

We Need To Resolve This!

Managing Discipline and
Grievance in 2009

With
Stewart George





The Overall Objectives

- By the end of the seminar, you will be able to:
 - Explain the changes to workplace dispute resolution law from 6 April 2009
 - Determine any action to be compliant from 6 April 2009
 - Explain the impact of the changes on redundancy

Handling Grievance And Discipline

From 6 April 2009



- **Out** go the current statutory procedures and the surrounding case law
- **In** comes – by popular demand – the pre 2004 ‘regime’
- **In** comes a new ACAS Code*
 - Plus ‘guidance’ **
- **In** come:
 - Revitalised ACAS conciliation processes
 - More accessible ACAS advice
- **Remaining**
 - Right to bring a companion
 - Contractual rights

*<http://www.acas.org.uk/index.aspx?articleid=2174>

**<http://www.acas.org.uk/index.aspx?articleid=2179>

Statutory Dismissal & Disciplinary Procedure (DDP)

1. Send the employee a full explanation of:
 - The conduct, capability or other circumstances resulting in either:
 - Dismissal, or
 - Discipline
2. Give them time to consider the written 'evidence'
3. Invite them to a meeting (allow companion to attend)
4. Expect them to attend
5. Hold the meeting
6. Inform afterwards of the outcome
7. Offer right of appeal
8. Accept employee exercising right to appeal
9. Invite them to an appeal meeting (allow companion to attend)
10. Give them a decision after the appeal

Standard Statutory Grievance Procedure (GP)

1. Employee's grievance must be explained in writing
2. Invite them to a meeting (allow a companion)
3. Expect them to attend
4. Afterwards give them the decision
5. Give them the right to appeal
6. Accept their appeal
7. Invite them to an appeal meeting
8. Give them the decision afterwards

The Revised Dispute Resolution 'Regime'

- 6 April 2009 implementation
 - Removes all statutory procedures, including the GP and DDP automatic unfair dismissal provision
 - Breaches of procedure in unfair dismissal cases will revert to the pre-2004 case law, and in particular the principles in *Polkey*
 - New discretionary powers for Tribunals to amend awards by up to 25% if parties have failed to comply with the revised ACAS Code

Polkey v A E Dayton Services

- The Polkey principle:

- *if the tribunal finds that following the correct procedure would have made no difference to the outcome, the dismissal will usually be deemed unfair, but the tribunal should still reduce the compensation payable. In appropriate cases the reduction may be reduced to nil, according to the principle*

Issues Under the New ACAS Code

- Employees/representatives involved in development of rules and procedures?
- No formal right to be accompanied at investigatory meetings unless employer procedure allows
- Vague on cross examination of witnesses by employee or companion (*given an opportunity to raise points about any information provided by witnesses*)

Issues Under the New ACAS Code

- *Persistently unable or unwilling to attend without good cause?*
- Advisable to allow employees to appeal at every stage of a disciplinary procedure
- No requirement to raise a grievance before applying to an ET
 - Impact on constructive dismissal
- More encouragement to use mediation
- Ex employees' grievances?
- Not applicable to redundancy or fixed term contract dismissals



Support Services

- From April 2009, an enhanced ACAS Helpline (08457 47 47 47) - open 8am-8pm Monday to Friday and 9am-1pm on Saturdays
- A free new ACAS early conciliation service, available through the Helpline
- Conciliation can be continued until an ET hearing

The Transitional Rules

- The 'trigger event' is the date when the disciplinary or dismissal action started
 - under the pre 409 regime:
 - a letter (the Step 1) sent by the employer to the employee or
 - a meeting (the Step 2), or
 - when no such steps have been taken:
 - the date of the disciplinary action/dismissal

The Transitional Rules

- New 'regime' applies to any case where the trigger event takes place on or after 6/4/09
- Old 'regime' continues to apply to pre 6/4/09 trigger events where an employee submits a written grievance or employment tribunal claim:
 - On or before 4/7/09 if it relates to a claim with a 3 month time limit (e.g. discrimination) or
 - On or before 4/10/09 if it relates to a jurisdiction with a 6 month time limit (e.g. an equal pay claim)
- A few cases being decided under the old regime may still run into 2010 because of the impact of time limits

Where Does That Leave Current Procedures?

- No need to alter unless you:
 - Want to remove some of the 'hurdles':
 - Putting grievances and allegations in writing?
 - Want to be 'ACAS Code complaint'
 - Appeals at every stage?

BHS v Burchell



- Employers must show:
 - Belief that the employee was guilty of misconduct
 - There are reasonable grounds on which to sustain that belief, and
 - At the time that belief was formed, had carried out as much investigation into the matter as was reasonable in the circumstances



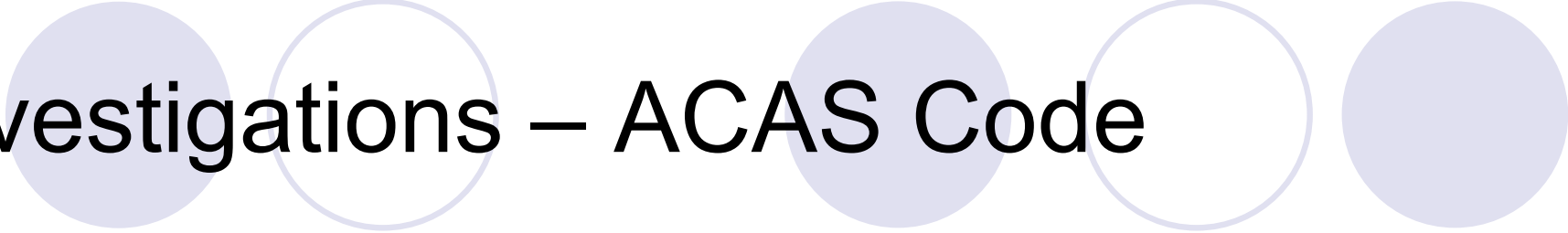
Investigations

- Polkey

- In cases of *misconduct*, investigating fully and fairly and hearing what the employee has to say in mitigation
- In cases of *incapacity*, giving the employee fair warning and a chance to improve

- James v Waltham Holy Cross UDC

- In cases of incapability, demonstrating a proper investigation/appraisal of the employee's performance and identification of the problem



Investigations – ACAS Code

- No unreasonable delay
- Investigatory or fact finding meeting?
- Gathering evidence
- If misconduct different people to investigate to those disciplining
- Allow accompaniment at investigatory meetings?
- Suspension as short as possible
 - Not part of discipline
 - Paid
 - Regularly reviewed



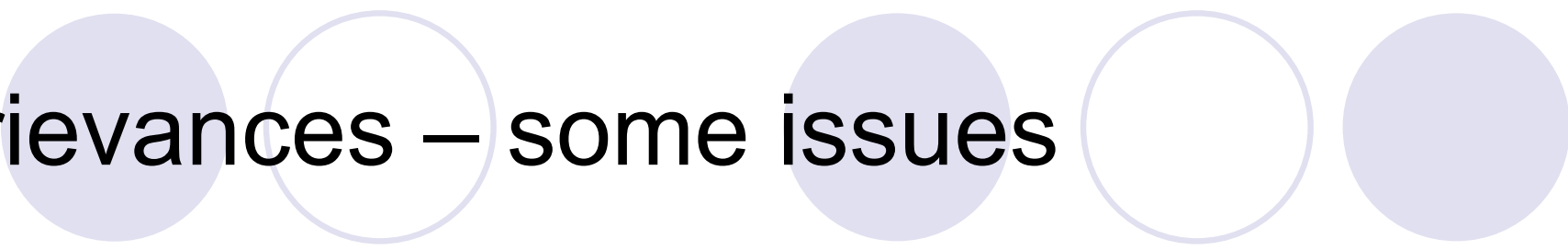
Dealing With Disciplinary Issues

- Clear and understood standards
- Timely intervention and action
- Appropriate procedures
- Appropriate competences, including behaviour
- Improvement is the aim
- Natural justice
- Consistency
- Fairness



Common Pitfalls in Discipline

- Not following the procedures and policy
- Out not in!
 - Establishing 'guilt' rather than how conduct can be improved
- Insufficient investigation and preparation
- Losing control
- Not concluding on a positive/decisive note



Grievances – some issues

- Research on previous grievances that might impact
- Use of mediators?
- Prompt responses and meetings
- Reasonable adjustments
- Companions



Redundancy Post 6/4/09

- If no redundancy procedure, then case law principles apply
 - Unless more than 20 redundancies proposed over 90 day period
- ACAS guide on redundancy
 - <http://www.acas.org.uk/index.aspx?articleid=747>
- Explore ways to avoid redundancy and sharing the pain:
 - Reduced hours/weeks
 - Reduced pay
 - Etc etc



Selecting for redundancy

- Define the ‘pool’
 - The wider the better to retain valued employees
- Consider ‘bumping’
 - Again, for retention
- Selection criteria
 - Address corporate challenges
 - Remain objective



Redundancy Selection Criteria

- Objective
- Verifiable by data
- Most popular
 - Performance
 - Skill & knowledge
 - Disciplinary record
 - Attendance record
 - LIFO
 - But.....discrimination risks!
- Applied fairly
 - Calibrated or moderated
- Shared with individuals

Competing For Jobs



- At risk have to apply to stay
- Limited case law
- Selection process less under scrutiny than redundancy selection
 - But....*must at least meet some criteria of fairness*

Unfair Dismissal Claims



- Employment tribunals
- 3 months to complain
 - Can be extended to 6
- ACAS must attempt conciliation
- Basic award £10,500 max
- Compensatory award – £66,200 max
 - Unless discrimination claimed
 - Then that claim attracts unlimited compensation
- Reinstatement also a remedy

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Proud to be amongst the first to be accredited to the ISO 9001 2008
Quality Management Standard in March 2009