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# STATES OF JERSEY



## **EMPLOYMENT: DISCIPLINARY AND GRIEVANCE PROCEDURES – CODE OF PRACTICE – WHITE PAPER – SEPTEMBER 2013**

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**Presented to the States on 10th September 2013  
by the Minister for Social Security**

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**STATES GREFFE**



## **Purpose and type of consultation**

To invite written comments on the ‘Disciplinary and Grievance Procedures’ Code of Practice prior to the Minister formalising the Code of Practice by Order under the Employment (Jersey) Law 2003.

**Closing date:** 7th November 2013

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## **Summary**

A revised ‘Disciplinary and Grievance Procedures’ Code of Practice has been prepared following consultation undertaken by the Employment Forum.

The purpose of this Code of Practice is to help employers and employees in businesses of all sizes to deal with matters relating to discipline and grievance in a fair and appropriate way.

Article 2A of the Employment (Jersey) Law 2003 (the ‘Employment Law’) enables the Minister for Social Security (the ‘Minister’) to approve codes of practice for the purposes of the Employment Law, subject to certain requirements being met, including a requirement to consult stakeholders.

### **Your submission:**

Please note that consultation responses may be made public (sent to other interested parties on request, sent to the Scrutiny Office, quoted in a published report, reported in the media, published on [www.gov.je](http://www.gov.je), listed on a consultation summary, etc.).

Please delete the following as appropriate:

- I agree that my comments may be made public and attributed to me
  - I agree that my comments may be made public but not attributed (i.e. anonymous)
  - I don’t want my comments made public
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## Background

Article 2A of the Employment Law requires that, prior to approving any Code of Practice for the purposes of the Employment Law, the Minister must publish a notice in the Jersey Gazette –

- (a) stating that a copy of the Code of Practice will be available for inspection during normal working hours, free of charge, at a place specified in the notice;
- (b) specifying a period during which it will be available for inspection (being a reasonable period of not less than 21 days, beginning after the notice is published); and
- (c) explaining that anyone may make representations in writing to the Minister in respect of the Code of Practice at any time before the expiry of the 7 days following the period for inspection.

In addition, the Employment Law requires the Minister to consult the Jersey Advisory and Conciliation Service (JACS), the Employment Forum (the ‘Forum’) and other persons, or representatives of such persons that might be affected.

## Employment Forum consultation

Earlier this year, the Minister directed the Forum to review and circulate Code of Practice and to make a recommendation to him. The Forum consulted during the period 25th February to 1st April 2013; details of which are on the website<sup>1</sup>.

The Forum presented its recommendation to the Minister on 25th July 2013, which included a revised ‘Disciplinary and Grievance Procedures’ Code of Practice. The Forum had concluded that, rather than modifying and revising individual elements of the Code of Practice, it would be beneficial to provide a simplified procedure. The Forum commented that: *“the revised draft code of practice would provide greater clarity and a more straightforward approach that provides sufficient flexibility for any size of business. The revised draft code of practice covers the fundamental principles of a fair process which are set out in a logical order, using clearer language.”*<sup>2</sup>

## Revised Code of Practice

The Minister presented the Forum’s recommendation and the revised Code of Practice to the States on 6th August 2013. The Minister then considered the Forum’s Code of Practice in conjunction with JACS and decided to make some minor revisions before inviting comments. Those revisions are shown as tracked changes in the attached Code of Practice. The two most significant of those changes are –

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<sup>1</sup> [www.gov.je/Government/Consultations/Pages/CodesPracticeEmploymentForum.aspx](http://www.gov.je/Government/Consultations/Pages/CodesPracticeEmploymentForum.aspx)

<sup>2</sup> Page 15 of the Forum’s recommendation, included in the Minister’s report to the States (R.98/2013) [www.statesassembly.gov.je/AssemblyReports/2013/R.098-2013.pdf](http://www.statesassembly.gov.je/AssemblyReports/2013/R.098-2013.pdf)

1. Paragraph 3 – The Minister has listed as one of the basic standards of reasonableness that the employee should have the right of appeal if the employer has taken disciplinary action. The Minister noted that it is evident from the decisions of the Tribunal that it will expect to see a right of appeal in a reasonable process, and the requirement for a right of appeal was already specified in the Code of Practice (paragraphs 43 to 46 and 58 to 61).
2. Appendices – The Minister has removed the appendices from the Code of Practice. The Minister considered it to be potentially confusing to include appendices that do not form part of the Code of Practice because it leaves their status questionable. The Minister decided that it would be clearer for employers if there were only 2 sources of information; codes of practice that the Tribunal must consider, and JACS guides that the Tribunal is not required to consider. The appendices have been removed from the Code of Practice and will instead form the basis for JACS guidance. All references to the appendices in the Code of Practice have been replaced with references to JACS guidance.

The Minister believes that the Code of Practice is a great improvement and that a simplified, more streamlined procedure should make it easier for business of all sizes to take appropriate steps to provide a fair disciplinary and grievance procedure. The revised Code of Practice will help to address one of the findings of the recent review of the Employment Tribunal's decisions<sup>3</sup> – that we should increase employers' awareness of the need to provide fair warning of dismissal in order to help avoid employment disputes.

The Minister invites representations from stakeholders and will consider any comments received before making the Code of Practice by Order under the Employment Law.

**Please submit your comments by 7th November 2013 by e-mail or by post to:**

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<sup>3</sup> [www.statesassembly.gov.je/AssemblyReports/2013/R.028-2013.pdf](http://www.statesassembly.gov.je/AssemblyReports/2013/R.028-2013.pdf)

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Please provide the following information with your comments –

1. Your name and contact details.
2. Specify whether your comments are submitted on behalf of a particular business or organisation.
3. Indicate whether your comments may –
  - (a) be made public and attributed to you;
  - (b) be made public but not attributed to you (i.e. anonymous);
  - (c) not be quoted publicly at all.

**This Consultation Paper has been sent to the following:**

The Public Consultation Register  
The Employment Forum's consultation database

**Supporting documents attached:**

Disciplinary and Grievance Procedures Code of Practice ([showing tracked changes](#)).

## Revised draft Code of Practice

### Disciplinary and Grievance Procedures

#### Introduction

This code of practice has been prepared by the Minister for Social Security (the 'Minister') in order to assist both employers and employees deal with matters related to discipline and grievance in a fair and appropriate way. It recognises that, while employees have a right to be treated reasonably, employers also have a right to manage their businesses and to ensure that employees conduct themselves in a way that contributes to business success.

While larger employers will be likely to have more detailed and extensive procedures, it is important to recognise that the obligation to behave reasonably applies to businesses of all sizes and in all sectors. In deciding cases of unfair dismissal, the Jersey Employment Tribunal (the 'Tribunal') must take into account the employer's size and administrative resources, but this does not mean that small employers are entitled to behave unreasonably. The principles set out in this code of practice are designed to apply to employers with just one or two employees just as much as they apply to larger employers with hundreds of employees.

In preparing this code of practice, the Minister has had careful regard to the need not to burden employers with excessive bureaucracy or red tape. It is hoped that this code of practice can contribute to the success of businesses in Jersey by setting out a clear framework of reasonable and fair treatment. This will help employers deal effectively with issues that arise in the workplace and help employees to raise their concerns in a constructive and proportionate manner.

The principles set out in this code of practice are designed to be as straightforward as possible. Employers who are unsure as to how a particular case should be handled can seek free advice and guidance from the Jersey Advisory and Conciliation Service (JACS).

#### Status of this code of practice

This code of practice has been approved by the Minister under Article 2A of the Employment (Jersey) Law 2003 (the 'Employment Law'). Breach of the terms of this code of practice does not of itself amount to a breach of the Employment Law, but in cases where it appears to a court or tribunal that any provision of this code of practice is relevant to a question arising in any proceedings, then the court or tribunal must take that provision into account in determining the question (Article 2B of the Employment Law).

[Note: For further guidance and example policies please go to www.jacs.org.je](http://www.jacs.org.je)

## Code of Practice on Discipline and Grievance Procedures

### When this code of practice applies

1. Part 1 of this code of practice applies in cases where the employee is accused of misconduct by the employer. Disciplinary situations can also include poor performance and capability issues. If employers have a separate capability procedure, they may prefer to address performance issues under that procedure. If so, however, the principles of fairness set out in this code of practice should still be followed, although they may need to be adapted. This code of practice is not intended to be followed in cases of business reorganisation or redundancy. Nor is it intended to cover dismissals based on the fact that the employee is unable to work because of sickness or injury. It is important to remember however that in all such cases the employer will still be under an obligation to behave reasonably in making a decision to dismiss.
2. Part 2 of the code of practice applies in circumstances in which an employee is aggrieved by the conduct of the employer.

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### Part 1 - Handling disciplinary issues

#### Behaving reasonably – fundamental principles

3. The fundamental requirement in dealing with issues of discipline is to behave reasonably. What is reasonable will vary depending on the circumstances of the case and the size of the employer. However employers of all sizes should be in a position to observe the basic standards of reasonableness. In practice, this means that:
  - action should not be taken in the heat of the moment, but only after appropriate consideration and reflection
  - before taking action, the employer should carry out an investigation aimed at discovering the facts
  - the employee should always be fully informed of the grounds on which the employer is considering disciplinary action
  - the employee should have a reasonable opportunity to put his or her side of the story
  - any explanation put forward by the employee should be considered by the employer with an open mind
  - any disciplinary penalty should be proportionate to the offence committed and appropriate in the circumstances
  - where the employer has taken disciplinary action, the employee should have the right of appeal.

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4. In all but the most exceptional of cases, a failure to observe any of the above fundamental principles is likely to render any dismissal unfair. The provisions of this code of practice are designed to ensure that these fundamental principles of fairness are followed by employers of all sizes.

### Dealing with matters informally

5. Many low level problems of misconduct can be dealt with informally without the need for a hearing. Often a 'quiet word' with the employee is all that is needed to solve the problem.
6. Dealing with matters informally is a normal part of everyday management and there is no need to follow a particular procedure. However it is a good idea for managers to make a note of when such interventions occurred for future reference.
7. Where the employer believes that disciplinary action such as a written warning or even dismissal is appropriate, then it is important that a formal disciplinary process is followed to ensure that the matter is dealt with fairly.

### Taking formal action

8. Where serious misconduct has occurred or where attempts to change behaviour through informal means have failed then it will be appropriate for the employer to take formal disciplinary action. Where there is a written disciplinary procedure (see the JACS guide to written disciplinary procedures) then this should be followed. However the following standards should be observed whether there is a written procedure in place or not.

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### Conducting a fair investigation

9. Formal disciplinary action should not be taken against an employee without a fair investigation first taking place.
10. In a fair investigation the employer will attempt to collect all the relevant information about the alleged misconduct. This may involve gathering appropriate documentation or talking to individuals within the business who are in a position to know what happened as well as the employee who the allegation(s) is against.
11. A fair investigation is open-minded. The employer must be looking for evidence which tends to show that the employee is innocent just as much as evidence tending to show that he or she is guilty.
12. A fair investigation should be sufficiently thorough, particularly when key facts are in dispute. A failure to pursue a plausible line of inquiry or speak to witnesses who are likely to have relevant evidence will often be sufficient to render any subsequent dismissal unfair.

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### Arranging a disciplinary hearing

13. When the investigation has been completed, the employer needs to decide whether there is sufficient evidence to hold a disciplinary hearing.
14. Where a hearing is to be held, the employee should be given adequate notice to enable him or her to prepare and find a representative. The law governing the right to a representative is explained in the JACS guide to the right to be represented. In straightforward cases, notice of one or two days may well be appropriate. However the more complicated the allegations, and the more detailed the evidence, the longer an employee will need to get ready for the hearing.
15. The hearing will usually be held in the employer's offices or some other suitable location. The hearing should be conducted in private, away from other employees if possible.
16. Prior to the hearing, the employee should be given a copy of the results of the investigation and an opportunity to examine the evidence that the employer has gathered.

### Conducting a fair hearing

17. A fair hearing is one with no prejudged outcome. Whoever conducts the hearing must do so with an open mind. Wherever possible the hearing should not be conducted by the same person who conducted the investigation. Where the size of the employer means that this is not practicable then the employer needs to be especially careful to maintain an open mind.
18. At the outset of the hearing the employer should explain the purpose of the hearing and the details of the allegation that have been made.
19. The evidence that has been gathered in the investigation should then be examined and the employee invited to comment on any aspect of it.
20. There is no requirement for witnesses to be brought into the hearing in person. It is usually sufficient for witness statements to be presented and discussed. However where witnesses are invited to attend the hearing in person, the employee should be allowed to put questions to them about their evidence.
21. The hearing must be conducted in a way which allows the employee to explain his or her side of the story. If the employer asks further questions of the employee during the hearing, these questions should genuinely be aimed at discovering the employee's version of events rather than simply catching him or her out.
22. The employee should be given the opportunity to be represented at the hearing by an appropriate representative. The law governing the right to a representative is explained in JACS guidance.

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23. The employer should make a written note or minute of the hearing which should be agreed by all parties who were present at the hearing.

### Making a decision

24. Once the evidence has been heard, the person conducting the disciplinary hearing should adjourn the hearing to consider what findings to make and what, if any, action to take. This involves reaching a conclusion as to what has happened and the extent to which this constitutes misconduct.

25. Before deciding what action to take, the employer should consider all the surrounding circumstances including whether there are any particular circumstances or other facts that should be taken into account which may make the conduct less serious.

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26. Although the results of the disciplinary hearing may be explained orally, they should always be followed up in writing.

27. The employer should set out the findings that were made and whether any disciplinary action is to be taken.

28. Disciplinary action will normally take the form of a warning or a decision to dismiss. Employers should be aware that sanctions such as demotion, suspension without pay or a financial penalty may be offered instead of dismissal.

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### Warnings

29. In most cases where the employer finds that misconduct has occurred, it will be appropriate to issue a written warning to the employee.

30. A warning should identify the misconduct that has been found to have taken place and warn that further misconduct on the employee's part will lead to further action.

31. A warning should be time-limited. Typically a written warning will last for either six months or one year and should be kept on the employee's personal file for that period.

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32. Once that time period has expired then the warning should be disregarded in any future disciplinary proceedings and removed from the employee's personal file.

33. Where further misconduct is found to have taken place within the period specified in the warning, then it will usually be appropriate to impose a 'final written warning'. A final written warning may also be imposed for a first offence if the conduct is sufficiently serious to warrant it.

34. A final written warning should identify the misconduct and warn that further misconduct will lead to dismissal.

35. A final written warning should also be time limited and should not normally last for longer than 12 months.

36. It will usually be fair to dismiss (with notice) an employee who has an active final written warning in place and who then commits an act of further misconduct even if that misconduct would not justify dismissal on its own.

### Gross misconduct

37. Where an employee commits an act of gross misconduct then it will usually be fair to dismiss him or her without notice even if no previous instances of misconduct have occurred.

38. However, even in cases of gross misconduct, the employer should still follow a fair procedure. Indeed, the fact that the employee is accused of gross misconduct makes it even more important that the principles outlined in [paragraph 3 of this code of practice](#) are adhered to.

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39. Gross misconduct is an act of misconduct which is so serious that it can be said to fundamentally undermine the trust and confidence that should underpin the employment relationship. Examples are:

- Theft and dishonesty
- Violent or threatening behaviour
- A refusal to obey the employer's reasonable instructions
- Serious bullying or harassing of colleagues
- Working while under the influence of drink or drugs
- Operating a business in competition with the employer

40. This is not an exhaustive list. The employer's disciplinary rules and procedures may set out further examples particular to the business concerned. Ultimately whether conduct amounts to gross misconduct is a matter which depends on a wide range of circumstances and needs to be judged on a case by case basis.

### The right to be represented

41. An employee has a right under Part 7A of the Employment Law to be represented at a disciplinary hearing by either a colleague or a trade union official. Full details of the right [are explained in JACS guidance](#).

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42. From the point of view of reasonableness, the right to be represented is essential in allowing the employee to state his or her case. The representative must be allowed to make representations to the employer and to confer with the employee. On the other hand, the representative should not answer questions put directly to the employee – although he or she may make representations about them.



### The right to appeal

43. An employee who has been subject to disciplinary action should be given the right to appeal against the decision.
44. Where the size of the employer permits this, the appeal should be conducted by a more senior level of manager than presided over the disciplinary hearing and who has not previously been involved in the case.
45. In smaller employers this will not be possible, but an appeal should still be offered so that the employer has a chance to reconsider the action that has been taken and listen to any fresh arguments that may be presented.
46. An appeal should essentially abide by the same principles of fairness as a disciplinary hearing – including the right of the employee to be represented. It may amount to a complete rehearing of the case, but it is also acceptable to focus on particular grounds of appeal raised by the employee.

## Part 2: Dealing with grievances

### Raising a Grievance

47. A grievance is a complaint raised by an employee about the way in which he or she is being treated by the employer. A reasonable employer will seek to deal fairly with grievances raised by an employee.
48. An employee who has a grievance should seek to resolve the matter informally wherever possible by discussing the issue with his or her manager. An employer should encourage employees who are unhappy to raise this with them at an early stage rather than allow problems to grow and fester.
49. Where the employee believes that an informal resolution is not possible then he or she should put the grievance in writing and give that to the appropriate manager. The grievance should be clearly and concisely stated and should set out what action the employee wants the employer to take in response.

50. On receiving the grievance the employer should organise a hearing with the employee to discuss his or her concerns. This should be arranged as quickly as possible and take place at a reasonable time and place.

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51. The employee has the right to be represented in this hearing in the same way and on the same basis as in the case of a disciplinary hearing.

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### Conducting a grievance hearing

52. At the hearing, the employee should be asked to put forward his or her complaint. This may be done by the representative on the employee's behalf, although the employee should be prepared to answer direct questions from the employer.

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53. It may become clear during the hearing that an investigation is needed to discover what has actually happened. In such a case, the hearing should be adjourned and an investigation should then take place.

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54. Ideally the investigation will be carried out by a manager who will not be conducting the grievance hearing itself, but this is less important in the case of a grievance hearing than it is in relation to a disciplinary matter. In smaller employers especially, the investigation will often be carried out by the same manager who will eventually conduct the hearing.

55. When the investigation is concluded, the grievance hearing can be reconvened.

56. If the grievance is upheld, the employer will need to decide what action to take. This can be as simple as offering an apology to the employee or it may involve reversing a decision or agreeing to changes in working practices.

57. If the grievance is rejected, this should be clearly explained to the employee along with the basis for the decision. While this may be done orally, it should also be confirmed in writing. The employee should also be informed that he or she has the right to appeal.

### The right to appeal

58. As with a disciplinary matter, an employee who is not happy with the outcome of a grievance may appeal.

59. At the appeal, the employee should explain why he or she was not happy with the outcome of the original grievance.

60. The manager conducting the appeal should consider carefully the points made by the employee before reaching a decision.

61. When a decision has been reached this should be communicated to the employee and confirmed in writing. The letter to the employee should indicate that the decision is now final.

### After the grievance

62. Once a grievance has been concluded, the employer may want to give consideration to what actions are needed to improve relationships in the workplace.

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