consequence of any failure. However, for local authorities as large employers we anticipate the expectation will be that they will be able to comply with the Code, unless there are highly exceptional circumstances.

**What tribunal claims will the Code apply to?**

Full details of the jurisdictions the Code will apply to and therefore the power for employment tribunals to adjust awards for non-compliance are in the new schedule A2 of the Trade Union and Labour Relations (Consolidation) Act 1992. A summary of the types of claims the Code will apply to is as follows:

- equal pay;
- discrimination;
- unfair dismissal (where the reason for dismissal is misconduct or poor performance);
- breach of contract and unauthorised deductions from wages;
- redundancy payments;
- whistleblowing;
- claims relating to rights to take time off work, for example for jury service and domestic reasons;
- claims relating to trade union and other consultation and representative rights;
- national minimum wage claims; and
- claims under the Working Time Regulations 1998.

**Acas conciliation services**

On the introduction of the Code, Acas' conciliation duties will change. Under the current regime, Acas is under a duty to conciliate in cases before any tribunal claim is issued. However, after the issue of the claim, in many cases including unfair dismissal claims, Acas' duty to conciliate is limited to a fixed period. That regime often caused difficulties as Acas was unable to prioritise and effectively allocate resources to appropriate pre-claim cases. Further, the fixed conciliation period made it difficult for parties to settle claims late on in proceedings, especially where one of those parties was unrepresented. However, in recognition of that problem and the proposed changes to Acas' duties, since April 2008 Acas have in practice ignored that fixed conciliation period and have continued to provide conciliation services throughout the period of the relevant claim.

Under the new regime, Acas' duty to conciliate in pre-claim cases will be amended to a statutory power to offer such services. Although on the face of it that would appear to reduce Acas' duties, the new regime will allow Acas to focus its resources more effectively on appropriate cases. The government has provided Acas with an additional £37m, to allow it to provide those pre-claim conciliation services. Fixed conciliation periods will also formally be repealed.

**Acas guidance**

To accompany the Code, Acas have produced a comprehensive guide to handling disciplinary and grievance matters (the Guidance). Tribunals will not

have the power to adjust awards on account of any failure to follow the Guidance, nor are they required to have regard to the Guidance. However it is anticipated that in many cases tribunals will refer to the Guidance to determine whether the employer's handling of misconduct, poor performance and grievance matters complies with the general principle of fairness. For that reason, it is recommended that when handling disciplinary and grievance matters, employers should read the relevant section of the Guidance and ensure that they comply with the recommendations.

The Guidance is split into disciplinary and grievance sections, and to make it easy to navigate with the Code, is set out with appropriate comments and guidance alongside extracts from the Code.

Key points of interest in the Guidance are:

- **Mediation:** to reinforce the emphasis on resolving disputes, the Guidance includes a brief commentary on how mediations operate, and suggestions on when they might be appropriate, for example for resolving grievances.
- **Sample letters:** sample letters are provided that employers can use as models for dealing with disciplinary and related issues. Those letters include: a notice of a disciplinary meeting, a notice of a final written warning and a letter to a worker's GP to enquire into the cause of a worker's absence.
- **The right to be accompanied:** the Guidance comments that on a strict interpretation, the right to be accompanied at grievance matters as set out at section 10 of the Employment Relations Act 1999 only applies where an employer is dealing with a complaint about a duty owed to the worker which arises from statute or common law (for example a contractual right). Therefore, a complaint about not getting a pay rise would not trigger the right to be accompanied, if there was no contractual right to a pay rise or the complaint was not based on unlawful discrimination, for example under the Sex Discrimination Act 1975. However, the Guidance makes it clear that it is good practice to allow workers to be accompanied by a colleague or trade union representative at all formal grievance meetings.

A full copy of the Guidance (although marked draft) is available at [www.acas.org.uk/CHttpHandler.ashx?id=905&p=0](http://www.acas.org.uk/CHttpHandler.ashx?id=905&p=0).

## **Transitional arrangements**

The question of whether the old Statutory Procedures or new Acas code will apply will normally be determined:

- in the case of disciplinary and dismissal matters, by whether the employer has started the disciplinary or dismissal action (the trigger event) before or after 6 April 2009. The trigger event will normally be the letter informing the employee that the employer is considering

disciplinary action.

- In the case of grievance matters, by whether the employee has complained (the trigger event), before or after 6 April 2009.

Where the trigger event occurs before 6 April 2009, the statutory procedures will apply. Where the trigger event occurs on or after 6 April 2009, the Code will apply. Full details of the transitional arrangements can be found at [www.berr.gov.uk/whatwedo/employment/Resolving\\_disputes/disputes\\_after\\_6\\_april\\_2009/index.html](http://www.berr.gov.uk/whatwedo/employment/Resolving_disputes/disputes_after_6_april_2009/index.html)

### **Implications for local authority employers**

Local authority employers will already have disciplinary and grievance procedures that are compliant with the Statutory Procedures, and those same procedures should in nearly all cases satisfy the requirements of the Code. However, those procedures should be checked against the Code, for example to check whether the procedures make it clear that the employee should be notified of their right to be accompanied at disciplinary meetings.

What local authority employers will welcome though is the focus on dispute resolution and the emphasis on pre-claim conciliation services. It is hoped that in cases that are suitable for mediation, that Acas will step in at an early stage, once the employer or the employee have made Acas aware of the issue. That may well mean that some cases will be resolved at an early stage, without recourse to employment tribunal proceedings. However, a realistic assessment must be taken of the new regime, and there will still be many disputes that end up in tribunal. The difference under the new regime though should be that employers will not find themselves being penalised unfairly for what could be viewed as minor breaches of procedure.

To assist HR professionals we have prepared a table of the principal changes, and that table is set out below. Further details of the Statutory Procedures and the background to the changes are available on the LGE website at [www.lge.gov.uk/eru/disputeresolution](http://www.lge.gov.uk/eru/disputeresolution)

**SUMMARY TABLE: CHANGES TO WORKPLACE DISPUTE RESOLUTION PROCEDURES**

<b>Situation</b>	<b>Old procedure</b>	<b>New regime</b>
Dealing with disciplinary and poor performance matters	Subject to limited exceptions, follow rigid 3-step Statutory Procedures under the Employment Act 2002.	Comply with less prescriptive Acas Code of Practice.
Dismissals for reasons other than misconduct and poor performance	Subject to limited exceptions, follow the 3-step procedure under the Employment Act 2002.	No requirement to comply with procedures under the Employment Act 2002 or the Acas Code of Practice, although employers should ensure they comply with general unfair dismissal considerations as set out in statute and case law.
Dealing with grievances	<p>Subject to limited exceptions, follow the 3-step procedure under the Employment Act 2002.</p> <p>Employee must submit grievance in writing, although no need to raise grievance in formal manner. Adjustments to tribunal time limits for bringing a claim.</p>	<p>Follow less prescriptive procedure in Acas Code of Practice.</p> <p>Employee must submit grievance formally and in writing. No adjustments to tribunal time limits for bringing a claim.</p>

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Situation	Old procedure	New regime
Right to be accompanied at disciplinary and grievance meetings	<p>No right under the Statutory Procedures to be accompanied, although right to be accompanied by a trade union representative or fellow worker under section 10 of Employment Relations Act 1999 (award of 2 weeks' pay if failure to comply).</p> <p>No obligation to tell employee of right to be accompanied, but good practice to do so.</p>	<p>Under the Acas Code, in disciplinary cases the employer must inform employee of right to be accompanied by a fellow worker or trade union representative and allow them to be accompanied, where reasonable request is made.</p> <p>In grievance cases, no obligation to <u>tell</u> employee of right to be accompanied, but good practice to do so. Employee must be allowed to be accompanied by fellow worker or trade union representative.</p>
Employee fails to attend disciplinary hearing	Complex rules on whether dismissal in absence of employee will result in dismissal being unfair.	Where employee is persistently unwilling or unable to attend the meeting without good cause the employer is able to take a decision on the evidence available to it.
Disciplinary and grievance matters arising at same time	Complex rules on whether matters should be dealt with together or separately.	Disciplinary procedures may be suspended to deal with grievance or if both cases related, permissible to deal with them concurrently.

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Situation	Old procedure	New regime
Employer fails to comply with relevant procedure	<p>Disciplinary and dismissal matters: dismissal automatically unfair and tribunal must increase any award by 10% and up to 50%, unless there are exceptional circumstances that would make adjustment inequitable.</p> <p>Grievance matters: tribunal must uplift any award by 10% and up to 50%, unless there are exceptional circumstances that would make adjustment inequitable.</p>	<p>Disciplinary, dismissal and grievance matters: discretionary power to adjust awards by up to 25%, if tribunal considers that the employer has unreasonably failed to comply with the Code.</p> <p>In disciplinary matters, "Polkey" applies ie dismissal may be unfair but compensation reduced by up to 100% if dismissal would have been fair if proper procedure followed.</p>
Employee fails to comply with relevant procedure	<p>Disciplinary and dismissal matters: decrease in any award by at least 10% and up to 50%, unless there are exceptional circumstances that would make adjustment inequitable.</p> <p>Grievance matters: employee barred from issuing tribunal claim until 28 days after grievance raised and decrease in any award of 10% to 50%, unless there are exceptional circumstances making adjustment inequitable.</p>	<p>Disciplinary, dismissal and grievance matters: discretionary power to adjust awards by up to 25%, if tribunal considers that the employer has unreasonably failed to comply with the Code.</p>
Acas conciliation services	<p>Acas under a duty to conciliate in pre-claim cases.</p> <p>Acas' duty to conciliate in certain post-claim cases limited to set period.</p>	<p>Acas provided with a discretionary power to conciliate in pre-claim cases.</p> <p>Acas duty to conciliate in post-claim cases for the duration of the claim.</p>