



## 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. Thus 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 rather 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.

#### The unit has two elements:

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

### ■ *Briefing Notes*

The responsibility for formulating, communicating, educating and ensuring that all employees are aware of and adhere to the policies and procedures defining standards of behaviour and performance, and the penalties for not reaching and maintaining those standards remain solely with the management. Whilst recognised trade unions play a major role in developing or modifying the policies, the ultimate accountability for the policies remains firmly as a managerial activity. Many employers have been severely criticised by employment tribunals, not so much for dismissing their employees, but because they dealt with the disciplinary matters without reference to their own procedures. Therefore it makes good business sense and legal compliance to have these procedures firmly embedded into the organisational culture.

Once the appropriate policies are in place, managers are expected to ensure that all employees are fully aware of the contents of them. It is pointless having glossy policy manuals if all they do is to gather dust in filing cabinets! Whilst care must be taken not to overload new entrants into the organisation, if information can be given to them during the induction period, the process of understanding organisational values and norms will start early.

# Unit C15

Within the confines of the Trade Unions Act and the Employment Rights Act, the 'implied terms' that can be 'taken for granted' in forming and maintaining employee relations are:

- **A common duty of care – employers have a duty to take reasonable steps for the safety, well being and health of all employees. In addition, employees have a duty to assist employers in maintaining health and safety procedures and they themselves have a duty of care of other employees. Any breaches in these matters constitute disciplinary proceedings**
- **Fidelity – employees have a duty to act in good faith towards the employer**
- **A duty not to disclose confidential material**
- **The employers' right to reorganise the work and the workforce**
- **A duty of support by the employer to managers to ensure that they are not harassed by employees**
- **A duty not to change terms and conditions of employment without consultation**

In actual fact, active work is needed to ensure that all employees fit into the structure and culture of the organisation. Investing time and effort when setting up the job and introducing jobholders to the work environment will greatly reduce the need for invoking discipline and grievance at a later stage.

Employer dissatisfaction may relate to employee performance, conduct, attendance or any other elements not fulfilled under the contract of employment. If the employee is not meeting the legitimate expectations of performance, it is natural for the employer to initiate corrective action. Formalisation of such actions has to be contained within disciplinary policy and procedures. Managerial disciplinary action might be constructive and rehabilitative first, before moving into retribution and punishment. When encouragement, support and development do not bring about the required behaviour, then sanctions against the employee are necessary and legitimate. The ACAS Code of Practice states: "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".



- **Fairness, equity and consistency in tackling discipline are vital for employment relations. An approach based on the philosophy 'problem solving to be the first resolve and punishment the last resort', provides ample opportunity for acceptance and corrective action and a sound foundation for policy on discipline**
- **Organisation rules set standards of performance and conduct, and define acceptable and unacceptable behaviour. These rules are set by the management and are legitimised by the common law duties of the employee. The employer is therefore entitled to specify performance, attendance, time keeping and conduct standards. Management cannot rely on those rules that are overtly expressed, as rules revolve and become legitimised through custom and practice. Rules need to be available to employees through induction; notification of the penalties of not conforming to rules should be clearly communicated to them, particularly where the disregarding of rules is likely to threaten continued employment**



## Critical Reflection

1. Explore the disciplinary policies and procedures in your organisation. Critically evaluate the effectiveness of them. Identify any gaps and suggest ways of improvement.

## ■ *Disciplinary Procedures*

The principles of natural justice in discipline will enhance equity and nurture voluntary compliance to rules. These principles are:

- **A knowledge of the expected standards**
- **A knowledge of the alleged failure and the nature of the allegation**
- **An investigation to establish a prima facie case**
- **An opportunity to offer an explanation and for this to be heard fairly**
- **The opportunity to be represented**
- **The penalty should be appropriate in relation to the offence, taking mitigating facts into account**
- **The chance and support to improve, except in cases of gross conduct**
- **The right to appeal**

# Unit C15

The ACAS code of practice provides practical guidance in handling disciplinary matters. Whilst not legally binding, these guidelines are considered relevant, and failure to regard them as such will be taken into consideration by an employment tribunal in its deliberations to reach a decision. The essential features of this code are:

- **All disciplinary matters should be in writing**
- **Specify to whom they apply**
- **Provide for matter to be dealt with quickly**
- **Indicate the disciplinary action that might be taken**
- **Specify the levels of management that has the authority to handle various stages of disciplinary action, ensuring that immediate line-managers do not normally 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 the employee the right to be accompanied by a trade union representative or a colleague of their choice**
- **Ensure that except in cases of gross misconduct, no employee is dismissed for a first breach of discipline**
- **Ensure that disciplinary action is not taken until the case has been fully investigated**
- **Ensure that the individuals are given an explanation for any penalty imposed**
- **Provide a right to appeal and specify the procedure to be followed**

(Source: ACAS Code of Practice)



An organisation has the right to develop its own policies and procedures covering discipline and grievance. An indicative model by ACAS gives clear guidance to good practice in handling discipline.

- 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 reoccurs, 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, 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 the employee's file for three to six months and will be disregarded after that period subject to satisfactory conduct. A second written warning normally stays on file for six to 12 months.
- 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 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 the letter will be kept in the employee's personal file for 12 to 18 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 the 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.

## ■ *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**
- **Serious act of insubordination**
- **Unauthorised access to systems**
- **Harassment, 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 'even-handedness' are well-established disciplinary principles and are crucial in the event that 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; the employer should actively listen**
- **Question the employee further to confirm factual information**
- **Consider carefully all employee response**
- **Make a decision, after giving full care and attention to all information, and to any mitigating circumstances, 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**

Disciplinary interviews are stressful and emotive. It is a highly skilled activity calling for resilience where 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.

## ■ *Grievance procedures*

A grievance is the formal expression of dissatisfaction or injustice that an employee feels towards the employer or colleagues at work. Reasons for expressing grievance vary; they could be:

- **Monetary issues**
- **Work-related issues**
- **Challenges to authority**
- **Harassment, bullying or discrimination at work**
- **Equality issues**

Grievance is based on the legal and procedural right of individuals at work to express dissatisfaction with aspects of the work environment and to have the dissatisfaction acknowledged, heard and resolved. The legislation – the Industrial Relations Act 1971 and consolidated in the Employment Rights Act 1996 – requires the employer to have a grievance procedure.

# Unit C15

The minimum requirement is the identification of **‘A person to whom the employee can apply for the purpose of seeking redress of any grievance relating to his or her employment and the manner in which any such application should be made’**. The grievance procedure therefore becomes part of the employment contract; however there is no legal requirement for a staged procedure or for the grievance to be resolved to the employee’s satisfaction.

A model grievance procedure should establish the stages through which the grievance progresses within the organisational hierarchy; the departmental head provides the first hearing, the functional head the second with the senior level concluding the third and final hearing. The timescales for resolution, from the receipt of the written grievance to its settlement should be specified in the policy; the overriding philosophy is to settle grievances as quickly as possible.

All attempts to resolve the matter informally should be exhausted prior to moving on to formal hearings. Where the employee feels aggrieved against the manager, the matter could be raised first with the Human Resources Manager or another manager of the same status as the line-manager. This should be clearly specified in the policy.

The importance of grievances issues being taken seriously cannot be over-emphasised. Many organisations provide mediators or counsellors to deal with grievance problems informally, especially when harassment or discrimination issues are in play.

It is important that a physical environment conducive to sensitive discussion is made available for grievance interviews. Managers need to develop the skills of active listening, empathy and appropriate body language in order to conduct such interviews. Open questions in a non-threatening way would encourage the employee to talk freely without feeling at a disadvantage. Critical evaluation of all facts, fairness, consideration of organisational policy and the potential impact of any decisions in setting a precedent have to be considered by the manager whilst making the final decision.

Decisions need to be communicated to all relevant parties as soon as possible, according to the timescale set by the policy.

**All records of disciplinary and grievance proceedings are to be kept confidential at all times. Access to personal files under the Data Protection Act 1996 makes it clear that an employee has the right to access the information kept on his or her file. At the same time it aims to protect ‘the right of privacy’ with respect to personal data.**

## ■ *Legislative Framework*

Managers need to be aware of:

- **The Equal Pay Act 1970 amended by Equal Value Regulations 1983**
- **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)**



## Practical Exercise

**2. Investigate the number of formal grievances in your organisation over the last year. Analyse the reasons for these and the outcomes of the hearings. In the light of what you have learned in this unit, write a critical evaluation of the procedure.**

## ■ *Conclusions to This Unit*

It is unrealistic to expect that the relationship between employer and employee will always be harmonious. Unresolved conflict is likely to be dysfunctional to any employment relationship. Disciplinary and grievance procedures have the potential to remedy dissatisfaction, resolve conflict, promote organisational equity and facilitate mutual adjustment within the employment contract.

Employers have considerable discretion concerning the types of behaviour they may wish to make the subject of disciplinary rules provided they are 'reasonable' and conform to common law obligations. If these rules are deemed unreasonable or unlawful, then 'the rule of enforcement will be vulnerable to legal challenge via complaints of unfair dismissal, allegations of racial or sexual discrimination or actions for breach of contract' (James and Lewis, 1992). A grievance may be seen as the acquisition and articulation of a sense of injustice and a feeling of dissatisfaction as a result of management actions which are deemed to be unreasonable and unfair. The complaint should be resolved quickly and as near to the point of origin as possible, underlining the importance of the initial, relatively informal stage of the procedure.

# Unit C15

## 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>
Records of identifying a problem individual, memos to this effect, record of counselling sessions you have carried out clearly recording the performance problem, methods of resolving it, the support provided, expected outcomes and the timescale		
Evidence that you alert staff to policies regarding discipline and grievance and provide support in understanding them		
Evidence that you fully understand the legal requirements. Check your organisation's policies: in any actions you may take you need to follow the procedures set out in the policies. Explain how you ensure confidentiality and why it is important to deal with discipline and grievance in an efficient and timely fashion. Explain also the rationale for implementing such actions		

Candidate's Signature:

Assessor's Signature:

Comments:

