



Managers Guidance Notes
Discipline and Appeals
Appeals Against Disciplinary Action

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ABOUT THE AUTHOR

I am an experienced HR Manager with 25 years experience gained predominantly in stand-alone roles within a mixture of small localised businesses and large multi-site organisations. I am used to taking the lead on HR projects, ensuring that all HR policies and procedures are legally compliant and being the first point of contact for managers and employees in the full range of HR issues including disciplinary and grievance matters, absence management and performance management.

I have set HR departments up from nothing, have built up a wealth of expertise in company restructures and intensive recruitment programmes and I have closed businesses down. During those experiences I have seen things done well and have seen things done badly!

I've worked in large and small businesses but my preference is for small businesses and I formed Kea HR Solutions in 2006 so I could specifically use my experience and expertise in Human Resources to help owners of SMEs across South Yorkshire and the surrounding counties manage their people. I understand all aspects of human resources and am able to apply that knowledge to provide a solution for your business that firstly meets the legal requirements but also fits your needs, goals, and business style.

My professional and personal approach means I will work closely with you to come up with the ideal HR solution for your company's specific needs. I will slot into your business seamlessly, a natural people person, your staff will connect with me. I believe in giving my customers honest and straightforward advice, free from confusing legal jargon. I will clearly explain all your options with their risks and benefits so you can make an educated and informed decision that is right for your business.

I understand that all businesses are unique so I don't believe in offering my customers a one-size-fits-all solution to HR. All my services will be tailored to fit your company and its individual challenges and budget. Whether you want me to provide your company with long-term HR management or you simply want one-off advice with a situation that is happening in your business today, I am here to help you.

For more information about Kea HR Solutions visit www.kea-hr.co.uk

INTRODUCTION

The statutory ACAS code of practice on disciplinary and grievance procedures includes recommendations about appeals against disciplinary penalties.

While there is no statutory duty for employers to provide employees with the right of appeal against a disciplinary penalty, it is an important part of a fair disciplinary procedure. A failure to provide the right of appeal would amount to a breach of the ACAS code and could result in a finding of unfair dismissal. The right should exist where any formal action is taken.

The Appeals mechanism serves as a safety net for both the organisation and employee by providing an early opportunity to review the decision and where there are errors, for these to be rectified quickly.

These Managers Guidance Notes cover the legal requirements and will ensure you manage the process fairly.



There are a range of sub-folders that contain detailed guidance about each stage of the discipline and appeals process:

- Legal Requirements and the Model Policy
- The Investigation
- Suspension from Work
- The Disciplinary Meeting

Need Clarification?

If you require advice or support with this or on any other employment matter I would be happy to assist you. You can contact me on 0114 360 0626 alternatively you can email me at <mailto:kathryn@kea-hr.co.uk>.

Disclaimer

Whilst every effort has been made to ensure that the contents of the toolkit are accurate and up to date, no responsibility will be accepted for any inaccuracies found. This guidance should not be taken as a definitive guide or as a stand-alone document on all aspects of employment law. You should therefore seek legal advice where appropriate. The material produced here is the property of Kea HR Solutions and may not be reproduced without permission.

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What Is The Right To Appeal?

The ACAS Code of Practice gives employees the right to appeal disciplinary and grievance decisions made by their employer which they consider to be wrong and/or unfair.

The ACAS Code of Practice is not legally binding, so you will not face an automatically unfair dismissal claim if you fail to follow its recommendations. However, employment tribunals take the code into account in considering the fairness of procedure in relevant cases, and are able to adjust any awards made by up to 25% for unreasonable failure to comply with any of its provisions. This adjustment can be up or down, depending on which party is at fault.

The Code states that employers should allow employees to appeal against any formal disciplinary decisions made. The code advises that appeals should be heard without unreasonable delay, and ideally by a manager not previously involved in the case. You should inform the employee in writing of the results of the appeal meeting as soon as possible.

It follows that, when notifying an employee of a disciplinary decision, you should inform the employee of the right of appeal if they are dissatisfied with the decision. If the employee wishes to appeal, they should notify you in writing, setting out the grounds for the appeal. The employee will have the statutory right to be accompanied at the appeal meeting by a trade union official or fellow worker of their choice.



A copy of the ACAS Code of Practice on Grievance and Disciplinary Procedures is stored on the Legislation tab of the Legal Requirements and Model Policy sub-folder.

Contractual Appeals Processes

Sometimes a disciplinary policy will state that it forms part of the contract of employment. If such a policy provides for a right of appeal and this is not given to an employee, this will be a breach of contract. Employers should also bear in mind that aspects of a disciplinary policy may become contractual by reason of custom and practice if their employees have a reasonable expectation that they will be given a right of appeal, and this is the process that is invariably followed.

Consistency of Treatment

It is important for employers to ensure consistency of treatment in offering a right of appeal to avoid the risk of a discrimination claim. For example, if one employee is given a final written warning but is not given a right of appeal and can point to a situation where an employee of a different racial group received the same level of warning but was given a right of appeal, there is the risk that a claim for race discrimination will result.

There should also be consistency in the way that you deals with appeals, for example by ensuring that the appeal is heard before a panel, or by a manager who is more senior than the person who conducted the original meeting, if this has been your practice in the past.

Good Practice for Disciplinary Appeals

The non-statutory guidance accompanying the Code says that, wherever possible, the person who hears the appeal should be someone senior in authority to the person who took the disciplinary decision. In small companies, if a more senior manager cannot be found, a different manager of equivalent level should be asked to hear the appeal. If there is no alternative but for the manager who heard the original disciplinary meeting to hear the appeal, they should act as impartially as possible when meeting it.

A time period should be set for the employee to exercise his or their right of appeal. The ACAS guide suggests that five working days is usually enough. However, you should reserve discretion to consider later appeals depending on the circumstances of the case.



The Model Policy allows five working days from receipt of the written confirmation of the disciplinary decision.

In terms of paperwork, a record or any notes of the original disciplinary meeting should be made available to both the employee and the person meeting the appeal. Each side should also let the other know if it intends to rely on any other documents and provide copies in good time before the meeting.

Following the appeal meeting, the manager should notify the employee of the outcome of the appeal. The ACAS Code recommends that this should be done in writing as soon as possible after the appeal meeting. If there is no further appeal stage, you should also make it clear that the decision is final, and that there is no further right of appeal.

Reasons for Appealing

The ACAS Code says that the employee should set out their grounds for appeal in writing. If necessary, encourage them to do this rather than simply making a verbal request. This will help you to understand their case and prepare for it. Sometimes, you may find you only need to review the severity of the penalty (if the employee believes you've been too harsh).

On other occasions, you may need to carry out a new investigation (for example, if the employee has fresh evidence or a new witness). Or occasionally, you may need to rehear the case from scratch (for example, if the employee claims the original meeting was flawed), in which case you should then offer another appeal if you uphold your original finding.



The Model Policy gives the following examples as grounds for appealing:

- The procedure: a failure to follow procedure had a material effect on the decision
- The decision: the evidence did not support the conclusion reached

- The penalty: was too severe given the circumstances of the case
- New evidence: which has genuinely come to light since the first hearing
- The decision maker was biased
- Similar misconduct: similar misconduct by other employees had been dealt with differently

Where the employee states the reason for the appeal as a failure to follow the procedure, my recommendation is to hold a full re-meeting and ensure the errors are not repeated. Therefore, if the employee had been dismissed and is not reinstated and subsequently claims unfair dismissal you will be able to argue that the appeal was sufficiently comprehensive (e.g., is not simply a review of the original decision) and therefore corrected any previous procedural defects.

The manager conducting the appeal should have access to all of evidence collated during the investigation and the notes of the disciplinary meeting but should not confer with the original decision maker in case this leads to a biased view of the case against the employee.

The Right to be Accompanied

Under s.10 of the Employment Relations Act 1999, workers have the statutory right to be accompanied at a disciplinary meeting by a fellow worker or trade union official of their choice and this includes an appeal meeting. The right applies where the appeal is against a disciplinary warning as well as where it is against dismissal. Where the chosen companion is a trade union official it is not necessary for you to recognise the trade union in question.

Sometimes an employer's disciplinary policy will allow employees to be accompanied by someone other than a trade union official or fellow worker, for example the policy may allow them to bring a friend or family member who is not employed by the company.



Go to the Resource Materials tab within the Legal Requirements and Model Policy sub-folder for more information about The Right to be Accompanied.

Notifying the Employee

Once you've received written details of the employee's case, you should write to them telling them when and where the appeal meeting will take place. As before, you should hold the meeting promptly and find a private venue where you won't be interrupted. Again, inform the employee that they have the right to be accompanied.

You should also tell the employee who will hear the appeal. If possible, this should be someone who hasn't already been involved in the case and is more senior than the person who made the disciplinary decision. This may not be practicable though if you're a very small company.

Whoever hears the appeal, it's important that they don't treat the outcome as a foregone conclusion and that they consider the employee's case impartially.

Rescheduling the Appeal Meeting

Where the employee's chosen companion is unavailable on the proposed meeting date, the employee should propose another date that falls within five working days of the original date. In these circumstances you must rearrange the meeting accordingly.

Where the employee fails to attend the appeal, you should investigate the reason for their non-attendance and taking into account the need to act reasonably should rearrange the meeting. Point out to the employee that, as the appeal has been initiated by them, it is important that they are present to explain their grounds of appeal.

Where an employee repeatedly fails to attend the appeal meeting without good reason, you should make clear to the employee that a decision may be taken in their absence and that the decision will be final. In such circumstances you can make a decision to hear the appeal on the basis of the information and evidence available and should give the employee an opportunity to make representations in writing.

Rejecting a Late Appeal

ACAS guidance recommends that 5 working days will normally be long enough for an employee to lodge an appeal if they wish.

However, this is only guidance, so if an employee makes a late appeal, it's advisable to hear this unless you have clear grounds not to. For example, if you've dismissed the employee, waited 5 days and then started to look for a replacement, this could justify turning down a late appeal request.

Impartiality And Fairness

The chair of the appeal should be impartial and should not have been involved in the process which led to the original disciplinary decision. They should also be outside of the reporting line of the person who conducted the disciplinary meeting to avoid allegations of bias (that they simply supported their subordinate's decision) and should be more senior than the manager that made the original decision where possible.

For smaller employers where this is not possible, you should consider whether the owner of the business (or the board of trustees if it's a charity) should hear the appeal. They should be provided with all of the evidence compiled during the investigation and copies of the notes from the disciplinary meeting. However, they should not speak with the original decision maker as this could impact on their impartiality.

The Appeal Meeting

At the appeal meeting, the manager conducting the meeting should ensure that they have the notes of the disciplinary meeting to hand, in case it is necessary to refer to what was said at that meeting. The manager should begin the meeting by introducing everyone who is present and explaining their role. They should explain that the purpose of the meeting is to address the specific points that the employee has raised in their appeal, and to reach an independent decision on whether to uphold the finding of the disciplinary meeting, to overturn that decision or to substitute a lesser penalty.

General rules of fairness and natural justice should apply to the appeal meeting. The employee should have an opportunity to explain why they think that the original decision was wrong. This might be because the employee considers that the penalty was too harsh; new evidence has come to light; or the employee wishes to complain that the procedure was not fairly or correctly applied at the original meeting. If the employee has chosen to be represented, the companion should be allowed to put their case, sum up the case and respond to any view expressed at the meeting. The companion is not, however, entitled to answer questions on the employee's behalf.

The employee should have the chance to put any new evidence to you. If the employee brings to the appeal meeting new issues that were not brought before the original disciplinary meeting, it will be necessary for you to consider the nature of these issues and why they were not originally raised. If the employee wishes to introduce completely new evidence that is relevant and was not considered previously, it may be necessary for the manager to adjourn the appeal meeting so that the new matters can be investigated.

Once the relevant issues have been thoroughly explored, summarise the facts and adjourn to consider the decision. Put the outcome in writing and make clear that the employee has now exercised their right of appeal and your decision is final.



Please refer to the Resource Materials Tab for an appeal meeting checklist.

New Evidence

Where new evidence is submitted the chair of the meeting needs to carefully consider the merits of the case and weight, which should be given to the evidence presented in support of their case.

New evidence may be taken into account when deciding the outcome of the appeal.

The Decision

The non-statutory ACAS guide recommends that the manager chairing the appeal should be prepared to change the initial decision if it becomes apparent that the basis for it was not sound. It advises that, rather than undermining authority, such action makes the independent nature of the appeal apparent.

ACAS warns against imposing a higher penalty on appeal, as this could deter employees from appealing. However, if fresh evidence comes to light during an appeal process, you could commence new disciplinary action against the employee in respect of that evidence.

The purpose of an Appeal is to enable an independent review to be carried out as to the 'reasonableness' of the previous manager's decision. It is particularly important that the appeal does not become another disciplinary meeting but focuses on reviewing the process followed and the reasonableness of the decision, which has been taken. In considering reasonableness, the Director/Manager will want to satisfy themselves on the following points:

- Has a thorough and sufficient investigation been conducted?
- Was the manager's decision to take disciplinary action reasonable based on the evidence relating to the case?
- Was the disciplinary action decided upon reasonable, given the circumstances of the case?
- Is the treatment of the employee consistent with the Trust's general approach to similar cases?
- Has the matter been handled fairly and appropriately and is it consistent with the Trust's Disciplinary Procedure?
- Has the manager been (unknowingly) biased or prejudiced in anyway when reaching the decision?
- Is there any new evidence, which if known at the time would have altered the decision?
- Is there any new evidence, which should now be considered?
- Particularly in cases of capability, has appropriate action been taken to try to assist the employee to maintain an acceptable standard?

The burden of proof is different than that used in the Criminal Courts. The decision should be that the manager taking the decision held a genuine belief that the incident (or circumstances took place). The circumstances themselves, being judged against the criteria of the "balance of probabilities", rather than "beyond all reasonable doubt".

There are three decisions that can be reached:

1. The original decision stands.
2. The original decision is revoked.
3. The original decision is replaced with a lesser sanction. Additional supporting action (eg a development programme) may also be suggested if appropriate.

Reinstating the Employee

If the original decision was to dismiss the employee, but this is overturned as a result of an appeal, you should reinstate the employee with immediate effect. You could choose to impose a lesser penalty in place of the original decision to dismiss, provided that the disciplinary policy does not restrict this.

There should be no break in the employee's continuity of service, and the employee should be paid for the period between the dismissal and reinstatement (taking into account any notice payment).

The employee cannot treat the decision to uphold the appeal as an offer to return to work which they can accept or reject.

Record Keeping

It is advisable to keep records of whether or not an appeal was lodged and the outcome of any appeal. It is also helpful to take notes at the appeal meeting itself. These records will be subject to normal data protection rules.

Top Tips

- Take into account that not following an appeals procedure that forms part of the contract of employment will be a breach of contract.
- Apply the right of appeal consistently so as to avoid the risk of discrimination claims.
- Appreciate that employment tribunals take the ACAS code of practice on disciplinary and grievance procedures - which includes recommendations about appeals against disciplinary penalties - into account when considering relevant cases.
- Be aware that the ACAS code states that employees should be given the opportunity to appeal against disciplinary decisions, that the appeal should be heard without unreasonable delay, and that you should inform the employee in writing of the outcome as soon as possible.
- Aim to have the appeal heard by a manager who is more senior than the one who dealt with the original disciplinary meeting.
- Be aware that workers have the statutory right to be accompanied at a disciplinary appeal meeting by a trade union official or fellow worker of their choice.
- Where the employee fails to attend the appeal meeting, investigate the reasons for this and rearrange the appeal meeting where appropriate.
- Ensure that the general rules of fairness and natural justice are applied to the appeal meeting.
- Keep records of the appeal.