



Respond to Poor Performance in Your Team

■ *Scope*

This Unit explores the vital responsibilities that managers and indeed organisations have in taking care of their employees' welfare by clearly stating what standards of behaviour and performance are expected of them and what is not acceptable. If the employee does not know what is expected, then it is unfair to criticise them (still less to impose sanctions) when they do not perform accordingly. Therefore the development of clear, unambiguous discipline and grievance rules and procedures is essential to business needs and success, indeed for the whole existence of the employment relationship irrespective of any legal requirements. Even when there is no legal obligation, employers would find, in trying to operate within the present turbulent and competitive business environment, that they face a number of problems in retaining staff without such guidelines.

Then there is the legal requirement. **The Employment Rights Act (1996)** requires employers to state their discipline and grievance procedures within the employment contract and make it available to all employees within eight weeks of joining the organisation.

This unit has two elements:

- C15.1** Help Team Members Who Have Problems Affecting Their Performance
- C15.2** Contribute to Implementing Disciplinary and Grievance Procedures

Points to Ponder

It is unrealistic to expect that relationships between employer and employees will always be harmonious; naturally there will be conflict within employment relationships. Disciplinary and grievance procedures are formal mechanisms for resolving individual conflict and represent positive opportunities for corrective action and concern resolution. Fairness and consistency in disciplinary and grievance matters are fundamental features of sound employment relationships.

Employer dissatisfaction may relate to employee performance (capability), conduct, attendance or any other unfulfilled elements of the contract of employment. If the employee is not meeting the employer's legitimate expectations in the performance of the contract there is potential conflict between the two parties and it is reasonable for the employer to seek corrective action to resolve an unsatisfactory situation. Formalised corrective action is embodied in a disciplinary policy and procedure.

Employee dissatisfaction may relate to employer treatment, demands, expectations or any other action within the contract which is seen as unreasonable, inequitable or illegitimate. Employee dissatisfaction might result in a loss of motivation, commitment and work performance. The formal opportunity to resolve employee dissatisfaction and resolve the conflict is provided by the grievance policy and procedure.

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Discipline at work – This can mean different things to different people. It incorporates self-discipline, peer discipline and managerial discipline.

- **Self-discipline – employment relations, commitment to organisational objectives**
- **Peer discipline – pressure from colleagues can be an effective remedy to sub-standard performance or conduct**
- **Managerial discipline – exercise of control over employee performance and behaviour based on legitimate organisational authority**

Discipline at work can have different objectives – retribution, deterrence and rehabilitation. Managerial disciplinary action can be constructive and rehabilitative and need not be retributive or punitive, although when encouragement, guidance or development does not resolve management dissatisfaction then sanctions against the employee may be necessary and legitimate.

Disciplinary procedures should not be viewed primarily as a means of imposing sanctions. They should also be designed to emphasise and encourage improvements in individual conduct. – ACAS

Organisational rules – An essential component of managerial discipline is the existence of organisational rules, which set standards of conduct and define acceptable and unacceptable behaviour. Rules are necessary to let employees know where they stand and provide a framework for the employment relationship. Rules are normally initiated, defined and communicated by management and should be aimed at voluntary compliance rather than a reliance on punishment for non-compliance.

Managerial expectation that rules will be honoured is legitimised by the common law duties of the employee which include being ready, willing and able to work, the exercise of care and competence in the performance of work and obedience to reasonable instructions. The employer is contractually entitled to specify performance, attendance, time keeping and conduct standards. Management cannot simply rely on those rules which are overtly expressed as rules evolve and become legitimised through custom and practice.



Recognising that organisational rules are generated from several sources encourages a flexible and dynamic interpretation of the rules and this is more compatible with a problem-solving approach to any employee failure. For rules to be effective they ought to be accepted and understood by those who are to be covered by them; they also must be workable to the managers who need to operate them.

The aim should be to specify clearly and precisely those necessary for the efficient and safe performance of work and for the maintenance of satisfactory relations within the workforce and between employees and management. Rules should not be so general as to be meaningless. – ACAS

Disciplinary procedures – There are valid reasons why organisations should have sound and effective disciplinary policies and procedures – approximately 4% of employees (about one million annually) are subject to disciplinary procedures (Salamon, 1998) thus making it a problem worth tackling and the importance of fairness has been firmly established as a principle by the industrial tribunals.

The Employment Rights Act of 1996, specifies that the employment conditions should make clear reference to disciplinary rules, procedures and appeal mechanisms, and finally, the consistent application of fair and effective disciplinary procedures will minimise the potential for disagreements in matters of discipline and reduce the possibility of employee dismissal.

Investigate

1. ***Carry out an audit of your organisation's performance management policies and procedures. Evaluate them in the light of the best practices you have learned in this unit and make recommendations to fill any gaps you might have found.***

Principles of Natural Justice

These incorporate

- **A knowledge of the standards of expected behaviour**
- **Knowledge of the alleged failure and the nature of allegation**
- **An investigation to establish the existence of a case should normally precede any allegation**
- **The opportunity to offer an explanation and for this to be heard and considered without bias**
- **The opportunity to be accompanied or represented**
- **The penalty should be appropriate in relation to the offence and mitigating factors taken into consideration**
- **The opportunity and support to improve except when misconduct goes to the root of the contract**
- **The right to appeal to a higher authority**

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Essential features of a disciplinary procedure (source: ACAS code of practice)

- **Be in writing**
- **Specify to whom they apply**
- **Provide for matters to be dealt with quickly**
- **Indicate the disciplinary actions which may be taken**
- **Specify the levels of management which have the authority to take various forms for disciplinary action, ensuring that immediate superiors do not have the power to dismiss without reference to senior management**
- **Provide for individuals to be informed of the complaints against them and to be given an opportunity to state their case before decisions are reached**
- **Give individuals the right to be accompanied by a trade union representative or by a fellow employee of their choice (this is statutory now)**
- **Ensure that, except for gross misconduct, no employee is dismissed for a first breach of discipline**
- **Ensure that no disciplinary action is taken until the case has been carefully investigated**
- **Ensure that the employee is given an explanation for any penalty imposed**
- **Provide a right to appeal and specify the procedure to be followed**

Note: All details of an employee's discipline or grievance investigations, interviews, decisions and all related documents must be handled and kept confidentially with particular attention to the Data Protection Act.



■ *Indicative model of disciplinary procedure (ACAS)*

It is important that prior to approaching formal procedures, all attempts are made to resolve the issue informally through advice, guidance and counselling.

- Stage 1 – **Oral warning**: if conduct or performance does not meet requirements, the employee will be issued a formal warning. He or she will be advised of a meeting, by the manager, and of the reason for the meeting, in writing, with an invitation to be accompanied by a union representative or a colleague at the meeting and that the outcome of the meeting might result in an oral warning. After the meeting, the manager will formally notify the employee of the decisions taken at the meeting, the employee's right of appeal, who to appeal to and the timescale within which he or she has to appeal. The letter will also confirm that a brief note of the oral warning will remain in the employee's personal file for three to six months, but will be spent after that period subject to satisfactory conduct or performance.
- Stage 2 – **First written warning**: if the offence is a serious one or if the offence recurs, the employee will be given a written warning by the manager. Again, a meeting takes place normally with the employee and his or her representative where the nature of complaint, the modified behaviour required and the timescale will be discussed and later confirmed in writing. It will also warn the employee that the next stage of the procedure will be considered if there is no improvement, and will be informed of the right to appeal, the person to address the appeal to and the timescale for appeal. A copy of this warning will be kept on employee file for three to six months and will be disregarded after that period subject to satisfactory conduct.
- Stage 3 – **Final written warning** – if there is still a failure to improve conduct or performance, or if the misconduct is serious enough to warrant only one written warning but not serious enough to justify dismissal, a final written warning will be issued to the employee. This will normally be done through a meeting with the employee and his or her representative, giving details of the offence, a clear statement that dismissal will result unless there is satisfactory improvement and the employee's right of appeal. This will be confirmed in writing, a copy of which will be kept on the employee's personal file for twelve to eighteen months after which it will be spent subject to satisfactory performance or behaviour. Alternatively, disciplinary suspension without pay up to a maximum of five days can be imposed at this stage.
- Stage 4 – **Dismissal**: if conduct or performance is still unsatisfactory and the employee fails to reach required standard, dismissal will normally result. Only the appropriate senior manager will have the authority to dismiss. The employee will be provided, as soon as practically possible, with the reasons for dismissal, the date on which employment will terminate and the right of appeal.

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Gross misconduct – the following list provides examples of offences likely to be seen as gross misconduct:

- **Theft, fraud, deliberate falsification of records**
- **Assault on another person**
- **Deliberate damage to company property**
- **Serious incapability through alcohol or being under the influence of drugs**
- **Serious negligence that causes unacceptable loss, damage or injury**
- **A serious act of insubordination**
- **Unauthorised access to systems**
- **Harassment, bullying, discrimination, threatening behaviour or attitude**

If an employee is accused of gross misconduct he or she can be suspended from work on full pay for up to five working days, while investigations are made on the alleged offence. If at the end of the investigation and the full disciplinary procedure, the management is satisfied that gross misconduct has occurred, the result will be summary dismissal without notice or pay in lieu of notice.

It is crucial that a thorough and objective investigation is carried out once it is established that there is a *prima facie* case for making an allegation.

It may be appropriate to suspend the employee from work during the investigation especially in cases of alleged gross misconduct, normally on the basis of paid leave unless specified otherwise in the contract.

The 'reasonableness' of employer actions and 'evenhandedness' are well-established disciplinary principles and are crucial in case the case gets to an employment tribunal.

Warnings and warning letters must spell out the nature of the offence, the remedy required; the support, development and monitoring to be provided, and specify review timescales. The employee should be left in no doubt about the potential consequences of failing to resolve the problem.



At a disciplinary interview, the employer should:

- **Introduce all present and clarify their roles**
- **Explain the purpose and nature of the interview**
- **Ensure that the employee understands the allegation made, support it with any evidence in hand and allow the employee to ask questions**
- **Offer the employee an opportunity to provide an explanation; employer should listen actively**
- **Question the employee further to confirm factual information**
- **Consider carefully all employee response**
- **Make a decision, after giving full consideration to all evidence**

Disciplinary interviews are stressful and emotive. It is a highly skilled activity calling for resilience, the manager needs to demonstrate objectivity, professionalism and sensitivity in the face of possible aggression, distress, devious ingenuity or denial behaviour. The skills of active listening, probing questioning, summarising and managing angry responses are essential to handle these situations successfully.

- **Full care and attention to all information and to any mitigating circumstances as whether to take disciplinary action or not**
- **Ensure that the employee knows the decision, what is expected, by when, the right of appeal and confirm this in writing**
- **Agree to provide reasonable support, training, review and feedback within specified timescales**

In operating disciplinary procedures are managers required to be impartial or objective? Even if the manager is impartial will the employees believe it?

The disciplinary procedure is a quasi-judicial process where, contrary to the normal practice, the prosecution and judiciary are not separated and the employer is acting as both prosecutor and judge: this militates against impartiality. Objectivity implies an interpretation of the facts and a decision-making process not distorted by emotion or bias.

Industrial tribunals – scope for education and advice for employers in relation to procedural fairness. It need not be slow or paper bound, but following correct procedures will reduce claims for unfair dismissal and make dismissals legally safe. Earnshaw (1997) found the main cause for tribunals was procedural defects. Where employees were successful in claims, the success was related to procedural shortcomings which were:

- **Employees not being made fully aware of the allegation and any supporting evidence**
- **Employees not being given the chance to respond to the allegation or the absence of disciplinary hearing**
- **Warnings not being explicit enough**
- **Insufficient time being given to the employee to remedy the problem**
- **Insufficient investigation**
- **Concerned with speed of action rather than consideration of the facts**
- **Dismissal occurring during the course of an argument**
- **Failure to apply the disciplinary procedure in full**
- **The decision not to have or to use a formal disciplinary procedure**

Grievances - Failure to resolve any concerns of the employees might result in them deciding to take action to address the perceived unfair treatment. This action may range from poor attendance or poor quality work to leaving the organisation, which is costly and unsatisfactory, as the problem is unrecognised and unresolved. A grievance is the formal expression of dissatisfaction or injustice that the employee feels towards the employer. It is based on the legal and procedural right of individuals at work to formally express dissatisfaction with elements of the work situation and to have it acknowledged, heard and an attempt made to resolve the situation. The expression of a formal work grievance is often triggered by a particular event which has left the employee feeling unfairly treated.

The culture of an organisation has a major effect on the way in which grievances are received and handled. In a unitary or neo-unitary organisation, there are assumptions that common values and common objectives are held by all employees and that the 'right to manage' is accepted by all. In these organisations, internal conflict is seen as dysfunctional, and individuals may feel inhibited about raising a formal grievance because of the effect this might have on their career prospects, and for fear of being labelled a 'deviant'. In a pluralist organisation, conflict is seen as inevitable and it is accepted that employees have a right to question management policies, procedures and decisions.



The formal grievance procedure is likely to be used and the need for a formal mechanism for resolving conflict is taken for granted. The requirement in law for the employer to have a grievance procedure was introduced in the Industrial Relations Act 1971 and consolidated in the Employment Rights Act 1996. The minimum that the law requires is the identification of 'a person to whom the employee can apply for the purposes of seeking redress of any grievance relating to his/her employment, and the manner in which any such application should be made'.

The grievance procedure therefore forms part of the written terms and conditions of employment. There are common issues that give rise to formal grievances: monetary issues (job evaluation outcomes, performance assessments that impact on pay, additional allowances); work-related issues (unfairness in the distribution of overtime or holiday) and challenges to authority (employee may challenge a manager's right to make a decision or the manner of a decision).

Basic Elements of a Grievance Procedure

- **There should be a formal procedure**
- **It should be in writing**
- **Management must agree with employee representatives the procedure for raising grievances and for settling them promptly and effectively**
- **If there are separate procedures for grievances and disputes these should be linked**
- **An individual grievance must be settled as close to the point of origin and as quickly as possible**

The procedure must set out the stages and the hierarchy through which it goes through – normally three levels – departmental head, functional head and senior manager. The timescale for resolution from receipt of the written grievance to its settlement should clearly be defined – the shortest possible. The outcome of the grievance must be notified to the aggrieved person in writing stating their right to take the grievance to the next stage. Discrimination and harassment are extremely sensitive issues, they could be perpetrated by the immediate line-manager and as normal procedure is through the line-manager, there needs to be an additional facility to tackle such issues outside the usual reporting structure.

Grievance Interviews

- **Appropriate physical environment**
- **Actively listen to what is being said, hear the feelings too**
- **Ask probing questions in a manner that is not threatening**
- **Prepare**
- **Analyse the fact and take a decision**

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Decisions that come out of grievances must be monitored for organisational impact and precedent. Communication is therefore very important both to the individual and to the organisation. All grievances should be analysed for organisational impact and for the establishment of precedents, which requires a monitoring mechanism by which all decisions are notified to a central monitoring point – Personnel. If there is a manager with a high incidence of grievance it might be indicative of a training need.

Managers need training to develop full knowledge of the understanding, application and monitoring of policies and to have confidence to take difficult decisions; they also need to have clear knowledge of the legislative framework covering discipline and grievance matters:

- **The Equal Pay Act, 1970 amended by the 1983 Equal Value Regulations**
- **Sex Discrimination Act, 1975**
- **Race Relations Act, 1976**
- **Disability Discrimination Act, 1995**
- **The Human Rights Act, 1998**
- **The Employment Relations Act, 1999 (the right to be accompanied)**
- **The Employment Equality (Religion or Belief) Regulations, 2003 (It is unlawful to discriminate on the grounds of sexual orientation or religion)**
- **The Race Relations (Amendment) Act, 2000**

Like any other workplace activities, performance, discipline and grievance remain firmly a managerial responsibility. Considering the extreme sensitivity and legal implications of these procedures and follow up actions, managers must remember to take advice from the organisation's HR professionals prior to proceeding with any investigations or actions. If in doubt, take advice at any point. It really is not worth making a mistake in these matters. When it comes to an employment tribunal ignorance is not an excuse!

Investigate

2. **Write a reflective report on a disciplinary interview that you have been involved in. (If you have never been to one, find out about one that took place in your organisation.) Could you have done things differently if it happened today? How?**

The law, in fact, makes it legitimate to dismiss an employee **fairly** and reasonably in certain circumstances provided there is a set of rules and guidelines which allow employees to be assured that a reasonable process has been followed prior to dismissal. **Unfair dismissal** on the other hand, is where employers have dismissed without following fair procedures such as investigation or attention to the principles of natural justice. **Constructive dismissal** is where the employee terminates the contract of employment by reason of the employer's behaviour.



■ *Guidance for Gathering Evidence for this Unit*

Note – If you do the two exercises supported by relevant, work-based documents, you will have gained most of the PCs.

Possible Sources of Supporting Evidence		
Unit C15 - Respond to Poor Performance in Your Team		
<i>Possible Source of Evidence</i>	<i>Used</i>	<i>Location in Workplace/Portfolio</i>
Documents showing your discussions with team members regarding performance		
Your reference to organisational policies, evidence of you seeking advice from HR specialists		
Notes of meetings to discuss performance, setting performance targets and timescales, and penalties of failing to reach set targets		
Evidence of any support you might have agreed upon and your actions to fulfil this Records of you implementing disciplinary or grievance procedures		
Memos you have written to individuals setting up meetings		
Conducting interviews, explaining outcomes, testimonies to this effect		
Candidate's Signature		
Assessor's Signature		

