Statutory Document No. 306/07

# THE EMPLOYMENT ACT 2006

# CODE OF PRACTICE ON DISCIPLINARY AND GRIEVANCE PROCEDURES 2007

*Approved by Tynwald 15th May 2007*

*Coming into Operation 30th September 2007*

A Code of Practice made by the Department of Trade and Industry under Section 171 of the Employment Act 2006[1].

**Arrangement of Paragraphs**



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[1] 2006 c. 21

Price £2.50

## Introduction

This Code of Practice provides practical guidance to employers, employees and their representatives on

- producing and using disciplinary and grievance procedures
- what constitutes reasonable behaviour when dealing with disciplinary and grievance issues, and
- the right to bring a companion to grievance and disciplinary hearings.

A failure on the part of any person to observe any provision of this Code of Practice does not of itself render that person liable to any proceedings. In any proceedings before the Employment Tribunal ('the Tribunal') any Code of Practice issued under section 171 of the Employment Act 2006 is admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings is required to be taken into account in determining that question.

Whilst every effort has been made to ensure that the explanations included in the Code are accurate, only the Employment Tribunal or the High Court can give authoritative interpretations of the law.

### Previous Code

This Code replaces the 1992 Code of Practice on Disciplinary Practice and Procedures in Employment which was issued under Section 87 of the Employment Act 1991 (repealed).

**Disciplinary** issues arise when problems of conduct or capability are identified by the employer and management seeks to address them through well recognised procedures. In contrast, **grievances** are raised by individuals bringing to management's attention concerns or complaints about their working environment, terms and conditions and work-place relationships.

### Smaller organisations

In small establishments it may not be practicable to adopt all the detailed provisions relating to disciplinary and grievance procedures, but most of the essential features could be adopted and incorporated into a simple procedure.

### Manx Industrial Relations Service

The Manx Industrial Relations Service offers a range of services to employers and employees, ranging from guidance to conciliating in employment disputes.

### Office of the Data Protection Supervisor

The Office of the Data Protection Supervisor is able to give advice on the keeping of employee records and other matters relating to the Data Protection Act 2002.

**A general note on workers and employees**

The provisions in Sections 1 and 2 of the Code only apply to *employees*, however the provisions in Section 3, in relation to the right to be accompanied at disciplinary and grievance hearings, apply to all *workers* (a wider term which includes employees: see para 39.4). This Code is about good employment practice. Therefore where workers are involved in grievance and disciplinary proceedings, it is good practice to apply the standards set out in the guidelines in Sections 1 and 2 to those proceedings, and not only those in Section 3.

## Section 1: Disciplinary practice and procedures in employment

### 1. Citation and Commencement

1.1. This Code may be cited as the Code of Practice on Disciplinary and Grievance Procedures 2007 and shall come into operation on the 30th September 2007.

### 2. Disciplinary rules and procedures

2.1. Disciplinary rules and procedures help to promote orderly employment relations as well as fairness and consistency in the treatment of individuals. They enable organisations to influence the conduct of workers and deal with problems of unsatisfactory performance and attendance thereby assisting organisations to operate effectively.

### 3. Misconduct and Capability

3.1. Disciplinary rules tell employees what behaviour employers expect from them. If an employee breaks specific rules about behaviour, this is often called *misconduct*. Employers use disciplinary procedures and actions to deal with situations where employees allegedly break disciplinary rules. Disciplinary procedures may also be used where employees don't meet their employer's expectations in the way they do their job. These cases of unsatisfactory performance are often known as *capability* and may require different treatment from misconduct. Disciplinary procedures should allow for this and further information is available in paragraphs 16.1 to 18.5.

3.2. It is important that individuals know what standards of conduct and performance are expected of them. Section 8(5) of the Employment Act 2006 requires employers to provide employees with a written statement of particulars of employment. Such a statement must also specify any disciplinary rules and procedures applicable to the employees and indicate a person to whom they should apply if they are dissatisfied with any disciplinary decision, and how that should be done. The statement should explain any further steps which exist in any procedure for dealing with disciplinary decisions. The employer may satisfy certain of these requirements by referring the employees to a reasonably accessible document which provides the necessary information.

3.3. Managers should also know and be able to apply the rules and the procedures they are required to follow. Guidance on how to draw up disciplinary rules and procedures is contained in paragraphs 7.1 - 9.4.

### 4. The law on unfair dismissal

4.1. The importance of having disciplinary rules and procedures and

ensuring that they are followed has also been recognised by the law relating to dismissals, since both the grounds for dismissal and the way in which the dismissal has been handled can be challenged before the Employment Tribunal. Where either of these is found by the Tribunal to have been unfair, the employer may be ordered to re-employ the employees concerned where requested and/or may be liable to pay compensation to them. In coming to a decision about the fairness or otherwise of a dismissal, the Tribunal will consider whether the employer acted reasonably in all the circumstances, having regard to the size and administrative resources of the undertaking.

4.2. When dealing with disciplinary cases, employers need to be aware of the law on unfair dismissal as well as the recommendations of this Code. The law on unfair dismissal requires employers to act reasonably when dealing with disciplinary issues. What is classed as reasonable behaviour will depend on the circumstances of each case, and is ultimately a matter for the Tribunal to decide. However, the core principles employers should work to are set out below. Drawing up and referring to a procedure can help employers deal with disciplinary issues in a fair and consistent manner.

## 5. Core principles of reasonable behaviour

5.1. The core principles of reasonable behaviour are:

- use procedures primarily to help and encourage employees to improve rather than just as a way of imposing a punishment
- before decisions are reached, make sure the employee is aware of the nature of the complaint against them, and provide them with an opportunity to state their case
- allow workers to be accompanied at a disciplinary hearing (see Section 3).
- make sure that disciplinary action is not taken until the facts of the case have been established and that the action is reasonable in the circumstances
- never dismiss an employee for a first disciplinary offence, unless it is a case of gross misconduct
- give the employee a written explanation for any disciplinary action taken and make sure they know what improvement is expected
- give the employee an opportunity to appeal
- deal with issues as thoroughly and promptly as possible
- act consistently

## 6. Small organisations

6.1. The Tribunal will take account of an employer's size and administrative resources when deciding if it acted reasonably. However, it is good practice to adopt all the principles in the Code and employees should be dealt with fairly and reasonably in all the circumstances.

## 7. Drawing up disciplinary rules and procedures

7.1. Management is responsible for maintaining and setting standards of performance in an organisation and for ensuring that disciplinary rules and procedures are in place. It is good practice to involve employees, and where appropriate their representatives, when making or changing rules and procedures.

7.2. When making rules, the aim should be to specify those that are necessary for ensuring a safe and efficient workplace and for maintaining good employment relations. It is unlikely that any set of disciplinary rules can cover all circumstances that may arise. However, it is usual that rules would cover issues such as:-

- behaviour and general conduct
- standards of work performance
- harassment or victimisation
- use of the organisation's facilities (e.g. e-mail and internet)
- timekeeping and attendance
- absences, and
- repeated or serious failure to follow instructions.

7.3. Rules should be specific, clear and recorded in writing. They should be readily available to all employees, for example in handbooks or on the organisation's intranet site. Management should make every effort to ensure that all employees know and understand the rules including those whose first language is not English or who have trouble reading. This is often best done as part of an induction process, and may need to be repeated from time to time.

## 8. Gross misconduct

8.1. Employers should inform employees of the likely consequences of breaking disciplinary rules. In particular, they should be given a clear indication of the type of conduct, often referred to as gross misconduct, which may warrant summary dismissal (i.e. dismissal without notice). *Summary* dismissal is not necessarily synonymous with *instant* dismissal and incidents of gross misconduct will usually still need to be investigated as part of a formal procedure. Acts which constitute gross misconduct are those resulting in a **serious** breach of contractual terms and will be for organisations to decide in the light of their own particular circumstances. However, they might include the following (this list is not intended to be exhaustive):

- theft or fraud
- physical violence or bullying
- deliberate and serious damage to property
- misuse of an organisation's property or name
- deliberately accessing internet sites containing pornographic,

offensive or obscene material
- insubordination
- failure to comply with a reasonable instruction
- unlawful discrimination or harassment
- bringing the employer into serious disrepute
- incapability at work brought on by alcohol or illegal drugs
- negligence which causes unacceptable loss, damage or injury
- breach of health and safety rules
- breach of confidence, and
- unauthorised absence.

## 9. Essential features of disciplinary procedures

9.1. Good disciplinary procedures should:

- be in writing
- say to whom they apply
- be non-discriminatory
- allow for matters to be dealt with without undue delay
- allow for information to be kept confidential
- tell employees the disciplinary action which might be taken
- specify the normal duration or validity of warnings
- say what levels of management have the authority to take disciplinary action
- require employees to be informed of the complaints against them, and where possible, to be supplied with all relevant evidence before any hearing
- give employees a chance to have their say before management reaches a decision
- provide the right to be accompanied (see Section 3)
- ensure that, except for gross misconduct, no employee is dismissed for a first breach of discipline
- require management to investigate fully before any disciplinary action is taken
- ensure that employees are given an explanation for any sanction, and
- allow employees to appeal against a decision.

9.2. Disciplinary procedures should not be viewed primarily as a means of imposing sanctions. Rather they should be seen as a way of helping and encouraging improvement amongst employees whose conduct or standard of work is unsatisfactory. Some organisations may prefer to have separate procedures for dealing with issues of conduct and capability, or harassment and bullying.

9.3. When drawing up and applying disciplinary procedures employers should have regard to the requirements of *natural justice*. This means that employees should, wherever possible, be given the opportunity of a

hearing with someone who has not been involved in the matter. They should be informed of the allegations against them, together with the supporting evidence in advance of the hearing and with sufficient time to give this reasonable consideration. Employees should be given the opportunity to challenge the allegations before decisions are reached and should be provided with a right of appeal.

9.4. It is important to ensure that everyone in an organisation understands the disciplinary procedures. Training in the use and operation of the procedures may also be appropriate in larger organisations. It is sensible to keep rules and procedures under review to make sure they are always relevant and effective. New or additional rules should only be introduced, or lapsed rules reintroduced, after reasonable notice has been given to all employees and, where appropriate, employee representatives have been consulted.

## 10. The procedure in operation

### Investigation

10.1. When a disciplinary matter arises, the relevant supervisor or manager should first establish the facts promptly before recollections fade, and where appropriate obtain statements from any available witnesses. It is important to keep a record for later reference. Ensure that sufficient investigation has been carried out to enable a clear view of facts to emerge.

10.2. Where an investigatory meeting is held solely to establish the facts of a case, it should be made clear to the employee involved that it is not a disciplinary hearing.

10.3. Having established the facts, the supervisor or manager should decide whether to

- drop the matter,
- deal with it informally or
- arrange for it to be handled formally,

and should inform the employee of that decision.

### Suspension

10.4. In certain circumstances, for example in cases involving gross misconduct, where relationships have broken down or where it is considered there are risks to an employer's property or responsibilities to other parties, consideration should be given to a brief period of suspension with pay whilst an 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 as disciplinary action.

### Informal action

10.5. Cases of minor misconduct or unsatisfactory performance are, in the first instance, usually best dealt with informally. A quiet word is often all that is required to improve an employee's conduct or performance. An informal approach may be particularly helpful in small firms, where problems can be dealt with quickly and confidentially. There will, however, be situations where matters are more serious or where an informal approach has been tried but is not working.

10.6. If informal action does not bring about an improvement, or the misconduct or unsatisfactory performance is considered to be too serious to be classed as minor, employers should provide employees with a clear signal of their dissatisfaction by taking formal action.

### Disciplinary hearing

10.7. Before a decision is reached or any disciplinary action taken there should be a disciplinary hearing at which employees have the opportunity to state their case and to answer the allegations that have been made. Any hearing should be held in a timely manner.

10.8. Prior to the hearing the employer should:-

- let the employee know in writing what it is they are alleged to have done wrong and why it is not acceptable
- let the employee have copies of any documents that will be produced at the hearing within a reasonable period of time
- arrange the hearing at a mutually convenient time, and
- advise of the statutory right to be accompanied (see Section 3).

10.9. If the employee cannot attend a hearing he or she should inform the employer in advance wherever possible. If the employee cannot attend due to circumstances outside his or her control or which are unforeseeable at the time the hearing was arranged, the employer should arrange another hearing. A decision may be taken in the employee's absence if he or she fails to attend the re-arranged hearing without good reason. If the employee is absent due to sickness then consideration should be given as to the likely date of return in setting a hearing date.

### Decide on outcome and action

10.10. Following the disciplinary hearing, and having considered the employee's case, the employer must decide whether disciplinary action is justified or not. Where it is decided that no action is justified the employee should be informed. Where it is decided that disciplinary action is justified

the employer will need to consider what form this should take. The employer should take into account the individual's record in the organisation, action taken previously in any similar cases, any explanations given and – most important of all – whether the intended disciplinary action is reasonable under the circumstances.

10.11. It is normally good practice to give the individual at least one chance to improve their conduct or performance before they are issued with a final written warning. However, if the misconduct or unsatisfactory performance – or its continuance – is sufficiently serious, for example because it is having, or is likely to have, a serious harmful effect on the organisation, it may be appropriate to move directly to a final written warning. In cases of gross misconduct (see para 8.1), the employer may decide to dismiss even though the employee has not previously received a formal warning.

10.12. Where the facts of a case appear to call for formal disciplinary action a formal procedure should be followed. The type of procedure will vary according to the circumstances of the organisation. Depending on the outcome of the procedure some form of disciplinary action may be taken as detailed below.

## 11. First formal warning

11.1. The employer can decide whether to give a **formal oral** or a **formal written warning**.

**Oral warning** - In the case of minor infringements the employee should be given a formal oral warning. Employees should be advised of the reason for the warning and the change in behaviour required. They should also be advised that it constitutes the first step of the disciplinary procedure and of their right of appeal. A note of the oral warning should be kept but should be disregarded for disciplinary purposes after a specified period (six months would be recommended).

**Written warning** - If the infringement is regarded as more serious the employee should be given a written warning. Employees should be given:

- details of the complaint,
- details of the improvement or change in behaviour required,
- the timescale allowed for this, and
- the right of appeal.

The warning should also inform the employee that a final written warning may be considered, or further disciplinary action that may include dismissal, if there is no sustained satisfactory improvement or change.

A copy of the written warning should be kept on file but should be disregarded for disciplinary purposes after a specified period (12 months

is recommended).

## 12. Final written warning

12.1. Where there is a failure to improve or change behaviour during the currency of a prior warning, or where the infringement is sufficiently serious, the employee should normally be given a final written warning, but only after they have had the chance to present their case at a hearing. The final written warning should

- give details of the complaint,
- warn the employee that failure to improve or modify behaviour may lead to dismissal or to some other action short of dismissal,
- give the employee a timescale for improvement, and
- refer to the right of appeal.

The final written warning should normally be disregarded for disciplinary purposes after a specified period which is not unreasonably long (12 months is recommended).

## 13. How long should warnings remain live?

13.1. After a certain period of time warnings should normally be disregarded for disciplinary purposes, including deciding whether to dismiss an employee or in increasing the level of disciplinary sanction that would otherwise be applied to the employee in particular circumstances.

13.2. Recommended time limits are given in paragraphs 11.1 and 12.1. However, in certain circumstances employers may wish to issue a warning for a specified period that is of a longer duration. For example, in a case of gross misconduct where a dismissal may have been reasonable, but the employer decides not to dismiss but to issue a final written warning with a longer time limit.

13.3. In all cases the period of time for which the warning remains in force should be made clear to the employee in the letter confirming the warning.

## 14. Dismissal or other penalty

14.1. If the employee's conduct or performance still fails to improve, the final step might be dismissal or (if the employee's contract allows it or it is mutually agreed) some other penalty such as demotion, disciplinary transfer, or loss of seniority/pay. A decision to dismiss should only be taken by a manager who has the authority to do so. The employee should be informed as soon as possible of the reasons for the dismissal, the date on which the employment contract will terminate, the appropriate period of notice and the right to appeal.

## 15. Written reasons for dismissal

15.1. The decision to dismiss should be confirmed in writing. Section 110 of the Employment Act 2006 gives all employees the right, on request, to be provided with a written statement giving particulars of reasons for dismissal, regardless of their length of service. This should be given within 14 days of the request. Further, the right to a written statement of reasons for dismissal applies automatically to employees dismissed while pregnant or during maternity or adoption leave without them having to request it.

## 16. Capability (Performance)

16.1. A potentially fair reason for dismissal is that the reason relates to the 'capability or qualifications of the employee for performing work of the kind which he or she was employed by the employer to do'. Employment Act 2006 s.113(2)(a).

16.2. Where employees are found to be failing to perform to the required standard the matter should be investigated before any action is taken.

- Where the reason for the unsatisfactory performance is found to be a lack of the required skills the employee should, wherever practicable, be assisted through training or coaching and given reasonable time to reach the required standard. Only after that should disciplinary action be considered.
- Where the unsatisfactory performance is due to negligence or lack of application on the part of the employee then some form of disciplinary action will normally be appropriate.

16.3. Failure to perform to the required standard can be dealt with through the normal disciplinary procedure. Some organisations will have a separate capability procedure which they may prefer to use. If an employer is considering an option which includes one of the sanctions set out in paragraph 41.1 then any hearing at which this will be discussed will attract the right of accompaniment as detailed in Section 3.

16.4. An employee should not normally be dismissed because of a failure to perform to the required standard unless warnings and an opportunity to improve (with reasonable targets and timescales) have been given. However, where an employee commits a single error due to negligence and the actual or potential consequences of that error are, or could be, extremely serious, warnings may not be appropriate. The disciplinary or capability procedure (where a separate capability procedure exists) should indicate that summary dismissal action may be taken in such circumstances.

16.5. An individual who is found to be performing unsatisfactorily should be told clearly:

- the performance problem
- the improvement that is required
- the timescale for achieving this improvement

- a review date
- any support the employer will provide to assist, and
- anything else that is agreed.

It would be good practice to put this in a letter so it is clearly available for future reference by both parties. This information is particularly important when the employee if being told them for the purposes of a formal warning under a disciplinary or dedicated capability procedure.

## 17. Performance affected by health

17.1. Where the unsatisfactory performance is due to ill health or a disability then consideration should be given as to whether adjustments could reasonably be made in the workplace to assist the employee or whether an alternative position in the workplace could be appropriate.

## 18. Absence from work

18.1. When dealing with absence from work, it is important to determine the reasons why the employee has not been at work. If there is no acceptable reason, or an employee has an unacceptable attendance record consisting of intermittent absences for unconnected causes or conditions, the matter should be treated as a conduct issue and dealt with as a disciplinary matter as laid out in paragraphs 11.1 to 15.1.

18.2. If a poor attendance record, whether based on continuous or periodic absence, is due to a specific (including medically certified) illness, the issue becomes one of capability, and the employer should take a sympathetic and considerate approach. When thinking about how to handle such a case, it is helpful to consider:

- how soon the employee's health and attendance will improve
- whether an alternative work pattern is available
- whether alternative work is available
- the effect of the absence on the organisation, and
- how any similar situations have been handled.

18.3. It may not be appropriate where poor health causes absences from work, whether intermittent or long term, to treat these cases as a disciplinary issue. A warning is necessary, however, the purpose of a warning in such a situation is not to warn an employee that they must improve their health, but to inform them that the situation is such that continued employment may not be possible.

18.4. The impact of long-term absences will nearly always be greater on small organisations, and they may be entitled to act at an earlier stage than large organisations.

18.5. In cases of long term absence any statutory and contractual issues will need to be addressed and specialist medical and/or legal advice may

be necessary.

**Special cases**

## 19. Dealing with gross misconduct

19.1. If an employer considers an employee to be guilty of gross misconduct, and thus potentially liable for summary dismissal, it is still important to establish the facts before taking any action. (See para 8.1 for examples of gross misconduct). A short period of suspension with full pay may be helpful or necessary, although it should only be imposed after careful consideration and should be kept under review. It should be made clear to the employee that the suspension is not a disciplinary action and does not involve any prejudgement.

19.2. It is a core principle of reasonable behaviour that employers should give employees the opportunity of putting their case at a disciplinary hearing before deciding whether to take action. This principle applies as much to cases of gross misconduct as it does to ordinary cases of misconduct or unsatisfactory performance. There may, however, be some very limited cases where despite the fact that an employer has dismissed an employee immediately without a hearing, the Tribunal, will, very exceptionally, find the dismissal to be fair.

## 20. What if a grievance is raised during a disciplinary case?

20.1. In the course of a disciplinary process, an employee may raise a grievance that is related to the case. If this happens the employer should consider suspending the disciplinary process for a short period while the grievance is dealt with. Depending on the nature of the grievance, the employer may need to consider bringing in another manager to deal with the disciplinary process. If this is not possible, for example in some small organisations, the case should be dealt with as impartially as possible.

20.2. It may be that the grievance is such that the concerns of the employee can be addressed as part of the disciplinary process, either at first instance or in any appeal, in which case following a separate grievance procedure may not be necessary. If this is the case any such concerns should still be addressed fairly and impartially.

## 21. Non discriminatory practices

21.1. When operating disciplinary procedures employers should be particularly careful not to discriminate on the grounds of race or gender, e.g., whilst it is not unlawful to take disciplinary action against a pregnant woman for a reason unconnected with her pregnancy it is unlawful sex discrimination and automatically unfair to dismiss a woman on the grounds of her pregnancy.

## 22. Probationary and short term contract employees

22.1. Employers may need to have special arrangements for dealing with unsatisfactory performance of employees on short-term contracts or new employees during their probationary period.

## 23. Employees to whom the full procedure is not immediately available

23.1. Special consideration in dealing with disciplinary hearings may be necessary for the handling of disciplinary matters among nightshift employees, employees in isolated locations or depots or others who may pose particular problems.

## 24. Trade union representatives

24.1. Disciplinary action against a trade union representative can lead to a serious dispute if it is seen as an attack on the union's functions. Normal standards apply but, if disciplinary action is considered, the case should be discussed, after obtaining the employee's agreement with a senior trade union representative or permanent union official.

## 25. Criminal charges relating to employment

25.1. An employee's misconduct may be such that it could amount to a criminal offence. The employer is not obliged to await the outcome of any criminal trial or police investigation before conducting their own investigation into the matter and deciding on the appropriate disciplinary action after following due process. The fact that an employee may have been charged with an offence is not sufficient on its own for the employer to conclude that an offence has been committed. In circumstances where there are criminal charges and a police investigation into the alleged offence then this can have an important bearing on the timing of the investigation and any dismissal. Further specialist advice should be sought.

25.2. Whereas criminal courts have to be satisfied beyond 'all reasonable doubt' that an offence has been committed, an employer has to have a genuine belief on reasonable grounds after reasonable investigation that the employee committed the offence in question.

## 26. Criminal charges or convictions not related to employment

26.1. If an employee is charged with, or convicted of, a criminal offence not related to work, this is not in itself reason for disciplinary action. The employer should establish the facts of the case and consider whether the matter is serious enough to warrant starting the disciplinary procedure. The main consideration should be whether the offence, or alleged offence, is one that makes the employee unsuitable for their type of work.

26.2. An employee should not be dismissed solely because they are absent from work as a result of being remanded in custody. However a long period of absence due to remand may make a dismissal fair – employers should take advice in such situations which can be complex.

26.3. Employers should bear in mind the requirements of the Rehabilitation of Offenders Act 2001, which provides that certain past convictions should be regarded as 'spent' after a period of time.

## 27. Appeals against disciplinary action

27.1. Employees who have had disciplinary action taken against them should be given the opportunity to appeal. It is useful to set a time limit for asking for an appeal. In most circumstances 5 working days should be sufficient.

27.2. Employees may choose to raise appeals on a number of grounds which could include

- disputing a finding or penalty
- new evidence coming to light, or
- procedural irregularities.

27.3. These grounds need to be considered when deciding the extent of any new investigation or re-hearing in order to remedy any previous defects in the disciplinary process.

27.4. Wherever possible the appeal should be heard by an appropriate individual, usually a senior manager, not previously involved in the disciplinary procedure. In small organisations it may not be possible to find such an individual and in these circumstances the person dealing with the appeal should act as impartially as possible.

27.5. Individuals should be informed of the arrangements for appeal hearings and also of their statutory or other contractual right to be accompanied at these hearings (see section three). Where new evidence arises during the appeal the employee, or their representative, should be given the opportunity to comment before any action is taken. It may be more appropriate to adjourn the appeal to investigate or consider such points.

27.6. The employee should be informed of the results of the appeal and the reasons for the decision as soon as possible and this should be confirmed in writing. If the decision constitutes the final stage of the organisation's appeals procedure this should be made clear to the employee.

## 28. Records

28.1. It is important, and in the interests of both employers and employees, to keep written records during the disciplinary process. Records should include:

- the complaint against the employee
- the employee's defence
- findings made and actions taken
- whether an appeal was lodged
- the outcome of the appeal
- any grievances raised during the disciplinary procedure
- subsequent developments.

28.2. Employee records should be treated as confidential and be kept no longer than necessary in accordance with the Data Protection Act 2002. This Act gives individuals the rights to request and have access to certain personal data. The Office of the Data Protection Supervisor can give guidance on the requirements in relation to the keeping of general employee records.

28.3. Copies of any hearing records should be given to the employee including copies of any formal minutes that may have been taken. In certain circumstances (for example to protect a witness) the employer may withhold some information.

## 29. Further action

29.1. Rules and procedures should be reviewed periodically in the light of any developments in employment legislation or good employment practice and, if necessary, revised in order to ensure their continuing relevance and effectiveness. Any amendments and additional rules imposing new obligations should be introduced only after reasonable notice has been given to all employees and, where appropriate, their representatives have been consulted. Except in very exceptional circumstances, where legal advice should be sought, changes to individual contracts may only be made with the agreement of the employees.

## Section 2 - Grievance procedures

### 30. What are grievances?

30.1. Grievances are concerns, problems or complaints that employees raise with their employers, regarding their employment.

### 31. Why have a grievance procedure?

31.1. Whilst employers are not required by statute to have a grievance procedure it is good employment relations practice to provide employees with a reasonable and prompt opportunity to obtain redress of any grievance.

31.2. Employers are required by section 8(5) of the Employment Act 2006 to specify, in the written statement of terms and conditions of employment, by description or otherwise, a person to whom an employee can apply if they have a grievance, the manner in which it should be raised and any further steps which exist in any procedure for dealing with grievances. The employer may satisfy certain of these requirements by referring the employees to a reasonably accessible document which provides the necessary information. It is good practice to allow for individuals to be accompanied at grievance hearings, and in certain cases it is a statutory requirement (see Section 3).

### 32. Formulating procedures

32.1. It is in everyone's best interest to ensure that employees' grievances are dealt with quickly and fairly and at the lowest level possible within the organisation at which the matter can be resolved. Management is responsible for taking the initiative in developing grievance procedures which, if they are to be fully effective, need to be acceptable to both those they cover and those who have to operate them. It is important therefore that senior management aims to secure the involvement of employees and their representatives, including trade unions where they are recognised, and all levels of management when formulating or revising grievance procedures.

### 33. Essential features of grievance procedures

33.1. Grievance procedures are used by employers to deal with employees' grievances. Grievance procedures enable individuals to raise issues with management about their work, or about the actions of their employers, clients or fellow employees, that affect them. It is impossible to provide a comprehensive list of all the issues that might give rise to a grievance but some of the more common include:

- terms and conditions of employment

- health and safety
- relationships at work
- new working practices
- organisational change
- equal opportunities.

33.2. Procedures should be simple, set down in writing and rapid in operation. They should also provide for grievance proceedings and records to be kept confidential.

33.3. In order for grievance procedures to be effective it is important that all employees are made aware of them and understand them and, if necessary that supervisors, managers and employee representatives are trained in their use. Wherever possible every employee should be either given a copy of the procedures or provided with access to them (e.g. in the personnel handbook or on the organisation's intranet site) and have the detail explained to them. For new employees this might best be done as part of any induction process. Special allowance should be made for individuals whose first language is not English or who have a visual impairment or other disability.

## 34. The procedure in operation – informal

34.1. Most routine complaints and grievances are best resolved informally in discussion with the employee's immediate line manager. Dealing with grievances in this way can often lead to speedy resolution of problems and can help maintain the authority of the immediate line manager who may well be able to resolve the matter directly. Both manager and employee may find it helpful to keep a note of such an informal meeting.

## 35. The procedure in operation - formal

35.1. Where the grievance cannot be resolved informally it should be dealt with under the formal grievance procedure. The number of stages contained in the procedure will depend on the size of the organisation, its management structure and the resources it has available. The following should be suitable for most organisations. Larger organisations may however, wish to have a second stage where the matter is raised with a more senior manager before the final stage,

**First Stage:**

- Where the grievance is against the line manager the matter should be raised with a more senior manager.
- If the grievance is contested the manager should invite the employee to attend a hearing in order to discuss the grievance and should

inform the employee of their statutory right to be accompanied where applicable (see Section 3)

- The manager should respond in writing to the grievance within a specified time (e.g. within five working days of the hearing or, where no hearing has taken place, within five working days of receiving written notice of the grievance).
- If it is not possible to respond within the specified time period the employee should be given an explanation for the delay and told when a response can be expected.

**Final Stage:** Where the matter cannot be resolved the employee should be able to raise their grievance in writing with a higher level of manager. The choice of this person will depend on the organisation but could include directors or in certain cases the chief executive or managing director.

- Employees should be permitted to present their case at a hearing and should be informed, where applicable, of their statutory right to be accompanied (see Section 3).
- The manager dealing with the grievance should give a decision on the grievance within a specified period (e.g. ten working days).
- If it is not possible to respond within the specified time period the employee should be given an explanation and told when a response can be expected.

35.2. In most organisations it should be possible to have at least a two stage grievance procedure. However, where there is only one stage, for instance in very small firms where there is only a single owner/manager, it is especially important that the person dealing with the grievance acts impartially.

35.3. In certain circumstances it may, by mutual agreement of the parties, be helpful to seek external advice and assistance during the grievance procedure. For instance where relationships have broken down an external facilitator, such as an Industrial Relations Officer of the Manx Industrial Relations Service, might be able to help resolve the problem.

## 36. Grievance meetings

36.1. The employee should be allowed to explain their complaint and say how they think it should be settled. If the employer reaches a point in the meeting where they are not sure how to deal with the grievance or feel that further investigation is necessary the meeting should be adjourned to get advice or make further investigation. This might be particularly useful in small organisations that lack experience of dealing with formal grievances. The employer should give the grievance careful consideration before responding.

## 37. Special considerations

37.1. Some organisations may wish to have specific procedures for handling grievances about allegations of unfair treatment e.g. discrimination or bullying and harassment, as these subjects are often particularly sensitive.

37.2. Organisations may also wish to consider whether they need a "whistleblowing" procedure in the light of the protected disclosure provisions in Part IV of the Employment Act 2006. These provisions give strong protection to employees and workers (which group is widely defined as in paragraph 39.4) who raise concerns about wrongdoing (including frauds, dangers and cover-ups).

37.3. Sometimes an employee may raise a grievance about the behaviour of a manager during the course of a disciplinary case. Where this happens and depending on the circumstances, it may be appropriate to suspend the disciplinary procedure for a short period until the grievance can be considered. Consideration might also be given to bringing in another manager to deal with the disciplinary case.

## 38. Records

38.1. Records should be kept detailing the nature of the grievance raised, the employer's response, any action taken and the reasons for it. These records should be kept confidential and retained in accordance with the Data Protection Act 2002 which requires the release of certain data to individuals on their request. Copies of any meeting records should be given to the individual concerned although in certain circumstances some information may be withheld, for example to protect a witness.

## Section 3 - The statutory right to be accompanied at disciplinary and grievance hearings

### 39. What is the right?

39.1. Under Part VIII of the Employment Act 2006, workers have a statutory right to be accompanied by a fellow worker or trade union official where they are required or invited by their employer to attend certain disciplinary or grievance hearings and when they make a reasonable request to be so accompanied. This right is additional to any contractual rights. Further guidance on what is a reasonable request and who can accompany a worker is set out at paragraphs 43.1 - 44.5.

39.2. The new right applies where the invitation or request to the worker to attend the disciplinary or grievance hearing is made on or after 30th September 2007.

39.3. Who has the right to be accompanied?

39.4. The statutory right to be accompanied applies to 'workers', which term is defined very widely for this purpose in section 58(1) of the Employment Act 2006. Coverage includes:

- someone who has a contract of employment (an employee);
- someone who is paid a regular salary or wage and works for an organisation, business or individual. The person's employer normally provides the worker with work, controls when and how the work is done, supplies him or her with tools and other equipment, and pays tax and National Insurance contributions. (This includes part-time and temporary workers, casual workers, students and seasonal workers, and the majority of freelancers);
- employment business workers,
- homeworkers,
- certain NHS practitioners, and
- certain categories of trainees.

### 40. Application of the statutory right

40.1. The statutory right applies where a worker:-

i) is required or invited to attend a disciplinary or grievance hearing, and

ii) reasonably requests to be accompanied at the hearing.

### 41. What is a disciplinary hearing?

41.1. For the purposes of this right section 105 of the Employment Act 2006 defines a disciplinary hearing, which attracts the right of

accompaniment, as a hearing that could result in:

- a formal warning being issued to a worker (i.e. a warning, whether about conduct or capability, that will be placed on the worker's record);
- the taking of some other disciplinary action (such as suspension without pay, demotion or dismissal or other action); or
- the confirmation of a warning or some other disciplinary action (such as might arise from an appeal hearing).

41.2. Informal discussions or counselling sessions do not attract the right to be accompanied unless they could result in formal warnings or other actions. Meetings to investigate an issue are not disciplinary hearings. If it becomes clear during the course of such a meeting that disciplinary action is called for, the meeting should be ended and a formal hearing arranged at which the worker will have the right to be accompanied. A hearing which arises out of capability which might result in dismissal or some other disciplinary action will also fall within the definition above.

**42. What is a grievance hearing?**

42.1. For the purposes of the right to be accompanied, a grievance hearing is a meeting at which an employer deals with a complaint about a duty owed by them to a worker, whether the duty arises from statute or common law (for example contractual commitments).

For instance:-

i) An individual's request for a pay rise is unlikely to fall within the definition unless a right to an increase is specifically provided for in the contract or the request raises an issue about equal pay within the meaning of the Employment (Sex Discrimination) Act 2000.

ii) Equally, unless stated in the contract, most employers will be under no legal duty to provide their workers with car parking facilities, and a grievance about such facilities would not carry the right to be accompanied at a hearing by a companion.

iii) Grievances arising out of day to day friction between fellow workers may not involve the breach of a legal duty unless the friction develops into incidents of bullying or harassment which would be included as they arise out of the employer's duty of care under the common law.

**43. What is a reasonable request?**

43.1. In order for workers to exercise their statutory right to be accompanied they must make a *reasonable* request to their employer. Whether a request is reasonable will depend on the circumstance of the individual case and, ultimately, it is a matter for the Tribunal to decide. However, when workers are choosing a companion, they should bear in

mind that it would not be reasonable to insist on being accompanied by a colleague whose presence would prejudice the hearing or who might have a conflict of interests. Nor would it be reasonable for a worker to ask to be accompanied by a colleague from a geographically remote location when someone suitably qualified was available on site. The request to be accompanied does not have to be in writing.

## 44. The companion

44.1. The companion may be:

a). A colleague
b). A full time official employed by a trade union
c). A lay trade union official, if they have been reasonably certified in writing by their union as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings. Such certification may take the form of a card or letter issued by the relevant trade union.

44.2. Some workers may have contractual rights to be accompanied by persons other than those listed above, for instance a partner, spouse or legal representative.

44.3. Workers are free to choose an official from any trade union to accompany them at a disciplinary or grievance hearing regardless of whether the union is recognised or not. However, where a trade union is recognised in a workplace it is good practice for workers to ask an official from that union to accompany them.

44.4. Colleagues or trade union officials do not have to accept a request to accompany a worker, and they should not be pressurised to do so.

44.5. Trade unions should ensure that their officials are trained in the role of acting as a worker's companion. Even where a trade union official has experience of acting in the role, there may still be a need for periodic refresher training.

## 45. Time off for companions

45.1. A worker who has agreed to accompany a colleague employed by the same employer is entitled to take a reasonable amount of **paid** time off to fulfil that responsibility (section 103(8) - (10) Employment Act 2006). This should cover the hearing. It is also good practice to allow time for the companion to familiarise themselves with the case and confer with the worker before and after the hearing. A lay trade union official is permitted to take a reasonable amount of **paid** time off to accompany a worker at a hearing so long as the worker is employed by the same employer. In cases where a lay official agrees to accompany a worker employed by another organisation, time off is a matter for agreement by the parties concerned.

## 46. Applying the right

46.1. If the companion cannot attend on a proposed date, the worker can suggest an alternative time and date so long as it is reasonable and it is not more than 5 working days after the original date. In proposing an alternative date the worker should have regard to the availability of the relevant manager. For instance it would not normally be reasonable to ask for a new date for the hearing where it was known the manager was going to be absent on business or on leave unless it was possible for someone else to act for the manager at the hearing. The location and timing of any alternative hearing should be convenient to both the worker and employer. Both the employer and worker should prepare carefully for the hearing.

46.2. The chosen companion has a statutory right to address the hearing but no statutory right to answer questions on the worker's behalf. The companion should be allowed to address the hearing in order to:

- put the worker's case
- sum up the worker's case, and
- respond on the worker's behalf to any view expressed at the hearing.

46.3. The companion can also confer with the worker during the hearing. It is good practice to allow the companion to participate as fully as possible in the hearing including asking witnesses questions. The companion has no right to answer questions on the worker's behalf, or to address the hearing if the worker does not wish it, or to prevent the employer from explaining their case.

## 47. What if the right to be accompanied is infringed?

47.1. If an employer fails to allow a worker to be accompanied at a disciplinary or grievance hearing or fails to re-arrange a hearing to a reasonable date proposed by the worker when a companion cannot attend on the date originally proposed, the worker may present a complaint to the Tribunal. If the Tribunal finds in favour of the worker the employer may be liable to pay compensation of up to two weeks' pay. In any claim of unfair dismissal, the failure to allow the right of accompaniment may also influence the Tribunal's decision as to whether a dismissal was fair or unfair.

47.2. Employers must be careful not to place any worker at a disadvantage for exercising or seeking to exercise their right to be accompanied as such detriment or dismissal is unlawful and may lead to a claim to the Tribunal. Equally employers must not place at a disadvantage those who act or seek to act as the accompanying person.

Made

12/04/07

Minister for Trade and Industry

EXPLANATORY NOTE
*(This note is not part of the Code)*

The Code is made under s.171 of the Employment Act 2006 for the purpose of promoting the improvement of industrial relations. The provisions of the Code are admissible in evidence and may be taken into account in determining any question arising in proceedings before the Employment Tribunal or a court. Failure to observe any provision of the Code does not, of itself, render a person liable to any proceedings.